UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JN CONTEMPORARY ART LLC,

PLAINTIFF,

-AGAINST-

PHILLIPS AUCTIONEERS LLC,

DEFENDANT.

CASE NO.: 1:20-cv-04370-DLC

PHILLIPS AUCTIONEERS LLC'S OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Luke Nikas
Maaren A. Shah
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000
lukenikas@quinnemanuel.com
maarenshah@quinnemanuel.com

Attorneys for Phillips Auctioneers LLC

Dated: July 2, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

Defendant Phillips Auctioneers LLC submits this opposition to Plaintiff JN Contemporary Art LLC's Order to Show Cause for Preliminary Injunction and Temporary Restraining Order.

PRELIMINARY STATEMENT

This dispute is about the plain meaning of two contracts entered into by two sophisticated participants in the art world. Phillips Auctioneers LLC is a major auction house. JN Contemporary is owned by Joseph Nahmad, a member of the Nahmad art dealing family that Plaintiff's counsel described at oral argument as "probably the largest purchasers and sellers of art in the world."

On June 27, 2019, Phillips and Plaintiff entered into two agreements. In the first agreement, Plaintiff agreed to place a GBP 3,000,000 bid on an artwork by Jean-Michel Basquiat that was consigned to Phillips for sale in London by a third party. The agreement was conditioned on two events: Plaintiff signing a separate agreement with Phillips regarding a work by Rudolph Stingel, and Phillips agreeing to pay the seller of the Basquiat work a guaranteed minimum sale price. Both of those conditions were satisfied, and the agreement was fully performed.

In the second agreement, Plaintiff consigned the Stingel work to Phillips, and Phillips agreed to auction the Stingel work in New York in its major spring evening auction of 20th Century & Contemporary Art scheduled for May 2020. The parties specifically bargained for the work to be sold at *this* specific auction on *this* specific date. The major spring evening auction is not an online sale. Nor is it an unknown quantity in the art world. It is one of the two most important art events of the year—a live, ticketed, in-person event that consigners clamor to be a part of and at which buyers collectively spend nine figures to acquire works of fine art.

The Stingel agreement's termination provision, found in Paragraph 12(a), states that:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate

> effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.

In March 2020, the world changed. COVID-19 spread rapidly, and New York City became the center of a global pandemic. Governor Cuomo declared a disaster emergency and issued Executive Orders that made it illegal to host non-essential gatherings. The White House and FEMA issued orders declaring COVID-19 a natural catastrophe. Courts recognized that "[t]he COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100, at *12 (Pa. Apr. 13, 2020). As a result, Phillips was legally prohibited from holding its major spring evening auction scheduled for May 14, 2020 in New York. Even Plaintiff's own counsel admitted at oral argument that "[Phillips'] building was shut down on Park Avenue and they couldn't have the evening auction."

Phillips had no choice but to postpone the auction. It did so, and then exercised its right under Paragraph 12(a) to terminate the consignment. Plaintiff then sued. Plaintiff's lawsuit is meritless, and its request for injunctive relief is beyond extraordinary. It is seeking a mandatory injunction that is aimed at obtaining the same affirmative remedy it seeks on final judgment. Moreover, the ultimate relief that Plaintiff seeks is *not* to enforce the parties' contracts as written—it is to force Phillips to provide an alternate performance that is not bargained for in the contracts. No court has awarded the type of relief that Plaintiff seeks here. This Court should not be the first.

First, Plaintiff has misread the Basquiat agreement. Plaintiff argues that the Basquiat agreement was conditioned on Phillips signing the Stingel Agreement *and* giving Plaintiff a guaranteed minimum price on the Stingel sale. Not so. The Basquiat agreement says it is conditioned on Plaintiff signing the Stingel Agreement and Phillips offering the "Property"—which is expressly defined as the *Basquiat work*—with a guaranteed minimum price to the "*seller*" *of the Basquiat* (not to Plaintiff). In other words, Plaintiff overlooked the contract's definition of

"Property" and ignored the reference to the "seller" of that Property.

Second, in the Stingel agreement, Phillips agreed to auction the Stingel at a specific sale: the major spring evening auction to be held in New York in May 2020. Plaintiff concedes this point and goes out of its way in its Order to Show Cause to state that "Evening Auction" is a specific phrase used in the industry to refer to one of the two major live sales conducted annually in spring and fall in-person in New York, as contrasted with other auctions or online sales.

Third, COVID-19 is a "natural disaster." Governor Cuomo said so. The White House and FEMA said so. The Courts that have addressed this issue said so. And it would defy common understanding of the English language to rule otherwise. *E.g., Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (discussing prison closure "because of a natural disaster *such as fire or disease*") (emphasis added). Phillips was permitted to terminate under Paragraph 12(a).

Fourth, Plaintiff's core argument—that Phillips could have auctioned the work at a different or rescheduled auction—is legally meritless. Phillips is not required to reach outside the four corners of the contract to offer alternative performance to Plaintiff when, as here, the bargained-for performance has been rendered impossible by force majeure. The parties bargained for a sale at the evening auction in New York in May 2020. Plaintiff admits that auction could not take place. Plaintiff cannot rewrite the contract to impose obligations it never bargained for.

Finally, not only is Plaintiff unable to meet the "rigorous standard" applicable to mandatory injunctions "of demonstrating a 'clear' or 'substantial' likelihood of success on the merits," *Levola v. Fischer*, 403 F. App'x 564, 565 (2d Cir. 2010), it also is incapable of satisfying *any* other factor required to obtain injunctive relief. Plaintiff cannot show imminent harm—indeed, it urged the Court to adopt a briefing schedule extending *beyond* the July 2 auction at which it says Phillips is obligated to sell the work. Nor can Plaintiff show irreparable harm—it is seeking to force Phillips

to sell the work and pay money. Plaintiff also fails to identify a single reason the balance of hardships tips in its favor.

The bottom line is simple: between its statements at oral argument, the allegations in the Complaint and its affidavit, and the letter it wrote to the Court today, Plaintiff has conceded fundamental facts that undermine its case. And it has decimated the rest of its position by asserting legal arguments that are nowhere supported by the parties' contracts or the governing law. It would be difficult to cobble together a weaker request for a mandatory injunction.

