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.

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PLAINTIFF'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

Defendant Phillips Auctioneers, LLC ("Defendant"), a prominent international auction house, is invoking the COVID-19 pandemic as a mask for committing flagrant breaches of contract in a transparent attempt to coax Plaintiff into retroactively agreeing to a stripped-down version of their agreement. Force majeure does not apply to this case for the reasons set forth below. Defendant induced Joseph Nahmad ("JN"), Manager of Plaintiff JN Contemporary Art, LLC ("Plaintiff"), to execute an agreement, dated June 27, 2019 (the "Basquiat Guarantee Agreement," Ex. 1[1]), pursuant to which Plaintiff agreed to irrevocably bid GBP £3,000,000.00 (the "Guarantee Obligation") on Lot 19, *Untitled*, Executed in 1981 by Jean-Michel Basquiat (the "Basquiat"), which was to be auctioned at Defendant's 20th Century & Contemporary Art Evening Sale on June 27, 2019 (the "June 27, 2019 Auction").

In consideration thereof, Defendant executed an agreement, dated June 27, 2019 (the "Stingel Consignment With Guarantee Agreement," Ex. 2), pursuant to which Plaintiff consigned *Untitled*, 2009 by Rudolf Stingel (the "Stingel") to Defendant to be offered for sale as part of Defendant's Spring 2020 evening auction of 20th Century & Contemporary Art, scheduled for May 2020 (the "Evening Auction") and Defendant agreed to guarantee the Stingel in the amount of $5,000,000.00 (the "Guaranteed Minimum"). The Basquiat Guarantee Agreement (Ex. 1) expressly stated that it was conditioned on execution of and performance of the commitments set forth in the Stingel Consignment With Guarantee Agreement (Ex. 2). An agreement, dated as of December 27, 2019 (the "Amendment," Ex. 3), between Plaintiff, Defendant and Muses Funding I LLC ("MF"), amended the Stingel Consignment With Guarantee Agreement (Ex. 2) to recognize MF's first-priority lien on the Stingel.

After Plaintiff performed fully under the Basquiat Guarantee Agreement (Ex. 1) and bid

[1] Unless otherwise stated, exhibit references herein concern exhibits to the Declaration of Joseph Nahmad, sworn to June 8, 2020 ("Nahmad Decl.").

GBP £3,000,000.00 on the Basquiat at the June 27, 2019 Auction, Defendant pulled the rug out from under Plaintiff and unilaterally terminated the Stingel Consignment With Guarantee Agreement (Ex. 2), disclaiming any legal obligations to Plaintiff thereunder, including payment of the Guaranteed Minimum. In an unlawful termination letter (the "Unlawful Termination Letter," Ex. 6), dated May 31, 2020 and signed by Hartley Waltman ("Waltman,") Defendant's General Counsel, Americas, Defendant claimed that it was prevented from holding the Evening Auction and had no choice but to postpone as a result of the COVID-19 pandemic despite Defendant's continued holding of online auctions in April and May 2020 when the COVID-19 pandemic was at its peak.

Defendant further attempted to invoke in bad faith ¶ 12(a) ("Termination") of the Stingel Consignment With Guarantee Agreement (Ex. 2) despite the COVID-19 pandemic and Government orders or Government action not falling under any of the enumerated events triggering postponement of the Evening Auction and Defendant refraining from canceling other consignment agreements for artworks to be offered in the Evening Auction. Defendant is picking and choosing which agreements to honor and turning a blind eye to the Guaranteed Minimum obligation legally owed by Defendant to Plaintiff.

