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 REPLY MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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Defendant's argument—that the Evening Auction[1] was date-specific (May 2020) and site-specific (an in-person auction in New York) (D.'s Memo at p. 12)—is fatally flawed. Defendant could have conducted the Evening Auction as an online auction in New York in May 2020 and illegally chose not to do so. Defendant has not satisfied its "burden of demonstrating force majeure." Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d Cir. 1985).[2] From this tainted soil grows poisonous fruit.

I. No Contract Term Requires that the Stingel Work Be Offered for Sale in New York at an In-Person Auction

Defendant's Opposition Memo is rife with misstatements about the Evening Auction.[3] Defendant has failed to identify any provision of the Stingel Consignment With Guarantee Agreement, dated June 27, 2019 ("SC;" Ex. 2), mandating that the Stingel Work be offered for sale in New York at an "***in-person auction***," in New York ***at a specific physical address*** or ***exclusively*** in New York (FAC at ¶¶ 45-46).[4] The sole contract provision cited by Defendant in which New York is referenced is ¶ 6(a) of the SC (Ex. 2):

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

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[1] Defendant's Spring 2020 evening auction of 20th Century & Contemporary Art, originally scheduled for May 2020.

[2] Plaintiff emphasizes the criticality of the allegations of the FAC. Defendant's 12(b)(6) motion, filed on July 7, 2020, is nothing more than a technique to avoid responding to the FAC allegations on Plaintiff's Order to Show Cause for injunctive relief.

[3] Defendant falsely claims that "[t]he Spring New York Evening Auction is ***not an online auction*** of contemporary art," "[t]he Spring New York Evening Auction has never once, in the entire history of Phillips' business, been held online" and "[i]t 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" (D.'s Memo at pp. 13-14) (emphasis added).

[4] Contrary to Defendant's counsel's false representations to the Court during the June 19, 2020 videoconference, to wit, "And so when the contract requires plainly that the work be offered in this specific auction in New York in person, the evening auction…" (Ex. 23, 7:13-15) and in D.'s Memo (pp. 1, 3, 6-8, 12, 14, 18, 23), that the Evening Auction was defined as an "in-person" sale.

Ex. 22 proves that this reference to New York is fully consistent with conducting an "online auction" pursuant to the SC (Ex. 2) in which the Stingel Work is offered for sale in New York and other jurisdictions worldwide via a live, real-time digital transmission. Ex. 22 is Defendant's auction schedule.[5] The first entry in the "New York" column is:

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

In Waltman Decl. Ex. E, a predecessor to Ex. 22, Defendant writes:

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

In Ex. 22 and Ex. E, Defendant claimed that the July 2, 2020 Evening Auction is a "New York" auction even though it was "***broadcast live*** from Phillips's new saleroom ***in London***" purely as an online sale with "principal auctioneer, Henry Highley [] lead[ing] the sale ***in real time*** while a video wall [] show[ed] Phillips's specialists ***on the phone with bidders***" (Ex. 16 FAC at ¶¶ 20, 42, 47-48; Ex. 1 to FAC).[6] The reference to New York in ¶ 6(a) of the SC (Ex. 2) clearly did not require that the Evening Auction be an "in-person" auction at a physical location in New York.[7]

The proof is in the pudding. The online auction in London labeled a "New York" auction best interprets the SC (Ex. 2). See incontestable video evidence that the Evening Auction was exclusively a global online auction (Ex. 28). Waltman Decl. Ex. C discusses online bidding. See ¶ 4(d)'s full delineation of online bidding procedures for the Evening Auction. Defendant admits:

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[5] Ex. 22 is an extract from Defendant's July 2, 2020 Evening Auction catalogue, available at https://issuu.com/phillipsauction/docs/ny010320_catalog?fr=sZWYxOTg1OTI2.

[6] Defendant claims there are "material differences between live and online auctions" (D.'s Memo at p. 19; Waltman Decl. at ¶¶ 9-10), but utterly fails to explain what these material differences are or how they shed any light on the express provisions of the SC (Ex. 2). In fact, an examination of Exs. C and D to the Waltman Decl. shows no material differences (JN Rep. Decl. at ¶ 14).

