

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

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:
ASHER EDELMAN, and EDELMAN ARTS,
INC., :
:
 Plaintiffs, :
 -against- :
:
EMIGRANT BANK FINE ART FINANCE, :
LLC, ANDREW AUGENBLICK, HOPE :
TATE, TUJU FIELDS and JOHN DOES 1-20, :
:
 Defendants.

INDEX NO. 650670/2010
AMENDED COMPLAINT

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Plaintiffs Asher Edelman and Edelman Arts, Inc., by their undersigned attorneys, for their Amended Complaint against defendants Emigrant Bank Fine Art Finance, LLC ("Emigrant"), Andrew Augenblick, Hope Tate, Tuju Fields and John Does 1-20 ("defendants"), allege as follows:

Nature of the Action

1. The present action arises out of a pattern of self-serving deception and fraud practiced by defendant Emigrant against its banking customers, including plaintiff Asher Edelman.
2. This misconduct began as a reaction to the regulatory failings and substantial investment losses confronting Emigrant's parent company, Emigrant Bank, the only remaining major New York banking institution that has failed to repay its TARP credits. Emigrant Bank currently carries a "D" rating, having in 2008 and 2009 sustained losses exceeding \$500 million.
3. In recognition of -- and in response to -- Emigrant Bank's potentially imminent economic collapse, Emigrant embarked upon a series of actions describable only as parasitic.

Desperate to locate and extract profit, even if unlawfully and at the expense of its own banking customers, Emigrant undertook to:

- gouge borrowers with excessive fees and costs (including renewal and origination fees) and penalty interest where not legally permissible;
- procure from borrowers collateral beyond what was agreed-to and legally appropriate;
- create unavoidable default circumstances for customers, including by promising -- and then substantially delaying -- workouts to avoid default; and
- take undue advantage of customers who then succumbed to default.

4. Because its unlawful acts were inflicted on a multitude of customers, Emigrant faces liability and damages not merely under legal theories of breach of contract and fraud, but also -- as the complaint will be amended to show following discovery -- for violations of statutory anti-racketeering prohibitions.

5. The legally-cognizable injuries Emigrant inflicted on plaintiff Edelman alone amount to tens of millions of dollars.

The Parties

6. Plaintiff Asher Edelman ("Edelman") is a resident of New York, New York.

7. Plaintiff Edelman Arts, Inc. ("Edelman Arts") is a New York Corporation.

Edelman Arts is an art dealership that operates a gallery located at 136 East 74th Street, New York, New York.

8. Upon information and belief, defendant Emigrant is a Delaware limited liability company with its principal offices located at 6 East 43rd Street, New York, New York.

Emigrant is a subsidiary of Emigrant Bank, the only remaining major New York banking institution that has failed to repay its TARP credits; it currently carries a rating of "D," and is among the lowest rated banks still operating. According to a recent article, Emigrant Bank lost

over \$500 million in 2008 and 2009. See Aaron Elstein, *Milsteins Pour \$20M More Into Emigrant Bank*, CRAIN'S NEW YORK BUSINESS.COM, May 28, 2010.¹ The article also reports that Emigrant Bank's primary shareholders, the Howard Milstein family, have had to inject \$220 million into the bank over the last three years, including a recent infusion of \$20 million in the first quarter of 2010. *Id.*

9. Upon information and belief, defendant Andy Augenblick, a New York resident, is Emigrant's President.

10. Upon information and belief, defendant Hope Tate, a New York resident, is Emigrant's First Vice President.

11. Upon information and belief, defendant Tuju Fields, a New York resident, is Emigrant's Senior Lending Officer.

12. Upon information and belief, John Does 1-20 are individuals that participated in the fraud, the flagrant violation of the Pre-Negotiation Agreement, and the other misconduct described herein.

Jurisdiction and Venue

13. The Court has jurisdiction over Emigrant pursuant to CPLR 301 because it is a New York domiciliary subject to the jurisdiction of New York courts, and/or pursuant to CPLR 302 because Emigrant transacts business in, and/or has committed tortious acts within, the State of New York.

14. Jurisdiction is appropriate as to each of the individual defendants as they either reside in this State or are subject to long-arm jurisdiction under CPLR 302.

¹ <http://www.crainsnewyork.com/article/20100528/FREE/100529825>

15. Venue is proper pursuant to CPLR 503 because plaintiff Edelman and the individual defendants all reside in New York County and because plaintiff Edelman Arts and defendant Emigrant maintain their principal offices in the New York County. Venue is also proper here because most of the events that give rise to this action occurred in New York County.

Facts Relevant to All Causes of Action

The Credit Facilities

16. On October 10, 2006, Mr. Edelman obtained a \$1 million revolving line of credit (the "Line of Credit") from Emigrant. Pursuant to the Note executed by Mr. Edelman in connection with the Line of Credit (the "Line of Credit Note"), the outstanding amounts drawn down on the Line of Credit accrued interest at a rate of 1% plus the prevailing Prime Rate. The Line of Credit Note set forth a maturity date of October 31, 2008.

