

Appraising Art in the Realm of Fraud: The Luke Brugnara Case

by Victor Wiener with contributions from David Shapiro

Expert witness assignments for appraisers of fine art most commonly involve civil disputes. However, occasionally an appraiser is retained to testify in a criminal case. In such instances an extra level of due diligence may be necessary, since the outcome of trial may involve prison sentences for one or more of the parties involved.

The Luke Brugnara case (United States v. Luke D. Brugnara, CR-14-0306-WHA), which resulted in court hearings in San Francisco in 2015, involved allegations of fraud, fake art, appraisal misrepresentation, theft and lack of due diligence among other issues.

To a large extent, the outcome of the case, in the form of sentencing, was dependent on appraisals submitted by both sides in the conflict.

Since the verdict is under appeal, one may not have heard the last of Brugnara.

Prologue

Luke Brugnara had been a successful real-estate entrepreneur in San Francisco during the first decade of the twenty-first century. At that time he purchased a number of works of art from several dealers, including Rose Long. However, after 2008, Brugnara's fortunes changed, and by 2015, he was without financial resources.

Unaware of Brugnara's current financial circumstances, in April 2015, New York art dealer Rose Long, approached Brugnara with an offer to purchase of a number of works including sixteen oil paintings on paper attributed to Willem de Kooning (1904-1997), some Picasso etchings by Pablo Picasso (1881-1973), a portrait by American Ashcan artist George Luks (1867-1933), a drawing by Joan Miró (1893-1983), and a Valsuani-edition cast of Edgar Degas's (1834-1917) bronze *Little Dancer Aged 14 Years*.

Long had sold some works of art to Brugnara at a time when he was prosperous; when she contacted him in 2015, she was not aware of his current financial circumstances.

Nonetheless, Brugnara told Long that he was interested in purchasing the works and that if he decided to go ahead with the purchase, they would be displayed in a museum that he was building in San Francisco.

Unbeknownst to Brugnara, most of the works on offer were not owned by Long but were on consignment to her by another dealer, Walter Maibaum.

An offering price of approximately \$11 million was negotiated.

Long shipped the artwork in five crates to San Francisco despite Brugnara's refusal to pay any deposit or shipping costs. She then flew to San Francisco to be there when the art arrived. When she arrived at the address of the "museum," she discovered that it was really Brugnara's garage; the "museum" was said to be under construction. Nonetheless she signed for all five crates, which were placed in Brugnara's garage.

Following this consignment, Long attempted, to no avail, to finalize the deal. At a certain point she informed Maibaum of what had occurred; he, in turn, delegated the matter to his San Francisco attorney, Harvey Schochet.

Over the next several days, Brugnara, through his attorney, Bob Kane, negotiated unsuccessfully with Schochet, for the return of the artworks. At some point during these negotiations, the discussion changed from five crates to four, and the crate containing Degas's *Little Dancer* went missing. The remaining crates were recovered unopened by the FBI during a search of Brugnara's garage.

Brugnara was put on trial.

Since he was indigent, Brugnara represented himself at trial, which commenced on April 27, 2015. On May 19, 2015, the jury returned a verdict of guilty on two counts of wire fraud, one count of mail fraud, and one count of making a false declaration in connection with these events. Brugnara was also convicted of escaping from custody (which resulted in being placed on the FBI's most wanted list) and of contempt of court based on many separate incidents of outbursts in the courtroom.

The Sentencing Phase In The Brugnara Trial: The Appraisal Process

Following his conviction, the Court appointed attorneys George Boisseau and Dena Young to represent Brugnara during the sentencing phase of the trial. Brugnara wished to continue to represent himself but the presiding judge, William Alsup, who had listened to numerous outbursts and insults from the defendant, refused to allow this.

Under the relevant legal statutes, the length of Brugnara's jail term would depend upon the value of the art in question. In brief, if it were determined that the art was worth over \$1 million, the sentence would be significantly longer than if it were determined that the art was worth under \$1 million.

Throughout the trial, the offering price for all the art in question – i.e. approximately \$11 million, was never challenged by any expert witness. Although Alexander Rotter, then Co-Head of Contemporary Art Worldwide at Sotheby's testified at trial, he was not asked any questions about the value of the art – just about Sotheby's relationship in the past with Brugnara.

Brugnara addressed the Court, claiming that most of the art was fraudulent.

Maibaum and Long, both of whom testified, maintained that the art was genuine and worth the offering price.

Hearing these allegations from Brugnara, Judge Alsup said at trial that if it turned out that a fraudster was a victim of fraud by another fraudster, the victimized fraudster is still guilty of fraud.

Boisseau and Young, Brugnara's newly appointed attorneys, retained Victor Wiener of Victor Wiener Associates, LLC (VWA) to testify on the value of the art in question; the fees of VWA were to be paid by the Court.

The United States Government, which prosecuted Brugnara, hired Christopher Gaillard of Gurr Johns to value the art for the Government.

Both sides submitted written reports, which are part of the public record.

Questions Of Authenticity

Since Brugnara, when representing himself before conviction, had declaimed that the art in question was fake, the authenticity of these works would be an essential element in determining their values, and ultimately the length of Brugnara's sentence.

While appraisers are not authenticators *per se*, they are ultimately responsible for the determination of authenticity, which has a significant if not determinative effect on value; the real Picasso is worth more than the fake Picasso.

In a major IRS donation case (*Doherty v. Commissioner*, US Tax Court Docket No. 161180), the tax court determined that disputes in authenticity can lower the value of a work of art significantly.

In the article "The Role of Appraisers in the Process of Authentication and in Other Related Valuation Issues" by Victor Wiener and Charles Wong, the *Doherty* case is discussed in detail; as the article explains:

A couple donated a painting attributed to the western artist Charles M. Russell to the Charles M. Russell Museum in Great Falls, Montana and claimed commensurate deductions permitted under income tax regulations....

The Commissioner for Taxation challenged deductions claimed on the basis that the painting was not a genuine Russell. The Commissioner argued that, as the painting was a forgery, the Fair Market Value was far less than what had been claimed.

Each side produced experts whose credentials were unimpeachable. One – the former executive director of the Charles M. Russell Museum who had authenticated the museum's collection of Russell works, then numbering some 1,800 pieces – agreed that he and the specialist on the other side were the "top Russell experts in the country"; the Tax Court's initial decision went so far as to state expressly: "There is little doubt that the opposing experts in this case are two of the foremost authorities on the works of Charles M. Russell."

(Victor Wiener and Charles Wong, "The Role of Appraisers in the Process of Authentication and in Other Related Valuation Issues," *Journal of Advanced Appraisal Studies*, 2011)

However, in *Doherty*, the Court found that while both experts were extremely credible, the effect on Fair Market Value was significant, and the value determined by the Court was ultimately significantly lower than it would have been had both experts been in agreement.

Extending the *Doherty* decision to other instances in which there is dispute among expert authenticators – e.g., scholars, museum officials, dealers, conservators et al. (a common occurrence in today’s commercial and academic worlds), it is the responsibility of the appraiser to determine, under such circumstances, whether Fair Market Value has been compromised, and if so, how the value of the object in question has been diminished.

This principle is an essential consideration to bear in mind when determining the value of some of the objects in question in the *Brugnara* case.

One should note that in *Doherty*, the Commissioner for Taxation challenged deductions claimed on the basis that the painting was not a genuine Russell. The Commissioner argued that, as the painting was a forgery, the Fair Market Value was far less than what had been claimed.

The Authenticity Of The Long/Maibaum Works In The Brugnara Case

The works in question that had to be valued, were the following:

Sixteen oil paintings on paper attributed to Willem de Kooning, all ca. 1965

George Luks, *Portrait Presumed to be of Gertrude Vanderbilt Whitney*, ca. 1908

Joan Miró, *Untitled (Personnage)*, 1930

Pablo Picasso, *Sueño y mentira de Franco (Dreams and Lies of Franco)*, January 8, 1937 and *En la taberna: Pêcheurs catalans en bordée (In the Tavern: Group of Catalan Fishermen)*, 1934

A Valsuani cast of the *Little Dancer Aged 14* by Edgar Degas

Wiener and Gaillard agreed that the Picasso and Miró were authentic, and both arrived at a valuation that was similar to the offering price made to Brugnara by Long and Maibaum.

While Wiener and Gaillard had different views about the authenticity of the Luks, their valuations were both vastly lower than Long/Maibaum's offering price to Brugnara.

Wiener and Gaillard agreed that, as of the date of offering to Brugnara, the authenticity of the de Koonings would be doubted by knowledgeable prospective buyers and therefore should be valued accordingly. However, what the correct valuation should be was a disputed figure between the two experts.

For some reason not revealed at trial, the Government did not ask Gaillard to value the Degas. Rather, they relied upon the testimony of a non-appraiser, FBI agent Jeremy Desor.

These valuations are discussed below.

However, when reading the valuation conclusions, one should bear in mind that it was in the Government's best interest to prove that the art was worth more than \$1 million, since Brugnara would receive a much longer sentence than if it could be determined that the art was worth under \$1 million, which was the hope of Brugnara's attorneys.

