

# Brothers in Law on Corporate Affairs — When Art and Business Mix



Charles and Thomas Danziger  
(Photo by Keziban Barry)

**FROM: JOE@PONZICORP.COM**

**TO: INFO@DANZIGER.COM**

**CC: HERB@PONZICORP.COM**

Hi, guys! My boss, Herb (copied above), asked if you could give some quick, free legal advice on our corporate art collection. I am running to a deposition, but let me know. Thanks!

**INFO@DANZIGER** We don't usually give free advice to nonclients via e-mail, but what's your question?

**JOE@PONZICORP** Our SVP of marketing is buying a series of photographs from our company that he originally purchased for our corporate massage room. He offered us the original purchase price, but wouldn't the photos have appreciated in value since then?

P.S.: No need to loop in Herb (poor guy—he was fired during lunch).

**INFO@DANZIGER** Yes. The company should receive fair market value for the works, ideally as determined by an independent appraiser. Consider the 1995 federal case *In re: The Mediators, Inc.* Richard Manney, as the CEO and sole shareholder of the New York media buying company, purchased millions of dollars' worth of paintings, antique furniture, fine jewelry, and rare collectibles with company money, but used them mainly to furnish homes and to outfit his family. When the Mediators faltered in the late 1980s, Manney personally borrowed \$12 million from Citibank (secured by the art) to buy the art from the company at the original price as opposed to the fair market value—effectively a discounted rate. The company became insolvent and the Manneys were sued by the credit committee for breach of their fiduciary duty on the grounds that they had enriched themselves at the corporation's expense by appropriating corporate assets for little or no consideration. The case was ultimately dismissed, largely on technical grounds, but the principles could still apply.

**JOE@PONZICORP** Cool! Another small question: Looking out my window, I just saw our main shareholder load the rest of our corporate art collection into his Hummer. He is probably taking the art home for temporary safekeeping. He lives in an amazing loft with fantastic light. No problem, right?

**INFO@DANZIGER** Similar issue, similar problem. And in fact your company's directors might also be liable here, since they are the guardians of corporate assets. In the 2007 bankruptcy case *ATR-Kim Eng Capital Partners, Inc., et al. v. Bonilla*, the Ninth Circuit Court found the San Francisco firm's directors had breached their fiduciary duties by allowing the majority shareholder to transfer major assets of the company—the ownership of several businesses worth more than \$35 million—to members of his family, likening the actions to negligence on a par with “leaving a large amount of cash unguarded in a public place.” The court denied the defendants' motion to dismiss.

**JOE@PONZICORP** Just got a call from our outside counsel, with great news. I've been promoted to senior vice president! Also, they want me to get back the art collection—and sell it! Cool, huh? No problem there, right?

**INFO@DANZIGER** That should be OK. In terms of transparency, we recommend selling through public auction, an established gallery, or a reputable dealer. Fortunately, corporations are not under the same ethical restrictions as many museums in deaccessioning works from their collections—the proceeds can be used for any legitimate business purpose.

**JOE@PONZICORP** An auction, eh? My girlfriend's roommate's sister works for an auction house. If I put the art up for auction, will the house act on my behalf or the buyer's?

**INFO@DANZIGER** Good question. It depends on the state and the auction contract. Under New York law, an auctioneer must act in the best interests of the seller, but this duty may be modified in the consignment agreement between the parties. For instance, the agreement usually gives the auctioneer the right to rescind the sale if a buyer raises valid questions about a work's authenticity.

**JOE@PONZICORP** Our outside auditors just found some neat prints when they blew open our former CEO's safe. He had used these prints to back our corporate bonds, but some have faded over time, and others were partially torn while he was shredding documents. Assuming we have the copyright, can we reproduce and sell them?

**INFO@DANZIGER** Careful—irrespective of copyright, you may face claims under the Visual Artists Rights Act of 1990 (VARA), which gives living artists the moral right to prevent distortion, mutilation, or modification that would prejudice their honor or reputation. Distortions resulting from the passage of time, such as fading, are excluded from VARA, but the shredded works are another matter and bring to mind the 2007 federal lawsuit *Louden v. Yahoo! Inc.* In that case, artist Sharon Louden sued the search giant after it clipped her outdoor installation *Reflecting Tips*, 2001, which was located on Yahoo's corporate campus and was designed to mimic the natural wetland vegetation there. The action was dropped in 2008.

**JOE@PONZICORP** Understood. The auditors did raise a tiny question about some of the choices the company made in art buying (the oil painting of Herb's girlfriend, for starters). Any problems?

**INFO@DANZIGER** Not necessarily. Corporate art collecting can be justified for purposes other than maximizing profits. The question is whether there was a rational business judgment behind the decision to collect.

**JOE@PONZICORP** I have a weird hypothetical for you. Could a CEO build a public museum with the company's funds to house his private collection? The guards at this hypothetical museum are former models (friends of the CEO), if that makes any difference.

**INFO@DANZIGER** Even without the models, that might be allowed. In three civil actions commenced by shareholders in 1989 against Occidental Petroleum Corporation, the company withstood shareholders' claims of waste after it spent more than \$85 million to build and fund the operations of the Armand Hammer Museum of Art and Cultural Center for the collection of its chairman. The court there found that the expense resulted in corporate good will and was reasonable in light of the company's pretax earnings of \$574 million. (The museum has since operated in partnership with the University of California, Los Angeles.)

**JOE@PONZICORP** So what are the outer limits of corporate philanthropy? Any problem donating our art collection to a great new charity to benefit former officers of our company?

**INFO@DANZIGER** The limit is when it is deemed a waste of corporate assets—a high standard that encompasses inadequate consideration and lack of reasonable business purpose. (Only the corporation or the shareholders can allege waste.) In *Cox Enterprises, Inc. v. News-Journal Corporation*, the court found in 2007 that News-Journal's spending on the arts was wasteful where individuals had used the company to “indulge their personal interests in the arts” and the company's lawyer had warned that its arts contributions “had a material adverse effect on corporate profits.” Your suggested donation would violate more laws than we can count.

**JOE@PONZICORP** Crazy day. Just heard we're in tomorrow's *Post*, and two company lawyers are coming to my apartment right now! Could it be another promotion?!! Thanks again for your help.

P.S.: Shoot me the definition of *coconspirator*, OK?

**INFO@DANZIGER** No problem, Joe. No problem.

*Thomas and Charles Danziger are the lead partners in the New York firm Danziger, Danziger & Muro, specializing in art law.*

*Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice.*

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