17. In connection with the Line of Credit, Mr. Edelman executed a security agreement (the "Security Agreement"), in which he provided Emigrant with a security interest in certain artwork identified in the Security Agreement.

18. Emigrant first perfected its security interest in the collateral on October 12, 2006. Over the course of Mr. Edelman's relationship with defendants, the Security Agreement was amended several times, as the list of collateral changed. Emigrant duly perfected its interest in any additional collateral as that collateral was made available to Emigrant.

19. On February 22, 2007, Mr. Edelman and Emigrant entered into a Letter of Credit Reimbursement Agreement (the "Letter of Credit Agreement") pursuant to which Emigrant agreed to honor, and Mr. Edelman agreed to repay, draws of up to \$1,000,000.

20. On March 12, 2007, Mr. Edelman borrowed an additional \$2 million from Emigrant (the "Demand Loan"), payable on demand. In consideration for Emigrant providing

him with the Demand Loan, Mr. Edelman agreed, in a separate agreement, to pay to Emigrant 10% of the "profits" from any sale of the Alberto Giacometti sculpture, *Torse de Femme* (the "Success Fee Agreement").

21. Pursuant to the Note executed by Mr. Edelman in connection with the Demand Loan (the "Demand Note"), the outstanding principal balance on the Demand Loan accrued interest at a rate of 1.5% plus the prevailing Prime Rate.

22. To secure the amounts due under the Demand Loan, the Line of Credit, the Letter of Credit Agreement, and an anticipated term loan in the amount of \$1,500,000, Mr. Edelman executed an Amended and Restated Security Agreement (the "First Amended Security Agreement") which, in pertinent part, provided an updated list of artwork in which Emigrant obtained a security interest, including *Torse de Femme*. The amount due to Emigrant under the Success Fee Agreement was not secured by the First Amended Security Agreement.

23. On March 12, 2007, Edelman Arts executed a guaranty (the "Guaranty") of Mr. Edelman's obligations under the Demand Loan.

24. On May 18, 2007, Mr. Edelman borrowed an additional \$1.5 million from Emigrant (the "Term Loan"). Pursuant to the Note executed by Mr. Edelman in connection with the Term Loan (the "Term Note"), the outstanding principal balance on the Term Note accrued interest at a rate of 2.5% plus the prevailing Prime Rate. The Term Note set forth a maturity date of May 18, 2012.

25. To secure the amounts due under the Demand Loan, the Line of Credit, the Letter of Credit Agreement, and the Term Loan, Mr. Edelman executed a further amendment to the Security Agreement (the "Second Amended Security Agreement"), in which he provided Emigrant with an updated list of artworks in which Emigrant would obtain a security interest.

Emigrant Bank Begins to Experience Severe Financial Problems in 2008

26. In the Fall of 2008, Mr. Edelman informed Hope Tate, a First Vice President at Emigrant, that he was going to draw down additional amounts on the credit facilities. In response, Ms Tate informed Mr. Edelman that such a draw-down would not be permitted as the financial condition of Emigrant's parent company, Emigrant Bank, was deteriorating because, among other things:

- It had suffered extensive losses on account of substantial investments it or its principal, Howard Milstein, had made in Wachovia and Lehman Brothers.
- The bank's private equity division had been poorly run, such that almost all of its investments were in dire straits.
- Many of the bank's commercial real estate loans which had been made with respect to buildings in which friends of Mr. Milstein's had an interest were not doing well, and the bank had failed to lay off sufficient risk for those loans on other financial institutions.
- The bank had made many jumbo mortgage loans to friends of Mr. Milstein and those loans were not performing well.

27. At that time, defendant Tate informed Mr. Edelman that Mr. Milstein had informed her, defendant Augenblick, Emigrant's President, and others, that the bank would have to substantially increase its rate of return on investments and oversecure any loan that could be oversecured in order to help its position with its regulators and its profits.

28. Defendant Tate further informed Mr. Edelman that all of Emigrant Bank's customers, including customers of Emigrant, were being "encouraged" to modify their loans so that their maturity dates would be in less than one year. Defendant Tate indicated that this was necessary to assist Emigrant Bank with federal bank regulators, as loans that were for less than one year did not require any reserve defendant (defendant Tate told Mr. Edelman that federal regulatory requirements mandated that Emigrant Bank maintain a 10% reserve for loans (such as his loans) that were for a term of greater than one year).

29. Defendant Tate told Mr. Edelman that, based on Mr. Milstein's directive, Emigrant was going to cancel his loans, and demand payment in full of all amounts due and owing, unless Mr. Edelman agreed to modify the Line of Credit to shorten the term and to modify his loans to increase the interest rates. Defendant Tate promised Mr. Edelman that if he was willing to agree to these accommodations for Emigrant's benefit, that after the Line of Credit was reworked and was approaching its new maturity date, Emigrant would continue to renew the Line of Credit for periods of slightly less than one year. Defendant Tate further promised Mr. Edelman that when the Line of Credit was extended, Emigrant would make up for the extra interest that it was going to charge to Mr. Edelman, along with origination and legal fees that were going to be charged in connection with the reworked loan, in one form or another.