BACKGROUND

I. THE PARTIES' AGREEMENTS

On June 27, 2019, Plaintiff executed two separate agreements with Phillips. The first agreement obligated Plaintiff to submit a GBP 3,000,000 irrevocable bid on Lot 19, *Untitled*, by Jean-Michel Basquiat (1981) at Phillips' 20th Century & Contemporary Art Evening Sale that took place in London (the "Basquiat Agreement"). Dkt. 22: Declaration of Joseph Nahmad ("Nahmad Decl.") Ex. 1, at 1. The Basquiat Agreement was made "[c]onditional upon signature by you [JN Contemporary] of the Consignment Agreement with Guarantee of Minimum Price in respect of the [Stingel Work] and conditional upon the above mentioned Property [*i.e.,* the Basquiat] being offered for sale with a commitment by Phillips to pay the Seller a Guaranteed Minimum." *Id*. The Basquiat Agreement specifically defined the "Property" as the Basquiat work, and the term "Seller" referred to the owner of the Basquiat. *Id*. The agreement further stated that "[i]n consideration of you providing the Guarantee Obligation [through the irrevocable bid], Phillips agrees to pay you a financing fee" of 20% of the overage of the hammer price above the guarantee if the work sells above the guarantee. *Id*. ¶ 6. The contract was performed: Plaintiff placed an irrevocable bid of GBP 3,000,000 at the auction, the Basquiat work sold for more than that bid, and Plaintiff was paid the financing fee. Dkt. 30: First Amended Complaint ("FAC") ¶ 11.

The second agreement (the "Stingel Agreement") provided that Plaintiff would consign to Phillips a work by Rudolph Stingel, *Untitled, 2009* (the "Stingel Work"), which Phillips would sell at auction subject to a guaranteed minimum amount of $5,000,000 to be paid to Plaintiff from the sale of the work (the "Guarantee"). Nahmad Decl., Ex. 2. The Stingel Agreement stated that "[t]he 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" (the "Spring New York Evening Auction"). *Id.* ¶ 6(a). Paragraph 11 states, "[s]ubject to . . . any applicable withdrawal or termination provision set forth under this Agreement, Phillips guarantees that you shall receive at least USD $5,000,000 . . . with respect to the sale of the Property." *Id.* ¶ 11(a). Paragraph 12(a)[1] sets forth the applicable termination provision:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.

Id. ¶ 12(a).

Plaintiff also used the Stingel Work to secure a $5,000,000 loan from third-party Muses Funding I LLC ("Muses"). FAC ¶ 14. On December 27, 2019, Plaintiff, Phillips, and Muses executed an amendment to the Stingel Agreement that memorialized the lien that Plaintiff had granted to Muses on the Stingel Work (the "Security Amendment"). Nahmad Decl., Ex. 3. The Security Amendment reiterated that the Stingel Work must be sold "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020 ('Auction')." *Id.*

[1] Paragraph 12(a) entitled "Termination" is mis-numbered as the second paragraph 12 in the agreement. The section preceding it concerning settlement and payment is numbered as paragraphs 12(a)-(k). This error has no impact on the dispute here. Any references to Paragraph 12 in this brief refer to the Termination provision of the Stingel Agreement, unless otherwise noted.

¶ 1(c). When negotiating the Security Amendment, Muses sought to modify Paragraph 12(a) to state that Phillips would honor the consignment and the Guarantee if the Spring New York Evening Auction were postponed and rescheduled to within six months of May 2020. Declaration of Hartley Waltman ("Waltman Decl.") ¶ 4. Phillips rejected this change. *Id.*

II. THE SPRING NEW YORK EVENING AUCTION

Plaintiff's principal, Joe Nahmad, is a sophisticated art market participant. Declaration of Luke Nikas ("Nikas Decl."), Ex. J: 6/19/2020 Proceeding Tr. 12:8–13. Plaintiff acknowledges that Phillips' Spring Evening Auction of 20th Century & Contemporary Art is a unique event that occurs annually, in person, in New York City. Nahmad Decl. ¶ 3 n.1 ("The New York Spring Auction traditionally takes place each year in May and is one of Defendant's two major evening auctions in New York."). In fact, Plaintiff has admitted that the "Evening Auction" identified in the parties' Stingel Agreement is distinct from an online auction of contemporary art. *See* Dkt. 21: Plaintiff's Proposed Order to Show Cause at 2 & n.1. The event takes place each year in May and is hosted at Phillips in New York City. Waltman Decl. ¶ 7. In Phillips' entire history, the Spring New York Evening Auction has never taken place online. *Id*. The Spring New York Evening Auction was scheduled for May 14, 2020. *Id.* ¶ 5.

As Plaintiff admits, "Evening Auction" is a well-known industry term that refers not simply to the timing of the event but to its format and nature. *See* Dkt. 21 at 2 & n.1; Nahmad Decl. ¶ 3 n.1; *see also* Waltman Decl. ¶¶ 7–8. The major spring evening auction is understood to be one of the two auction events of the year for contemporary art and is held annually by each of the major auction houses during the same week in spring. *Id*. ¶ 8. It is a major, in-person, and ticketed live auction. *Id.* The Spring New York Evening Auction's reputation as one of the two most important annual art events attracts an unparalleled caliber of artwork and buyers in comparison to the numerous other auctions that take place throughout the year. *Id.* As a result, many art collectors

will only consign their marquee artworks to Phillips if the works are offered for sale exclusively at this auction. *Id.* It is not unusual for a spring evening auction to generate in excess of $100 million in one night. *Id.* It is for these reasons that the Guarantee was explicitly tied to the Spring New York Evening Auction and could be voided if that auction were postponed. *Id.*

Phillips also holds auctions online throughout the year. *Id.* ¶ 9. An online auction is *not* a different method of conducting the same live sale that would otherwise occur in person; it uses a different auction format and is subject to a distinct legal structure that carries different legal and business risks. *Id.* Consignments to online auctions versus live auctions are also subject to different Conditions of Sale and different written agreements. *Id.*; *see also id.*, Ex. D ¶ 11; Nahmad Decl., Ex. 2 ¶¶ 1, 9(b) (consignment subject to Conditions of Sale published at www.phillips.com for live auctions). For these reasons, Phillips selects very carefully which works it will offer at which auctions in which formats, and whether or not (and in what amount) to offer guaranteed minimums. Waltman Decl. ¶ 9.

