UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X Civil Action No. 1:20-cv-04370 (DLC)

JN CONTEMPORARY ART LLC,

Plaintiff,

-against-

PHILLIPS AUCTIONEERS LLC,

Defendant.

----------X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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FACTUAL BACKGROUND

For the factual background, the Court is respectfully referred to the Second Amended Complaint, dated July 31, 2020 (the "SAC," Ex. 1).

POINT I

FRCP 12(b)(6) LEGAL STANDARD

Although FRCP 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," the SAC (Ex. 1) is factually detailed. As a matter of law, declarations of force majeure and claims of impossibility of performance are fact-intensive inquiries not resolvable on a motion to dismiss without any discovery,[1] as are questions of intent, including Defendant's intent to perform (see Points III.C., VI and VII) and the parties' intent to relate the Basquiat Guarantee Agreement ("BC," Ex. 2) and Stingel Consignment With Guarantee Agreement ("SC," Ex. 3) (see Point V). Defendant's rote treatment of FRCP 12(b)(6)'s legal requirements is devoid of substance. This motion fails to connect its arguments to the FRCP 12(b)(6) standards.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, supra, at 678.

"***When there are well-pleaded factual allegations, a court should assume their veracity*** and then determine whether they plausibly give rise to an entitlement to relief." Id., at 679 (emphasis added). The Court must "construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." Arar v. Ashcroft, 585 F.3d 559, 567 (2d Cir.

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[1] See Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F.Supp. 312, 319 (S.D.N.Y. 1989); see also Stinnes Interoil, Inc. v. Apex Oil Co., 604 F.Supp. 978, 983 (S.D.N.Y. 1985); Clarex Ltd. v. Natixis Secs. America LLC, 2013 WL 2631043, *3 (S.D.N.Y. Jun. 11, 2013).

2009).[2] FRCP 12(b)(6) "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conduct." Lynch v. City of New York, 952 F.3d 67, 75 (2d Cir. 2020); see also Iqbal, supra, at 678.

The choice between two plausible inferences drawn from factual allegations is for the factfinder, not the Court, on an FRCP 12(b)(6) motion. Anderson News, LLC v. American Media, Inc., 680 F.3d 162, 184-85 (2d Cir. 2012).[3] "Rule 12(b)(6) does not countenance ...dismissals based on a judge's disbelief of a complaint's factual allegations." Twombly, supra, at 556.[4]

Contrary to the FRCP 12(b)(6) standard, throughout Defendant's Memorandum of Law ("D.'s Memo"), Defendant claims alternative constructions of its contractual provisions and disputes Plaintiff's statements of fact concerning the Evening Auction without rebutting the plausibility of Plaintiff's allegations or the reasonable expectation that discovery will reveal evidence supporting Plaintiff's contentions. Locked in a dispute about the meaning of contractual language that it alone drafted, Defendant has not met the standards of an FRCP 12(b)(6) motion.

POINT II
THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF THE SC (EX. 3) FOR DEFENDANT'S FAILURE TO OBTAIN PLAINTIFF'S WRITTEN CONSENT

Plaintiff has pled that, pursuant to ¶ 6(a)(i) of the SC (Ex. 3), Defendant may "select, change or reschedule the place, date and time for the auction…to a later date than May 2020" only upon obtaining Plaintiff's "prior written consent." Defendant's contention that ¶ 17(b) of the SC (Ex. 3)

[2] The Court also may consider facts alleged in documents attached to or incorporated by reference in the SAC (Ex. 1) (see DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010)), as well as documents integral to or relied upon in the SAC (Ex. 1), even if not attached or incorporated by reference (see Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)).

[3] See also Todd v. Exxon Corp., 275 F.3d 191, 203 (2d Cir. 2001), holding "fact-specific question[s] cannot be resolved on the pleadings;" Lynch, supra, at 75.

[4] "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." Anderson, supra, at 185; see also Iqbal, supra, at 696; Twombly, supra, at 556; Lynch, supra at 75.

"supports Phillips' position that neither party is permitted to unilaterally change the performance obligation from the Spring New York Evening Auction to any other auction" (D.'s Memo at p. 20) is farcical. Defendant, caught in its own contradiction, twice breached and unilaterally modified the SC (Ex. 3) by rescheduling the Evening Auction, in March and May 2020, to June 24-25 and July 2, 2020 without seeking or obtaining Plaintiff's prior written consent or giving legal force majeure notice to Plaintiff (and with the Stingel Work remaining in the Evening Auction both times) (Ex. 1 at ¶¶ 20, 27-28, 30-31, 34, 39, 43-45).[5] Force majeure was a feeble afterthought as Defendant's breach of the SC (Ex. 3) antedated any invocation of force majeure. Courts uniformly hold that a defendant breaches an agreement by acting without plaintiff's prior written consent in direct contravention of the express terms of a written agreement mandating that defendant first obtain plaintiff's prior written consent.[6] Defendant has no way around this towering principle of law.

Defendant's contention that it did not need to obtain Plaintiff's written consent because ¶ 6(a)(i) of the SC (Ex. 3) governs "voluntary rescheduling" only (D.'s Memo at pp. 19-20) is not supported by any authority. ¶ 6(a)(i) of the SC (Ex. 3) contains no reference whatsoever to "voluntary rescheduling" and does not contrast itself to ¶ 12(a) of the SC (Ex. 3). Though Defendant claims to have publicly announced the postponement of in-person auctions via a statement on its website on March 14, 2020 (D.'s Memo at p. 6), Defendant did not legally send

[5] The SC (Ex. 3) does not confer on Defendant the right to postpone the Evening Auction more than once on account of alleged force majeure (Ex. 1 at ¶¶ 26-35, 73).

[6] See Metro Funding Corp. v. WestLB AG, 2010 WL 1050315, *18 (S.D.N.Y. Mar. 19, 2010); see also Icahn School of Medicine at Mount Sinai v. Neurocrine Biosciences, Inc., 191 F.Supp.3d 322, 330 (S.D.N.Y. 2016); US Bank Nat. Ass'n Orix Capital Markets, LLC v. NNN Realty Advisors, Inc., 614 Fed.Appx. 548, 550-51 (2d Cir. 2015); Clinical Insight, Inc. v. Louisville Cardiology Med. Grp., PSC, 2013 WL 3713414, *10 (W.D.N.Y. Jul. 12, 2013); First Mercury Ins. Co. v. Schwartz, 2019 WL 2053850, *16-17 (E.D.N.Y. Mar. 1, 2019); VRA Family Ltd. Partnership v. Salon Mgmt. USA, LLC, 2020 WL 2164913, *1 (2d Dep't May 6, 2020); Empire Room, LLC v. Empire State Bldg. Co. LLC, 159 A.D.3d 648, 649 (1st Dep't 2018).

Plaintiff the Unlawful Termination Letter, which notified Plaintiff of the postponement of the Evening Auction and the termination of the SC (Ex. 3), until June 1, 2020 (Ex. 1 at ¶¶ 32-35).