30. On December 19, 2008, in reliance on defendant Tate's representations, Mr. Edelman executed a letter amendment to the Line of Credit Note on behalf of himself and Edelman Arts (the "12/19/08 letter amendment"). Consistent with defendant Tate's representation that Mr. Edelman could only retain his loans if he agreed to the terms that were necessary to assist Emigrant with complying with Mr. Milstein's directive, the 12/19/08 letter amendment provided: 1) that the maturity date for the Line of Credit would be extended to November 30, 2009 (a period of less than one year); 2) that Mr. Edelman would provide additional collateral to Emigrant on account of all of his obligations; 3) that Mr. Edelman could not take any advances under the Line of Credit Note until he paid the Demand Note in full, unless those advances were used to pay interest to Emigrant or to pay Emigrant's expenses and legal fees in connection with the 12/19/08 letter amendment; and 4) that Mr. Edelman would make the following payments to Emigrant: i) a payment to reduce the principal balance due under the Demand Note to \$1,050,000; ii) all interest due under all of the credit facilities; iii) a

non-refundable restructuring fee of \$21,500; and iv) all fees and expenses incurred by Emigrant in connection with the 12/19/08 letter amendment.

31. Shortly thereafter, defendant Tate informed Mr. Edelman that consistent with her prior representations, Emigrant was going to increase Mr. Edelman's interest rates. Based upon all of Ms. Tate's prior representations, on January 28, 2009, Mr. Edelman executed a letter amendment to the Line of Credit Note and the Demand Note on behalf of himself and Edelman Arts (the "1/28/09 letter amendment"). The 1/28/09 letter amendment contained the same terms as the 12/19/08 letter amendment, except that 1) it extended the maturity date of the Line of Credit to December 31, 2009 (again, a period of less than one year); and 2) it increased the interest rate on the Line of Credit Note by three percentage points and the interest rate on the Demand Note by two and one-half percentage points, such that both loans were accruing interest at the rate of 4% plus the prevailing Prime Rate. Emigrant charged Mr. Edelman another \$21,500 restructuring fee in connection with the 1/28/09 letter amendment.

32. On May 15, 2009, Edelman Arts signed an Amended and Restated Guaranty whereby it guaranteed Mr. Edelman's obligations under the Line of Credit, the Demand Loan, and the Term Loan.

Emigrant Waives Mr. Edelman's Innocent Default Concerning Insurance Proceeds

33. In February 2009, Mr. Edelman received \$500,000 in proceeds from Chubb as the result of the settlement of a litigation that had nothing to do with any of the works serving as collateral for the credit facilities and which concerned a claim made prior to the existence of any of the Emigrant credit facilities. Upon receiving those proceeds, Mr. Edelman reviewed the loan documents for the Line of Credit and the Demand Loan, each of which had recently been amended pursuant to the 12/19/08 and 1/28/09 letter amendments, to see if either required him to

turn over the proceeds to Emigrant. As the documents for those loans did not contain any such requirement, Mr. Edelman retained the proceeds.

34. In late May or early June 2009, Mr. Edelman reviewed the original loan documents for the Term Loan dated May 18, 2007, in connection with a recent amendment to that loan and an amended security agreement that Emigrant had requested in order to obtain additional collateral for Mr. Edelman's credit facilities, even though they were substantially oversecured at the time. During that review, Mr. Edelman noticed that in contrast to the amended documents for the Line of Credit and the Demand Loan, the documents for the Term Loan required the turnover of the Chubb lawsuit proceeds. Upon his discovery, he immediately informed defendant Tate that he had received the proceeds in February 2009, but that he had not turned them over to Emigrant, as he was unaware that any of the loan documents required him to pay those proceeds to Emigrant.

35. When Mr. Edelman informed defendant Tate about the Chubb proceeds, he also informed her that he no longer had the proceeds and that he did not have sufficient liquidity to pay the amount of the proceeds to Emigrant immediately. Defendant Tate said that she understood how Mr. Edelman had made this mistake and that this would not be a problem. She further stated that due to the high value of the collateral securing the loan, Emigrant would waive the requirement that Mr. Edelman pay the Chubb proceeds to Emigrant.

36. On June 3, 2009, in connection with an amendment to the Term Note that had occurred on May 15, 2009, Mr. Edelman executed a further amendment to the Security Agreement (the "Third Amended Security Agreement"), in which he provided Emigrant with a security interest in an updated list of artwork and other assets, including an additional \$1,000,000 life insurance policy payable upon his death (he had previously provided a \$1,000,000 life

insurance policy to Emigrant as collateral). Consistent with defendant Tate's statement that Emigrant would not pursue a default based upon the Chubb proceeds, the Third Amended Security Agreement did not reference that default. Additionally, the Chubb proceeds were expressly removed from the list of collateral.