III. PHILLIPS POSTPONES THE SPRING NEW YORK AUCTION AS A RESULT OF THE COVID-19 PANDEMIC AND TERMINATES THE STINGEL AGREEMENT

In March 2020, the COVID-19 pandemic took hold in New York, and Governor Andrew Cuomo issued a series of executive orders restricting and eventually barring all non-essential business activities, which included art exhibitions and auctions, starting on March 23, 2020 and extending into June 2020. *See* Nikas Decl. ¶¶ 2–10 & Exs. A–I. On March 14, 2020, Phillips issued a public announcement on its website entitled, "Auction Update: Temporary Closures & Postponements," stating: "As more of our community of staff, clients and partners becomes affected by the spread of the Coronavirus, we have decided to postpone all of our sales and events in the Americas, Europe and Asia. . . . Our upcoming 20th Century & Contemporary Art sales in New York will be held the week of 22 June 2020, consolidating the New York and London sales

into one week of auctions." Waltman Decl. ¶ 11 & Ex. E. Phillips ultimately postponed the auction to July 2, 2020, and decided to hold it in a different, never-before-used format in which the auctioneer would call the lots from a showroom in London that would be live-streamed to potential bidders online, and permit online bids as well as absentee and telephone bidding. *See* FAC ¶ 42; Dkt. 35.

On June 1, 2020, Phillips electronically sent Plaintiff a termination notice (the "Termination Notice") that terminated the Stingel Agreement, stating, among other things, "[a]s you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the New York State and New York City governments placed severe restrictions upon all non-essential business activities. Certain government orders were invoked that applied to and continue to apply to Phillips' business activities. Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to postpone the Auction beyond its planned May 2020 date." Nahmad Decl., ¶ 30 & Ex. 5. Phillips also mailed a copy of the Termination Notice to Plaintiff on June 2, 2020. Nahmad Decl., ¶ 31 & Ex. 6.

ARGUMENT

I. PLAINTIFF CANNOT OBTAIN ULTIMATE RELIEF THROUGH A PRELIMINARY INJUNCTION

Plaintiff requests an injunction forcing Phillips to "auction [the Stingel Work] at [its] next online or in-person auction of Contemporary Art" and pay Plaintiff the greater of the guaranteed amount or the net sale proceeds. Dkt. 21 at 1–2. Neither a temporary restraining order nor a preliminary injunction can be used to obtain the ultimate relief sought in this case. *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) ("It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.").

"The purpose of a preliminary injunction is not to give the plaintiff the ultimate relief it seeks." *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261–62 (2d Cir.

1996) ("a temporary injunction 'ought not to be used to give final relief before trial'"); *Diversified Mortg. Inv'rs v. U.S. Life Ins. Co. of New York*, 544 F.2d 571, 576 (2d Cir. 1976) (preliminary injunction "is not an adjudication on the merits, and it should not grant relief properly awarded only in a final judgment"); *Barchha v. TapImmune, Inc.*, 2013 WL 120639, at *1 (S.D.N.Y. Jan. 7, 2013) (same). This is what Plaintiff seeks to do here. The request should be denied on this basis alone. *See, e.g., Barchha*, 2013 WL 120639, at *2 (denying request for mandatory injunction to force defendant to facilitate sale of stock because it "would not be a limited measure to preserve the status quo, but instead equivalent to a final adjudication of the merits of plaintiff's claims.").

II. PLAINTIFF IS NOT ENTITLED TO A MANDATORY INJUNCTION

A "preliminary injunction is an extraordinary remedy never awarded as of right." *H'Shaka v. O'Gorman*, 758 F. App'x 196, 198 (2d Cir. 2019). Here, Plaintiff asks for even more than that—it asks for a mandatory injunction to change the status quo, which "is even more extraordinary." *Id.* Plaintiff must therefore meet an "even higher" burden by demonstrating that it is *clearly entitled* to the relief it seeks. *Cacchillo v. Insmed, Inc*., 638 F.3d 401, 406 (2d Cir. 2011). When "the movant is seeking to modify the status quo by virtue of a mandatory preliminary injunction (as opposed to seeking a prohibitory preliminary injunction to maintain the status quo), or where the injunction being sought will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits, the movant must also: (1) make a strong showing of irreparable harm, and (2) demonstrate a clear or substantial likelihood of success on the merits." *Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020). A mandatory preliminary injunction "should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." *Cacchillo*, 638 F.3d at 406; *see also Levola*, 403 F. App'x at 565. The

movant must also show that the "balance of hardships tip[s] decidedly toward the party requesting the preliminary relief." *Cacchillo*, 638 F.3d at 406.

A. Plaintiff Cannot Demonstrate A Clear And Substantial Likelihood Of Success

Plaintiff cannot meet the "rigorous standard" applicable to mandatory injunctions "of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." *Levola*, 403 F. App'x at 565. Plaintiff's claims for breach of the Basquiat Agreement and the Stingel Agreement are both predicated on Phillips' refusal to offer the Stingel Work at auction. *See* FAC ¶¶ 30–101.[2] The plain language of each contract undermines Plaintiff's claims.

1. Phillips did not breach the Basquiat Agreement

Plaintiff argues that Phillips breached the Basquiat Agreement by failing to auction the Stingel Work, because the Basquiat Agreement supposedly states that it is conditioned on, among other things, "the Stingel Work being offered for sale by [Phillips]; . . . and that [Phillips] shall pay Plaintiff the Guaranteed Minimum" of $5,000,000 for the Stingel Work. FAC ¶ 69 (emphasis in original). Plaintiff has misread the Basquiat Agreement. The contract, which is clear and unambiguous, must be construed on its plain terms—not the terms Plaintiff *wishes* he bargained for. *See Lilly v. City of New York*, 934 F.3d 222, 236 (2d Cir. 2019); *Unisys Corp. v. Hercules Inc.*, 638 N.Y.S.2d 461, 463 (1st Dep't 1996).

The subject line of the Basquiat Agreement states, "Re: . . . Lot 19, Jean-Michel BASQUIAT, *Untitled*, Executed in 1981. (the '"Property"')." Nahmad Decl., Ex. 1, at 1.