[7] Any ambiguity or competing interpretations of the SC (Ex. 2) must be construed against Defendant as the draftsman. See White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007).

> "An online auction is *not* a different method of conducting the same live sale that would otherwise occur in person…" (Waltman Decl. at ¶ 9; D.'s Memo at p. 7).

The Waltman Decl. supports Plaintiff as it "reach[es] outside the four corners" (D.'s Memo at 3, 19) of the SC (Ex. 2), attaching Defendant's auction calendar "as of early March 2020," which:

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

In stark contrast, the SC (Ex. 2) does not set forth "the specific location" or physical address of the Evening Auction and does not "delineate[] between live[8] and online auctions" (Id.). Neither the term "live" nor any mention of Defendant's auction calendar is found in the SC (Ex. 2).

II. No Contract Term Requires that the Evening Auction Be Conducted in May 2020

Defendant contends that the Stingel Work had to be sold in the Evening Auction in May 2020[9] (D.'s Memo at pp. 14-15 and fn 3), which is contradicted by the express terms of the SC (Ex. 2) contemplating a sale of the Stingel Work at public auction in June 2020 or later, as follows:

- ¶ 6(a) of the SC (Ex. 2) states that the Evening Auction is "***currently scheduled*** for May 2020" (emphasis added);[10]
- ¶ 6(a)(i) of the SC (Ex. 2) grants Defendant the right "to ***select, change or reschedule the place, date and time for the auction*** but any change to ***a later date than May 2020*** would be subject to [Plaintiff's] prior written consent" (emphasis added); and

[8] Defendant's use of the term "live" is muddled as Merriam Webster defines "live stream" as "to stream digital data (such as audio or video material) that is delivered continuously and is usually intended for immediate processing or playback" (Ex. 24). Defendant attempts to narrowly construe "live" to refer only to in-person events, a reading belied by the definition of "live stream" concerning events (in-person or remote) streamed in real time.

[9] Defendant's insistence that "*the* auction" means an in-person auction in New York in May 2020 (D.'s Memo at p. 14) (emphasis in original) is bizarre as Defendant did not even bother to define the term in the SC (Ex. 2) and the vast majority of references to "the auction" therein are not capitalized. To the extent that Defendant claims any ambiguity or competing interpretations of the foregoing, such must be construed against Defendant as the draftsman. See White, 9 N.Y.3d at 267.

[10] The SC (Ex. 2) is dateless with no specific date in May 2020 recited for the Evening Auction. Defendant's use of the indefinite adverb "currently" means "only at present" and "subject to change" and is antithetical to any definiteness.

- ¶ 12(a) of the SC (Ex. 2) begins, "In the event that the auction is ***postponed***…" (emphasis added).[11]

Defendant's misdirected understanding of ¶ 6(a)(i) of the SC (Ex. 2)[12] is pure gibberish. The SC (Ex. 2) shows that the Evening Auction was not required to be held in May 2020.[13] ¶ 3(c) of the SC (Ex. 2) ("…[O]r to include such Property ***in the next appropriate auction*** after restoration has been completed…) demonstrates that the date for the Evening Auction was not set in stone.[14] Defendant is estopped from standing on the terms of the SC (Ex. 2) in arguing that the Evening Auction date was set in stone when Defendant ***twice*** unilaterally orally modified the SC (Ex. 2) by rescheduling the Evening Auction without obtaining Plaintiff's written consent or claiming force majeure. See Rose v. Spa Realty Assoc's, 42 N.Y.2d 338, 344 (1977) (Ex. 16 at ¶¶ 21-22, 25-26).

III. Defendant Was Not Prevented from Performing

The non-performing party[15] must demonstrate a force majeure event "prevent[ed] [it] 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 under the agreement must be completely

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[11] Defendant's reference to its negotiations with Muses Funding I LLC is irrelevant as ***Defendant has not alleged that Plaintiff ever 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" (D.'s Memo at p. 15).