Emigrant Compels the Execution of a Standstill Agreement

37. Despite defendant Tate's agreement to waive the innocent default concerning the Chubb proceeds, which was memorialized when Emigrant provided Mr. Edelman with the Third Amended Security Agreement, on July 1, 2009, Emigrant informed Mr. Edelman and Edelman Arts by letter that, in addition to regular interest, it was going to begin charging penalty interest of 8% plus the prevailing Prime Rate on all of the credit facilities, due to the failure to turn over the proceeds of the Chubb lawsuit.

38. Shortly thereafter, consistent with defendant Tate's representation that Emigrant was not going to pursue its remedies in connection with the proceeds from the Chubb lawsuit, and the Third Amended Security Agreement, defendant Augenblick informed Mr. Edelman that Emigrant wanted to negotiate a Standstill Agreement to provide Mr. Edelman with time to pay the \$500,000 in principal on account of the Term Note that would have come from the Chubb lawsuit proceeds. Mr. Edelman had previously told defendant Tate that he did not have currently liquid funds to make the \$500,000 payment demanded by Emigrant, but that he was willing to sell collateral to fund such payments. Nevertheless, defendant Augenblick informed Mr. Edelman that he needed to agree to pay \$500,000 to Emigrant on account of the Term Note and that Emigrant would not permit credit against this \$500,000 from any collateral sales. Subsequently, even though Mr. Edelman again told defendant Augenblick that he did not have liquid funds to pay \$500,000 to Emigrant, defendant Augenblick stated to Mr. Edelman that

Emigrant had control over Edelman Arts and Mr. Edelman, and that they needed to do whatever Emigrant told them to do.

39. Defendants Augenblick and Tate ultimately presented Mr. Edelman with a Standstill Agreement and said that if Mr. Edelman did not sign it on behalf of himself and Edelman Arts, Emigrant would take everything Mr. Edelman owned. On October 14, 2009, based upon defendant Augenblick's representation that Mr. Edelman was required to sign the Standstill Agreement or risk losing his entire art collection and personal belongings, and without any meaningful negotiation as to any of the material terms, Mr. Edelman executed the Standstill Agreement on behalf of himself and Edelman Arts.

40. Although defendants Augenblick and Tate were well aware that Mr. Edelman did not have sufficient cash flow to make payments without selling the collateral, the Standstill Agreement that Mr. Edelman was compelled to sign required that he make two payments (the first of which was due January 31, 2010), totaling \$500,000, without selling any collateral.

41. In addition to being compelled to agree to a payment schedule with which defendants knew he could not comply, the Standstill Agreement also provided that Mr. Edelman waived any defenses concerning the credit facilities, including his defense that Emigrant had waived his innocent default concerning the Chubb proceeds. Additionally, the Standstill Agreement provided that the interest rate on the Term Note was increased by one and one-half percentage points to the rate of 4% plus the prevailing Prime Rate.

42. Emigrant continued engaging in improper conduct after Mr. Edelman executed the Standstill Agreement, as it frustrated his attempt to make a partial payment on account of the agreement. Shortly after signing the Standstill Agreement, Mr. Edelman informed Emigrant that he was prepared to make a \$150,000 payment of principal due on the Term Note out of his cash

flow, even though, as he had indicated previously, he would not be able to make the \$250,000 payment due under the Standstill Agreement by January 31, 2010. Emigrant informed Mr. Edelman that even if he made the Term Note payment without selling any collateral, it would not credit any of the payment towards the excess \$500,000 due under the Standstill Agreement.

Emigrant Improperly Seeks An Interest in A Company In Which Plaintiffs Have No Ownership Interest

43. On December 21, 2009, Steve Howard, a principal of Art Assure, Ltd., and Mr. Edelman attended a meeting with defendants Tate and Augenblick, as they wanted to discuss Emigrant taking as collateral the equity of Art Assure, Ltd.

44. During the December 21, 2009 meeting, Mr. Howard and Mr. Edelman informed defendants Tate and Augenblick that Art Assure, Ltd. had recently been formed. They explained to defendants Tate and Augenblick that Art Assure Ltd.'s business (art auction consulting) was going to be completely different than that of Edelman Arts (an art gallery) and that Art Assure, Ltd. was not going to receive any assets or diversion of income from Edelman Arts. Additionally, Mr. Howard and Mr. Edelman explained that Mr. Edelman's wife, not Mr. Edelman, has a majority equity ownership interest in the common shares in Art Assure, Ltd. as part of Mr. Edelman's estate planning and that Mr. Howard has a minority equity ownership interest in common shares. They further informed Emigrant that Art Assure, Ltd. also has outside investors who own preferred shares.