The Picasso Etchings

Pablo Picasso - *En la taberna: Pêcheurs catalans en bordée*
(*In The Tavern: Group Of Catalan Fishermen*), 1934



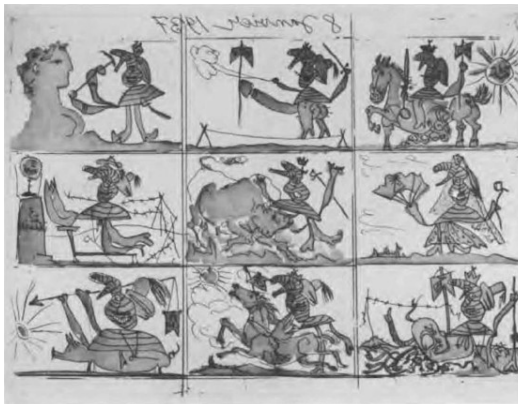
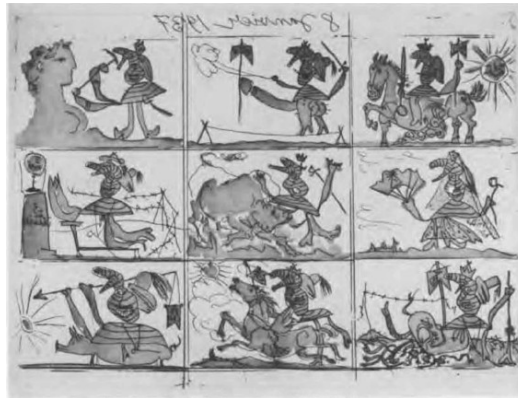
Pencil signed proof impression on paper watermarked “Picasso”

Etching

Plate: 9.25” x 11.7”

Sheet: 13.4” x 17.7”

Pablo Picasso - *Sueño y mentira de Franco* (*Dreams And Lies Of Franco*), January 8, 1937



Two plates, etching with aquatint: each plate with nine individual vignettes

Plate one: 12.5” x 16.6”

Plate two: 12.5” x 16.6”

(a) The pair of etchings on Imperial Japon, each signed and numbered 136/150.

(b) The pair of etchings, each numbered 484/850 and stamped signed “Picasso”

(c) The pair of etchings, each pencil signed, proofs on Monval paper.

(d) Set of the eighteen individual vignette etchings, each matted as issued and authorized by Picasso on June 9, 1939. Two etchings stamp signed “Picasso.” The plate size of each vignette etching measures approximately 3.5” x 5.5”.

Since the Picasso etchings were offered as a group, although somewhat loosely related to one another, VWA valued them as a group, collectively at \$75,000. Comparable auction sales of etchings from these editions confirmed this valuation.

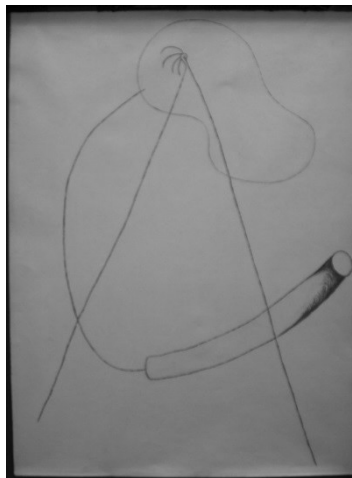
Gurr Johns valued the works individually but arrived at almost identical results, with individual values totaling \$73,000.

Long / Maibaum offered all of the Picasso etchings to Brugnara for a total of \$100,000.

The Miró Drawing

Joan Miró

Untitled (Personnage), 1930



Signed and dated on verso -Pencil

24³/₄” x 18”

Framed with paper floating behind Plexiglass

Certificate not included in package

VWA ascribed a value of \$110,000 to the Miró. Reliance was placed on several comparable sales of linear drawings of abstracted forms by Miró.

Gurr Johns arrived at a valuation close to ours, \$100,000.

Long / Maibaum offered the Miró to Brugnara for \$160,000.

The Luks Painting

George Luks

Portrait Presumed to be of Gertrude Vanderbilt Whitney, Ca.

1908



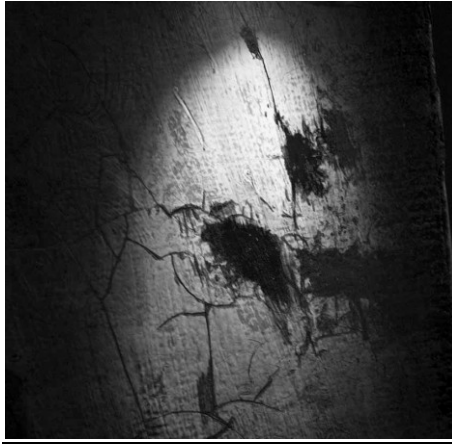
Signed lower right: "Luks"

Oil on canvas

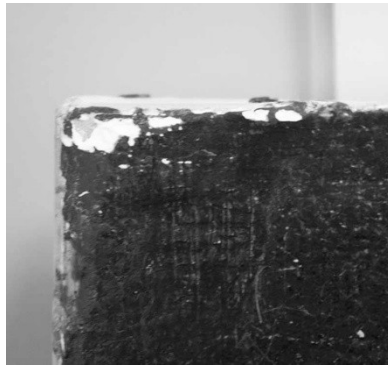
49½" x 39½"

Framed (NB: The work was shipped without the frame.)

The VWA valuation of this painting for \$30,000 was significantly influenced by its very poor condition.



George Luks, *Gertrude Vanderbilt Whitney* (detail showing damage and inpainting under black light)



George Luks, *Gertrude Vanderbilt Whitney* (detail showing abraded corner)

VWA found no reason to doubt the attribution of this work to Luks.

However, VWA also found no substantiation to representations made on the part of the seller that the work depicts Gertrude Vanderbilt Whitney. Lack of concrete identification of the sitter also had an impact on value.

Gurr Johns valued the Luks painting at \$4,000, also noting its poor condition. Gurr Johns catalogued the painting as “attributed to” without offering any reason for doubting its authenticity.

Long/Maibaum offered the Luks painting to Brugnara for \$450,000.

The Sixteen Works On Paper Attributed To de Kooning

Long and Maibaum had contracted with Brugnara to sell him sixteen works on paper attributed to de Kooning for \$7 million, with the possibility of a discount.

Below are a few representative examples of this group of works.

1. Attributed to Willem de Kooning

Woman (Study), c. 1965



Signed lower center right: “de Kooning”

Oil on Japanese paper

25½” x 20”

Unframed

2. Attributed to Willem de Kooning

Woman, c. 1965



Signed lower right: “de Kooning”

Oil on paper

46" x 24"

Unframed

3. Attributed to Willem de Kooning

(Untitled), c. 1965



Signed in pencil lower left center: "de Kooning"

Oil on paper mounted on board

20" x 23½"

Framed and glazed

The Expert Conclusions

Both Christopher Gaillard of Gurr Johns, acting for the government, and Victor Wiener of VWA, acting for Brugnara, valued the de Koonings as though they were not authentic.

While both Gaillard and Wiener testified that appraisers are not, by definition, authenticators, nonetheless they had a responsibility in valuing the property the way they believed the market would react to the works in question when knowing all the facts.

The Gurr Johns appraisal report valued all sixteen works attributed to de Kooning as having "no commercial value," hence a value of \$0; the VWA report valued the group of de Koonings at \$80,000. Neither value is close to \$7 million put forth by Long and Maibaum. [NB: It was in the Government's best interest to have a valuation as high as possible for a maximum prison sentence, while it was in Brugnara's interest for the value to be as low as possible for a shorter sentence.]

The Gurr Johns report offered no explanation for ascribing “no commercial value” to these works.

The VWA report spent considerable time in justifying its low value as discussed below.

Gaillard stated on the stand that he believed that a buyer would not be convinced by the execution of the paintings, nor by the signature, which showed, in some cases, pentimenti.

Wiener identified the signature problems as one of many elements that led him to conclude that the works in question would not be accepted by buyers as genuine de Koonings. However, he testified that the value was not zero but \$80,000, since works bearing de Kooning signatures but not considered to be genuine de Koonings are frequently sold for prices vastly under those for works by de Kooning works viewed as genuine.

Wiener also pointed to the VWA appraisal report, which sets forth reasoning for concluding that the de Koonings should be valued as imitations, despite the facts that the sellers, Long and Maibaum, should be regarded as established professionals and that a seemingly reasonable provenance seemed to have been presented by the sellers. The reasoning behind the VWA conclusion is explained below.

The Provenance or History of the Collection

According to documents reviewed in connection with this assignment, the following was set forth:

1. Maibaum received the de Koonings on consignment from collectors Anders Karlsson and Michael Stone.
2. They in turn had purchased the de Koonings from artist John MacWhinnie for \$1,000,000 total for sixteen works.
3. MacWhinnie stated at the time of sale to Karlsson and Stone that he had obtained the de Koonings from his mother, Inez MacWhinnie, who was a local dealer in art and antiques in the east end of Long Island, New York. MacWhinnie stated that Inez was friendly with well-known local artists with worldwide reputations such as Fairfield Porter, Dan Flavin, and Larry Rivers. When she died, the de Koonings, together with works by other artists, passed on to him.

4. No other documents concerning provenance, publications, exhibition history, et al. were forthcoming before the de Koonings were offered for sale by Long, having received them from Maibaum.

Qualifications and Background of the Sellers

According to testimony given by Maibaum and Long, both have long experience in the buying and selling of art. Therefore, they both could be considered established professionals, knowledgeable of the generally accepted practices of professional art dealers.

Furthermore, Maibaum appears to be especially well versed in proper procedure for professional art dealers, since, during his deposition, he stated:

Actually we have more than 8,000 books in our personal library... And so we don't have to go to the public library... And quite frankly, we have books and catalogs that most libraries don't have. (See trial transcript, p. 352.)

Steps taken by sellers to verify authenticity

One reason prospective purchasers obtain works from reputable dealers is that they expect them to take steps necessary to verify important valuation considerations such as authenticity and clear title.

Alexander Rotter, then Co-Head of Contemporary Art Worldwide at Sotheby's, testifying for the prosecution during the trial, stated in the case of the de Koonings that in order to offer the paintings for sale he would:

... look at the history of it, meaning the provenance and the exhibition history and the literature references... and at the last station with de Kooning unless – it's very well documented in literature, meaning in I would say ten books that are specific about de Kooning, and are recognized by every scholar and it's illustrated in there ... we would go to the Foundation and ask for their opinion... And just when this is established we would go about pricing it.

Maibaum or Long, from the documentation provided, apparently did none of this.

VWA stated in the report:

...had Maibaum consulted the 8,000 books in his library, he would have found no mention of the putative de Koonings. During our research, we were unable to find any mention of these works.

The only steps that Maibaum apparently did take were to put forth a document from MacWhinnie in which MacWhinnie stated the presumed provenance from Inez, and to solicit an affidavit from Karlsson and Stone, the two consigners of the de Koonings, attesting to the authenticity of the Long/Maibaum works.