[12] That ¶ 6(a)(i) of the SC "protects Plaintiff by requiring its prior written consent if Phillips wanted to voluntarily move the auction to a different place or later date" (D.'s Memo at fn 3).

[13] Fn 8 of Defendant's Opposition Memo supports Plaintiff as Defendant was not contractually permitted to unilaterally modify performance obligations under the SC (Ex. 2).

[14] ¶ 3(c) of the SC (Ex. 2) does not, as claimed by Defendant, require the parties to negotiate new sale terms ***as a result of the Stingel Work being offered at a later auction*** (D.'s Memo at fn 3). Rather, ¶ 3(c) of the SC (Ex. 2) states that if the Stingel Work is ***lost or damaged***, requiring ***restoration***, the date and place of the Evening Auction may be changed. It should come as no great shock to Defendant that damage to an artwork might occasion a change in pre-sale estimate and, accordingly, terms of sale.

[15] Defendant's arguments in II.A.1. of D.'s Memo concerning a typographical error are a tempest in a teapot and do not affect the merits whatsoever, like so many of Defendant's contentions.

impossible. See Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep't 2001); Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F.Supp. 312, 318 (S.D.N.Y. 1989). "[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, 782 F.2d at 319.

Defendant's failure to take any steps to perform pursuant to the SC (Ex. 2), including holding the Evening Auction as an online auction in New York in May 2020, despite Defendant's uncontested ability to conduct online auctions[16], is fatal to Defendant's claims. The facts show that the Evening Auction was not date-specific or site-specific; it was held on July 2, 2020 as an online auction (see Points I and II). Defendant is estopped from invoking its alchemist interpretation of the force majeure provision for two interrelated reasons. First, as Defendant materially breached the SC (Ex. 2) by failing to obtain Plaintiff's written consent to reschedule the Evening Auction post-May 2020, Defendant—the breaching party—cannot enforce the SC (Ex. 2) against Plaintiff—the non-breaching party. See Nadeau v. Equity Residential Props. Mgmt. Corp., 251 F.Supp.3d 637, 641 (S.D.N.Y. 2017); Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 75 (1966); PDL Biopharma, Inc. v. Wohlstadter et al., 2019 WL 4305607, *16-17 (Sup. Ct. N.Y. Co. Sept. 11, 2019).

Second, Defendant should be estopped, "in the interest of fairness," from claiming force majeure as Defendant's extraordinary ***89-day delay*** is a classic breach of the implied covenant of good faith and fair dealing. See Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 7 N.Y.3d 96, 106-07 (2006). Ex. 6 is legally deemed to have been received on June 9, 2020 (FAC at ¶¶ 23, 29), ***89 days*** following Defendant's claimed postponement of the Evening Auction on March 14, 2020 (Waltman Decl. Ex. E). Defendant has proffered no reasonable excuse for waiting until the very last minute to declare force majeure and give notice to Plaintiff thereof, which

[16] In April and May 2020, during the COVID-19 pandemic, Defendant conducted at least 11 online auctions (Ex. 16 FAC at ¶ 46). Defendant has not disputed that its auctions regularly are conducted online with bids received online, via the telephone and by way of absentee bid (Id., at ¶ 51).

significantly prejudiced and irreparably harmed Plaintiff (JN Reply Decl. at ¶¶ 1-5). Defendant's authority Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp., 771 F.Supp. 63, 67-68 (S.D.N.Y. 1991), claiming that Defendant is not estopped from terminating the SC (Ex. 2) as "Paragraph 12(a) does not require any specific form or date of notice" (D.'s Memo at fn 6), is misplaced. In Toyomenka, supra, the force majeure notice was ***6 days late*** and defendant made "a reasonable effort to notify [plaintiff] of force majeure ***as soon as possible***" (emphasis added).

Defendant's site- and date- specific platform fails. 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) held that defendants were required to perform even where Government directives forced defendants to use impractical, commercially unviable methods. At bar, Defendant was "in the best position" (Id.) to insert in the SC (Ex. 2), inelegantly penned by Defendant, that the Evening Auction must be held as an in-person auction in New York on a specific date in May 2020. There is no such ink.