45. During the meeting, defendant Augenblick inquired as to whether Emigrant could participate in any profits or equity of Art Assure, Ltd. as a method for obtaining repayment of Mr. Edelman's loans. Mr. Howard and Mr. Edelman explained to him that because neither Mr. Edelman nor Edelman Arts had any ownership interest in Art Assure, Ltd., such an arrangement

was not possible. Mr. Augenblick then agreed that Emigrant would not pursue Art Assure, Ltd. in connection with Mr. Edelman's loans.

46. At the conclusion of the meeting, defendant Augenblick stated to Mr. Howard that Emigrant had control over Mr. Edelman and Edelman Arts and that Mr. Edelman and Edelman Arts were required to do whatever Emigrant wanted them to do.

Emigrant Fails to Document a Loan Modification That It Proposed and Affirmed

47. In December 2009, defendant Tate informed Mr. Edelman's that defendant Tuju Fields, Emigrant's Senior Lending Officer, had a proposal for amending the credit facilities. Defendant Tate indicated that Emigrant now wanted to restructure all of Mr. Edelman's obligations, which would remove the risk of default that all parties knew existed pursuant to the Standstill Agreement from the moment it had been executed. Defendant Tate further stated that Emigrant did not want to incur any legal fees unless the parties could come to an agreement, so Emigrant was going to have its in-house lawyers prepare a term sheet for Mr. Edelman's review.

48. On January 8 and 19, 2010, Emigrant sent two term sheets to Mr. Edelman setting forth its proposals for the amended terms for the credit facilities, each of which was signed by defendant Tate. Both times that Mr. Edelman received the term sheets, he informed Emigrant orally that he was generally agreeable to the terms.

49. After Mr. Edelman agreed to the second term sheet, defendant Tate informed him that Emigrant's lawyers were preparing the documents to memorialize the parties' agreement. When Mr. Edelman did not receive any documents from Emigrant, he inquired as to when he would receive the documents. In response, defendants Tate and Augenblick informed him that the documents prepared by Emigrant's lawyers had too many errors and that they had returned the documents to the lawyers to be re-written, which was delaying the transaction.

50. Shortly after receiving the second term sheet, Mr. Edelman informed Emigrant that he was prepared to make a good faith payment of \$75,000. As he would need to sell items at the Spring auctions in May and June 2010 to finance additional payments, and the term sheet required quarterly payments of \$150,000. At that time, Mr. Edelman and defendants Tate and Augenblick orally agreed that he would make a principal payment of \$75,000 to Emigrant and then, by June 30, 2010, he would make an additional principal payment of at least \$225,000. Consistent with this agreement, Mr. Edelman made, and Emigrant accepted, a \$75,000 principal payment.

51. When Emigrant still failed to provide Mr. Edelman with documents concerning the agreement set forth in the term sheet, he began to try to contact defendant Fields to arrange a meeting to discuss a resolution. Due to supposed scheduling issues on Emigrant's part, the meeting took three to four weeks to schedule. During that time, Mr. Edelman informed Emigrant that he was prepared to discuss paying off all of the credit facilities and that he was willing to put *Torse de Femme* up for auction in May 2010, as, at a minimum, it would pay a substantial portion of the credit facilities, such that he did not think that it would be difficult to arrange payment of any remaining obligations.

Emigrant Requires Plaintiffs to Sign a Pre-Negotiation Agreement Prior to Discussing Mr. Edelman's Proposals to Pay Off the Credit Facilities

52. The meeting between the parties was ultimately scheduled for March 8, 2010. As a pre-condition to having the meeting, Emigrant required that Mr. Edelman execute a Pre-Negotiation Agreement. Based upon an express representation by Emigrant in the Pre-Negotiation Agreement that it was willing to discuss all of the outstanding loan obligations, Mr. Edelman signed the Pre-Negotiation Agreement at the beginning of the March 8, 2010 meeting.

53. Among other things, the Pre-Negotiation Agreement provided, in pertinent part:

Borrower, Guarantor or Lender, in their sole respective discretion, shall have the right to terminate the discussions contemplated by this agreement at any time by written, email, or telecopied notice to the others, but during the discussions shall not have the right to avail themselves of any remedy provided in the Loan Documents, at law or in equity.

54. At the March 8, 2010 meeting, Mr. Edelman once again offered to put *Torse de Femme* up for auction. Defendant Fields, who ran the meeting for Emigrant, responded that this was a good idea, but that Emigrant wanted a direct interest in Art Assure, Ltd. Although Mr. Edelman said he could not provide such an interest as he had no ownership interest in Art Assure, Ltd., he offered to share with Emigrant any earnings that he received as a consultant from Art Assure, Ltd., to the extent that those earnings increased his cash flow. Defendant Fields then informed Mr. Edelman that Emigrant was ending the meeting and defendant Tate informed Mr. Edelman that Emigrant was requiring him and Edelman Arts to immediately move every single item of the collateral, which in addition to artwork included the majority of his personal effects, such as furniture and silverware, to the Transcon warehouse where other collateral was in storage, and to provide a bailment agreement.