The VWA report states:

In our opinion neither Karlsson nor Stone are recognized authorities on de Kooning, and therefore they are in no position to offer certificates of authenticity upon which sellers could rely. It is also our opinion that knowledgeable and experienced art dealers such as Maibaum and Long would know this. [NB: It should be noted that Karlsson has brought about multiple lawsuits for being defrauded for buying a fake Jackson Pollock paintings. See: Rozalia Jovanovic, "Jackson Pollock at Center of \$2.8 Million California Fraud Suit," *Artnet News*, June 17, 2014.]

Importance of Verifying Works of Art With Questionable Provenance

The VWA report goes into detail about how important it is for appraisers to verify provenance of appraised works. A clear and verifiable provenance can be a decisive determination of how a work of art will be viewed by the art market and ultimately, how much a work in question should be valued. The VWA report goes into detail about the steps taken by the appraisers to investigate and to verify the stated provenance of the de Koonings.

The Gurr Johns report is silent on this issue.

The Knoedler case and its affinities with the Long/Maibaum de Koonings

Knoedler & Company, New York's oldest gallery, under the direction of Ann Freedman, sold dozens of counterfeit Abstract Expressionist works by such major artists such as Jackson Pollock, Mark Rothko, and

Robert Motherwell; lawsuits ensued, resulting in the gallery's closure in 2011 after 165 years in business.

The works were supplied by a Long Island dealer Glafira Rosales, who also furnished fictitious provenance.

Lawsuits were brought against both Freedman and the gallery, beginning with that of hedge-fund manager Pierre Lagrange to whom Freedman sold a forged Pollock for \$17 million. The events leading immediately to the end of Knoedler are recounted in *Bloomberg Business*:

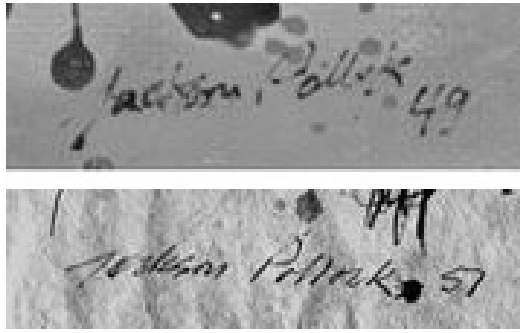
Lagrange, the co-founder of London-based GLG Partners Inc., sued in December 2011, alleging the Pollock painting he bought four years earlier, *Untitled* 1950, was a forgery. When he tried to sell the painting, both Sotheby's Inc. and Christie's Inc. rejected it because it wasn't included in the definitive catalogue of the artist's works, Lagrange said.

Knoedler, founded in 1846, closed its doors a day after Lagrange provided the gallery with an expert report that the painting was a fake, according to the complaint.

(Patricia Hurtado and Edvard Pettersson, "Closed New York Gallery Settles Suit Over 'Forged' Pollock," *Bloomberg Business*, October 5, 2012. See also: Shnayerson, Michael, "A Question of Provenance," *Vanity Fair*, May 2012. See also: Daniel Grant, "Reading the Tea Leaves in the Knoedler Mess," *Artnet*. See also: Laura Gilbert, "Fakes still on the market as Knoedler victims sue," *The Art Newspaper*, January 2, 2014.)

One key criterion in the determination that the Knoedler works from Rosales were fake was the matter of signatures.

One of the works that Rosales supplied to Knoedler was a forgery of a Pollock with a mistake in the spelling of the artist's name in the signature. The forger, Pei-Shen Qian, misspelled the artist's last name as "Pollok." As illustrated in Patricia Cohen's *New York Times* article "Note to Forgers: Don't Forget the Spell Check," the below juxtaposition shows the forged signature (above) and an authentic signature (below).



forged Pollock signature (above) and authentic Pollock signature (below)

(See: Patricia Cohen, “Note to Forgers: Don’t Forget the Spell Check,” *New York Times*, June 11, 2014.)

This misspelling in the Pollock signature has a striking similarity with a critical anomaly in the signatures of the Long/Maibaum works attributed to de Kooning.

All sixteen paintings attributed to de Kooning have signatures in which the “d” and the “e” of “de Kooning” are disconnected, while in authentic de Koonings, the “d” and “e” are generally connected. [NB: This does not discount the possibility that a genuine de Kooning could have a signature in which the “d” and the “e” are somewhat disconnected, but such instances would be anomalies, not the norm. This point is discussed further below.]

The issue of the de Kooning signatures is discussed in detail below.

As reported in an article for *New York Magazine*, Freedman maintains that she was a victim and had no knowledge that the works supplied by Rosales were forgeries. Freedman insists that she took ample steps in verification:

Freedman says that she did her best to get answers from Rosales. “I went to Glafira and pushed and pushed to get more information, relentlessly,” Freedman said. “My ongoing diligence met more than the gold standard; there is plenty of evidence of that.”

(James Panero, “‘I am the Central Victim’: Art Dealer Ann Freedman on Selling \$63 Million in Fake Paintings,” *New York Magazine*, August 27, 2013.)

Freedman says that she had the “best conservation studio examine” the works. (See: Panero.) She also examined the artist’s materials for con-

sistency with those of the period, a proper measure to take, despite that knowledgeable forgers can often easily fake period materials.

In attempting to verify the authenticity of the fake Abstract Expressionist paintings, Freedman states that she spoke to numerous noted scholars, curators, and other dealers. As reported in *The Art Newspaper*:

Among the people Freedman claims she consulted are the late art dealer Ernst Beyeler, senior curators (or former curators) at the Solomon R. Guggenheim Museum, the Beyeler Foundation and the National Gallery of Washington, DC, Dean Sobel, the director of the Clyfford Still Museum, David Anfam, the author of the Rothko catalogue raisonné, leading academics such as Thomas Crow at New York University, and many others.

(See: Helen Stoilas, Javier Pes, and Charlotte Burns, “AbEx fakes scandal silences the experts,” *The Art Newspaper*, October 11, 2013.)

It should be noted that the full extent of the above inquiries is not known, but any such measure would appear to go significantly beyond any steps that Maibaum took to verify the authenticity of the Long/Maibaum works.

Even having taken such measures, some felt that Freedman had not done enough to verify the authenticity of the fakes. As reported in *New York Magazine*, Marco Grassi, owner of the Old Master gallery Grassi Studios, wrote of Freedman:

This has ruined one of the greatest galleries in the world. It has trashed a lot of people’s money. It seems to me Ms. Freedman was totally irresponsible, and it went on for years. Imagine people coming to someone and saying every painting you sold me is a fake. It is an unthinkable situation. It is completely insane. A gallery person has an absolute responsibility to do due diligence, and I don’t think she did it. The story of the paintings is so totally kooky. I mean, really. It was a great story and she just said, ‘this is great.’” (Panero)

(General: See: “Everything You Ever Wanted to Know About the Knoedler Forgery Debacle But Were Afraid to Ask.” *Blouin Artinfo*, December 6, 2011.)

The SWCA case an example in the importance of checking provenance

The VWA report states that Maibaum should have a full understanding of checking the importance of provenance.

In 2007, Maibaum was party to a lawsuit brought by Christie's against art dealer, Scott White (SWCA). In brief, White had purchased a sculpture, attributed to Pablo Picasso, *Buste de Fernande*, from the Sculpture Guild of America (SGA) headed by Walter Maibaum and his wife Carol Conn.

White in turn sold the sculpture to Christie's who in turn sold it to their client, publisher and collector S.I. Newhouse.

At one point the authenticity of the sculpture was questioned, and Christie's demanded rescission from White. In answer to Christie's suit against White and SWCA, a cross-claim was filed against Maibaum for misstatement of provenance.

According to the stated Cross-Claim Facts, SGA (Maibaum's company), represented to SWCA that the sculpture had been purchased from the Estate of Benjamin Segal, a professor of art history at the University of Pennsylvania.

After the authenticity of the sculpture was doubted, Christie's researched the stated Segal provenance and could not find any trace of such a person ever existing.

Furthermore, SWCA alleged that Maibaum and SGA had misstated the provenance of the sculpture and that the sculpture had in fact been purchased from Universe Antiques, NY for \$30,000 and not \$4.2 million, which Maibaum allegedly represented to SWCA as the purchase price from the Estate of Prof. Benjamin Segal.

The case was eventually settled out of court, but the lessons to be learned are that one has to be extremely careful about how provenance is stated and researched; this fact should have extreme resonance for Maibaum, but as discussed below, Maibaum accepted on face value representations from MacWhinnie about the de Kooning works on paper in question.

The Beltracchi case and its lessons for the determination of authenticity

There is an additional element in the SWCA case that should have proven cautionary to Maibaum.

As stated in the SWCA filing, Maibaum relied upon Werner Spies, a noted German art historian, to authenticate the contested Picasso sculpture. According to SWCA, Spies was paid \$100,000 for his certificate of authenticity, a fact claimed to be unknown to SWCA at the time. (Paragraphs nos. 67 and 69)

By 2014, when Maibaum and Long attempted to sell the previously little-known works attributed to de Kooning, Spies had been discredited for authenticating seven fake Max Ernst paintings created by the forger Wolfgang Beltracchi, who is known for a prolific output of highly skilled fakes of such twentieth-century masters as Heinrich Campendonk, André Derain, Kees van Dongen, Max Pechstein, and Ernst.

Spies authenticated seven Beltracchi-forged paintings as Ernsts between 1999 and 2004, doing so in spite of his own “doubts about the authenticity of some works.” According to Spies, “his expertise is required in order to sell an Ernst,” and so it appears that he made use of this unique position to his own benefit, considering that “Spies received 7-8% commissions for the sales of fake works.” (See: “Werner Spies Breaks his Silence Regarding Max Ernst Forgeries,” *Blouin Artinfo*, February 15, 2012.)