POINT III
THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF THE SC (EX. 3) FOR DEFENDANT'S UNLAWFUL TERMINATION OF THE SC (EX. 3)

A. Force Majeure Clauses Are Construed Narrowly and the Doctrine of Impossibility Is Applied Narrowly

Force majeure clauses are narrowly construed and the doctrine of impossibility is rarely applied and, if so, narrowly.[7] The burden of demonstrating force majeure factually is on the party invoking the doctrine, i.e., Defendant. See Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d Cir. 1985).[8] Any ambiguity in a force majeure clause, particularly one in a form contract (like the SC (Ex. 3), BC (Ex. 2) or Defendant's Conditions of Sales (SAC Ex. 6)), must be construed strongly against its drafter, i.e., Defendant. See M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 142 (2d Cir. 2005); Beardslee, supra at 219; Aukema, supra, at 209; A&Z Appliances, Inc. v. Elec. Burglar Alarm Co., Inc., 90 A.D.2d 802 (2d Dep't 1982).

B. The Evening Auction Was Not Date-Specific or Site-Specific

Defendant's argument that the Stingel Work could be auctioned only in "the Spring New York Evening Auction, in New York in May" (D.'s Memo at p. 14) is false and contradicted by Defendant's own statements (SAC Exs. 4-5) and the SC (Ex. 3). There is no such restrictive or

[7] See Reade v. Stoneybrook Realty, LLC, 63 A.D.3d 433, 444 (1st Dep't 2009); see also In re Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012); Kel Kim Corp. v. Central Mkts., 70 N.Y.2d 900, 902–903 (1987); Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, 108 A.D.3d 1, 7 (1st Dep't 2013).

[8] See also Beardslee v. Inflection Energy, LLC, 904 F.Supp.2d 213, 220 (N.D.N.Y. 2012); Aukema v. Chesapeake Appalachia, LLC, 904 F.Supp.2d 199, 210 (N.D.N.Y. 2012).

exclusive language in the SC (Ex. 3) and Defendant brazenly has misrepresented to the Court that the SC (Ex. 3) mandates an "in person" auction in New York.[9]

1. No Contract Term Required that the Stingel Work Be Auctioned in New York at an In-Person Auction

Defendant has not identified any SC (Ex. 3) provision mandating that the Stingel Work be offered for sale at an ***in-person auction***, ***at a specific physical address*** or ***exclusively*** in New York. The sole contract provision referencing New York cited by Defendant is ¶ 6(a) of the SC (Ex. 3):

> "The Property shall be offered for sale ***in New York*** in our major spring 2020 evening auction of 20th Century & Contemporary Art ***currently scheduled*** for May 2020" (emphasis added).

Ex. 4 to the SAC (Ex. 1), Defendant's auction schedule,[10] proves that this reference to New York is alchemy, not contractual, and is consistent with conducting an "online auction" in which the Stingel Work is sold in New York and globally via a live, real-time digital transmission. The first entry in the "New York" column is:

> "2 July"- "20th Century & Contemporary Art"- "postponed from 14 & 15 May, New York and 24 June, London."

In SAC Ex. 5, a predecessor to SAC Ex. 4, Defendant writes:

> "London and New York **20th Century & Contemporary Art Evening Sales** to be consolidated into one ***New York auction***" (emphasis added).

In Ex. 6 (referenced and quoted in Ex. 1 ¶¶ 50-51), Defendant conceded that the July 2, 2020 Evening Auction is a "New York" auction though "***broadcast live*** from Phillips's new saleroom ***in London***" purely as an online sale with "principal auctioneer, Henry Highley [] lead[ing] the sale ***in real time*** while a video wall [] show[ed] Phillips's specialists ***on the phone with bidders***" (Ex. 6; Ex. 1 at ¶¶ 26, 43, 50-51). ¶ 6(a) of the SC (Ex. 3) clearly did not require the Evening Auction to be

[9] See Defendant's counsel's false representations to the Court during the June 19, 2020 videoconference, to wit, "And so when the contract requires plainly that the work be offered in this specific auction in New York in person, the evening auction…" (Ex. 5, 7:13-15), and in D.'s Memo at pp. 1, 3, 12-13 that the Evening Auction was defined as an "in-person" sale.

[10] SAC Ex. 4 is an extract from Defendant's July 2, 2020 Evening Auction catalogue, available at https://issuu.com/phillipsauction/docs/ny010320_catalog?fr=sZWYxOTg1OTI2.

an "in-person" auction at a physical location in New York.[11] The proof is in the pudding. See auction video (Ex. 14).

Though Defendant's General Counsel Hartley Waltman, Esq. ("Waltman") claims that there are "materially different terms" for live and online auctions (D.'s Memo at p. 13; Ex. 7, Waltman Decl., dated July 2, 2020, at ¶¶ 9-10), he utterly fails to explain what these material differences are or how they shed any light on the express provisions of the SC (Ex. 3)[12] and admits:

> "An online auction is *not* a different method of conducting the same live sale that would otherwise occur in person…" (Ex. 7 at ¶ 9).

The Waltman Decl. (Ex. 7) supports Plaintiff as it "reach[es] outside the four corners" (D.'s Memo at pp. 3, 18) of the SC (Ex. 3), attaching Defendant's auction calendar "as of early March 2020," which:

> "[D]elineates between live and online auctions, and provides the specific location at which live auctions are to take place…" (Ex. 7 at ¶ 5 and Ex. A thereto).

In stark contrast, the SC (Ex. 3) does not set forth "the specific location" or physical address of the Evening Auction and does not "delineate[] between live[13] and online auctions" (Id.). Neither the term "live" nor any mention of Defendant's auction calendar is found in the SC (Ex. 3).

2. No Contract Term Required that the Stingel Work Be Auctioned in May 2020

Defendant contends that the Stingel Work had to be sold in the Evening Auction in May 2020 (D.'s Memo at pp. 12-14), which is contradicted by the express terms of the SC (Ex. 3) contemplating a sale of the Stingel Work at public auction in June 2020 or later, as follows:

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[11] Any ambiguity or competing interpretations of the SC (Ex. 3) must be construed against Defendant as the draftsman. See White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007).

[12] In fact, an examination of Exs. C and D to the Waltman Decl. (Ex. 7) shows no material differences (Ex. 8 - Joseph Nahmad Rep. Decl., dated July 9, 2020 at ¶ 14).

[13] Defendant's use of the term "live" is wrong. Merriam Webster defines "live stream" as "to stream digital data (such as audio or video material) that is delivered continuously and is usually intended for immediate processing or playback" (Ex. 9).

- ¶ 6(a) of the SC (Ex. 3) states that the Evening Auction is "***currently scheduled*** for May 2020" (emphasis added);[14]
- ¶ 6(a)(i) of the SC (Ex. 3) grants Defendant the right "to ***select, change or reschedule the place, date and time for the auction*** but any change to ***a later date than May 2020*** would be subject to [Plaintiff's] prior written consent" (emphasis added); and
- ¶ 12(a) of the SC (Ex. 3) begins, "In the event that the auction is ***postponed***…" (emphasis added).