Emigrant Flagrantly Violates Its Pre-Negotiation Agreement "Not to Avail Itself of Any Remedy Provided in the Loan Documents"

55. Despite its agreement on March 8, 2010 to forbear from exercising any remedies in the credit facilities, on March 9, 2010, Emigrant, without cancelling the agreement in writing, as was required, sent a default notice to Mr. Edelman and, for the first time, demanded payment in full of all of his obligations. The letter also demanded that Mr. Edelman and Edelman Arts move all of the collateral to the Transcon warehouse by 7:00 P.M. the following day.

56. On March 10, 2010, Emigrant commenced an action against plaintiffs by filing a motion for summary judgment in lieu of complaint. On March 12, 2010, at 12:20 P.M., Mr. Edelman received an email from Emigrant's counsel stating that it would be seeking a temporary

restraining order from the Court against Mr. Edelman and Edelman Arts at 2:30 P.M. that day in connection with an order to show cause for a preliminary injunction that it had filed.

57. The application for the temporary restraining order and the preliminary injunction were based upon an affidavit from defendant Tate that was replete with misstatements. Among other misstatements, defendant Tate 1) incorrectly asserted that Mr. Edelman had improperly given a piece of collateral to his former landlord in Paris even though Emigrant had been well aware of the location of the item for a long time and had never asked Mr. Edelman to retrieve it; 2) accused Mr. Edelman of improperly contemplating providing an interest in certain collateral to a now-former landlord in New York City, in exchange for permitting Mr. Edelman to cancel a lease, when this was merely a proposal that Mr. Edelman made to Emigrant (he abandoned the concept as soon as Emigrant rejected it); 3) misrepresented that Mr. Edelman had refused to make an insurance claim for several items of collateral that were lost, when, in fact, Mr. Edelman had merely suggested that Emigrant, as a loss payee, should make the claim (when Emigrant refused, Mr. Edelman filed the claim; as set forth below, he has received the proceeds of the claim and paid them over to Emigrant); 4) claimed that Mr. Edelman should have turned over certain lawsuit proceeds, when the subject proceeds were not required to be turned over under any of the loan agreements, but instead, were a payment from Mr. Edelman's insurance carrier in exchange for Mr. Edelman's assistance in connection with an insurance claim; and 5) wrongfully asserted that Mr. Edelman and Edelman Arts had failed to provide location information concerning the collateral and certain financial disclosure.

58. Emigrant has caused the Court to conduct three hearings on its preliminary injunction application, even though Mr. Edelman has complied with all of the orders issued by the Court and he has not taken any actions to dissipate the collateral.

59. On May 12, 2010, Mr. Edelman and Emigrant entered into an agreement whereby Emigrant would receive \$2,500,000 from the sale of *Torse de Femme* that would be applied to Mr. Edelman's obligations under the credit facilities. The funds were wired to Emigrant that same day.

60. On May 13, 2010, Mr. Edelman's counsel delivered to Emigrant a check for insurance proceeds received for certain items of lost collateral in the amount of \$79,800.

61. Emigrant did not provide Mr. Edelman with any documentation as to how it applied the foregoing payments until it sent him the June 2010 statement for the credit facilities.

62. After reviewing the statement, Mr. Edelman determined that the statement reflected that Emigrant had only applied \$2,035,310.90 to his account, instead of \$2,579,800.

63. When Mr. Edelman's counsel contacted Emigrant's counsel to determine the whereabouts of the remaining funds that Emigrant had received, Emigrant's counsel informed it that Emigrant had 1) applied \$100,000 to a payment due to Emigrant under the Success Fee Agreement for the *Torse de Femme*; and 2) applied \$444,689.10 for attorneys' fees and costs and for purported costs of collection in connection with the lawsuit it had filed against Mr. Edelman and Edelman Arts. These items were not set forth on the statement that Emigrant sent to Mr. Edelman and he was never informed in any other manner that Emigrant had applied his payment to these items.

64. On June 4, 2010, Mr. Edelman's counsel asked Emigrant's counsel to provide a detailed breakdown of the attorneys' fees and costs that Emigrant had charged to Mr. Edelman. To date, Emigrant has failed to provide any such information.

First Cause of Action

(Breach of Contract)

(Against Emigrant)

65. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

66. As a pre-condition to meeting with Mr. Edelman to discuss his proposals to pay off the credit facilities, defendants required Mr. Edelman to execute a Pre-Negotiation Agreement. On March 8, 2010, Mr. Edelman signed the Pre-Negotiation Agreement based upon Emigrant's express representation in the Agreement that Emigrant was willing to discuss all of the outstanding loan obligations.

67. The Pre-Negotiation Agreement provided, in pertinent part,

Borrower, Guarantor or Lender, in their sole respective discretion, shall have the right to terminate the discussions contemplated by this agreement at any time by written, email, or telecopied notice to the others, but during the discussions shall not have the right to avail themselves of any remedy provided in the Loan Documents, at law or in equity.