Spies’ authentications of forgeries enabled the defrauding of collectors including Daniel Filipacchi, who paid \$7 million for the fake Ernst *La Forêt (2)* in a sale brokered by Diva Fine Arts and Hanna Graham Associates. Among hundreds of forgeries by Beltracchi, *La Forêt (2)* was the most expensive one to be entered into commerce. (See: Röbel, Sven and Michael Sontheimer, “The \$7 Million Fake: Forgery Scandal Embarrasses International Art World,” *Spiegel Online International*, June 13, 2011.)

Beltracchi was sentenced to six years of jail time for his forgeries. While Spies’ actions have not led to jail time, his authentication of a fake Ernst by Beltracchi resulted in a Paris court ordering him, along with dealer Jacques de la Béraudière, to pay defrauded collector Louis Reijtenbagh in the

total amount of €652,883. (See: Bob Simon, “The Con Artist: A Multimillion Dollar Art Scam, *60 Minutes*, aired Feb. 23, 2014. See also: Georgina Adam, “The Art market: Elizabeth Taylor’s diamond fails to please,” *Financial Times*, February 27, 2015.)

Spies’ credibility in general has been significantly compromised, following his authentication of fake Ernst paintings. In an article for *ArtNews*, “Authenticating Picasso” George Stolz, enumerating sources on Picasso, mentions Spies’ role in cataloguing Picasso’s sculptures, but discounts the scholar’s reliability:

...Spies, a former director of the Pompidou Center, has seen his reputation tarnished in a scandal involving his erroneous certifications of forgeries of works by Max Ernst.

(George Stolz, “Authenticating Picasso,” *ArtNews*, January 2, 2013)

The fact that previously trusted experts can prove to be something other than reliable, as seen in the instance of Spies, upon whom Maibaum is said to have relied for the consummation of the sale of a disputed Picasso sculpture, is another red flag. The VWA report states that Maibaum should have heeded these warning signs before accepting as genuine previously unknown works attributed to de Kooning.

Importance of red flags

The contentious issues of authenticity and provenance are illustrative of the many red flags that established art dealers such as Maibaum and Long should bear in mind. As art increases in value and is viewed as an investment alternative to more traditional financial instruments, the structures of art-related transactions can come under increased legal scrutiny.

The relatively recent case of *Bender Foundation v. Carroll*, which was published on the front page of the *New York Law Journal* on August 27, 2013, illustrates this point clearly.

The case relates to the bankruptcy of art dealer and convicted felon Lawrence Salander, who was found guilty of operating a modern-day Ponzi scheme with art. To shield his assets from bankruptcy seizure, Salander transferred art to the Hon. Joseph P. Carroll; part of the art was claimed as property belonging to the Dorothy G. Bender Foundation and the tennis

player and art dealer John McEnroe. It was Bender's contention that the sale to Carroll was illegal and that there were enough red flags for Carroll, as an art dealer, to recognize the transfer of property as an inappropriate and illegal transaction.

The court upheld Bender's position and ordered restitution of the art in question to Bender from Carroll.

The Bender case has enhanced relevance for the Brugnara case, since the Court agreed with the position of Bender's expert, Victor Wiener, on the issue of red flags. It should also be noted that the expert on the other side, whose opinions were not accepted by the Court, was Alex Rosenberg, who has written expert opinions for Walter Maibaum on the value of the Degas bronzes.

Steps Taken By VWA to Verify Opinions of Authenticity

In order to verify opinions about authenticity, experts, including leading conservators and curators dealing with de Kooning's works were consulted by VWA, and numerous works by de Kooning in New York museums were examined, as detailed in the VWA report.

The Gurr Johns report does not state any steps taken to verify authenticity or to arrive at the conclusion that the works attributed to de Kooning had "no commercial value."

Meeting with Suzanne Siano

VWA met with Suzanne Siano, chief conservator and principal of the studio Modern Art Conservation. Siano worked as a conservator for the Museum of Modern Art (MoMA) for twelve years, with extensive experience on de Kooning's paintings.

Siano stated that she had never before seen any of the Long/Maibaum works attributed to de Kooning. From photographic reproductions, she judged the works inconsistent with de Kooning's work, although she did not exclude them totally, pending physical inspection.

Meeting with Samantha Friedman

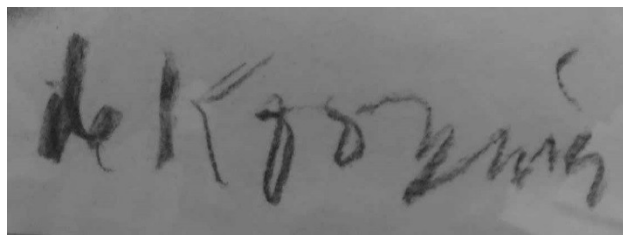
VWA met with Samantha Friedman, Assistant Curator in the Department of Prints and Drawings at MoMA, to inspect works on paper by de Kooning in the museum's collection.

Friedman had never before seen any of the Long/Maibaum works attributed to de Kooning before.

All of the MoMA works presented for inspection differed notably from the Long/Maibaum works in question, including ones that were made close in date, c. 1965. The figures in the MoMA works evidenced de Kooning's brilliant draftsmanship, which is not apparent in the Long/Maibaum works. Critically, the signatures of all of the MoMA works matched each other (with the "d" and "e" connected in "de Kooning"), and none of them matched the ones that are generally used in the Long/Maibaum works in which the "d" and "e" are separate.



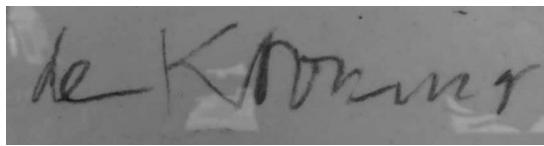
Willem de Kooning, *Untitled*, 1968, charcoal on transparentized paper, 18³/₄" x 18⁷/₈", Museum of Modern Art



Willem de Kooning, *Untitled* (detail of signature), 1968, charcoal on transparentized paper, 18³/₄" x 18⁷/₈", Museum of Modern Art



Willem de Kooning, *Untitled*, 1968, charcoal on transparentized paper, 18⁵/₈" x 23⁵/₈", Museum of Modern Art



Willem de Kooning, *Untitled* (detail of signature), 1968, charcoal on transparentized paper, 18⁵/₈" x 23⁵/₈", Museum of Modern Art



Willem de Kooning, *Seated Woman*, 1952, pencil, pastel, and oil on two sheets of paper, 12¹/₈" x 9¹/₂", Museum of Modern Art



Willem de Kooning, *Seated Woman* (detail of signature), 1952, pencil, pastel, and oil on two sheets of paper, 12¹/₈" x 9¹/₂", Museum of Modern Art

Lauren Mahony

Friedman referred VWA to a specialist on de Kooning, Lauren Mahony, who worked with John Elderfield, then Chief Curator Emeritus of Painting and Sculpture at MoMA and now Adler Distinguished Curator at the Princeton Art Museum, who organized and wrote the catalogue for the monumental 2011-12 MoMA retrospective exhibition on de Kooning; Mahony currently organizes exhibitions at Gagosian Gallery, including a 2013 show on de Kooning.

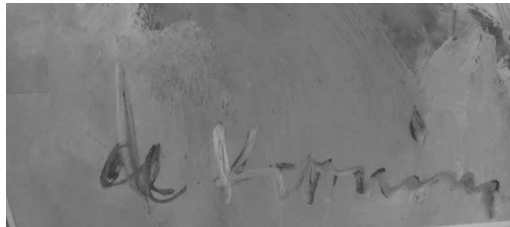
Mahony affirmed that VWA was right to be skeptical of the attribution of any of these works to de Kooning. She had never seen the Long/Maibaum works attributed to de Kooning.

The Whitney Museum of American Art

VWA viewed de Kooning works at the Whitney Museum of American Art, including two oil paintings, *Woman Accabonac* (1966) and *Woman in Landscape III* (1968) painted close in date to the Long/Maibaum works attributed to de Kooning. These works demonstrated a wide range of painterly effects, including heavy impasto (thick paint); wrinkles, which conservator Susan Lake says “are a common occurrence in the paint surfaces of [de Kooning] works of the 1960s” due to the admixture of excess oil (See Susan F. Lake. *Willem de Kooning: The Artist's Materials*. Los Angeles, 2010, p. 68); scraped back surfaces, which de Kooning had newly been able to create on paper due to the admixture of the slow-drying poppy oil (Lake, pp. 57-58); and collaged elements such as Band-Aids. In the Long/Maibaum works, impasto is much less pronounced, and the other effects are less evident or absent. The signatures of the Whitney works matched each other (with connected “de”), and did not match those found in most of the Long/Maibaum works attributed to de Kooning.



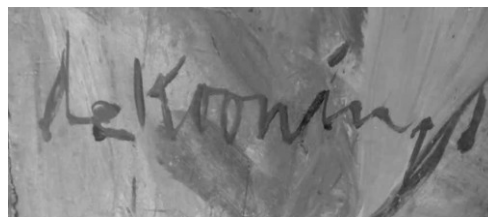
Willem de Kooning, *Woman in Landscape III*, oil on paper, 63½" x 42½",
Whitney Museum of American Art



Willem de Kooning, *Woman in Landscape III* (detail of signature), oil on
paper, 63½" x 42½", Whitney Museum of American Art



Willem de Kooning, *Woman Accabonac*, oil on paper mounted on canvas, 79” x 35¹/₈”, Whitney Museum of American Art



Willem de Kooning, *Woman Accabonac* (detail of signature), oil on paper mounted on canvas, 79” x 35¹/₈”, Whitney Museum of American Art

Brooklyn Museum

VWA visited the Brooklyn Museum to view *Woman*, an earlier de Kooning oil painting on paper.

In color and composition, this work was considerably more sophisticated than any of the Long/Maibaum works attributed to de Kooning. The signature of the Brooklyn Museum *Woman* has a connected “de” and does

not match the signatures found in most of the property in the Brugnara case.