Defendant's preposterous treatment of ¶ 6(a)(i) of the SC (Ex. 3) is a dream-like notion that ¶ 6(a)(i) "protects Plaintiff by requiring its prior written consent if Phillips wanted to *voluntarily*[15] move the auction to a different place or later date" (D.'s Memo at p. 14). It is, in fact, an incontrovertible concession that the Evening Auction was not required to be held in May 2020. Defendant breached Plaintiff's absolute right to control the next date of the Evening Auction post-May 2020. ¶ 3(c) of the SC (Ex. 3) ("…[O]r to include such Property ***in the next appropriate auction*** after restoration has been completed…") further demonstrates that the date for the Evening Auction was not immutable.[16] Defendant is equitably estopped from arguing that the Evening Auction date was set in stone when Defendant ***twice*** unilaterally modified the SC (Ex. 3). See Rose v. Spa Realty Assoc's, 42 N.Y.2d 338, 344 (1977) (Ex. 1 at ¶¶ 27-28, 30-31).

Defendant attempts to "excise terms" from the SC (Ex. 3) and "distort the meaning of those used" in the SC (Ex. 3) to "make a new contract for the parties" in which the Stingel Work could only be sold at a May 2020 in-person auction in New York. See Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). The parties' expectations are irrelevant (D.'s

[14] The SC (Ex. 3) is dateless with no specific date in May 2020 recited for the Evening Auction. Defendant's use of the indefinite adverb "currently" means "only at present" and "subject to change" and is antithetical to any definiteness.

[15] The term "voluntary" is not found in ¶ 6(a)(i) of the SC (Ex. 3).

[16] ¶ 3(c) of the SC (Ex. 3) does not require negotiation of new sale terms ***as a result of the Stingel Work being offered at a later auction*** (D.'s Memo at p. 14). It states that if the Stingel Work is ***lost or damaged***, requiring ***restoration***, the date and place of the Evening Auction may be changed. Damage to an artwork might occasion a change in pre-sale estimate and, accordingly, terms of sale.

Memo at pp. 12-13) as the SC (Ex. 3) was not site- or date-specific. See ¶¶ 6(a), 6(a)(i) and 12(a) of the SC (Ex. 3) and Defendant's construction of "New York auction" in Exs. 4-5 to the SAC (Ex. 1).

C. Defendant Was Not Prevented from Performing the SC (Ex. 3)

Defendant fails to show a causal nexus between the claimed force majeure event and its purported inability to perform due to circumstances beyond its reasonable control. A non-performing party must demonstrate that a force majeure event "prevent[ed] [it] from performing under the terms of the [agreement]." Aukema, supra, at 210. Performance must be completely impossible. See Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep't 2001); see also Phibro, supra, at 318. "[T]he non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure." Phillips, supra, at 319. The defense of impossibility is not available to a party that did not take virtually every action within its power to perform under the subject agreement. See U.S. v. Int'l Bhd. of Teamsters, 816 F. Supp. 864, 874 (S.D.N.Y. 1992), aff'd, 986 F.2d 15 (2d Cir. 1993).[17]

Defendant cannot rely on a force majeure or impossibility defense[18] as Defendant has failed to make the above showings, instead repeating the debunked mantra (see Point III A.-B., supra) that it "was required to postpone" the Evening Auction "as a result of the COVID-19 pandemic" and that the Stingel Work could be sold only at an in-person auction in New York in May 2020 (D.'s Memo at p. 16).[19] As Defendant was not prohibited by law or governmental order from conducting

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[17] See also Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990); East River Sav. Bank v. Secretary of HUD, 702 F.Supp. 448, 460 (S.D.N.Y. 1988).

[18] Defendant's claim that performance was "excused by the common law doctrine of impossibility" (D.'s Memo at pp. 20-21) is groundless. In LeRoy v. Sayers, 217 A.D.2d 63, 71 (1st Dep't 1995), centered on a house damaged by a fire, the Court could not determine on a ***summary judgment motion*** whether the damage was so significant that defendant could not satisfy his lease obligations.

[19] Defendant's cases at pp. 20-21 are inapposite. In Goddard v. Ishikawajima-Harima Heavy Indus's Co., 229 A.D.2d 754 (1st Dep't 1968) and Leisure Time Travel, Inc. v. Villa Roma Resort & Conf. Ctr., Inc., 55 Misc. 3d 780, 782 (Sup. Ct. Queens Co. 2017), the subjects of the contracts (a factory and resort, respectively) were destroyed. In Radiosurgery New York L.L.C. v. Cabrini Med.

an online auction during the COVID-19 pandemic, Defendant's authority has no bearing on this litigation.[20] Defendant's invocation of Executive Orders (D.'s Memo at pp. 16-17) does not support its claim that it was "unlawful" to conduct the Evening Auction as no Executive Order prohibited the transacting of business online during the COVID-19 pandemic. Defendant's competitors have been live-streaming online auctions with remote bidding during the COVID-19 pandemic, including, inter alia, Christie's July 10, 2020 live, online multi-part auction, titled "ONE: A Global Sale of the 20th Century" and Sotheby's June 29, 2020 digitally streamed live auction in which a Francis Bacon triptych sold for $84.6 million (Ex. 1 at ¶ 50; Exs. 10 and 11).[21]

Defendant's specious assertion that "[a]ny notion of pretext is also rebutted by Phillips [sic] consistent, contemporaneous statements of postponement, all of which identified the pandemic as the cause" (D.'s Memo at p. 17) is false. The issue is not whether Defendant "***postponed*** 'all of [its] sales and events in the Americas, Europe and Asia' as a result of the pandemic" or whether Defendant "entered into ***new contractual arrangements*** with certain consignors for another

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Ctr., 19 Misc. 3d 1102(A) (Sup. Ct. Richmond Co. 2008), the subject of the contract (a hospital) lost its license. In Baron Leasing Corp. v. Raphael, 103 A.D.3d 763, 763-64 (2d Dep't 2013), a driver's death required a taxi medallion to be placed in storage. In the foregoing cases, performance actually was impossible, not simply more difficult or costly.

In Metpath Inc. v. Birmingham Fire Ins., 449 N.Y.S.2d 986, 989 (1st Dep't 1982), Defendant insurer was not liable where the President of the United States unilaterally terminated a strike by firing the strikers ***after three days***, but the subject insurance policy expressly limited coverage exclusively to increased costs arising from a strike that were accrued at least ***seven days*** after the commencement of the strike. In Moyer v. City of Little Falls, 134 Misc.2d 29 (Sup. Ct. Herkimer Co. 1986), government action caused a monopoly and a 666% increase in the contract price. In these two cases, performance either was not contractually required or was so unexpectedly costly that it was "unfair" to require performance.

[20] In United Water New Rochelle, Inc. v. City of N.Y., 687 N.Y.S.2d 576, 580 (Sup. Ct. Westchester Co. 1999), which does not concern force majeure, the Court declined to compel specific performance that "could pose severe health and safety risks for the communities which petitioners serve." In Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, 2012 WL 6091570 at *26 (E.D.N.Y. Dec. 7, 2012), which also does not concern force majeure, the Court held that even where the promised performance is illegal, "justice may require the payment of damages."