The first paragraph of the Basquiat Agreement states:

---

[2] Plaintiff's brief does not address its claim for breach of the implied covenant. *See* FAC ¶¶ 83–101. Regardless, this claim has no merit because it is based on the same allegations as its contract claims and seeks the same damages. FAC ¶¶ 72–82, 91–101. *Deutsche Bank Nat'l Trust Co. v. Quicken Loans Inc.*, 810 F.3d 861, 869 (2d Cir. 2015). Nor can the covenant "be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." *Fesseha v. TD Waterhouse Inv'r Svcs.*, 305 A.D.2d 268, 268 (1st Dep't 2003).

> Conditional upon signature by you of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolph Stingel, Untitled, 2009 (Contract Number 04NYD752) and conditional upon the above mentioned Property 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:

Id.

With respect to the first prong of this paragraph regarding the "Consignment Agreement," the "you" that is referred to in the first paragraph refers to Plaintiff, to whom the letter agreement was addressed and by whom it was signed. *Id.* at 1, 3. The condition that Plaintiff sign the "Consignment Agreement" was satisfied: Plaintiff did sign the Stingel Agreement.

The second prong of the first paragraph was also satisfied. That prong, which states that the Basquiat Agreement was "conditional upon the above mentioned Property being offered for sale with a commitment by Phillips to pay the Seller a Guaranteed Minimum," does not say what Plaintiff argues. *Id*. at 1. This condition has nothing to do with the Stingel work. It refers to the capital-P "Property" being offered for sale and Phillips offering the capital-S "Seller" a guaranteed minimum. "The Property" is defined in the "Re" line of the Basquiat Agreement, located above the first paragraph, as "Lot 19, Jean Michel BASQUIAT, Untitled, Executed in 1981." *Id*. And "Seller" refers to the seller of the Basquiat—not Plaintiff, which is referred to as "you" in the Basquiat Agreement. Paragraphs 18 and 19 of the contract also make this clear. Paragraph 18 states that "[t]his Agreement is expressly conditional upon the sale of the Property"—*i.e.*, the Basquiat work—"in circumstances where Phillips has guaranteed the Seller" of the Basquiat "a guaranteed minimum amount (and the Seller having accepted such guaranteed minimum amount)." *Id.* ¶ 18. Paragraph 19 echoes this language, stating that "[i]f the Property is not offered for sale at the Auction for any reason or is offered for sale without a guarantee to the Seller of a guaranteed minimum amount, then this Agreement will be null and void." *Id.* ¶ 19. It further

states that, "[f]or the avoidance of doubt no sum will be due or payable to you under this Agreement . . . if[] the Property is not consigned to Phillips under a written contract that requires us to provide the seller with the Guaranteed Minimum . . . ." *Id.* ¶¶ 19–19(a).

This language is clear: Plaintiff's obligation to place a GBP 3,000,000 bid on the Basquiat work is conditioned upon Phillips auctioning the *Basquiat work* subject to a guaranteed minimum to be paid to the *seller of the Basquiat*. That makes sense, because the Basquiat Agreement is, in essence, third-party financing of Phillips' obligation to guarantee a minimum price to the seller, and Phillips would not need that financing from Plaintiff if it never offers the work at auction or if it offers the Basquiat work without a guaranteed minimum. *E.g.*, *id.* ¶ 15 ("[Y]ou absolutely and unconditionally agree to share in the risk arising from the obligation that Phillips has made with the Seller of the Property."). The Basquiat Agreement—which has an integration clause (*Id.* ¶ 23)—was therefore performed in full: the work was auctioned subject to a guaranteed minimum price, and Plaintiff was paid his financing fee. FAC ¶ 11. Plaintiff's claim has no chance of success. *See Few Spirits, LLC v. UB Distribs., LLC*, 2020 WL 532521, at *5 (Sup. Ct. N.Y. Cty. Feb. 3, 2020) (dismissing claim that was contrary to the contract's plain terms).

2. Phillips did not breach the Stingel Agreement

Plaintiff's claim for breach of the Stingel Agreement is also meritless, because Phillips was permitted to terminate the Stingel Agreement under the circumstances presented here.

(a) *The Stingel Agreement clearly designates the Spring New York Evening Auction as the exclusive venue of sale*

Plaintiff's core argument is that "there is no requirement" in the Stingel Agreement "that the Stingel be offered for sale at an in-person auction." Br. 15 (emphasis in original). This is contrary to the clear contractual terms. The Stingel Agreement required that the work be sold at a specific in-person auction: the Spring New York Evening Auction. Because Phillips postponed

that auction for reasons outside of its control, Plaintiff's claim must fail.

The Stingel Agreement states that Plaintiff "hereby consign[s] to [Phillips] the [Stingel Work] which [Phillips], as your exclusive agent, will offer for sale at public auction . . . subject to the provisions set forth below . . . ." Nahmad Decl., Ex. 2 ¶ 1. The agreement specifically stated that the public auction at which Phillips agreed to offer the work for sale was the Spring New York Evening Auction: "The Property *shall* be offered for sale in New York in our major spring 2020 auction of 20th Century & Contemporary Art currently scheduled for May 2020." *Id.* ¶ 6(a) (emphasis added); *see also id.* at preamble ("Sale Date: May 2020."); Nahmad Decl., Ex. 3 ¶ 1(c). Plaintiff concedes this fact. *E.g.*, FAC ¶ 16(iii); Br. 1; Dkt. 35 (letter from Plaintiff's counsel admitting that the Spring New York Evening Auction is "contractually" the auction at which the Stingel Work was to be sold). *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms. . . . [and] a court may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

The Spring New York Evening Auction is not an online auction of contemporary art—which is where Plaintiff is *now* seeking to force Phillips to sell the work. Plaintiff admits this. *See* Dkt 21, at 2 & n.1. Plaintiff's principal is a member of the prominent art dealing Nahmad family, who its counsel described as "very big clients" of Phillips and "probably the largest purchasers and sellers of art in the world." Nikas Decl., Ex. J, Tr. 12:9–11. As this sophisticated Plaintiff knows, the designation of the Spring New York Evening Auction for the sale of the Stingel Work was careful and deliberate. Phillips conducts no other auction at any other time of the year, anywhere in the world, that attracts the same high caliber of artworks, collectors, and prices as the

major New York spring and fall evening auctions. The Spring New York Evening Auction has never once, in the entire history of Phillips' business, been held online. Waltman Decl. ¶ 7. It takes place in person in New York and is accompanied by days of in-person viewings, gatherings for potential buyers and collectors, and other marketing events. *Id*. That understanding informed the parties' agreement to consign this particular work for sale in this particular auction—with this particular Guarantee. *See Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC*, 30 A.D.3d 1, 8 (1st Dep't 2006) ("Besides the common meaning of the language employed, the expectations and purposes of the parties in view of the factual context in which the agreement was made must be considered in interpreting a contract term, with due regard to the parties' sophistication.").