Willem de Kooning, *Woman* (detail), oil on paper board, 35³/₄" x 24³/₈",
Brooklyn Museum

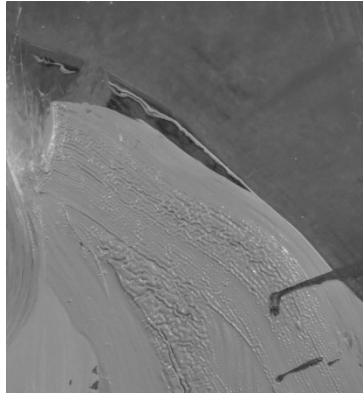


Willem de Kooning, *Woman* (detail of signature), oil on paper board, 35³/₄" x
24³/₈", Brooklyn Museum

Conservators Peggy Ellis and Susan Lake

Finally, VWA turned to the matter of paper. Some works that are part of the Long/Maibaum offerings appear to be on Japanese paper. Since VWA had never previously seen a de Kooning painting on Japanese paper, the advice of two conservators was sought, namely Margaret "Peggy" Ellis, Director of the of the Thaw Conservation Center at the Morgan Library, and Susan Lake, chief conservator and head of Collection Management at the Hirshhorn Museum and Sculpture Garden. An expert on de Kooning, Lake has published on the conservation of de Kooning's works on paper.

Ellis and Lake each stated that, while they could not rule out the possibility that de Kooning had ever used Japanese paper, it was not something that either had ever seen before.



Willem de Kooning, *Woman in Landscape III* (detail showing wrinkles [ocher] and scraped back area [green]), oil on paper, 63½" x 42½", Whitney Museum of American Art



Woman Accabonac, detail showing collaged Band-Aid

Contact with MacWhinnie

Unlike Maibaum, VWA decided to try to contact John MacWhinnie who sold the sixteen works attributed to de Kooning to Karlsson and Stone, who then consigned the works to Maibaum for sale.

[NB: Like Maibaum, Gurr Johns did not contact MacWhinnie]

David Shapiro of VWA was successful in reaching MacWhinnie, asking him if he had any additional information on provenance, exhibition history, or publication history other than what we had seen in a statement of May 20, 2013.

MacWhinnie said in the statement and later in greater detail in an e-mail that he had received the works from his mother, Inez MacWhinnie, who died in 2005. She, in turn, had presumably received the works from de

Kooning himself, since they knew one another when she was an antiques dealer in Southampton, close to where de Kooning lived.

As for any further information such as publications and exhibitions, MacWhinnie said:

Concerning the paintings in question, I unfortunately have no provenance of note to convey, such as receipts, nor paperwork, and, as I have told the individuals to whom they were sold, I am not qualified, nor am I an expert in the authentication of them. I had contacted the de Kooning Foundation at one point and was advised that their policy is to not issue COA's [*sic*] nor to make any opinions concerning submissions of paintings purportedly by de Kooning.

MacWhinnie is correct in assuming that the de Kooning Foundation does not authenticate, although their website states that they may in the future. However, MacWhinnie could have solicited the opinions of leading de Kooning scholars, such as John Elderfield and Lauren Mahony (as VWA had done) and leading conservators of de Kooning, such as Susan Lake and Suzanne Siano, with whom VWA had spoken as discussed above.

[NB: Alexander Rotter of Sotheby's testified that if he were re-searching the Long/Maibaum works attributed to de Kooning, he would contact the de Kooning Foundation, among other things. However, it is unclear how much the Foundation would commit to pass judgment on the works in question. It is also interesting to note that Rotter did not mention consultation with the leading de Kooning scholars and conservators who, based upon VWA's conversations, were more than happy to review the works.]

MacWhinnie continues in his e-mail:

Because I found that I was unable to achieve a COA from the deKooning [*sic*] Foundation in any regard, I then decided to introduce a few of the paintings from my mothers [*sic*] collection to ARTNET, whom I understood to be highly regarded International experts in the field of Fine Art. Apparently ARTNET felt that despite the limited provenance, (which I honestly and fully conveyed to them), they had significant validity and value, enough to offer them as by deKooning [*sic*] with pre auction estimates of a

conservative \$50,000 to \$100,000 and \$40,000 to \$60,000. Both paintings sold.

MacWhinnie fails to say the prices for which the paintings sold, how they were catalogued, or when they were offered for sale. These points are discussed below.

Background of MacWhinnie: the toilet seat

John MacWhinnie's involvement with questionable works attributed to de Kooning dates back at least to 1985, when auctioneer Charles Vanderveer showed MacWhinnie a painted toilet seat that he had bought from his own auction for \$50. Vanderveer proposed that the seat may have been painted by de Kooning. He solicited MacWhinnie to obtain an authentication, since MacWhinnie was a friend of Willem de Kooning's and had spent time in his studio. (See: Gruson, Lindsey, "It was painted by de Kooning, and it May be Valuable – But is it Art?" *The New York Times*, Jan. 22, 1985.)

In a 1985 article for *The New York Times*, Lindsey Gruson recounts MacWhinnie's efforts to authenticate the toilet seat and the de Koonings's response:

"As soon as I saw it, I knew it was of his hand," Mr. MacWhinnie said of Mr. de Kooning.... [MacWhinnie] took the seat to Mrs. [Elaine] de Kooning, who authenticated it. She said her husband could not remember having painted it...

Critically, she authenticated only that it was something her husband had done and rejected its inclusion in his artistic oeuvre. She reacted negatively to MacWhinnie's attempts to aggrandize the authentication and monetize the object:

Mrs. de Kooning, also a noted painter, said she was upset that her authentication had been made public and that the toilet seat was going to be sold as art. It was done as a joke to marbleize the wood," she said. "It was done very fast in a spirit of merriment that prevailed at the time. To term this painting is ridiculous."

De Kooning's dealer, Xavier Fourcade, echoed Elaine de Kooning's sentiments; as recounted by Gruson, Fourcade "dismissed the idea that the

toilet seat should be considered a valuable artwork” and “said he did not think it had any value as art.” MacWhinnie, however, had a financial stake in the seat, and spoke very differently about the seat in spite of Elaine de Kooning’s ire and Fourcade’s dismissal. Gruson recounts:

“It’s a youthful, exuberant example of the painter at the height of his abstract expressionism,” said Mr. MacWhinnie, who was given a 33 percent share in the seat for his work in having it authenticated.

(Gruson, Lindsey, “It was painted by de Kooning, and it May be Valuable – But is it Art?” *The New York Times*, Jan. 22, 1985)

In 1992, the seat was put up for auction at Guernsey’s. Although de Kooning paintings had, at the time, fetched over \$3 million, and notwithstanding speculative valuations of the seat at up to \$1 million, it was given an estimate of \$50,000 to \$60,000 and failed to sell. Bidding stopped at \$7,500, less than one sixth of the low estimate.

(See: Lindsey Gruson, “Is it Art or Just a Toilet Seat? Bidders to Decide on a de Kooning,” *New York Times*, January 15, 1992; See also: “Auction Fails to Flush Out a Buyer for Piece of Art,” *Deseret News*, Feb. 20, 1992)

Question of signatures

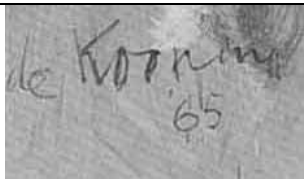

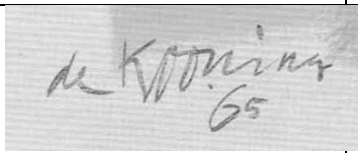
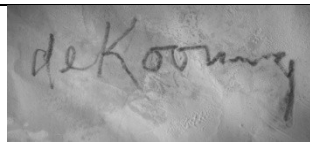
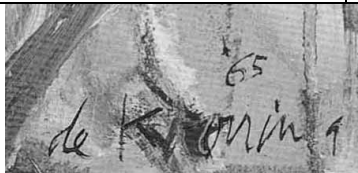

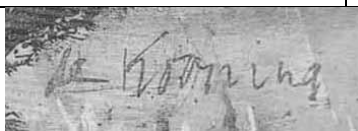
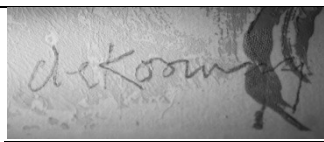
The VWA report pointed out that most of the Long/Maibaum works attributed to de Kooning have signatures in which the “d” and the “e” of “de” in “de Kooning” are separated from each other. As such, these signatures deviate from most signatures in other works by de Kooning, not only from the mid 1960s but throughout his career.

This point can be seen in the examples below in which signatures on the Long/Maibaum de Koonings are juxtaposed with signatures from works in the John and Kimiko Powers Collection, which were exhibited at Gagosian Gallery in 2000.

All of the works in the Powers collection were painted in 1965, the same year when the MacWhinnie de Koonings have been estimated to have been painted.

The signatures of the Powers paintings differ markedly from those in the Long/Maibaum group; in all of the Powers paintings, the “d” and the “e” of “de Kooning” are connected.

Below is a series of juxtapositions of signatures in de Kooning paintings from the Powers collection with signatures in the Long/Maibaum group of works attributed to de Kooning.

Signatures of Powers works	Signatures of Long/Maibaum works
	
	
	
	

Determination of the Values For the se Koonings

Gurr Johns considered the works attributed to de Kooning offered to Brugnara by Long/Maibaum to be inauthentic. No reason for this determination was given in their report. Testifying in court, Gaillard spoke of stylistic discrepancies and pointed to pentimenti in the signatures of some.

Consequently, Gurr Johns determined that the de Koonings had “no commercial value.”

VWA, however, pointed to works offered at minor auctions bearing the signature of de Kooning, which sold for nominal prices in the range of

\$5,000-10,000 – prices considerably different from those realized for authentic de Kooning paintings on paper, created around the same time as the works attributed to de Kooning in the Brugnara case; authentic.