[21] See Quinn Emanuel and Skadden legal guidance cited in Plaintiff's injunctive relief reply brief, dated July 9, 2020, at pp. 6-7 and fn 17 (Docket no. 50).

auction" (Id.) (emphasis supplied). The issue is that Defendant ***terminated*** the SC (Ex. 3) while declining to terminate the 24 other consignment agreements (11 with guarantees) for the Evening Sale (Ex. 1 at ¶¶ 42-47, 107-108; Ex. 8 JN Decl. at ¶ 13). Defendant used the pandemic as a false pretext to ***unlawfully terminate its obligation*** to Plaintiff as Defendant perceived the Stingel market as weak and deemed it financially beneficial to cancel a $5,000,000.00 debt (Ex. 1 at ¶ 40; Ex. 8 JN Decl. at ¶¶ 2, 39). Discovery will reveal that Defendant auctioned at least 24 artworks in the July 2 "New York" Evening Auction (conducted in London and livestreamed globally) pursuant to consignment agreements executed prior to or in May 2020 and that at least 11 of those artworks contained contractual guarantees that Defendant kept in place despite the COVID-19 pandemic. "The truth is rarely pure and never simple."[22] This is the fulcrum of pretext as Defendant singled out the Stingel Work for termination and otherwise admittedly perpetuated the status quo.

Defendant's failure to take any steps to perform pursuant to the SC (Ex. 3), including holding the Evening Auction as an online auction in New York in May 2020, despite Defendant's uncontested ability to conduct online auctions,[23] is fatal to Defendant's claims.[24] In April and May 2020, during the COVID-19 pandemic, Defendant advertised and conducted at least 11 online auctions (Ex. 1 at ¶ 49). On July 2, 2020, Defendant conducted the "New York" Evening Auction as an online auction based in London. See Id. at ¶¶ 50-51; see also p. 5, supra. Being physically present at an auction house never has been the sine qua non of a Phillips auction. In addition to the

[22] Wilde, Oscar. *The Importance of Being Earnest*.

[23] Defendant has not disputed that its auctions regularly are conducted online with bids received online, via the telephone and by way of absentee bid (Ex. 1 at ¶ 54).

[24] Defendant's assertion that "[n]o contractual provision permits the Stingel Work to be offered at the July 2, 2020 auction ***without both parties' consent***" (D's Memo at p. 18) (emphasis added) is false and misleading. ¶ 6(a)(i) of the SC (Ex. 3) requires ***Plaintiff's written consent*** to auction the Stingel work subsequent to May 2020. Defendant highlights Plaintiff's lack of written consent to sell the Stingel Work at the Evening Auction on July 2, 2020 while deliberately omitting that Defendant never sought written consent from Plaintiff in violation of ¶ 6(a)(i) of the SC (Ex. 3).

more recent method of placing bids online, bidders at Phillips, Christie's and Sotheby's auctions have long been able to bid by telephone or absentee bid (Ex. 1 at ¶ 43).

In Aukema, supra, at 209-11 and Beardslee, supra, at 219-21, the Court held that force majeure was not triggered by the Governor's moratorium on the only viable, profitable method of oil and gas drilling as performance remained possible using other drilling methods and defendants made no efforts to perform. The Court further held that the draftsman is "in the best position" to insert specific terms into a contract. Id. At bar, Defendant draftsman failed to insert in the SC (Ex. 3) that the Evening Auction must be held as an in-person auction in New York in May 2020. In Rochester Gas and Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, *10 (W.D.N.Y. Feb. 13, 2009), the Court rejected defendant's force majeure defense as it still could perform, holding, "The mere fact that this undertaking may have become burdensome, as a result of subsequent, perhaps unanticipated, developments, does not operate to relieve [defendant] of [its] obligation" (internal citation omitted); see also Macalloy, supra, at 227.

Defendant made a conscious financial decision not to perform. See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., 2010 WL 1945738, *5 (Sup. Ct. Albany Co. May 12, 2010). See also Rivas Paniagua, Inc. v. World Airways, Inc., 673 F.Supp.708, 713 (S.D.N.Y. 1987) ("[Defendant] unilaterally chose to cancel commercial flights, presumably for its own economic benefit"). So too is Defendant selectively terminating the SC (Ex. 3) because Defendant perceives the Stingel market as weak while at least 11 artworks offered at the Evening Sale had Defendant's guarantee or a third-party guarantee (Ex. 1 at ¶ 43).

Defendant cannot co-opt the COVID-19 pandemic to excuse its non-performance of legal contracts while holding online auctions throughout April, May and June 2020 of the contemporary art market of which the Stingel is a part. Defendant's inability to perform in the exact manner that it anticipated and prefers is not tantamount to being unable to perform. See United Equities Co. v.

First Nat'l City Bank, 52 A.D.2d 154, 161 (1st Dep't 1976) ("It may be that the contract could not be carried out in quite the way that the parties may well have contemplated originally. But ***this was a mere matter of mechanics***"). Defendant's pretextual force majeure invocation was an economic decision to cancel a perceived liability in light of Defendant's assessment of the Stingel market and the changing "mechanics" of the Evening Auction. This goes to the heart of Defendant's intent and is a critical question of fact mandating discovery and Defendant's deposition.

Defendant's cases (D.'s Memo at pp. 18-19) are inapposite. In Int'l Paper Co. v. Rockefeller, 161 A.D. 180, 183-84 (3d Dep't 1914), defendant was excused from delivering timber that was destroyed by a fire where the parties contracted for a timber delivery ***from a specific location***.[25] In Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412 (5th Cir. 1983), defendant was not required to deliver phosphoric acid by truck, instead of the ***contracted-for rail***, because:

> "[T]he sales contract…provided that delivery was to be made by rail '*unless otherwise agreed*' to by both parties." Id. at 1415 (emphasis in original).

In Virginia Power Energy Mktg., Inc. v. Apache Corp., 297 S.W. 3d 397, 403 (Tex. App. 2009), alternate delivery was not required where "the parties expressly agreed that [defendant] was to deliver 610,000 MMBtu of natural gas to a *specific* Delivery Point" (emphasis in original).

In Babcock & Wilcox Co. v. Allied-General Nuclear Servs., 161 A.D.2d 350, 352 (1st Dep't 1990), defendant was not required to store and dispose of spent nuclear fuel because:

> "[T]he agreement is one for the ***reprocessing*** of spent fuel to which the ***transportation, storage and disposal*** of nuclear waste products (after reprocessing and recovery of usable fuel) are ***merely incidental***." Id. (emphasis added).

In Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993), defendant was not required to arrange for substitute performance after an embargo where the parties anticipated the

[25] The Court further held, "The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it." Id. at 185.

embargo and included "governmental interference" in their force majeure provision. Defendant's thin authority (one Second Circuit case) cannot eliminate the alternative performance requirement.

D. An Alleged *Temporary* Impossibility Does *Not* Excuse Defendant's Non-Performance

When the alleged impossibility is ***temporary***, performance is ***suspended*** until the impossibility is removed.[26] Performance is not excused. Id. See Executive Orders stating that they are "***temporary***" (Exs. F-M);[27] see also Defendant's August 13, 2020 press release (Ex. 12), confirming that any claimed impossibility of performance was temporary and no longer exists.