For this reason, every relevant provision in the Stingel Agreement refers pointedly to "*the* auction"—meaning the Spring New York Evening Auction. *See, e.g.*, Nahmad Decl., Ex. 2 ¶¶ 12(a)–(c), 9(b). It is also for this reason that Phillips' agreement to pay the Guarantee was expressly subject to its ability to terminate if "*the* auction" were postponed for reasons outside its control. *See id.* ¶¶ 11, 12(a).[3]

[3] The contract is consistent on this point. Other than in Section 12(a)'s termination provision, in every single instance contemplated in the contract in which the Stingel Work might be offered in any auction other than the Spring New York Evening Auction, the contract requires the parties' consent and, as appropriate, new agreed sale terms before the work may be sold at auction on a later date, in any form. Section 6(a) of the Stingel Agreement, which Plaintiff erroneously relies on, FAC ¶¶ 21, 34, supports this very point: it protects Plaintiff by requiring its prior written consent if Phillips wanted to *voluntarily* move the auction to a different place or later date—recognizing that a later auction in a different location or format is *not* what the parties agreed to and therefore such a discretionary move requires written consent to change the agreement's terms. This concept is again echoed in Section 3(c), which nullifies the Guarantee and requires the parties to negotiate new sale terms if the Stingel Work cannot be sold in the Spring New York Evening Auction due to loss or damage and must instead be offered "in the next appropriate auction after restoration has been completed." Nahmad Decl., Ex. 2 ¶ 3(c). The import of this language is clear: it is the Spring New York Evening Auction, live and in person in New York in May, that the parties

Plaintiff knew these facts. It even bargained to strike out the second clause of the termination provision that would have been contained in Section 12(b) of the contract. Nahmad Decl., Ex. 2, ¶ 12(b). It could have tried to do the same with respect to Section 12(a) or refused to consign the work to Phillips with this provision. It didn't. In fact, when negotiating the Security Amendment, Muses requested that Phillips revise Section 12(a) to state that Phillips would honor the guarantee if it postponed and rescheduled the Spring New York Evening Auction within six months of May 2020—*i.e.*, precisely what Plaintiff is now claiming Section 12(a) requires. Phillips refused. Waltman Decl. ¶ 4. Plaintiff cannot claim that it is entitled to relief that Phillips expressly rejected during negotiations. *See Solid 21, Inc. v. Richemont N. Am., Inc.*, 2020 WL 3050970, at *3 (S.D.N.Y. June 8, 2020) (a court should not "rewrite a contract to include terms the parties have expressly omitted . . . ."); *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978) ("In these circumstances, the courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").

(b) *The COVID-19 Pandemic is a "natural disaster" within the meaning of Section 12(a)*

Plaintiff argues that Section 12(a) does not apply because it "contains no reference to anything akin to the COVID-19 pandemic" and that the principle of *ejusdem generis* precludes the clause's application. Br. 12–13. Plaintiff is incorrect.[4] Even applying the principle of *ejusdem*

---

bargained for—not a subsequent live or online auction that might be held at a later date. *See Spanski Enters., Inc. v. Telewizja Polska S.A.*, 2019 WL 6498257, at *5 (S.D.N.Y. Dec. 2, 2019) ("[C]ourts must endeavor to read a contractual document in a manner that gives effect to all of its provisions and that causes them to be consistent with one another").

[4] Plaintiff cites only two cases to support its argument. Br. 12. Both undercut its claims. In both cases, the allegedly disruptive event was not specifically enumerated in the force majeure provision in the contract and the enumerated events in the force majeure clauses all pertained to the ability to conduct day-to-day business operations, whereas the allegedly disruptive event did not. *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 903 (1987); *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (3d Dep't 2007). Here, by contrast, "natural disaster"

generis, the COVID-19 pandemic is clearly a "natural disaster" or similar "circumstance beyond our or your reasonable control" contemplated by Section 12(a). And where, as here, "the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure." *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (1st Dep't 2017); *see also Kel Kim*, 70 N.Y.2d at 903 (an expansive force majeure provision will be enforced where the event that prevented performance is "of the same kind or nature as the particular matters mentioned").

It is beyond dispute that the COVID-19 pandemic is a natural disaster of epic proportions. The Governor's Executive Orders declared a "state disaster emergency" caused by the COVID-19 pandemic and made illegal any non-essential gatherings starting March 23, 2020 through June 2020. *See* Nikas Decl. ¶¶ 2–10 & Exs. A–I; *see also* N.Y. Exec. Law § 20(2)(b) (defining "state disaster emergency"); N.Y. Exec. Law § 28(1). New York law defines a "disaster" as widespread harm "resulting from any natural or man-made causes," including "epidemic" and "disease outbreak." N.Y. Exec. Law § 20(2)(a).