1. Willem de Kooning-*Untitled (Woman In A Forest)*, c. 1963-64



Oil on paper laid on Masonite, 29" x 34"

Sale: Sotheby's New York: Wednesday, November 9, 2011

Price (including buyer's premium): **3,050,500 USD**

2. Willem de Kooning-*Woman On A Sign II*, 1967



Oil on paper laid on canvas, 56" x 41.5"

Sale: Sotheby's New York: Wednesday, May 9, 2012

Price (including buyer's premium): **2,882,500 USD**

3. Willem de Kooning - *Woman As Landscape*, 1965-66



Oil on paper laid on canvas, 40" x 29.3"

Sale: Sotheby's New York: Friday, September 23, 2011

Price (including buyer's premium): **1,594,500 USD**

VWA also stated that according to USPAP, Standard 6 (Mass Appraisals), the appraiser must consider the effect on the market if sixteen similar and like works attributed to de Kooning would be sold at one time.

The conclusion was that if a knowledgeable prospective buyer were to consider purchasing all sixteen works attributed to de Kooning offered by Long/Maibaum at one time, it is most likely that the prospective buyer would expect a significant discount.

de Kooning Valuation Conclusions

VWA concluded that the Fair Market Value for the collection of the sixteen works on paper attributed to de Kooning is \$80,000.

Clearly, this valuation is significantly lower than the \$7 million for which Maibaum and Long had hoped to sell the collection to Brugnara. It is also significantly lower than the price for which MacWhinnie had sold the collection to Karlsson and Stone.

The reason for this conclusion is that VWA determined that the attribution to de Kooning in April 2014 could not be sustained.

Specifically, VWA considered the following:

1. Maibaum and Long failed to contact the seller MacWhinnie to learn acquisition information and further details of the exhibition history and publication of the collection.
2. Maibaum and Long failed to research the works beyond relying on the statements of the sellers notwithstanding the fact that Maibaum has testified that he has an extensive art library.
3. Maibaum and Long failed to contact the authors of the catalogue and organizers of the monumental MoMA retrospective on de Kooning, which had taken place in 2012, two years prior to the attempted sale to Brugnara.
4. Maibaum and Long failed to consult any conservators on the technique used in de Kooning's works on paper.
5. Maibaum and Long appear to have relied exclusively on statements made by MacWhinnie (the original seller) and Karlsson and Stone to verify the authenticity of the works, notwithstanding the fact that none of these three are experts or scholars on de Kooning. [NB: Karlsson and Stone authenticated the works, while MacWhinnie did not.]
6. Maibaum and Long failed to heed the warnings apparent in the case of Knoedler & Co, where gallery director Ann Freedman is defending herself against charges of art fraud for not doing enough to verify the provenance and authenticity of works by twentieth-century masters working at the same time as de Kooning.
7. Maibaum and Long failed to heed the warnings apparent in the case of Werner Spies and his involvement with the forger Wolfgang Beltracchi for authenticating fake works by Max Ernst, notwithstanding the fact that Maibaum had used Spies to authenticate a contested Picasso sculpture in the SWCA case.
8. Maibaum and Long failed to check the provenance thoroughly of the previously unknown works attributed to de Kooning despite the fact that Maibaum had previously, in the SWCA case, been accused of having given as provenance a certain "Professor Benjamin Segal" whose existence no one (not even Maibaum) was able to verify at the time of the litigation.

9. Finally, one cannot help but being struck by the contrast of the type of extensive work Maibaum had done in attempts to market the Valsuani *Dancer*, discussed below, as opposed to any form of due diligence in the attempts of Maibaum and Long to sell unverified works attributed to de Kooning at prices consistent with documented and verified de Kooning works on paper.

Taking all these factors into consideration, VWA valued the de Koonings at \$80,000, a value consistent with prices realized at auction for unverified works on paper bearing de Kooning's signature.

The irony is that the government's expert, Gaillard of Gurr Johns, came in with a value considerably lower than Brugnara's experts when it was in the government's interest to arrive at as high a value as possible.

The Degas Valsuani Cast of *La Petite Danseuse de Quatorze Ans* (*The Little Dancer, Aged Fourteen*)

Edgar Degas

***La Petite Danseuse de Quatorze Ans* (*The Little Dancer, Aged Fourteen*)**



Bronze sculpture cast by Valsuani Foundry

Height: 29 inches - Sculpture Number 73

At this point in the trial, four of the five groups of objects reputed to be by Picasso, Miró, Luks and de Kooning had been valued.

The Government's experts, Gurr Johns had arrived at a total of \$177,000 while VWA had arrived at a total of \$295,000.

The remaining object to be valued was a Valsuani cast of Degas's famous *Little Dancer Aged Fourteen*. If the Government were to prevail and get the court to consider a maximum penalty for Brugnara, the value of the Degas would have to be greater than \$823,000.

To complicate matters, the Degas had disappeared from Brugnara's garage after it had been consigned by Long. To date it has not been found, and an insurance settlement by Lloyd's has been paid to Maibaum.

While it would be impossible for the appraisers to perform a physical examination, the literature on the sculpture was so extensive that it would still be possible to offer an opinion of value.

For some inexplicable reason, the Government did not ask their expert, Gaillard of Gurr Johns to value the Degas, instead, the Government relied upon the testimony of FBI agent Jeremy Desor, who is neither an appraiser nor an expert on art.

During the sentencing phase of the trial, the Government never explained why they used Desor instead of Gurr Johns, nor was this ever questioned, in court, by Brugnara's attorneys. Brugnara continued to use VWA for the Degas valuation.

The valuation of the Degas is extremely complicated.

Controversy: Divergent Scholarly Opinions -- Overview

During his lifetime, Degas was not known as a sculptor, although he did exhibit a wax of the same subject as the *Little Dancer*.

When he died in 1917, his heirs discovered numerous sculptures in his studio, most in wax, which could be used to generate bronzes.

The heirs contracted with the Hébrard foundry to cast bronzes from these newly discovered models. In or about late 1919 casting began and ceased decades later.

Towards the beginning of this century other plaster casts, resembling the Hébrard bronzes, but not identical, were said to have been found in

another foundry, the Valsuani Foundry. Those connected with the Valsuani Foundry claimed that the plasters were taken from other wax models crafted by Degas.

Eventually bronzes were cast from the plasters and sold, primarily by the Degas Sculpture Project, headed by Maibaum.

From that point on, the scholarly community was of two minds: either the Valsuani sculptures were genuine or they were not.

Divergent Opinions: Specifics

There is a considerable body of literature discussing the often-diverse views of Degas scholars on the authenticity of the Valsuani bronzes.

Those for

Gregory Hedberg, formerly chief curator of the Wadsworth Atheneum and now on staff at Hirschl & Adler Galleries, New York, who purchased a plaster from the Valsuani group for his gallery.

Arthur Beale, Chair Emeritus of the Department of Conservation and Collections Management at the Museum of Fine Arts, Boston, who has not actively endorsed them but has given ambiguous statements.

Geraldine Norman, special advisor to the Director of the Hermitage, a journalist but not a Degas scholar.

Those Against

Véronique Wiesinger, director of the Alberto and Annette Giacometti Foundation in Paris who urged scholars to boycott a colloquium on “Posthumous Bronzes in Law and Art History” held in May 2012 at the Hermitage Museum in Saint Petersburg, Russia, where the Degas bronzes were to be displayed, because she did not want the sculptures to gain credibility.

Gala-Salvador Dalí Foundation in Figueres, Spain, which controls Dalí’s estate

Numerous scholars refused to attend the Hermitage symposium on posthumous bronzes in 2012 where the Valsuani bronzes would be displayed. They include:

Sara Campbell of the Norton Simon Museum

Catherine Chevillot of the Musée Rodin

Joseph Czestochowski, co-author of *Degas Sculptures: Catalogue Raisonné of the Bronzes*, 2003

Anne Pingeot, former curator of the Louvre and of the Musée d'Orsay, Paris

Richard Kendall of the Sterling and Francine Clark Museum, Williamstown, Massachusetts, renowned scholar on Degas.

Many of these scholars were contacted for the VWA Report to see if they have changed their mind; of those surveyed (who did not wish to be mentioned by name), all held to their previously expressed opinions.

It was clear after the VWA investigations that a considerable majority of scholars were unconvinced that the Valsuani casts were made from authentic Degas models.

The Hermitage Colloquium and Subsequent Publication

The purpose of the colloquium, which was convened at an off-site location of the Hermitage Museum, was to examine the issue of posthumous bronze casts drawn from the works of famous artists.

Although the Valsuani casts were not the subject *per se* of the colloquium, they loomed heavily over it, since they were exhibited in a gallery space adjacent to the conference room and several speakers addressed the issue of these casts.

All of the major Degas specialists who are cited above and who had stated that they doubted the authenticity of the Valsuani bronzes were invited to attend. All refused.

As one of this group of scholars indicated to VWA in a recent phone call, they felt that if they were to attend, they might give credibility to the Valsuani casts – something that they wished to avoid at all costs.

Subsequent to the colloquium, a catalogue on the Valsuani bronzes was published by the Hermitage. Of those authors contributing to the Hermitage catalogue, only one could be cited as a sculpture specialist who had a history of published articles on Degas extraneous to the controversy

connected with the Valsuani bronzes – i.e. Prof. June Hargrove of the University of Maryland.

In response to a solicitation by VWA for her opinion of the Valsuani bronzes as of 2014, Hargrove wrote in an e-mail:

My article, actually written in 2008 and merely republished in 2013 [in the Hermitage exhibition catalogue], is a five-page overview of Degas's total career, not his sculptures. Contrary to what people might say or think, I am not technically qualified to judge the plasters and the Valsuani editions. It requires more laboratory knowledge and more direct engagement with the works than I have.

Once published, the Hermitage catalogue served as a marketing tool for those selling the Valsuani bronzes – perhaps justifying the fears of those scholars who boycotted the Hermitage colloquium.

Long testified that she initially came to Brugnara's house with the Hermitage catalogue in her purse (in addition to the bronze in a crate) presumably to demonstrate how important others thought the bronze to be.

The Issue of Scientific Testing: The Yank Barry Litigation

Collectors in today's world of advanced scientific testing frequently insist upon such tests for objects in which authenticity is doubted.

The recent Yank Barry litigation illustrates this point clearly.