E. COVID-19 and Governmental Regulations Are Not Specifically Listed in the Force Majeure Clause

A force majeure defense excuses non-performance "***only if*** the force majeure clause ***specifically*** includes the event that actually prevents a party's performance." Kel Kim, supra, at 902 (emphasis supplied).[28] Even if the term "natural disaster" in the SC (Ex. 3) includes a pandemic (which it does not), COVID-19 did not cause Defendant's purported inability to conduct an auction. Defendant concedes that its purported inability was due to ***governmental executive orders and regulations*** (D.'s Memo at pp. 14-15). Pandemics, governmental orders and regulations, executive orders and severe economic crises are ***not*** included in the subject force majeure clause and are ***not*** of the same general subject matter as the other events set forth therein.[29]

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[26] See Bank of Boston Intern. v. Arguello Tefel, 644 F. Supp. 1423, 1427 (E.D.N.Y. 1986); see also Scanlan v. Devon Sys., Inc., 2000 WL 218389, at *2 (S.D.N.Y. Feb. 24, 2000).

[27] In the Nikas Declaration, dated August 28, 2020 (Docket 62), all eight links to Governor Cuomo's Executive Orders (¶¶ 7-14) contain the phrase "temporary suspension." See e.g., https://www.governor.ny.gov/news/no-20214-continuing-***temporary-suspension***-and-modification-laws-relating-disaster-emergency" (Nikas Decl. ¶ 9).

[28] See also Phibro, supra, 720 F.Supp. at 318; Team Mktg. USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942-43 (3d Dep't 2007); Reade, supra, at 433; Aukema, supra, at 209.

[29] The parties struck ¶ 12(b) of the SC (Ex. 3), which granted Defendant the right to terminate the SC (Ex. 3) in the event of an economic downturn. "It would, therefore, appear that the parties to the [contract] considered the possibility of a change in the financial circumstances of either party, even if not specifically anticipating the nature or extent of such economic downturn, and determined that

Defendant improperly imputes the definition of "disaster" in New York's Executive Law and other governmental acts and orders (D.'s Memo at p. 15) to define "natural disaster" in ¶ 12(a) of the SC (Ex. 3). ***Contractual terms are construed differently than and are not interchangeable with terms in Governmental Orders***. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 89 (Pa. 2020) (D.'s Memo at p. 15) supports Plaintiff. In that case, the court held that ejusdem generis does not apply to governmental "disaster" statutes, which, like New York Exec. Law 20(2)(a)), "intend[] to expand the list of disaster circumstances." Id. at 89.[30] In stark contrast, ***contractual*** force majeure clauses are narrowly construed, ejusdem generis must be applied and "natural disaster" does not include governmental orders or pandemics.

F. The COVID-19 Pandemic and Related Governmental Regulations Were Reasonably Foreseeable, Which Is a Fact-Intensive Inquiry

Non-performance is excused ***only*** when the specific intervening event, i.e., COVID-19 and/or governmental regulations, is unforeseeable ***and*** the risk could ***not*** have been built into the agreement at the time of contract formation. See Rochester, supra, 2009 WL 368508 at *7; see also Team Mktg., supra, 41 A.D.3d at 942-943.[31] Unforeseeability is ***strictly construed***. Id. In that regard, Plaintiff respectfully requests that the Court take judicial notice of the widely-publicized SARS pandemic of 2002 and H1N1 pandemic of 2009.

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this provision would not shield the parties from liability for any non-performance of their respective obligations on such basis." Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 34 Misc. 3d 1222(A), at *5 (Sup. Ct. New York Co. 2009), aff'd, 68 A.D.3d 562 (1st Dep't 2009).

[30] In Pennsylvania Dep't of Pub. Welfare v. U.S., 48 Fed. Cl. 785, 791 (2001), the court held that the legislature does not create contracts (which establish narrow economic rights and obligations between contracting parties and exist for a prescribed period), but rather laws that "are inherently subject to revision and repeal" and that cover all persons in a jurisdiction.

[31] See also In Re Cablevision, supra, at 264; Beardslee, supra at 217, 221 (hydrofracking ban was foreseeable); Korea Life Ins. Co. v. Morgan Guar. Trust Co., 269 F. Supp. 2d 424, 447 (S.D.N.Y. 2003) (devaluation of foreign currency was a foreseeable risk); RW Holdings, LLC v. Mayer, 131 A.D.3d 1228, 1230 (2d Dep't 2015); Warner v. Kaplan, 71 A.D.3d 1, 6 (1st Dep't 2009); Vernon Lumber Corp. v. Harcen Const. Co., 60 F. Supp. 555, 558 (E.D.N.Y. 1945); A + E Television Networks, LLC v. Wish Factory Inc., 2016 WL 8136110, at *12 (S.D.N.Y. Mar. 11, 2016).

Defendant incorrectly places the burden on Plaintiff (D.'s Memo at p. 13 and fn 6). The doctrine of impossibility focuses on whether the event producing the loss was unforeseen ***as a means of assessing which party assumed the risk***.[32] The foreseeability inquiry is whether Defendant, a sophisticated auction house tracing its origins to 1796, could have drafted or negotiated the SC (Ex. 3) to guard against the general risk that supervening events, unrelated to its own conduct, might force a closure. In Urban Archaeology, supra, at *4-5, the court held that the party invoking the doctrine was a sophisticated commercial party:

> "[W]ho could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed [citation omitted]."[33]

The SC (Ex. 3) ***did*** allocate risks of damage in certain circumstances and Defendant declined to allocate all other risks not expressly listed in the force majeure clause. The Court should not relieve Defendant of the consequences of its poor draftsmanship in omitting governmental orders and pandemics in its force majeure clause. See Asphalt Int'l, Inc. v. Enter. Shipping Corp., S.A., 667 F.2d 261, 265 (2d Cir. 1981). Whether COVID-19 and/or governmental regulations were unforeseeable events causing impossibility of performance is a fact-intensive inquiry and not suitable for adjudication at the dismissal stage without any discovery whatsoever. See Ginsburg v. City of Ithaca, 2014 WL 12588499, at *1 (N.D.N.Y. Apr. 4, 2014).

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[32] See American Trading and Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939, 941-42 (2d Cir. 1972); see also Four Points Shipping & Trading, Inc. v. Poloron Israel, L.P., 846 F. Supp. 1184, 1188 (S.D.N.Y. 1994):

> "Without a specific contract provision, such unforeseeability of the full extent of the risk on the part of [defendant] would be a precondition for excusing nonperformance because of impracticability under the underlying doctrine of impossibility of performance, ***or under a force majeure clause which was silent on allocation of the specific risk at issue***."

[33] See also General Elec. Co. v. Metals Res. Group Ltd., 293 A.D.2d 417 (1st Dep't 2002); In re M&M Transp. Co., 13 B.R. 861, 870-71 (Bankr. S.D.N.Y. 1981).