Further, on March 20, 2020 President Trump issued a "major disaster declaration" due to the COVID-19 outbreak in New York under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. FEMA, DR-4480-NY Initial Notice, March 20, 2020, https://www.fema.gov/disaster/notices/dr-4480-ny-initial-notice. Under the Stafford Act, a "major disaster" is strictly limited to "any natural catastrophe" or "any fire, flood, or explosion." 42 U.S.C. § 5122(2). As COVID-19 is obviously not a "fire, flood, or explosion," the White House and FEMA have clearly deemed the pandemic a "natural catastrophe." Courts have also

---

is specifically listed in Section 12(a), and COVID-19 did disrupt Phillips' ability to conduct daily operations—precisely the type of event that both *Kel Kim* and *Team Marketing* stated would constitute a force majeure.

recognized that "[t]he COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito*, 2020 WL 1847100, at *12; *accord Commonwealth v. Mills*, 104 Va. Cir. 350, 351-52 (Cir. Ct. Madison Cty. 2020) ("the Coronavirus rises to the level of a natural disaster as a communicable disease of a public health threat as defined in" the Virginia Code); *Commonwealth v. Vila*, 104 Va. Cir. 389, 393 (Cir. Ct. Fairfax Cty. 2020) (noting that under Virginia law "natural disaster" includes a "communicable disease of public health threat" and encompasses COVID-19). *See also Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (discussing prison closure "because of a natural disaster *such as fire or disease*") (emphasis added).[5]

Plaintiff cannot avoid this result by claiming that it was "Government orders," not the pandemic, that caused Phillips to postpone the auction. Br. 13. Plaintiff's citation to the Termination Notice on this point (*id.*) misleadingly leaves out the key language from the letter. Phillips stated that it was postponing the auction "due to the COVID-19 pandemic" and that it was "due to these circumstances *and* the continuing government orders" that Phillips "ha[s] been prevented from holding the Auction and ha[s] no choice but to postpone the Auction beyond its planned May 2020 date." Nahmad Decl., Ex. 6 (emphasis added). Phillips' public announcement postponing the Spring New York Evening Auction also identifies the pandemic as the reason for its decision. *See* Waltman Decl., Ex. E.

[5] Plaintiff's Complaint makes the cursory statement that "all events relating to COVID-19 were foreseeable." FAC ¶¶ 37, 70. While this misses the point—the question is not whether the resulting *closures* stemming from COVID-19 were foreseeable but whether the *pandemic* itself was—it is absurd to argue that either the pandemic or the severe restrictions on daily life resulting from it were foreseeable.

(c) *Phillips was forced to postpone the Spring New York Evening Auction as a result of the unforeseeable COVID-19 Pandemic*

Even though Section 12(a) clearly encompasses COVID-19 and permitted termination, Plaintiff's primary argument is that Phillips cannot avail itself of the termination provision because Phillips could have offered the Stingel Work at any subsequent auction. Br. 13–17. For example, Plaintiff states that Phillips has conducted "at least 11 online auctions since April 2020" and has rescheduled the Spring New York Evening Auction for July 2, 2020 in an alternate format. Plaintiff therefore argues that Phillips must sell the work even though it cannot do so "in the exact manner that it anticipated and prefers." Br. 15–16. Plaintiff is wrong as a matter of law.

As Plaintiff's counsel conceded at oral argument, it was impossible and illegal for Phillips to hold the Spring New York Evening Auction live, in-person, at its New York location on May 14, 2020, because of the COVID-19 pandemic and the resulting Executive Orders prohibiting such gatherings from taking place. *See* Section II(A)(2)(b), *supra*; *see also* Nikas Decl. Ex. J, Tr. 9:9–10 (admitting that "[Phillips'] building was shut down on Park Avenue and *they couldn't have the evening auction*.") (emphasis added). The health and safety risks posed by the virus prevented the auction, and the Executive Orders prohibited this event and carried the force of law. *See Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc*, 2012 WL 6091570, at *26 (E.D.N.Y. Dec. 7, 2012) ("It is hornbook law that courts may not compel a party through specific performance to take actions in contravention of the law"). Phillips had no choice but to postpone the auction.[6] Plaintiff's insistence that no "causal nexus" existed between COVID-19 and Phillips'

[6] Plaintiff's allegations that Phillips breached the contract and waived its termination right by sending a belated and ineffective termination notice are without merit. *See* FAC ¶¶ 22, 40. Paragraph 12(a) does not require any specific form or date of notice. *See Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp*., 771 F. Supp. 63, 67-68 (S.D.N.Y. 1991) (holding that late force majeure notice did not preclude defense because notice was not a condition precedent under the contract and there was no prejudice from the late notice).

inability to hold the Spring New York Evening Auction is frivolous. Br. 13.

Plaintiff nonetheless argues that Phillips could offer the Stingel Work at an online auction, which it contends is an accommodation that is within Phillips' reasonable control. Br. 12–16. This is a non-sequitur. Even if alternate performance were within Phillips' reasonable control, that has no bearing on the effect of the Section 12(a) termination provision or whether Phillips' postponement of the Spring New York Evening Auction was within its control. Plaintiff's proposal contravenes the clear language of the Stingel Agreement (*see* Section II(A)(2)(a), *supra*), and also ignores the material differences between live and online auctions. *See supra*, at 6–7; Waltman Decl. ¶ 9. Phillips is not required to reach outside the four corners of the contract to offer alternative performance to Plaintiff when, as here, the bargained-for performance has been rendered impossible by force majeure. *See, e.g.*, *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (where U.S. government prevented defendant from contractual performance, constituting a force majeure event, contract did not require defendant "to provide substitute performance from its Indian licensee"); *Babcock & Wilcox Co. v. Allied-Gen. Nuclear Servs*., 161 A.D.2d 350, 350–52 (1st Dep't 1990) (where force majeure event prevented defendant "from reprocess[ing] spent nuclear fuel for plaintiff" per the parties' agreement, court rejected "plaintiff's contention that defendants could have engaged in alternate performance under the contract by storing and disposing of the spent nuclear fuel"); *Int'l Paper Co. v. Rockefeller*, 146 N.Y.S. 371, 374 (3d Dep't 1914) ("We need not say that the defendant could not have furnished live wood of equal quality from other lands; but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood would be furnished, and when the source is destroyed the defendant is excused from further performance"); *Jon-T Chemicals, Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 & n.5 (5th Cir. 1983) (rejecting

plaintiff's argument that "delivery by truck would have been a commercially reasonable substitute" for delivery by train, which was prevented by force majeure, because the contract specified that delivery be made by train); *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex. App. 2009) (rejecting plaintiff's argument that force majeure clause did not apply because defendant could have delivered gas to an alternate delivery point than the location specified in the contract, because doing so would "force [defendant] to deliver gas, notwithstanding an acknowledged force majeure event, to a location other than that to which the parties expressly agreed").