Plaintiff respectfully is entitled to the requested injunctive relief and specific performance as Defendant has caused irreparable harm to Plaintiff and there is a clear or substantial likelihood of success on the merits on Plaintiff's breach of contract claims, as follows:

- ***Plaintiff has suffered irreparable harm and is entitled to specific performance because monetary damages are impossible to calculate and too speculative;***

- ***The balance of the hardships tips decidedly to Plaintiff because absent injunctive relief, Plaintiff will suffer irreparable harm and Defendant will not suffer any calculable and specific harm by being held to its contractual obligations;***

- ***Plaintiff has demonstrated a clear or substantial likelihood of success on the merits as Defendant clearly breached several provisions of the Stingel Consignment With Guarantee Agreement (Ex. 2), the Amendment (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1);*** and

- ***Defendant's pretext for not performing is legally baseless and disproven by Defendant's pattern of conduct.***

FACTUAL BACKGROUND

For the factual background, the Court is respectfully referred to the Nahmad Decl. and the First Amended Complaint, dated June 23, 2020 (the "FAC"). For the purpose of defining certain references, some of the facts are repeated herein.

POINT I
PLAINTIFF SATISFIES THE STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING ORDER

In order to obtain a temporary restraining order and/or a preliminary injunction, Plaintiff must demonstrate the following:

i. Irreparable harm; and

ii. Either: (a) Likelihood of success on the merits; or (b) Sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in Plaintiff's favor.

See New York Bay Capital, LLC v. Cobalt Holdings, Inc., 2020 WL 1989485, *4 (S.D.N.Y. Apr. 27, 2020); see also Polymer Technology Corp. v. Mimran, 37 F.3d 74 (2nd Cir. 1994); Roberts v. Atlantic Recording Corp., 892 F.Supp. 83 (S.D.N.Y. 1985). Where a party seeks a mandatory injunction commanding an affirmative act, Plaintiff must show a clear or substantial likelihood of success or that extreme or very serious damage will result from a denial of the relief requested. See Jordan v. New York City Board of Elections, 2020 WL 3168509, *1 (2d Cir. June 15, 2020). For the reasons set forth below, Plaintiff satisfies the standard for obtaining a mandatory preliminary injunction and temporary restraining order.

A. Plaintiff has suffered irreparable harm and, in the absence of injunctive relief, will continue to suffer irreparable harm as a result of Defendant's breaches of contract

and unlawful conduct. Accordingly, the balancing of the equities tips decidedly to Plaintiff and Plaintiff is entitled to specific performance.

"Irreparable harm is an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 811 F.Supp.2d 803, 828 (S.D.N.Y. 2011); see also Robins v. Zwirner, 713 F.Supp.2d 367, 374 (S.D.N.Y. 2010). Plaintiff is irreparably harmed "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." Home It, Inc. v. Wen, 2020 WL 353098, *3 (S.D.N.Y. Jan. 21, 2020) (internal citation omitted). Irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." Robins, supra, 713 F.Supp.2d at 374.

By breaching the Stingel Consignment With Guarantee Agreement (Ex. 2), the Amendment (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1) and reneging on its legal obligation to offer the Stingel for sale at public auction while guaranteeing the Stingel in the amount of $5,000,000.00, Defendant has irreparably harmed Plaintiff in an amount that cannot be calculated with any reasonable certainty (Nahmad Decl. at ¶¶ 9-14; FAC at ¶¶ 60, 76, 95). Pursuant to ¶ 2 of the Stingel Consignment With Guarantee Agreement (Ex. 2), if the final bid exceeded $5,000,000.00, Defendant would owe Plaintiff 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum (Nahmad Decl. at ¶¶ 11, 18; FAC at ¶¶ 16, 59-60, 75-76, 94-95). It is simply not possible to know prior to the completion of an auction who will bid on a particular artwork and for how much that artwork will sell (Nahmad Decl. at ¶¶ 12, 19). Defendant concedes the speculative nature of auction pricing in ¶ 7 of the Stingel Consignment With Guarantee Agreement (Ex. 2) in which Defendant states that it made no representations or warranties to Plaintiff about the actual price at which the Stingel will sell and that Plaintiff cannot

rely on pre-sale estimates as a prediction or guarantee of the value of the Stingel or the price at which it will sell at the Evening Auction (Nahmad Decl. at ¶¶ 12, 19).