POINT IV

THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF THE SC (EX. 3) FOR DEFENDANT'S FAILURE TO AUCTION THE STINGEL WORK IN THE EVENING AUCTION WITH THE GUARANTEED MINIMUM AND DEFENDANT'S REFUSAL TO PAY PLAINTIFF IN FULL BY THE SETTLEMENT DATE

Plaintiff has pled that Defendant breached the SC (Ex. 3) by violating ¶¶ 6(a) and 11(a) of the SC (Ex. 3) and ¶¶ 12(a)-(c) of the SC (Ex. 3), as amended by ¶¶ 9(a)(i)-(iii) of the Amendment (Ex. 4), concerning the sale of the Stingel Work with the Guaranteed Minimum and payment requirements to Plaintiff. Defendant's de minimis treatment of these allegations is limited to the following:

> "These claims, too, are based on Phillips' refusal to offer the Stingel Work at auction subject to the $5,000,000 Guarantee. SAC ¶¶ 82–83. But Phillips' obligation to do so was excused under Paragraph 12(a) of the Stingel Agreement, which permitted Phillips to terminate the contract" (D.'s Memo at p. 10).

Plaintiff has comprehensively rebutted Defendant's baseless contentions concerning ¶ 12(a) of the SC (Ex. 3) in Point III, supra.

POINT V

THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF THE BC (EX. 2)

The BC (Ex. 2) and SC (Ex. 3) are not two separate agreements. They were executed on the same day, at the same time and in the same place and are interrelated, interconnected, interdependent and consideration for each other. "The issue of the dependency of separate contracts...boils down to the intent of the parties." Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turtur, 892 F.2d 199, 205 (2d Cir. 1989). The parties' "expressed intention and meaning, ascertained from the whole instrument, rather than from technical or conventional expressions, are the guides in determining the character and force of their respective covenants." Rosenthal Paper Co. v. Nat'l Folding Box & Paper Co., 226 N.Y. 313, 320 (1919).[34] Courts also rely on "the

[34] See also Rudman v. Cowles Comms., Inc., 30 N.Y.2d 1, 13 (1972); Greasy Spoon Inc. v. Jefferson Towers, Inc., 75 N.Y.2d 792, 795 (1990).

application of common sense." Id.

In Lowell v. Twin Disc, Inc., 527 F.2d 767, 769–70 (2d Cir. 1975), the court held:

> "[T]he test is as follows: 'It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, ***so that there would have been no bargain whatever, if any promise or set of promises were struck out***…'" (emphasis supplied) (internal citation omitted).

The introductory paragraph of the BC (Ex. 2) expressly acknowledges that Plaintiff conditioned execution of the BC (Ex. 2) on Defendant complying with its guarantee obligations to Plaintiff pursuant to the SC (Ex. 3), as follows:

> "***Conditional upon signature by you of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolf Stingel, Untitled, 2009 (Contract Number 04NYD752)*** and conditional upon the above mentioned Property [the Basquiat Work] being offered for sale with a commitment by Phillips to pay the Seller a Guaranteed Minimum you have agreed that you will provide a third-party guarantee obligation ('Guarantee Obligation') as follows…"

Defendant's insistence (D.'s Memo at pp. 1 and 9) that the foregoing requires ***only*** that Plaintiff execute the BC (Ex. 2) is nonsensical. "Common sense" (see Rosenthal, supra, at 320) dictates that implicit in the "conditional" requirement for Plaintiff to execute the SC (Ex. 3) is Defendant's corresponding requirement to comply with its guarantee obligations pursuant to the SC (Ex. 3).

The SAC alleges in detail (Ex. 1 ¶¶ 10-18, 93-94) that on June 27, 2019, the parties intended to effectuate a "trade" in which Plaintiff would guarantee the sale of the Basquiat Work in exchange for Defendant's guarantee of the sale of Plaintiff's Stingel Work and that the BC (Ex. 2) and SC (Ex. 3), drafted by Defendant, would be interrelated, interconnected, interdependent and consideration for each other and that neither agreement would have been executed alone.

Novick v. AXA Network, LLC, 642 F.3d 304, 312-13 (2d Cir. 2011) rejects Defendant's contention that the BC (Ex. 2) and SC (Ex. 3) are independent, holding that a factual analysis is mandatory as the two agreements:

> "[C]annot be reviewed properly without consideration of the parties' intent…and the circumstances surrounding those Agreements, for the independence or interdependence of promises cannot be determined by examining one promise in isolation."

In Kamin v. Koren, 621 F. Supp. 444, 447 (S.D.N.Y. 1985), the court held:

> "***The fact that the agreements did not state in haec verba they were interdependent does not control. Separate written agreements executed at the same time may be considered in law as one agreement***, but only if the parties so intended. Whether the parties intended that the...agreements should be interdependent is a ***question of fact*** which turns upon the circumstances of each case" (emphasis supplied).

The majority of Defendant's arguments (D.'s Memo at p. 13) concern an allegation in the FAC (Docket 30 ¶¶ 9 and 69) that does not appear in the SAC (Ex. 1) and must not be considered by the Court. See In re: Zinc Antitrust Litig., 2016 WL 3167192, *5 (S.D.N.Y. Jun. 6, 2016); see also In re Crysen/Montenay Energy Co., 226 F.3d 160, 162 (2d Cir. 2000). Defendant's cases (D.'s. Memo at p. 10) are irrelevant. Pearce v. Manhattan Ensemble Theater, Inc., 528 F.Supp. 2d 175 (S.D.N.Y. 2007) and N. Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171 (1968) concern the statute of frauds. The remainder of Defendant's arguments raise issues of fact that cannot be resolved on an FRCP 12(b)(6) motion. See Twombly, supra, at 556; see also Todd, supra, at 203; DiFolco, supra, at 113.

POINT VI
THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

"[I]mplicit in every contract is a covenant of good faith and fair dealing...which encompasses any promises that a reasonable promisee would understand to be included." Spinelli v. Nat'l Football League, 903 F.3d 185, 205 (2d Cir. 2018) (internal citation omitted). "'[N]either party to a contract shall do anything [that] has the effect of destroying or injuring the right of the other party to receive the fruits of the contract,' or to violate the party's 'presumed intentions or reasonable expectations.'" Id. (internal citation omitted).

Defendant's assertion that this claim must be dismissed as duplicative is legally and factually meritless. Defendant's own case destroys its argument (D.'s Memo at p. 21). See Gravier Prods., Inc. v. Amazon Content Servs., 2019 WL 3456633, at *4 (S.D.N.Y. Jul. 31, 2019) ("[B]ut where...there is a dispute over the meaning of the contract's express terms, there is no reason to bar

a plaintiff from pursuing both types of claims in the alternative");[35] see also Spinelli, supra, 903 F.3d at 206; Longhi v. Lombard Risk Syst's, Inc., 2019 WL 4805735, *10 (S.D.N.Y. Sep. 30, 2019). Dismissal is inappropriate as the parties' injunctive relief and motion to dismiss papers are rife with critical disputes about the meaning and import of key Defendant-drafted contractual provisions (i.e., ¶¶ 6(a) and 12(a) of the SC (Ex. 3)) and terms (i.e., "New York auction").[36]

Defendant's contention that "[t]he implied covenant claim, like the contract claims, is based entirely on Phillips' allegedly wrongful termination of the Stingel Agreement under Paragraph 12(a) and refusal to offer the Stingel Work at online auctions at which it allegedly offered other consigned works" (D.'s Memo p. 21) is false. Defendant ignores Plaintiff's allegations, inter alia, concerning Defendant's material misrepresentations, misleading use of the Stingel Work to advertise the Evening Auction while not intending to auction the Stingel Work therein and extreme delay in declaring force majeure (sandbagging Plaintiff by pulling the Stingel Work from the Evening Auction at the eleventh hour after alternative means of obtaining a guarantee and sales contract were foreclosed to Plaintiff as a result of Defendant's extreme delay) (Ex. 1, ¶¶ 102-04, 109).