68. During the March 8, 2010 meeting, Mr. Edelman made good faith proposals to pay off the credit facilities, including auctioning *Torse de Femme* and sharing with Emigrant any earnings he received as a consultant from Art Assure, Ltd., to the extent that those earnings increased his cash flow.

69. Contrary to Emigrant's representation that it was willing to discuss all of the outstanding loan obligations, when Mr. Edelman explained that he could not provide Emigrant with an interest in Art Assure, Ltd. since he had no ownership interest in that company, Emigrant ended the meeting.

70. Despite Emigrant's agreement to forbear from exercising any remedies in the credit facilities, on March 9, 2010, without cancelling the negotiations in writing, as required by

the Pre-Negotiation Agreement, Emigrant sent a default notice to Mr. Edelman and demanded payment in full of all of his obligations. The default notice also demanded that Plaintiffs move all of the collateral to the Transcon warehouse by 7:00 p.m. the following day.

71. On March 10, 2010, Emigrant commenced an action against Plaintiffs by filing a motion for summary judgment in lieu of complaint. In addition, on March 12, 2010, Emigrant filed an application for a temporary restraining order and preliminary injunction.

72. Emigrant breached the Pre-Negotiation Agreement by (i) refusing to discuss Mr. Edelman's proposal for paying off the credit facilities at the March 8, 2010 meeting; (ii) failing to cancel the negotiations in writing, as required by the Pre-Negotiation Agreement that Emigrant had drafted; (iii) transmitting a default notice to Mr. Edelman that demanded payment in full of all of plaintiffs' obligations; and (iv) commencing an action against plaintiffs by filing a motion for summary judgment in lieu of complaint and an application for a temporary restraining order and preliminary injunction.

73. As a result of Emigrant's breach of the Pre-Negotiation Agreement, plaintiffs have sustained substantial damages.

Second Cause of Action

(Fraud)

(Against All Defendants)

74. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

75. As alleged above, defendants made repeated representations to Mr. Edelman that it would not pursue his defaults. These include: a) defendant Tate's representation in June 2009 that Emigrant would waive Mr. Edelman's innocent default concerning the Chubb proceeds,

which was evidenced by the removal of the Chubb proceeds as collateral in the Third Amended Security Agreements; b) defendant Augenblick's statement to Mr. Edelman that Emigrant wanted to negotiate a Standstill Agreement concerning the Chubb proceeds; c) defendant Tate's representation to Mr. Edelman in December 2009 that Emigrant wanted to amend the credit facilities to remove the risk of default under the Standstill Agreement and that defendant Fields had a proposal for amending the credit facilities in that regard; d) Emigrant's transmission of two term sheets to Mr. Edelman in January 2010; e) defendant Tate's representation to Mr. Edelman that Emigrant's lawyers were preparing the documents to memorialize the agreement between the parties set forth in the term sheets; f) the representation by defendants Tate and Augenblick that the attorney's documents were filled with errors and were being rewritten; g) the agreement by defendants Tate and Augenblick to accept Mr. Edelman's good faith payment of \$75,000 and to alter the amounts of the March 31 and June 30, 2010 payments; and h) Emigrant's agreement to waive its remedies under the loan documents in the Pre-Negotiation Agreement.

76. Defendants' true motivation in making the foregoing statements was to continue to push Mr. Edelman to the brink of default, or actually into default, so that they could carry out Howard Milstein's directive to increase interest rates, manipulate maturity dates, and obtain additional collateral rights. Thus, defendants knew that their representations were materially false and misleading and they intended that Mr. Edelman and Edelman Arts would rely on the misrepresentations.

77. Plaintiffs reasonably relied on defendants' misrepresentations by engaging in good faith discussions with defendants, not seeking financing to pay-off the credit facilities, and not putting works up for auction in order to make principal payments. Had defendants informed plaintiffs that Emigrant did not intend to proceed with the agreement in the term sheets (and had

defendant Tate not told Mr. Edelman that Emigrant wanted to remove the threat of default under the Standstill Agreement or had Emigrant never transmitted the term sheets at all), defendants would have made the necessary arrangements to repay Emigrant through alternative financing and/or the placement of works for auction. Indeed, by early March when Emigrant sent a demand letter and then the next day commenced an action against the plaintiffs, which was when plaintiffs learned that defendants' previous representations were false, it was too late for plaintiffs to arrange to place additional works at the Spring auctions (other than *Torse de Femme*, which the parties had already discussed).

78. Additionally, upon information and belief, Emigrant contacted the press as soon as it filed its action against plaintiffs and its preliminary injunction motion against plaintiffs. As the action and motion were based on many untrue assertions, and Mr. Edelman was in discussions with Emigrant to pay the credit facilities in full when he was blindsided by the filing of the action, plaintiffs have suffered substantial reputational and commercial harm. Moreover, Emigrant's improper actions prevented plaintiffs from timely obtaining financing to remedy the default or pay the credit facilities in full prior to Emigrant filing and publicizing its action.