Defendant's attempt to distinguish Plaintiff's additional cases misleads the Court:

> "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." (D.'s Memo at p. 21 and fn 9).

Plaintiff never claimed that Defendant sought to profit by ***rescheduling the Evening Auction***. Defendant used the pandemic as a false pretext to ***unlawfully terminate its obligation*** (Ex. 16 FAC at ¶ 39; JN Decl. at ¶¶ 2, 39). Clearly, canceling a $5,000,000.00 debt was financially beneficial.

Defendant's insistence that it had no choice but to postpone the Evening Auction and terminate the SC (Ex. 2) (D.'s Memo at p. 21)—a prejudicial ***89 days*** after Defendant's March 14, 2020 announcement on its website (Waltman Decl. Ex. E)—is false (Ex. 16 FAC at ¶¶ 38-42). Defendant declined to cancel the 24 other consignment agreements (11 with guarantees) for the Evening Sale (Ex. 16 FAC at ¶¶ 41-44, 87-88, fn 9; JN Rep. Decl. at ¶ 13). Quinn Emanuel's founding partner, John Quinn, Esq., lectures at https://www.quinnemanuel.com/covid-center:

> "One thing that might shed some light on whether performance is truly impossible or whether it has just been hindered or rendered more expensive is to see what other participants in the market place are doing because if other parties in the market places are finding ways to perform their contracts, supply the goods, or whatever the particular performance is, that certainly suggests that performance was not impossible."[17]

Defendant's financial decision not to perform constitutes an unmistakable breach of contract.[18] See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., 2010 WL 1945738, *5 (Sup. Ct. Albany Co. May 12, 2010); Rivas Paniagua, Inc. v. World Airways, Inc., 673 F.Supp.708, 713 (S.D.N.Y. 1987).[19]

Defendant's cases (D.'s Memo at pp. 19-20) are not the law and involve force majeure provisions expressly mandating a ***specific form*** of delivery, unlike the SC (Ex. 2), which does not mandate that the Evening Auction be held as an in-person auction in May 2020 (see Points I and II).[20] Defendant's actual performance, including its decision not to terminate the 24 consignment agreements and its two unilateral reschedulings of the Evening Auction[21], underscores Defendant's

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[17] See also April 3, 2020 Skadden article (Ex. 25): "Companies must also assess various practical considerations, including ***whether the event can be held virtually***, or without attendees…" (emphasis added). Countless entities (commercial, educational, judicial, etc.) have been conducting business online on Zoom and Skype for Business, including this Court, which remotely conducted an online videoconference in this case on June 19, 2020.

[18] Defendant's competitors have been live-streaming online auctions with remote bidding during the COVID-19 pandemic, including, inter alia, Christie's July 10, 2020 live, online multi-part auction, titled "ONE: A Global Sale of the 20th Century" and Sotheby's June 29, 2020 digitally streamed live auction in which a Francis Bacon triptych sold for $84.6 million (FAC at ¶ 47; Exs. 26 and 27).

[19] Accordingly, Defendant's contention that its performance was "excused by the common law doctrine of impossibility" (D.'s Memo at p. 22) is entirely groundless. The single case cited by Defendant, LeRoy v. Sayers, 217 A.D.2d 63, 71 (1st Dep't 1995), concerned a house that had been damaged by a fire and the Court was not even able to determine on the summary judgment motion whether the damage was so significant that defendant could not satisfy his lease obligations.

[20] Babcock & Wilcox Co. v. Allied-General Nuclear Servs., 161 A.D.2d 350, 352 (1st Dep't 1990) is entirely inapposite as the subject contract was "for the reprocessing of spent fuel," but plaintiff demanded transportation, storage and disposal, which were "merely incidental."