Courts routinely hold that implied covenant claims like Plaintiff's are non-duplicative of breach of contract claims, though premised on similar facts, where a party deprives its counterpart of contractual benefits while maximizing its own.[37] Defendant's insistence that "Plaintiff does not

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[35] Gravier, supra, at *4-5, is further distinguishable as plaintiffs "essentially claim that [defendant] is bound by an implied promise to abide by the terms" of the subject agreements and fail to "identify any disagreement over the meaning of terms in those contracts that could render their implied covenant claims non-duplicative."

[36] See also Hallett v. Stuart Dean Co., 2020 WL 5015417, *8-9 (S.D.N.Y. Aug. 25, 2020) (holding that even where breach of contract and implied breach causes of action are ***duplicative***, a plaintiff may plead them in the alternative at the motion to dismiss stage); Foscarini, Inc. v. The Greenestreet Leasehold Partnership, 2017 WL 2998846 (Sup. Ct. N.Y. Co. Jul. 14, 2017) (holding that breach of contract and implied covenant causes of action may be pled simultaneously where plaintiff pleads similar damages for both claims as long as "the factual bases thereof are distinct and independent").

[37] See Commercial Lubricants, LLC v. Safety-Kleen Sys's, Inc., 2019 WL 6307241, *2-3 (E.D.N.Y. Nov. 25, 2019); see also Longhi, supra, at *9-10; Spinelli, supra, at 205-06; 511 W. 232nd Owners

get to retroactively insert such a promise into the contract simply because it feels that it has been treated differently relative to third parties" (D.'s Memo at p. 22) misses the point.[38] The implied covenant is built on the unshakeable foundation that, ***at the time of contract formation (not retroactively)***, a contract contains "any promises that a reasonable promisee would understand to be included." Spinelli, supra, at 205.

"Good faith and fair dealing require a party 'to speak' if it does not intend to perform an express or implied promise under the agreement." Donerail Corp. N.V. v. 405 Park LLC, 2011 WL489188, *12 (Sup. Ct. N.Y. Co. Feb. 2, 2011). "Intent 'is generally an issue of fact to be established at a hearing or trial.'" Id. (internal citation omitted); see also Foscarini, supra (pleading was sufficient where plaintiff violated the implied duty to send a renewal notice only if it truly intended to renew by sending a faulty notice to make defendant believe that plaintiff was renewing while it searched for a better deal). The "allegation that Phillips represented to Plaintiff that Phillips

Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152-54 (2002); In re Platinum-Beechwood Litig., 2019 WL 4194538, *8-9 (S.D.N.Y. Sep. 3, 2019).

[38] Defendant's cases are inapposite. In Rowe v. Great Atl. & Pac. Tea Co., Inc., 46 N.Y.2d 62, 68-69 (1978), petitioner did not rely on the implied covenant, instead claiming that the parties agreed to a particular contract term, but failed "to verbalize that understanding and to incorporate it into their written contract." In Fesseha v. TD Waterhouse Inv'r Servs., Inc., 761 N.Y.S.2d 22, 23 (1st Dep't 2003), the agreement granted defendant the right to liquidate and nothing contractually "limited that right." At bar, nothing in the BC (Ex. 2) or SC (Ex. 3) granted Defendant the right to misrepresent its intentions to Plaintiff and Defendant's right to terminate the SC (Ex. 3) clearly was attenuated by the requirement that postponement and termination of the Evening Auction be the result of forces beyond Defendant's reasonable control, not discretionary financial gamesmanship.

'would honor all contractual commitments with consignors…'" (D.'s Memo at p. 22)[39] goes to the heart of Defendant's intent to auction the Stingel Work at the Evening Auction.[40]

POINT VII
THE SAC (EX. 1) PLEADS A CLAIM FOR EQUITABLE ESTOPPEL

In Shondel J. v. Mark D., 7 N.Y.3d 320, 326 (2006), the court held:

> "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position."[41]

Regarding the party to be estopped, equitable estoppel requires "(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party;"[42] "and (3) in some situations, knowledge, actual or constructive, of

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[39] Defendant's assertion that "Phillips' alleged willingness to enter into different contractual arrangements with third parties to consign different works…does not imply that Phillips must extend the same extracontractual offer to Plaintiff" (D.'s Memo at p. 22) is also meritless. Plaintiff's contention is that Defendant's termination of the SC (Ex. 3) was a ***discretionary business decision***, not a decision that Defendant was forced to make, and that Defendant's failure to terminate any other consignment agreements for the Evening Auction is proof (see Ex. 1 ¶ 43).

[40] Greenfield v. Scriva, 2007 WL 1309731, *5 (Dist. Ct. Nassau Co. May 3, 2007), which does not concern an implied covenant claim, is entirely inapposite. The court held that a document demand for all documents concerning defendant's performance of services for any customer was improperly broad. Whether defendant was engaged in a scheme of bilking consumers was irrelevant as the primary inquiry was whether defendant properly performed services for plaintiff. At bar, whether Defendant honored other consignment agreements for the Evening Sale is indisputably relevant to the critical factual inquiry of whether Defendant was able to auction the Stingel Work at the Evening Sale or whether it was forced to terminate the SC (Ex. 3) for reasons beyond its control. Discovery will show that Defendant found an alternative means of performing other consignment agreements for the Evening Auction, a proposition that Defendant has not denied.

[41] See also In re Ionosphere Clubs, Inc., 85 F.3d 992, 999 (2d Cir. 1996); Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 725 (2d Cir. 2001); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., 7 N.Y.3d 96, 106-07 (2006).

[42] In re Vebeliunas, 332 F.3d 85, 93-94 (2d Cir. 2003); see also Pilkington N. Am., Inc. v. Mitsui Sumitomo Ins. Co. of Am., 2020 WL 2521562, at 10 (S.D.N.Y. May 18, 2020).

the real facts."[43] "It is immaterial to a claim of estoppel that there was no actual attempt to defraud or mislead."[44] Defendant's silence "act[s] as a 'representation' for purposes of estoppel...when one has a duty to speak or one knows that the other party was acting under a mistaken belief." Katz v. Colonial Life Ins. Co. of Am., 951 F. Supp. 36, 41 (S.D.N.Y. 1997); see also Gleason v. Spota, 194 A.D.2d 764, 765 (2d Dep't 1993); Pilkington, supra at 10. Defendant concedes that Defendant consignee owed fiduciary duties to Plaintiff consignor (D.'s Memo at p. 24). Defendant was required to reveal its true intentions to Plaintiff.