Plaintiff's argument not only ignores settled law, it would also render the termination clause meaningless because the postponement of a specific auction would always happen against the backdrop of other, later or online, auctions occurring subsequently at which a work could potentially be offered instead. *See Virginia Power*, 297 S.W.3d at 403 (where contract specified a precise delivery location and contained a force majeure clause excusing performance, holding that "both of these contract provisions would be rendered meaningless under [plaintiff's] interpretation of the [force majeure] clause, which would force [defendant] to deliver gas, notwithstanding an acknowledged force majeure event, to a location other than that to which the parties expressly agreed" and refusing to require alternate performance because "[w]e must presume that the parties intended each contract provision to have effect"); *see also Spanski Enters.*, 2019 WL 6498257, at *5 ("a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect.").[7]

[7] Plaintiff's argument that the Spring New York Evening Auction was not "postponed" because it was "rescheduled" to a later date (Br. 10-11) is nonsensical, and the *Wilder v. World of Boxing* cases—which discuss whether a liquidated damages clause was properly invoked by a boxer who declined to appear at a bout that was rescheduled pending an investigation into his opponent's

Plaintiff's argument that the termination of the contract was a discretionary business decision, and therefore subject to Paragraphs 6(a)(i) and 17(b), and not Paragraph 12(a), also fails.[8] Br. 9-10, 13-16. Phillips did not postpone the auction in an exercise of discretion. Plaintiff's argument that the pandemic was a pretext to cover a business judgment is rebutted by the Executive Orders (which made it impossible to hold the Spring New York Evening Auction), by the similar actions of Phillips' peer businesses, by the experience of all New Yorkers, and by Phillips' contemporaneous, consistent statements identifying the virus as the cause of the postponement. *See* Waltman Decl., Ex. E; Nahmad Decl., Ex. 5. For this reason, Plaintiff's cited cases (Br. 13–17) are inapplicable. In some of those cases, non-performance was the result of a purely commercial decision made in the face of financial hardship.[9] In the remaining cases, the contract did not specify that performance must be made in the precise way that was rendered impossible.[10]

---

alleged violation of the league's discretionary drug policies—are totally inapposite. The plain dictionary definition of "postpone" makes no such distinction. Obviously, an event that is postponed can also be later rescheduled. *See, e.g.*, Oxford Lexico English Dictionary, at https://www.lexico.com/en/definition/postpone (postpone: "Cause or arrange for (something) to take place at a time later than that first scheduled."); Merriam-Webster English Dictionary, at https://www.merriam-webster.com/dictionary/postpone (postpone: "to put off to a later time."). Moreover, the fact that Paragraph 12(a) permits termination if the specified auction is "postponed" means that Phillips may terminate the consignment even if the same exact auction is held in the same form and location but at a later date.

[8] Paragraph 17(b), requiring modifications to be in writing by both parties, in fact supports *Phillips'* position that Plaintiff is not permitted to unilaterally change the performance obligation from the Spring New York Evening Auction to any online or live auction.

[9] *E.g., Rochester Gas and Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 (W.D.N.Y. Feb. 13, 2009); *Macalloy Corp. v. Metallurg, Inc.,* 284 A.D.2d 227 (1st Dep't 2001); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.,* 931 N.Y.S.2d 436, 438 (3d. Dep't 2011); *Rivas Paniagua Inc. v. World Airways, Inc.*, 673 F. Supp. 708, 713 (S.D.N.Y. 1987). Unlike in these cases, the decision not to hold the Spring New York Auction was not financially beneficial for Phillips, nor did it save Phillips money in the face of other financial hardship. Also unlike here, in most of these cases the claimed event was not listed in the force majeure clause.

[10] *E.g., Aukema v. Chesapeake Appalachia, LLC,* 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012); *Beardslee v. Inflection Energy, LLC,* 904 F. Supp. 2d 213, 220–21 (N.D.N.Y. 2012), *aff'd,* 798 F.3d 90 (2d Cir. 2015). In *United Equities Co. v. First Nat. City Bank,* 383 N.Y.S.2d 6, 12 (1st

Here, by contrast, the contract specified the particular method of performance—sale at the Spring New York Evening Auction—that was rendered impossible by a natural disaster in the form of a global pandemic. In fact, as the courts stated in *Aukuma* and *Beardslee* (two of Plaintiff's authorities), defendant oil drillers did not prevail because they "were in the best position to impose drilling specifications as to the methods used or formations explored," which they failed to do. *Aukuma,* 904 F. Supp. 2d at 210; *Beardslee*, 904 F. Supp. 2d at 219. Phillips did exactly the opposite here: it imposed specifications on the particular auction event, including the event, date, location, and format, at which it was obligated to offer the Stingel Work.

(d) ***Performance of the Stingel Agreement is also excused under the doctrine of impossibility***

Phillips' performance is also independently excused by the common law doctrine of impossibility. "Impossibility excuses a party's performance when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *LeRoy v. Sayers*, 635 N.Y.S.2d 217, 223 (1st Dep't 1995). For the reasons explained in Sections II(A)(2)(b) and (c), *supra*, the pandemic was an unforeseeable event that made it objectively impossible for Phillips to hold the Spring New York Evening Auction in May 2020 in New York as the parties bargained. Because the sale of the work at that specific event was fundamental to the parties' agreement, Phillips' performance is therefore excused.

B. Plaintiff Cannot Make A Strong Showing That Extreme Damage Will Result From The Denial Of Preliminary Relief

Nor can Plaintiff establish that "extreme or very serious damage will result from a denial of preliminary relief." *Cacchillo*, 638 F.3d at 406.

Dep't 1976)*, aff'd sub nom. United Equities Co. v. First Nat'l City Bank,* 41 N.Y.2d 1032 (1977), plaintiff had received the full benefit of the contract and was attempting to use the force majeure clause to increase its profit beyond what it bargained for in the contract.