On June 28, 2013 Maibaum (as Degas Sculpture Project) sued Yank Barry and his Global Village Champions Foundation for breach of contract on the purchase of a full set of Valsuani Degas bronzes including the *Little Dancer* EF-D, alleging that Barry disclosed confidential information including Maibaum's "research" into the bronzes and the appraisals by Maibaum's experts, and had not paid for the works in full, despite contract modifications (Docket 13-cv-04551; Doc 33 – 2nd amended complaint 9/23/13, pp. 3-13).

The final contract called for the purchase of a set (with a *Little Dancer*) at \$7 million, which Barry would then "donate" to Global Village Champions for a raffle (Doc 33 EX 9.) Barry paid a total of \$600,000 prior to the lawsuit (Doc 33 EX 9.).

On September 20, 2013, Barry, et. al. filed a motion to dismiss (Docket 13-cv-04551; motion, memorandum of law).

At a discovery hearing, the defendants sought to utilize scientific testing of the plasters in order to establish that they were not authentic Degas as Maibaum claimed (Transcript p. 19). The value of the bronzes was also at issue in the case. (Doc 38 Transcript p 16).

On January 3 2014: Barry et. al. submitted a proposal for specific types of scientific testing in an effort to prove the lack of authenticity of the bronzes (letter - Document 41).

On February 7, 2014: Maibaum opposed the scientific testing (Letter – Document 42).

On March 18, 2014: (shortly after the request for scientific testing) the case was settled and dismissed.

Although the terms of the settlement are private, it is known that the settlement involved return of the *Little Dancer* EF-D, because that was the same *Little Dancer* that was shipped to Brugnara one month later in April 2014, based on the certificate provided with it and on Maibaum's admission to the FBI (10/9/2014 FBI Interview with Maibaum, p.10/12 LB100273, LB100264-LB100275).

The significance of the Barry case is that Maibaum, instead of taking the bronze back, the way many dealers would once their credibility has been attacked by their client, chose to pursue litigation. However, that litigation was settled within weeks after Barry insisted that scientific testing should be performed. Then Maibaum, not having been paid by Barry, offered the same bronze through Long to Brugnara at a much higher price than he had been willing to accept from Barry.

The Barry case was settled quietly; however, VWA stated in their report that an informed prospective purchaser would definitely question why Maibaum resisted scientific testing if he were so certain that the Valsuani bronze was authentic. And, to repeat as Dr. Hargrove wrote:

to judge the plasters and the Valsuani editions [requires] laboratory knowledge and ... direct engagement with the works.

Valuation Determination of the Valsuani Bronze

The Rosenberg Appraisal

An appraisal report of 2012 written by Alex J. Rosenberg was included with the documentation generated for this case. Presumably this report was offered in conjunction with the sale of the Valsuani *Dancer*, and as such, the VWA report states that this presumption has been taken into consideration in arriving at their determination of Fair Market Value.

Rosenberg valued the Valsuani *Dancer* at \$14.4 million as of the date of his report.

To support his valuation conclusion he cites nine comparable sales of Degas's *Dancer*; all of these sales, which took place at auction between 1986 and November 1, 2011, were for bronzes made at the Hébrard foundry used immediately after Degas's death and not the Valsuani foundry used more than 75 years later.

Using the data for these sales, Rosenberg constructs a methodology taking into account a variety of discounts which allows him to arrive at a value considerably under the highest sale he cites as a comparable, which took place in 2009 for close to \$19 million, notwithstanding the fact that Rosenberg states that in recent years (i.e., considerably after the 2009 sale), there has been a major increase in the value of Degas's *Dancer*.

It is interesting to note that there is a major omission from Rosenberg's list of comparables; on November 28, 2011, a sale of what is presumed to be a Valsuani *Dancer* was sold in Hong Kong by Seoul Auctions [Lot 00021] for just under USD \$1.8 million.

Presumably, inclusion of this important sale (i.e. the only auction sale of a presumed Valsuani *Dancer*) would have caused Rosenberg to modify his appraised value. Yet, the sale is not mentioned in the appraisal report, which is dated October 19, 2012, nearly one year after the Hong Kong sale took place.

Another major omission in the Rosenberg appraisal is that no mention is made of the fact that the scholarly community is divided among specialists on Degas about the authenticity of the Valsuani bronzes, with the majority of scholars having serious doubts. Clearly this is a significant fact

that should affect value (see Doherty case cited above), yet Rosenberg fails to mention this.

USPAP cites a benchmark for appraisers that reports should not contain major errors of omission or commission if reports are to be considered credible. (See USPAP, Standard 7, 2016-17.).

The VWA report states that the omissions cited in the Rosenberg report are enough to make the valuation conclusions unreliable and as such to render the report as lacking in credibility.

The Hong Kong Sale

Considerable mention had been made in the court documents reviewed of the Hong Kong sale of the Valsuani *Dancer* discussed above.

The sale price of \$1.8 million may be considered by some as a reference point in setting a value for the Valsuani *Dancer*.

However, VWA states in their report that this sale should not necessarily be considered totally credible or determinative as some may be tempted to view this. There are several factors or reasons to support this opinion.

1. There appears to be no mention in the sale catalogue that the bronze was part of the Valsuani edition, although the year of casting may have been given but not clarified. This is in sharp contrast to the cataloguing procedures of Sotheby's and Christie's, which give much stronger details of the productions of the Degas casts. No mention of Valsuani appears on the transcription on Artnet, the international auction database, nor does the catalogue entry make mention of the Valsuani/Hébrard controversy or the fact that this was the first time a Valsuani Degas was offered for sale.
2. With the sale taking place in China, one cannot expect that a prospective purchaser would know that a future sale at Sotheby's or Christie's would be unlikely, since both auction houses had stated that they would not sell the Valsuani casts, as Maibaum's testified.
3. Perhaps most importantly, the Seoul auction catalogue fails to mention that, as in the case of all recent casts by Valsuani, the sculptures are stamped "reproduction," which as Maibaum states in a sales re-

ceipt produced in conjunction with the trial, is a requirement of current French law. With this in mind, it is highly unlikely that Chinese bidders would consider paying the high price of \$1.8 million for a bronze marked “reproduction.”

Private Sales of the Valsuani Dancer

Due to the lack of reliable data of any auction sales for the Valsuani Dancer, VWA determined that the greatest emphasis should be placed on the private sales data of the Degas.

With this in mind, VWA extrapolated information from the court documents that were considered to be most pertinent.

Document: LB100264-LB100275

LB100265: Maibaum set a price of \$2 million for the sale of the Degas *Little Dancer* to Long. Maibaum had the sculpture insured at a value of \$1.5 million and viewed that as the minimum price at which he would be willing to consider selling it. [NB: This insurance value differs considerably from the \$14.4 million Fair Market Value for which Rosenberg appraised the Valsuani Dancer at the end of 2014. Since Fair Market Value is almost always lower than Retail Replacement Value, which is the value generally required for an insurance appraisal, one wonders why such a large variance occurs?]

LB100266: Maibaum sells the bronzes controlled by the Degas Sculpture Project (DSP) as a set of seventy-three bronzes for about \$4.5 million total. The latest Rosenberg appraisal of the seventy-three bronzes showed a Fair Market Value of about \$40 million. If a set were being purchased for a museum or would eventually be donated to a museum, then the buyer would be able to purchase a *Little Dancer* for an additional \$2 million.

LB100272: Maibaum purchased this *Little Dancer* in 2007 for €350,000. Maibaum agreed to sell the *Dancer* to Long, who was then going to sell it to Brugnara for \$2 million. The increase in price resulted from a number of factors, including the results of years of research done by Maibaum and his colleague Greg Hedberg.

LB100273: One of the Valsuani *Dancers* sold for about \$1.8 million at an auction in November 2011, as reflected in a document marked "LB-WM 000203." Maibaum was not involved in the auction transaction. [NB: See above discussion of Hong Kong auction.] Maibaum has sold Valsuani *Dancers* for a range of prices over the years. Maibaum sold one to Long years ago for around \$200,000. Maibaum has sold others at prices ranging from around \$500,000 to \$600,000. Maibaum has not completed a sale of a *Little Dancer* in a while. Maibaum has owned about fifteen to twenty *Dancers* over time and currently owns around three.

LB100258: Long acquired a Valsuani *Dancer* sculpture from Maibaum at least twelve years ago. Long paid around \$225,000 for the sculpture.

Document: Parrish Interview (File #: 196D-SF-4846231)

Chuck Parrish has purchased bronzes cast from the Valsuani Foundry plasters. Parrish thought that the most he had paid for one of the *Little Dancers* was \$1 million in a transaction that did not involve Maibaum. Parrish advised that the *Little Dancers* had sold at auctions for around \$1.5-\$2 million. [NB: Apparently this is the one Hong Kong sale discussed above]. Parrish bought *Little Dancers* for around \$500,000-\$700,000 from individuals in Europe who either did not understand the market or had an urgent need to sell.

Parrish could not recall how much he paid for the Valsuani *Dancers* he purchased from Maibaum. Parrish sometimes made these purchases at below-market prices as part of transactions in which Maibaum intended to buy them back.

Parrish once purchased an initial 60% interest in a Valsuani *Dancer* and later bought the remaining 40%. Parrish paid \$400,000 for the last 40% but could not recall what he paid for the initial 60%

The VWA Valuation Conclusion of the Valsuani Dancer

The appropriate Fair Market Value for the Valsuani Dancer is \$600,000.

General factors determining the valuation

In arriving at this valuation VWA stated that:

1. While an appraiser is not by definition an authenticator, one must take into consideration the market perception of authenticity of a work in determining its value. (See Doherty case discussed above.) This market perception has been an important factor in arriving at the valuation. While VWA did not venture an opinion about whether the Valsuani Dancer is authentic or not, the valuation ascribed reflects an opinion, expressed in numbers, about how an informed market would perceive the Valsuani Dancer.
2. Fair Market Value is predicated on the willing buyer being knowledgeable of all the relevant facts. Consequently, the above value reflects this valuation pre-condition.