The only certainty with respect to Plaintiff's damages is the floor amount of $5,000,000.00, or the Guaranteed Minimum that Defendant is legally obligated to pay Plaintiff in the event no other bidder places a higher bid on the Stingel, pursuant to ¶ 11 of the Stingel Consignment With Guarantee Agreement (Ex. 2). However, Plaintiff's damages may be much higher insofar as a bidder may pay $6,000,000.00, $10,000,000.00 or an even greater amount for the Stingel with Plaintiff entitled to 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum. The vagaries of human behavior are unpredictable. A monetary award cannot possibly be adequate compensation when there is no certainty as to the amount of Plaintiff's damages.

"Courts have recognized that artworks are unique chattels that warrant the protection of injunctive relief." Naber v. Steinitz, 1991 WL 11764578 (Sup. Co. N.Y. Co. December 23, 1991); see also Robins, supra, 713 F.Supp.2d at 374-75; Onecard Corp. v. Unisys Corp., 1991 WL 196399 (S.D.N.Y. Sept. 23, 1991); Kinderhill Select Bloodstock, Inc. v. United States of America, 835 F.Supp. 699 (N.D.N.Y. 1993) ("…[T]his court agrees in light of precedent from New York State courts which have previously found such items as works of art … to be unique"); Staff v. Hemingway, 47 A.D.2d 709, 365 N.Y.S.2d 84 (1975); Danae Art Intern. Inc. v. Stallone, 163 A.D.2d 81, 557 N.Y.S.2d 338 (1st Dep't 1990) (finding art unique for purposes of injunctive relief); Morse v. Penzimer, 58 Misc.2d 156, 295 N.Y.S.2d 125 (Sup. Ct. Oneida Co. 1968). As irreparable harm often arises in connection with breached contracts concerning unique products or services, such as artworks, "a showing of irreparable harm is similar to the showing required for specific performance of a contract." Robins, supra, 713 F.Supp.2d at 374.

Specific Performance

Plaintiff must be granted specific performance. The "guiding consideration" in determining whether specific performance will be ordered is "the difficulty of proving damages with reasonable certainty." Edge Grp. WAICCS LLC v. Sapir Grp. LLC, 705 F.Supp.2d 304, 313 (S.D.N.Y. 2010). "[I]in all cases the court must address the practical question of whether the damages of the aggrieved party can be reliably determined." Id. The Court does so by "look[ing] to the specific circumstances of the case to determine whether there is a sufficiently reliable means of measuring value for purposes of awarding contract damages." Id. at 313-14; see also JMG Custom Homes, Inc. v. Ryan, 45 A.D.3d 1278, 1281 (4th Dep't 2007); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415 (2001).

"[S]pecific performance usually is limited to contracts for whose breach the traditional remedy of damages is inappropriate because the unusual goods or services involved are difficult to value." La Mirada Prods. Co., Inc. v. Wassall PLC, 823 F.Supp. 138, 141 (S.D.N.Y. 1993); see also David Tunick, Inc. v. Kornfeld, 838 F.Supp. 848, 852 (S.D.N.Y. 1993) (holding that specific performance is available in cases involving intrinsically unique objects, such as prints). Specific performance may be ordered "if the assessment of monetary damages is impractical or too speculative." La Mirada, supra, 823 F.Supp. at 141; see also Union Capital LLC v. 5BARZ Int'l Inc., 2016 WL 8794475, *1-2 (S.D.N.Y. Oct. 5, 2016) (granting specific performance where, inter alia, the amount of damages is "difficult to calculate because the price of defendant's stock fluctuates widely"). "That plaintiff has an available remedy at law does not bar specific performance…Rather, a court will order specific performance when the remedy at law is not as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity." La Mirada, supra, 823 F.Supp. at 141 (internal citation omitted).

As discussed, infra, the damages flowing from Defendant's breach of the Stingel Consignment With Guarantee Agreement (Ex. 2), the Amendment (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1) cannot be reliably determined. If Defendant offered the Stingel at the Evening Auction and there were no bids, Defendant would owe Plaintiff the $5,000,000.00 Guaranteed Minimum, pursuant to ¶ 11 of the Stingel Consignment With Guarantee Agreement (Ex. 2) (Nahmad Decl. at ¶¶ 10, 17). If the final bid exceeded $5,000,000.00, Defendant would owe Plaintiff 80% of the amount by which the final bid exceeded the $5,000,000.00 Guaranteed Minimum, pursuant to ¶ 2 of the Stingel Consignment With Guarantee Agreement (Ex. 2) (Nahmad Decl. at ¶¶ 11, 18; FAC at ¶¶ 16, 59-60, 75-76, 94-95).

