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## Just Between Us: Buyer of Rothko Painting Sued for Breach of Confidentiality

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Confidentiality provisions are not a new or novel inclusion in agreements for the sale of assets, let alone the sale of artwork. However, the extremely drawn out case of *Hoffman v. L&M Arts, et al*, presents a rather odd view on the scope and nature of confidentiality provisions within the art law context. Specifically, it provides buyers and sellers of artwork with important advice for the inclusion and construction of confidentiality provisions in future sales. The case also presents the interesting issue of whether a confidentiality provision requiring that the transaction for the sale of artwork remain confidential can preclude the future sale of the work.

In 2007 when Marguerite Hoffman, a wealthy art collector, decided to sell an "Untitled" 1961 Mark Rothko oil painting shortly after her husband's death. In order to sell the painting, Hoffman would have to remove it from the Dallas Museum of Art where it was currently on display. To safeguard her from the public discourse that would result from a public sale of the painting, Hoffman decided to make a private sale of the painting. Hoffman signed a Letter Agreement with L&M Arts, an intermediary between the buyer and seller, for the private sale of the painting for \$17.6 million. The Letter Agreement included the following confidentiality language: "All parties agree to make maximum efforts to keep all aspects of this transaction confidential indefinitely." Further, the Agreement required the buyer to not hang or display the painting for six months after the sale.

The sale occurred and the confidentiality provisions presented no problems. That is until 2010, when the buyers, Studio Capital, Inc. and David Martinez, decided to auction the painting to great fanfare. During the process of the sale, the painting appeared on the cover of the Sotheby's catalog and, ultimately, sold for more than \$31 million. In response to this extraordinary sale, Hoffman sued L&M Arts, Studio Capital, and Martinez for breach of the confidentiality provision of the Agreement.

The result in initial trial court was a victory for Hoffman against L&M Arts, while the court set aside the ruling against Studio Capital and Martinez because they were not parties to the Letter Agreement and, therefore, it was not possible to find them liable. However, L&M Arts filed an appeal to the decision challenging whether the Letter Agreement covered the future sale of the painting.

The Court of Appeals in Texas found that the Letter Agreement did not cover the future sale of the painting because the Letter Agreement specifically covered only the "aspects of the transaction", not the transaction itself. Furthermore, the six month ban on the display of the artwork did not indicate that Hoffman intended for the work to never be displayed and, as such, did not indicate that the sale remain confidential indefinitely. Also, an unreasonable restraint on the sale of property is void under Texas law and the Letter Agreement required "maximum effort" applied "indefinitely", making the restraint unreasonable and, thus, void. The court found for L&M Arts and found that the Letter Agreement was not breached, reversing the original trial court decision.

This extensive trial provides a few great lessons in the crafting and construction of confidentiality provisions. First, this case should not be read to completely ban the use of confidentiality provisions that keep the sale of artwork a secret. However, the court reminds us that one of the most significant factors considered in connection with determining the enforceability of such provisions is the length of the restriction. This leads to another lesson, which is that the parties should certainly understand exactly what each party to the transaction can and cannot do, but also should understand the period of time and, in some cases, the geographic restrictions imposed as a



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result of the confidentiality provisions. Third, the parties to a transaction should always ensure that every party is bound by the confidentiality provisions, or, at the very least, include an indemnity provision for the breach of a third-party buyer when, as in the immediate case, an intermediary is used. Lastly, in case of breach of the confidentiality provisions, parties should clearly draft the remedies and damages that may follow, so that the confidentiality of the transaction is not further exacerbated as a result of a prolonged trial.

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