Plaintiff's brief fails to address the requirement that its alleged injury be actual and imminent. *See, e.g.*, *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) ("irreparable harm must be shown to be actual and imminent"). Nor can it make this showing. Despite taking the extraordinary step of moving for emergency relief, at oral argument Plaintiff's counsel requested a briefing schedule that extended past the July 2 auction date at which Plaintiff professes that Phillips could and should sell the Stingel Work, despite defense counsel's willingness to move quickly. *See* Nikas Decl., Ex. J, Tr. 14:3–24. According to Plaintiff's counsel, a pending summary judgment brief in another case he's handling and the July 4 holiday weekend take precedence over the submission of "emergency" papers on this motion (*see id.*; *see also id.* at Tr. 3:13–19)—demonstrating precisely how urgent Plaintiff truly believes this motion to be. Plaintiff's own Order to Show Cause requests that the Stingel Work be "auctioned at Defendant's next online auction for major contemporary works of art"—with no specification as to when that might take place—"or Defendant's next in person 'Evening Auction,'" which by Plaintiff's own definition could occur at the earliest in the fall of this year. Dkt. 21 at 2. There is clearly no urgency. *See, e.g.*, *Kamerling*, 295 F.3d at 214 ("irreparable harm must be shown to be actual and imminent").

Plaintiff states, without any basis, that monetary damages "cannot be calculated with any reasonable certainty." Br. 4. Plaintiff is wrong. Plaintiff's requested relief—that it be paid the proceeds from the sale of the Stingel Work—is for monetary relief. Plaintiff is not requesting to keep possession of a unique work of art.[11] To the contrary, Plaintiff is demanding that the work

[11] For this reason, all of Plaintiff's cited cases concerning the appropriateness of a preliminary injunction in disputes concerning unique works of fine art are inapplicable, because they all addressed situations in which a plaintiff sought to preserve the status quo and *enjoin* the sale or transfer of a work to protect an asserted superior possessory right over the physical property itself. *See* Br. 5 (citing, *e.g., Kinderhill Select Bloodstock, Inc. v. U.S.A.*, 835 F.Supp. 699 (N.D.N.Y. 1993) (court denied injunction, but noted that plaintiff had established irreparable harm only "because [plaintiffs'] goal is to have the horses back, and the horses are unique").).

be sold, and that it be paid. Plaintiff is demanding money; there is nothing unique about that. *See Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 934 F.2d 30, 34 (2d Cir. 1991) ("[W]hen a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted."). Plaintiff's own request for monetary relief "in a sum no less than $7,000,000.00, the precise amount to be proven at trial" proves this point. FAC ¶¶ 66, 81, 100. *See, e.g.*, *Diamond v. Gemological Inst. of Am.*, 2012 WL 12874273, at *2 (S.D.N.Y. Nov. 14, 2012) ("The fact that Plaintiff has affirmatively pleaded a dollar amount for the diamond renders nonsensical its argument that money will not make it whole.").

Further, Plaintiff is well aware that the Stingel Work can be and has been valued with a reasonable degree of accuracy. Plaintiff itself approved the use of a third-party appraiser to value the work and any loss thereto in the Stingel Agreement. Nahmad Decl., Ex. 2 ¶ 3(c). Works of fine art, however unique, are capable of appraisal, and there is an entire industry devoted to this trade. *See* Waltman Decl. ¶ 6 & Ex. B.[12] This is particularly true of the Stingel Work, which was sold for 4,667,000 GBP (or around $5.8 million) at the March 2018 Contemporary Art Evening Auction at Sotheby's, where Sotheby's had made a pre-sale auction estimate of 4,000,000 – 6,000,000 GBP. Waltman Decl. ¶ 6 & Ex. B. Plaintiff's assertion that only an auction process can properly value the Stingel Work, and that the Stingel Work may command an auction result of more than $10 million (Br. 5), is simply wrong and amounts to pure speculation. *Under Seal v. Under Seal*, 273 F. Supp. 3d 460, 473 (S.D.N.Y. 2017) (denying preliminary injunction where allegations were "far too speculative to support a finding of imminent irreparable harm").

[12] *See, e.g.,* https://artdealers.org/appraisal-service (describing expert art appraisal service); https://www.sothebys.com/en/about/services/valuations (same)

Finally, it does not follow that Plaintiff will suffer an irreparable injury merely because it has pled its claim as one for specific performance. Br. 6-7. Plaintiff conflates the two inquiries, and the "fact that [a plaintiff] may ultimately be entitled to specific performance does not govern its entitlement to a preliminary injunction." *Westchester Fire Ins. Co. v. DeNovo Constructors, Inc.*, 177 F. Supp. 3d 810, 813 (S.D.N.Y. 2016). To conflate "the ordinary remedy of specific performance and the extraordinary remedy of a preliminary injunction" would "create a per se rule that would eliminate the crucial 'irreparable harm' branch of the test for preliminary injunctions." *Firemen's Ins. Co. of Newark, New Jersey v. Keating*, 753 F. Supp. 1146, 1151 (S.D.N.Y. 1990). Plaintiff fails to meet that test, which is the "single most important prerequisite for the issuance of a preliminary injunction." *Robins*, 713 F. Supp. 2d at 374.[13]

C. The Balance Of Hardships Tips Decidedly In Phillips' Favor

Plaintiff cannot establish that the balance of hardships tips in its favor. Not only would the mandatory injunction upset the status quo, it would force Phillips to expend time, effort, and money to make a sale that cannot later be unwound and that it never agreed to make. The extraordinary and inappropriate nature of that request for ultimate, affirmative relief is further compounded by the fact that Plaintiff has shown no irreparable harm or likelihood of success on the merits. *Doe v. Paychex, Inc.*, 2020 WL 219377, at *8 (D. Conn. Jan. 15, 2020). Plaintiff's real motive—to offload the burden of its loan obligation to Phillips in order to pay off Muses and put Phillips in Muses' place as a creditor—is not a legitimate basis for a mandatory injunction.

CONCLUSION

The Court should deny the Plaintiff's requests for relief.

[13] Plaintiff's citation to *David Tunick, Inc. v. Kornfeld*, 838 F.Supp. 848, 852 (S.D.N.Y. 1993) (Br. 6), is inapplicable. There, plaintiff bought a fake Picasso print, and the court ruled that defendant could not substitute a *different* Picasso print under the UCC. *Id.* at 851. But Plaintiff's case here has nothing to do with the UCC's substitute good test, and Plaintiff will be able to sell the same Stingel Work when the case ends.

Dated: July 2, 2020

QUINN EMANUEL URQUHART & SULLIVAN, LLP

BY: */s/ Luke Nikas*

Luke Nikas
Maaren A. Shah
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000
lukenikas@quinnemanuel.com
maarenshah@quinnemanuel.com

Attorneys for Phillips Auctioneers LLC