Without conducting the Evening Auction, it is impossible to determine how many bids would be made on the Stingel and what the final bid would be (Nahmad Decl. at ¶¶ 12, 19). ¶ 7 of the Stingel Consignment With Guarantee Agreement (Ex. 2), drafted exclusively by Defendant, recognizes this inherent uncertainty as it states that Defendant made no representations or warranties to Plaintiff about the actual price at which the Stingel will sell and that Plaintiff cannot rely on pre-sale estimates as a prediction or guarantee of the value of the Stingel or the price at which it will sell at the Evening Auction (Nahmad Decl. at ¶¶ 12, 19). As the Stingel is an intrinsically unique object and the assessment of monetary damages at bar is impractical and speculative, a monetary award cannot adequately compensate Plaintiff.

Balancing of the Hardships

The irreparable harm suffered by Plaintiff, which is not presently calculable with any certainty, and Plaintiff's entitlement to specific performance are set forth supra. The balancing of the equities could not be starker and "simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma v. Lien, 198 A.D.2d 186,187, 604 N.Y.S.2d 84, 85 (1st Dep't 1993) (reversing denial of preliminary injunctive relief

where "plaintiff would suffer irreparable injury absent the relief sought[;] [o]n the other hand, we can perceive no great harm to defendants"); see also Home It, supra, 2020 WL 353098 at *6.

A "balancing of the equities favors the movant [for preliminary injunctive relief] where the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction." Kimm v. Blue Cross & Blue Shield of Greater N.Y., 160 Misc. 2d, 97,101, 608 N.Y.S.2d 385 (Sup. Co. N.Y. Co. 1993) (internal citation omitted). The balancing of the hardships cannot tip in favor of Defendant where it cannot "establish that [they] will suffer any calculable and specific harm merely from being bound by their contractual obligations." 251 West 30th St. LLC v. 251 West 30th St. Owner, LLC, 2017 WL 1349978, *6 (Sup. Co., N.Y. Co. Mar. 31, 2017).

Absent injunctive relief, Plaintiff will have been damaged in an amount no less than $5,000,000.00—and very possibly much more—as a direct result of Defendant's breaches of contract and will have been made to bid GBP £3,000,000.00 on the Basquiat at the June 27, 2019 Auction while Defendant evades its legal obligation to guarantee the Stingel for $5,000,000.00 at the Evening Auction (Nahmad Decl. at ¶¶ 9-14; FAC at ¶¶ 60, 76, 95). Defendant's breaches also caused Plaintiff to make additional interest payments to MFI on the loan from MFI to Plaintiff, which loan would have been paid off by Plaintiff by August 2020 if not for Defendant's breaches (FAC at ¶¶ 66, 81, 100). Granting Plaintiff's requested relief will not harm Defendant in any manner whatsoever and simply will force Defendant to be bound by its contractual obligations.

B. Plaintiff has sufficiently alleged a clear or substantial likelihood of success on the merits at trial.

The elements of a breach of contract cause of action are: (1) The existence of an agreement; (2) Adequate performance of the agreement by Plaintiff; (3) Breach of the agreement by Defendant; and (4) Damages. See Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F.Supp.2d 162, 188-89 (S.D.N.Y. 2011). "The construction of an unambiguous contract…is a matter of law

for the court and 'the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.' Reed Foundation, Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, 2012 WL 5966641, *5 (Sup. Ct. N.Y. Co. Oct. 19, 2012) (internal citation omitted). "[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms." Id. (internal citation omitted).