The party asserting estoppel must show "(1) lack of knowledge and of the means of knowledge of the true facts; (2) reliance upon the conduct of the party to be estopped; and (3) prejudicial changes in their positions." Vebeliunas, supra, at 94; Pilkington, supra, at 10. Plaintiff has adequately pled the foregoing elements of equitable estoppel (Ex. 1 ¶¶ 118-132). Defendant's extraordinary ***89-day delay*** is a textbook case for the application of equitable estoppel to prevent Defendant "as a matter of fairness" from claiming force majeure. The Unlawful Termination Letter (Ex. 14) was legally received on June 9, 2020 (Ex. 1 at ¶ 35), ***89 days*** following Defendant's claimed postponement of the Evening Auction on March 14, 2020 (SAC Ex. 5; D.'s Ex. N). In April 2020, Defendant materially misrepresented to Plaintiff that Defendant would honor all contractual commitments with consignors (Ex. 1 ¶ 120). Defendant prominently used the image of the Stingel Work on its website until in or about mid-May 2020 to attract bidders for the twice rescheduled Evening Auction, leading Plaintiff ***and*** the art world to believe that the Stingel Work ***would*** be included therein (Id. ¶¶ 30, 102, 120). Defendant did not terminate or amend any other consignment agreements (with or without guarantees) for the twice rescheduled Evening Auction (Id. ¶¶ 43, 123).

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[43] BWA Corp. v. Alltrans Express U.S.A., 112 A.D.2d 850, 853 (1st Dep't 1985).

[44] Columbia Broadcasting System v. Stokely-Van Camp, Inc., 522 F.2d 369, 378 (2d Cir. 1975); see also Rothschild v. Title Guarantee & Tr. Co., 204 N.Y. 458, 462 (1912).

On May 30, 2020, Defendant finally informed Plaintiff that it was invoking force majeure (Id. ¶¶ 30, 102).[45] There is no reasonable excuse for waiting until the last minute to declare force majeure. As fully set forth in the SAC (Ex. 1 ¶¶ 126-128), Plaintiff relied to its detriment on Defendant's representations and on the twice rescheduled auctions, as follows:

i. Plaintiff refrained from contracting with private purchasers or with Christie's or Sotheby's to offer the Stingel Work for sale at a public auction and with a guaranteed minimum (Id. ¶¶ 121, 126);

ii. Defendant's last-minute termination substantially reduced the value of the Stingel Work in the eyes of potential purchasers and "burned" it in the marketplace with buyers aware that Defendant failed to generate sufficient purchase interest in the Stingel Work (Id. ¶¶ 121, 126, 128, 133); and

iii. Defendant deprived Plaintiff of the Guaranteed Minimum or 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum (Id. ¶ 128).

Defendant frivolously argues that Plaintiff was on notice on March 14, 2020 (while Defendant was advertising the Stingel Work) that Defendant "***could*** exercise its termination rights at any time" after March 14, 2020 (D.'s Memo at pp. 22-23) (emphasis supplied). The issue is not whether Defendant ***might*** have declared force majeure. Up until the last minute, Defendant led Plaintiff to believe that it ***would not*** invoke force majeure, ***would*** auction the Stingel Work on June 24-25 or July 2, 2020 and ***would*** comply with its Guarantee obligations.[46]

As Defendant materially breached the SC (Ex. 3) by failing to obtain Plaintiff's written consent to reschedule the Evening Auction post-May 2020, Defendant—the breaching party—cannot enforce the SC (Ex. 3) against Plaintiff—the non-breaching party. See Nadeau v. Equity Residential Props. Mgmt. Corp., 251 F.Supp.3d 637, 641 (S.D.N.Y. 2017); see also Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 75 (1966); PDL Biopharma, Inc. v. Wohlstadter et al., 2019 WL

[45] Defendant's claim (D.'s Memo at p. 23) that Ex. 1 ¶ 103 supports that Plaintiff became aware on May 26, 2020 is false. Ex. 1 ¶ 103 emphasizes that on May 26, 2020, "There was never any indication that Defendant would attempt to eliminate the Guaranteed Minimum in the [SC]."

[46] Once Plaintiff was notified of Defendant's unlawful termination, it promptly filed a complaint less than two weeks later on June 8, 2020 and simultaneously filed a motion for injunctive relief.

4305607, *16-17 (Sup. Ct. N.Y. Co. Sept. 11, 2019).

Defendant is equitably estopped from asserting that the SC (Ex. 3) was exclusively limited to an in-person auction in New York in May 2020 (Ex. 1 ¶¶ 41-43, 123) as Defendant conducted the Evening Auction on July 2, 2020 online, on the telephone and by way of absentee bid, livestreamed the Evening Auction online in real time globally, dubbed the Evening Auction a "New York auction" and did not terminate any other consignment agreements for the Evening Auction (see Point III. A.-B.; Ex. 1 ¶¶ 43-45, 123 and Exs. 4 and 5 to Ex. 1). Defendant further is estopped from terminating the SC (Ex. 3), which has been, in part and substantially, performed as Plaintiff has fully performed the interrelated and interdependent BC (Ex. 2). See United Equities, supra, at 157, 163.

Defendant's authority, Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp., 771 F.Supp. 63, 67-68 (S.D.N.Y. 1991) (D.'s Memo at p. 23), is misplaced. In Toyomenka, supra, the force majeure notice was ***6 days late*** (not ***89 days late***) and defendant made "a reasonable effort to notify [plaintiff] of force majeure ***as soon as possible***" (emphasis added).

POINT VIII
THE SAC (EX. 1) PLEADS A CLAIM FOR BREACH OF FIDUCIARY DUTIES

Defendant concedes (D.'s Memo at p. 24) that New York courts repeatedly have held that auction houses owe fiduciary duties to their consignors, i.e., Plaintiff. See, e.g., Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 117 A.D.2d 285 (1st Dep't 1986).

Defendant intentionally misconstrues Plaintiff's seventh cause of action (D.'s Memo at p. 24) by arguing that Plaintiff's claim "boils down to" the allegation that Defendant breached its fiduciary duties by exercising a contractual right of termination based on force majeure. Defendant ignores the vast scope of the fiduciary duties owed to Plaintiff. See Ex. 1 ¶¶ 137-140. All of Defendant's cases concern consignment clauses providing the auction house with unambiguous sole discretion or sole judgment to carry out any of its contractual responsibilities when it might be

subjected to liability if it did not rescind the sale. None of those cases concern an auction house's termination of its contractual duties to its consignor when it would ***not*** be subjected to liability if it did not rescind.

As detailed in Point III, supra, unbeknownst to Plaintiff, Defendant made an unlawful commercial decision based on Defendant's self-interest to illegally terminate the SC (Ex. 3) because of, inter alia, Defendant's belief that the Stingel market had weakened. Defendant's illegal termination of the SC was ***not*** a product of purported force majeure (see Point III, supra). Defendant further breached its fiduciary obligations as set forth in Ex. 1 ¶ 142, including, inter alia, failing to advise Plaintiff that it intended to single out the SC (Ex. 3) for termination while declining to terminate any other consignment agreements for the Evening Auction, "burning" the Stingel Work and placing Defendant's own financial interests above those of Plaintiff.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Defendant's motion to dismiss be denied in its entirety, together with such other and further relief as to this Court seems just and proper.

Dated: New York, New York
September 18, 2020

Respectfully submitted,
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