79. As a result of defendants' misrepresentations, and their reliance thereon, plaintiffs have suffered and will continue to suffer damages in the tens of millions of dollars. Those damages include reputational damage; damages to Edelman Arts and other businesses in which Mr. Edelman is involved; improper charges for increased interest and default interest (both past and future), loan origination fees, attorneys' fees and other loan fees (both past and future); and damages due to defendants' inability to engage in transactions involving the collateral for the credit facilities.

Third Course of Action

(Fraud)

(Against Defendants Tate and Emigrant)

80. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

81. As alleged above, as a result of Emigrant Bank's dire financial condition, defendant Tate informed Mr. Edelman that Emigrant was going to cancel his loans and demand payment in full unless Mr. Edelman agreed to modify the Line of Credit to shorten the term and to modify his loans to increase the interest rates.

82. Defendant Tate promised Mr. Edelman that if he agreed to these accommodations for Emigrant's benefit, after the Line of Credit was reworked and approaching its new maturity dates, Emigrant would continue to renew the loan for a term of less than one year and that Emigrant would make up for the extra costs, including origination and legal fees, and increased interest, that would be incurred in connection with the reworked loans. In reliance on these representations, on December 19, 2008 and January 28, 2009, Mr. Edelman executed letter amendments on behalf of himself and Edelman Arts that increased his interest rates, provided for a maturity date for the Line of Credit that was less than one year from the date of each amendment, and for which Mr. Edelman was charged origination and attorneys' fees.

83. Ms. Tate's representation that Emigrant would make up for the additional costs relating to loan origination and legal fees was materially false.

84. Ms. Tate knew that her representation was false and misleading and she intended that plaintiffs would rely on the misrepresentation so that she could comply with Howard Milstein's directive to, among other things, increase interest rates and shorten loan terms.

85. Plaintiffs reasonably relied on defendants' false representation by executing the 12/19/08 and 1/28/09 letter amendments.

86. As a result of the foregoing misrepresentation, and their reliance thereon, plaintiffs have suffered and will continue to suffer substantial damages, as they have paid, and Emigrant continues to charge, increased interest, loan origination fees, attorneys' fees and other loan fees.

Fourth Course of Action

(Fraud)

(Against Defendants Emigrant, Tate and Augenblick)

87. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

88. As alleged above, consistent with defendant Tate's representation that Emigrant would not pursue its remedies in connection with the proceeds from the Chubb lawsuit, which is evidenced by the removal of those proceeds from the collateral list for the Third Amended Security Agreement, defendant Augenblick informed Mr. Edelman that Emigrant wanted to negotiate a Standstill Agreement so that Emigrant would not pursue its remedies concerning the Chubb proceeds.

89. Although Mr. Edelman had previously informed defendant Tate that he did not have liquid funds to make the payment demanded by Emigrant, but was willing to sell collateral to fund such payments, defendant Augenblick told Mr. Edelman that to replace the Chubb proceeds, he needed to agree to pay \$500,000 to Emigrant on account of the Term Note and that Emigrant would not permit credit against the \$500,000 payment from any asset sales.

90. Subsequently, defendant Augenblick told Mr. Edelman that Emigrant had control of Edelman Arts and Mr. Edelman, and that they needed to do whatever Emigrant told them to do. When they provided him with the final Standstill Agreement for execution, defendants Augenblick and Tate told Mr. Edelman that if he did not sign the Standstill Agreement on behalf of himself and Edelman Art, Emigrant would take everything Mr. Edelman owned.

91. The foregoing statements were materially false, as Emigrant did not have control over plaintiffs or everything that Mr. Edelman owned.

92. Defendants knew that their representations were false and misleading and intended that plaintiffs would rely on the misrepresentations by executing the Standstill Agreement.

93. Plaintiffs reasonably relied on defendants' false representations by signing the Standstill Agreement, which, among other things, provided a payment schedule with which all parties knew plaintiffs could not comply; contained a waiver of any defenses concerning the credit facilities, including the defense that Emigrant had waived the innocent default concerning the Chubb proceeds; and increased the interest rate on the Term Note by one and one-half percentage points to the rate of 4% plus the prevailing Prime Rate.

94. As a result of the foregoing misrepresentations, and their reliance thereon, plaintiffs have suffered and will continue to suffer damages in the tens of millions of dollars. Those damages include reputational damage; damages to Edelman Arts and other businesses in which Mr. Edelman is involved; improper charges for interest and default (both past and future), loan origination fees, attorneys' fees and other loan fees (both past and future); and damages due to defendants' inability to engage in transactions involving the collateral for the credit facilities.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request judgment against defendants as follows:

- (a) Compensatory damages in an amount to be determined at trial;
- (b) The costs of this action, including reasonable attorneys' fees; and
- (c) Such other and further relief as may be necessary and appropriate.

Dated: New York, New York
July 13, 2010

Respectfully submitted,

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