Courts routinely hold that a defendant has breached a written agreement where the defendant has taken certain actions without the prior written consent of plaintiff in direct contravention of the express terms of a written agreement mandating that defendant obtain the prior written consent of plaintiff prior to taking such actions. See Metro Funding Corp. v. WestLB AG, 2010 WL 1050315, *18 (S.D.N.Y. Mar. 19, 2010) (finding a breach of the servicing agreement where a party modified loans without its counterparty's prior written consent, contrary to the express terms of the agreement); see also Icahn School of Medicine at Mount Sinai v. Neurocrine Biosciences, Inc., 191 F.Supp.3d 322, 330 (S.D.N.Y. 2016) (defendant's licensing of a drug-discovery tool to a third-party company without plaintiff's prior written consent breached the parties' agreement); 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).

Pursuant to General Obligations Law 15-301, where a written contract has a clause expressly prohibiting oral modification and requiring a subsequent writing for modification, oral modifications are unenforceable as a matter of law. See Nostrum Pharm., LLC v. Dixit, 2016 WL

5806781, *21 (S.D.N.Y. Sept. 23, 2016); see also Credit Suisse First Boston Mortg. Capital LLC v. Cohn, 2004 WL 1871525, *6 (S.D.N.Y. Aug. 19, 2004). In any event, there has been no oral modification of any of the subject agreements and Plaintiff has not entered into any other oral or written agreement with Defendant concerning the Evening Auction (Nahmad Decl. at ¶ 16).

It is indisputable that Defendant executed three written agreements with Plaintiff, exclusively drafted by Defendant, concerning the Stingel: (i) Stingel Consignment With Guarantee Agreement (Ex. 2); (ii) Amendment (Ex. 3); and (iii) Basquiat Guarantee Agreement (Ex. 1) (Nahmad Decl. at ¶ 3; FAC at ¶¶ 8, 13-14). It is also beyond cavil that Plaintiff has fully performed under each of the agreements (Nahmad Decl. at ¶¶ 4, 24; FAC at ¶¶ 11, 20, 32, 57, 61, 70-73, 89, 92, 96). With respect to the Basquiat Guarantee Agreement (Ex. 1), Plaintiff submitted an irrevocable bid in the sum of GBP £3,000,000.00 at Defendant's June 27, 2019 Auction on June 27, 2019 (Nahmad Decl. at ¶¶ 4, 24; FAC at ¶¶ 11). With respect to the Stingel Consignment With Guarantee Agreement (Ex. 2) and Amendment (Ex. 3), Plaintiff has consigned the Stingel to Defendant and has permitted Defendant to advertise the Evening Auction using images of the Stingel (Nahmad Decl. at ¶ 41; FAC at ¶ 20). Leading up to Defendant's contractual breaches, Defendant exclusively used images of the Stingel on its website as the sole and pivotal artwork to attract bidders for the Evening Auction (Nahmad Decl. at ¶ 41; FAC at ¶ 20).

For Plaintiff's manifold breaches of contract with respect to, inter alia, ¶¶ 6(a), 17(b) and 17(d) of the Stingel Consignment With Guarantee Agreement (Ex. 2), ¶ 8(c) of the Amendment (Ex. 3) and the Basquiat Guarantee Agreement (Ex. 1), the Court is respectfully directed to the FAC at ¶¶ 20-29, 31-67 and 69-82. Notably, Defendant did not legally ***postpone*** the Evening Auction and, on two occasions in March and May 2020, ***rescheduled*** the Evening Auction to June 24-25, 2020 and July 2, 2020, respectively, without giving legal force majeure notice to Plaintiff (FAC at ¶ 54). On May 30, 2020, the Evening Auction had not been ***postponed***, but rather had been

rescheduled twice without a whisper of postponement (and with the Stingel remaining in the Evening Auction both times) (Id.). See Wilder v. World of Boxing LLC, 310 F.Supp.3d 426, 446 (S.D.N.Y. 2018) ("…[T]he damages that WOB and Povetkin seek are attributable in this case to intervening causes—namely, Povetkin's positive test for Meldonium, the WBC's consequent ***postponement*** of the Bout, and/or the WBC's subsequent failure to ***reschedule*** or resanction the Bout") (emphasis added); see also Wilder v. World of Boxing LLC, 777 Fed.Appx. 531, 534 (2d Cir. 2019) ("…[A]ny damages suffered by the WOB Parties flowed from the WBC's determination to ***postpone*** and ultimately not to ***reschedule*** the fight") (emphasis added)..