Specific factors cited by VWA determining the valuation of the Degas *Little Dancer*

1. The scholarly community of Degas specialists is dramatically split about whether the Valsuani bronzes are genuine or not. Neither side appears to be ambiguous in their opinions or to have changed their opinions as of the date of the VWA Report. Clearly a significant majority of scholars with a history of specializing in Degas research, which predates the current controversy, believes that the Valsuani bronzes are not genuine. This does not mean that the scholars who believe the bronzes to be genuine are not sincere in their opinion but those who do not believe in the authenticity of the works would appear to outnumber the advocates for their authenticity, despite an animated exchange of opinions, which continues today. The knowledgeable buyer undoubtedly would take this into account.
2. The documents that have been offered by Maibaum and Long, such as the Rosenberg appraisal report and Maibaum's scholarship do not adequately reflect the above-cited controversy.

3. The fact that Maibaum refused to have additional scientific testing performed as requested by Yank Barry would be a significant factor an informed buyer would take into consideration.
4. The fact that the Seoul auction sale of a presumed Valsuani *Dancer* may not be a valid data point is also a fact that was considered in determining value.
5. Lastly, consistent with all the factors mentioned above, VWA stated in their report that all private sales generated by Maibaum may have been to individuals not knowledgeable of all the relevant facts as reflected in the fact that Maibaum has used the Rosenberg appraisal report to generate sales; by definition the Rosenberg report is assumed to be written objectively and without accommodation to the client's interests, as required by USPAP, yet there are major errors of omission in the Rosenberg report, rendering it unreliable according to USPAP Standards.
6. Consequently the above valuation is consistent with the price Maibaum was willing to pay several years ago – i.e. €350,000 as he stated, although he has stated that he had sold one example to Long for \$200,000 which opens the question of why he would sell it for less than he had paid. (See above.) Notwithstanding these discrepancies in Maibaum's purchase and sales prices, VWA also took into account that market interest of a speculative nature may have been stimulated due to the controversy and the notoriety of the Valsuani bronzes. Consequently, the value ascribed by VWA as of April 2014 is significantly higher than some of Maibaum's reported purchase and sales prices.

VWA Valuation Conclusions

Sixteen oil paintings on paper attributed to Willem de Kooning

..... \$80,000

George Luks, *Gertrude Vanderbilt Whitney*,.....

\$30,000

Joan Miró, *Untitled (Personnage)*..
 \$110,000
 Pablo Picasso, *Sueño y Mentira de Franco (Dream and Lie of Franco)*
 and *En La Taberna*
 \$75,000
 Edgar Degas, *The Little Dancer, Aged Fourteen* (Valsuani cast).....
 \$600,000

Total Fair Market Value of the Long/Maibaum works on the Effective Date: \$895,000

Gurr Johns Valuation Conclusions

Sixteen oil paintings on paper
 attributed to Willem de Kooning..... NO
 COMMERCIAL VALUE
 George Luks, *Gertrude Vanderbilt Whitney*.....
 \$4,000
 Joan Miró, *Untitled (Personnage)*..
 \$100,000
 Pablo Picasso, *Sueño y Mentira de Franco (Dream and Lie of Franco)*
 and *En La Taberna*
 \$73,000
 Edgar Degas, *The Little Dancer, Aged Fourteen* (Valsuani cast).....
 NOT VALUED

Total Fair Market Value of the Long/Maibaum works on the Effective Date: \$177,000

The Desor Testimony

As stated above, the Government chose not to use their expert Gurr Johns to value the Valsuani *Dancer*.

Instead they relied upon the testimony of FBI agent Jeremy Desor – not as an expert witness but as a fact witness.

If the Government were to succeed in getting as long a jail sentence as possible for Brugnara, the valuation for the entire collection which Long and Maibaum attempted to sell to Brugnara would have to be above \$1 million.

Going into the sentencing hearing, VWA had valued the collection at \$895,000 while Gurr Johns put forth a value of \$177,000 without the Valsuani *Dancer*. As such, the Government's case rested on the Degas being valued above \$823,000.

At the sentencing hearing, Agent Desor testified that he had asked an FBI colleague stationed in Korea to check the validity of the Seoul Auction sale. To the best of their knowledge, the FBI concluded that the sale did take place and the \$1.8 million was paid.

Victor Wiener testified that while this may be true, Agent Desor is not a professional appraiser and he does not have the expert qualifications to interpret the facts of the sale.

In Wiener's opinion, if valid cataloguing information had been withheld from potential buyers, such as the fact that the Valsuani bronze had been stamped "reproduction," it would be highly unlikely that the recorded price would have ever been realized.

He further testified that Agent Desor, by his own admission, was not an art expert and that only an art expert, such as a professional appraiser, would be able to evaluate how important full cataloguing information would be for a proper sale.

At the conclusion of the sentencing hearing, the Government held to its position that the recorded sale of \$1.8 million was determinative of the Fair Market Value of the Valsuani *Dancer*.

Ultimately the length of Brugnara's jail sentence was dependent upon whether the Court would accept the Seoul auction price as determinative.

The Sentence

The court reconvened a few weeks after expert valuation testimony was heard.

Brugnara was sentenced to eighty-four months (including fifteen months for contempt of court).

Judge Alsup agreed with the VWA valuation of the Valsuani *Dancer* at \$600,000, restituting Maibaum at that amount for the work, which remains missing. He stated:

\$600,000 goes to Mr. Maibaum for that. That's restitution, \$600,000 for the Degas. (USA v. Luke D. Brugnara, Transcript of Proceedings, October 20, 2015, p. 37)

Hence, Brugnara received reduced jail time based on the VWA values.

Judge Alsup also expressed his opinion that the de Koonings are most likely fake. He stated:

[T]he evidence is pretty strong that the de Koonings were not authentic, and they were about half of the supposed purchase price. (USA v. Luke D. Brugnara, Transcript of Proceedings, October 20, 2015, p. 187)

Conclusion

The case of United States v. Luke D. Brugnara questions the belief that many have that appraisers are not authenticators.

While appraisers of art do not generally issue certificates of authenticity that can follow an object from owner to owner, they frequently have to opine on how buyers and sellers may view the authenticity of objects.

This was the situation during the Brugnara trial. The two appraisers in the case, Christopher Gaillard of Gurr Johns, acting for the Government, and Victor Wiener of Victor Wiener Associates, acting for Brugnara, both stated opinions that the art in question was of questionable authenticity. Their opinions were stated in different ways, but the final result of the opinions of both expert appraisers saved Brugnara from a longer jail sentence than the one he ultimately received.

The Luks painting

While Gaillard believed the painting was not genuine, and Wiener believed that it was genuine, their appraised values were so low at \$4,000 (Gurr Johns) and \$30,000 (VWA) that whether it was genuine or not was an

academic point. The appraised value of both appraisers was significantly lower than the value a genuine Luks in decent condition would have.

The works on paper attributed to de Kooning

Both Gaillard and Wiener testified that the de Koonings were most likely not authentic; while Gaillard testified that, as such, they had no commercial value, Wiener testified the value was \$80,000 for sixteen works of dubious authenticity bearing questionable signatures of the artist. The values of both experts were far below the \$7 million for which Long and Maibaum had offered the paintings to Brugnara, a cumulative price which was an essential element in the Government's prosecution of Brugnara for fraud.

The Valsuani Degas

While the Degas *Little Dancer* was always recognized as a posthumous cast, the question of whether Degas actually created the wax model for the cast was always an issue lurking in the background of the valuation.

Ultimately the valuation of the bronze for Brugnara's sentencing depended on whether the Court would accept a genuinely realized price at auction as determinative of true value.

The Government relied on a fact witness, FBI agent Desor, who testified that the auction sale was legitimate, while Wiener testified that while this sale may have indeed taken place, it was predicated on incomplete cataloguing, which artificially induced the price. It was Wiener's testimony that only a professional appraiser could make this determination.

Ultimately the Court believed that an appraiser's analysis of factors such as accurate cataloguing and market assessment of authenticity is more important than a realized sale which took place, especially when that sale was predicated on incomplete presentation of substantive data.

Consequently, while appraisers may not issue certificates of authenticity, their opinion of market acceptance of authenticity, as of an effective date of valuation, may indeed determine how long a convicted felon may spend in jail.

Epilogue: The Maibaum Request

Immediately following the evidentiary hearing in which the expert opinions were heard, Maibaum filed a motion with the Court to have the works of art in question returned.

The motion was denied.

Judge Alsup wrote on September 2, 2015:

At the evidentiary hearing, both the government's and the defense's experts severely questioned the authenticity of the Willem de Kooning paintings. Specifically the sale price at which defendant Luke Brugnara was offered the de Koonings was \$7,000,000. The defense's expert appraised these same de Koonings at \$80,000 and the government's expert testified that they had no commercial value. Therefore, in light of this development, no art will be returned until both of the following have occurred: (1) all of defendant Brugnara's appeals in this case have been exhausted and there is no possibility of a new trial; and (2) the government affirms that it will not prosecute Modernism, its owner Walter Maibaum, or his associate Rose Long in connection with this art.

About the Author

Victor Wiener is founder and director of the appraisal firm Victor Wiener Associates, LLC, a multi-disciplined company specializing in the appraisal of high-end collections for private and institutional clients. Prior to the establishment of his current practice he was executive director of the Appraisers Association of America, director of Christie's Department of Fine Arts in Rome, and a consultant for Sotheby's Appraisal Department.

For over 25 years he has been an adjunct assistant professor in New York University's Appraisal Studies Program teaching courses in Legal and Ethical Guidelines for Appraisers, IRS Rules and Regulations and the Uniform Standards of Professional Appraisal Practice (USPAP).

His practice includes expert witness testimony for many art related disputes including the bankruptcy settlement arrived at between the City of Detroit and its leading creditor in which he and his company valued the assets of the Detroit Institute of Art valued at \$8.1 billion; litigation con-

cerning the estates of Andy Warhol and Louise Nevelson; and valuation for the insurance settlement of the damaged Picasso painting *Le Rêve* which at the time was the most expensive work of art ever sold.

David Shapiro

David Shapiro is an accredited member of the Appraisers Association of America and is an appraiser employed by Victor Wiener Associates.