If Defendant is deemed to have postponed the Evening Auction (which it legally did not do), the Stingel Consignment With Guarantee Agreement (Ex. 2) does not give Defendant the right to postpone the Evening Auction more than once on account of alleged force majeure (FAC at ¶ 54). Accordingly, invoking force majeure to cancel the Stingel Consignment With Guarantee Agreement (Ex. 2) on the basis of postponement is and was a breach of the Stingel Consignment With Guarantee Agreement (Ex. 2) as Defendant no longer had such force majeure right (FAC at ¶ 54).

Defendant Cannot Rely on Force Majeure

Invoking a force majeure clause to excuse a party's non-performance under an agreement is a two-step process with "[t]he burden of demonstrating force majeure [] on the party seeking to have its performance excused." Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d Cir. 1985).

First, the non-performing party must demonstrate that the subject force majeure clause "include[s] the specific event that is claimed to have prevented performance." Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F.Supp. 312, 318 (S.D.N.Y. 1989). This specific event must have been unforeseeable. See Rochester Gas and Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, *7 (W.D.N.Y. Feb. 13, 2009).

Second, even if the claimed force majeure event "constituted a force majeure event factually," the non-performing party must demonstrate that the event "prevent[ed] [the non-performing party] from performing under the terms of the [agreement]." Aukema v. Chesapeake Appalachia, LLC, 904 F.Supp.2d 199, 210 (N.D.N.Y. 2012). Performance must be completely impossible as a direct result of the claimed force majeure event, not merely impractical, unanticipatedly difficult or unprofitable. See Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep't 2001); see also Phibro, supra, 720 F.Supp. 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, 782 F.2d at 319.

Defendant Cannot Demonstrate that the Specific Event Claimed to Have Prevented Performance is Included in the Force Majeure Clause

Defendant's reliance on force majeure is nothing but a bad faith canard. See Kel Kim Corp. v. Central Markets, 70 N.Y.2d 900, 902-03 (1987) ("Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused"). ¶ 12(a) of the Stingel Consignment With Guarantee Agreement ("Termination") (Ex. 2) states that Defendant's obligation to pay Plaintiff the Guaranteed Minimum would be deemed null and void ***only*** in the event of certain contractually limited circumstances causing Defendant to postpone the Evening Auction beyond Defendant's or Plaintiff's reasonable control, namely natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack and natural or chemical contamination (Ex. 2 at ¶ 12(a) ("Termination")). According to the principle of ejusdem generis, even when there is an expansive catchall clause, "the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." Id.; see also Team Marketing USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942-43 (3d Dep't 2007).

Pursuant to New York law, force majeure is not applicable here and cannot excuse

Defendant's breaches of contract because ¶ 12(a) of the Stingel Consignment With Guarantee Agreement (Ex. 2) contains no reference to anything akin to the COVID-19 pandemic. However, assuming arguendo that the COVID-19 Pandemic is covered under ¶ 12(a) of the Stingel Consignment With Guarantee Agreement (Ex. 2), Defendant still cannot invoke that force majeure clause to excuse Defendant's non-performance. In the Unlawful Termination Letter (Ex. 6), Defendant claims that it has been prevented from holding the Evening Auction as a result of "the New York State and New York City governments plac[ing] severe restrictions upon all non-essential business activities" and because "[c]ertain government orders were invoked that applied to and continue to apply to Phillips' business activities." As set forth in detail infra, throughout the life of the COVID-19 Pandemic, Plaintiff has held and continues to hold online auctions (FAC at ¶¶ 46-51). Accordingly, Plaintiff's non-performance purportedly stems from Government orders or Government action (whether local, state or federal) that prohibit in-person auctions **and not** from COVID-19 rendering auctions in any form, whether online or otherwise, impossible to conduct. As ¶ 12(a) of the Stingel Consignment With Guarantee Agreement (Ex. 2) does not specifically include Government orders or Government action, Defendant cannot invoke that contract provision to excuse its non-performance.

Defendant Cannot Demonstrate that it Was Prevented from Performing or that It Attempted to Perform Its Contractual Duties

Defendant cannot show a causal connection (causal nexus) between the claimed force majeure event and Defendant's purported inability to perform due to circumstances beyond its reasonable control. In Aukema, supra, 904 F.Supp.2d at 209-11 and Beardslee v. Inflection Energy, LLC, 904 F.Supp.2d 213, 219-21 (N.D.N.Y. 2012), the Court held that the subject force majeure provisions were not triggered by the Governor's directive placing a moratorium on a certain method of oil and gas drilling (HVHF drilling)—despite Defendants' claim that the banned method was the only viable and profitable method—because the State directive did not render impossible

performance under the subject contracts and defendants made no efforts to perform in light of the moratorium. Though the State directive banned HVHF drilling, defendants still were able to use conventional drilling methods to perform under the agreements, as follows:

> "The only thing defendants were unable to do during the primary terms was to horizontally drill using HVHF. The leases do not limit defendants' right to drill to a specific type of drilling nor a particular formation. While defendants submit evidence demonstrating that horizontal drilling combined with HVHF is the only commercially viable method of production in the Marcellus Shale and drilling using conventional methods is impractical, '[m]ere impracticality ... is not enough to excuse performance.'" Aukema, supra, 904 F.Supp.2d at 210 (internal citation omitted).

In Rochester, supra, 2009 WL 368508 at *10, the Court rejected defendant's force majeure affirmative defense as defendant still was able to perform under the subject agreement, albeit at a much greater cost to defendant, holding that "[t]he 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, 284 A.D.2d at 227 ("Plaintiff shut down its plant voluntarily due to financial considerations brought about by environmental regulations. Those are not circumstances constituting a *force majeure* event, and financial hardship is not grounds for avoiding performance under a contract").

As in the cases cited supra, Defendant at bar is making a conscious financial decision not to perform under valid agreements and not to live up to the financial risk that it signed on to take at the time of contract execution by attempting to invoke force majeure despite performance being possible. See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., 2010 WL 1945738, *5 (Sup. Ct. Albany Co. May 12, 2010), holding:

> "But even assuming for purposes of this motion that a severe economic downturn is a triggering event that falls within the broad 'catchall' language of the force majeure clause, the Court concludes that [defendant] has failed to demonstrate that it was prevented from complying with its obligations under the Lease due to events entirely outside of its control…Defendant's decision to undertake a capital intensive expansion during a time of apparent economic growth and its subsequent responses to the severe economic downturn represent business decisions on the part of [defendant], not events outside of its control."

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. Just as the financial difficulty which might have encouraged [defendant] to cancel its commercial flights does not excuse performance of the Contract, nor does the unilateral act that provided [defendant] with an economic benefit excuse [defendant] from its obligations under the Contract"). So too is Defendant selectively terminating the Stingel Consignment With Guarantee Agreement (Ex. 2) because Defendant perceives the Stingel market as weak while at least 11 artworks being offered at the Evening Sale have Defendant's guarantee or a third-party guarantee (FAC at ¶ 42). Defendant cannot invoke force majeure because it wants to cherry-pick which aspects of the goods it is selling are weakened.

It is incontrovertible that there is no requirement in the Stingel Consignment With Guarantee Agreement (Ex. 2) or in any other agreement between Plaintiff and Defendant that the Stingel be offered for sale at an ***in-person*** auction (FAC at ¶ 46). It is further indisputable that Defendant has advertised and conducted at least 11 online auctions since April 2020 (Id.) and continues to bombard publications and potential bidders with advertisements for the upcoming Evening Auction, now scheduled for July 2, 2020, which "will be live streamed and will feature a host of multimedia content for remote bidders, including on-the-spot art-historical and market analysis for its lots" (Id. at ¶¶ 47-48). The Evening Auction "will be broadcast live from Phillips's new saleroom in London" with Defendant's "principal auctioneer, Henry Highley, [] lead[ing] the sale in real time while a video wall will show Phillips's specialists on the phone with bidders" (Id.). Being physically present at an auction house never has been the sine qua non of a Phillips auction. In addition to the relatively 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 (FAC at ¶ 42). There is no logical reason that Defendant could not have conducted the Evening Sale in May or

June 2020 with the Stingel offered for sale thereat.

Defendant's recasting of the Evening Auction as an online auction demonstrates that Defendant's termination of the Stingel Consignment With Guarantee Agreement (Ex. 2) was not due to circumstances beyond Defendant's reasonable control and instead was a transparent attempt to cancel a perceived liability. Defendant's counsel's invocation of Executive Order 202 (see June 19, 2020 Oral Argument Transcript, 7:13-8:4)[2] does not support his claim that it was "unlawful" to conduct the Evening Auction as neither Executive Order 202 nor any subsequent COVID-19-related Executive Order prohibited the transacting of business online.

Defendant must not be permitted to hide under the imaginary blanket of the COVID-19 pandemic excusing the performance of any and all legal contracts while simultaneously 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 at all and Plaintiff must not be made to pay the price for Defendant's dissatisfaction. 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 counsel made the baffling assertion that "[i]f you read the plain language of the Basquiat agreement, it is clear [Defendant] performed the agreement" (see June 19, 2020 Oral Argument Transcript, 6:13-15). In fact, Defendant had no obligations vis-à-vis the auctioning of the Basquiat and the only real performance called for with respect to the June 27, 2019 Auction (and not the interconnected obligations concerning the Evening Auction) was Plaintiff's obligation to submit an irrevocable bid for the Basquiat in the sum of GBP £3,000,000.00, which Plaintiff fully performed (FAC at ¶¶ 10-11). The Stingel Consignment With Guarantee Agreement (Ex. 2) and

[2] If the Court requires a copy of the June 19, 2020 Oral Argument Transcript, Plaintiff will supply one as an exhibit to its reply papers.

the Basquiat Guarantee Agreement (Ex. 1) were back-to-back guarantees and Defendant backed out of its guarantee. Defendant is attempting to use force majeure not to limit any claimed damages due to circumstances beyond Defendant's reasonable control (which do not exist), but to keep Defendant's profit resulting from Plaintiff's performance of its contractual obligations, cancel a liability on Defendant's books and withhold from Plaintiff its bargained-for contractual benefits. See United Equities Co. v. First Nat'l City Bank, 52 A.D.2d 154, 157, 163 (1st Dep't 1976):

> "Plaintiff has received the benefit and profit it contracted for. Plaintiff seeks to use the *force majeure* clause not to limit damages but to give it a greater profit than it contracted for
> …
> In summary, paragraph 'IV' was a *force majeure* clause intended to meet the problem of frustrated expectations of the parties. It has no application where there has been no frustration and where on the contract date of performance, October 14, 1971, plaintiff was given what it realistically contracted for by way of a tender of performance or a reasonable commercial substitute therefor, and where plaintiff has realized and been paid the full benefit and profit contracted for."

Summary of Probability of Success on the Merits

Defendant cannot invoke force majeure to excuse its non-performance as Government orders or Government action are not included in the subject force majeure provision and, even if they were, the documentary evidence shows that Defendant's performance was not rendered impossible by circumstances beyond Defendant's reasonable control—Defendant is in fact launching the same Evening Auction at a different time as the Evening Auction was rescheduled twice and never postponed. Defendant did not meet its legal obligation to perform any act under the subject agreements to the extent possible (and did not even perform a fraction of an act) as force majeure is inapplicable where performance is possible in the face of a claimed force majeure event even if in an unanticipated, impractical or unprofitable manner (see Aukema, supra, 904 F.Supp.2d at 209-11 and Beardslee, supra, 904 F.Supp.2d at 219-21). The law and facts demonstrate that Plaintiff has met the high standard for obtaining a mandatory injunction as there is no question, with all due respect, that Plaintiff has demonstrated a clear or substantial likelihood of success and will

prevail on the merits.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Plaintiff's Order to Show Cause be granted in its entirety, together with such other and further relief as to this Court seems just and proper.

Dated: New York, New York
June 23, 2020

Respectfully submitted,
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