[21] On two occasions in March and May 2020, Defendant rescheduled the Evening Auction to June 24-25 and July 2, 2020 without giving legal force majeure notice to Plaintiff (and with the Stingel Work remaining in the Evening Auction both times) (Ex. 16 FAC at ¶ 54). The SC (Ex. 2) does not confer on Defendant the right to postpone the Evening Auction more than once on account of

thin authority, which includes a single Second Circuit case that favors Plaintiff. In Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993), defendant was not required to perform or arrange for substitute performance after the enactment of an embargo where the parties anticipated this event and included "governmental interference" in their force majeure provision. The requirement of alternative performance cannot be eliminated.

IV. A Force Majeure Event Has Not Occurred

Defendant improperly imputes the definition of "disaster" in New York's Executive Law and other Governmental Acts and Orders (D.'s Memo at p. 16) to define "natural disaster" in ¶ 12(a) of the SC (Ex. 2). Terms found in contracts and in Governmental Orders are construed differently and are not interchangeable. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 89 (Pa. 2020) (D.'s Memo at p. 2)—decided on Pennsylvania, not New York, law concerning ejusdem generis—supports Plaintiff. In Friends, supra, the court held that ejusdem generis, which ***prevents general words in a contract from being construed broadly***, is inapplicable to statutory language where the legislature "intended to **expand** the list of disaster circumstances" (emphasis in original). New York Exec. Law 20(2)(a) intended to ***expand*** the Governor's powers in an emergency and its definition of "disaster" is construed ***broadly***, not ***narrowly as with ejusdem generis***. In Pennsylvania Dep't of Pub. Welfare v. U.S., 48 Fed. Cl. 785, 791 (2001), the court held that the legislature does not create contracts (which establish narrow economic rights and obligations between contracting parties and exist for a prescribed period), but rather laws that "are inherently subject to revision and repeal" and that cover all persons in a jurisdiction. Contracts and laws cannot be construed in the same manner.[22]

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alleged force majeure (Ex. 16 FAC at ¶¶ 20-29, 40, 54).

[22] Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) (D.'s Memo at pp. 3, 17), concerning compliance with prisoner population limits contained in a consent judgment, is irrelevant.

In Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 902 (1987), the court held that a force majeure defense is narrow and excuses nonperformance "***only if*** the force majeure clause ***specifically*** includes the event that actually prevents a party's performance."[23] Defendant contends that Governmental Orders prevented it from holding the Evening Auction as:

> "[T]he New York State and New York City governments placed severe restrictions upon all nonessential business activities" and "Certain government orders were invoked that applied to and continue to apply to Phillips' business activities" (Ex. 6).

Defendant's self-imposed condition of an in-person auction was the result of its "business decision" and a force majeure event has not occurred (Ex. 16 at ¶¶ 35-37; Pl.'s Opening Memo at pp. 12-13).

V. Plaintiff is Entitled to the Requested Injunctive Relief

Plaintiff's requested injunctive relief ***does not change*** the status quo ***as of the time the action commenced*** on June 8, 2020 (D.'s Memo at p. 9) (see Docket no. 10). Notice pursuant to Ex. 6 was given on June 9, 2020 (FAC at ¶¶ 23, 29)—***the day after this action was commenced***. WarnerVision Entm't Inc. v. Empire of Carolina, Inc, 101 F.3d 259, 261 (2d Cir. 1996) (D.'s Memo at p. 9) supports Plaintiff, holding that the "purpose of a preliminary injunction is… to maintain the status quo pending a full hearing on the merits."

Even if the Court accepts that the status quo changed ***prior*** to commencement of this action, Defendant still is wrong. In Xiotech Corp. v. Express Data Prod. Corp., 2013 WL 4425130, at *2 (N.D.N.Y. Aug. 14, 2013), the status quo change caused the irreparable harm.[24] Leonid Friedland's May 30, 2020 text (Ex. 16 ¶ 28; Ex. 5) terminated the ***one-year status quo*** (Ex. 16 at ¶¶ 20-29).[25]

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[23] See also Reade v. Stoneybrook Realty, LLC, 63 A.D.3d 433 (1st Dep't 2009); Aukema, supra, 904 F.Supp.2d at 209, emphasizing the ***specific*** event must be included in the force majeure clause.

[24] Xiotech, supra, cites Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978), holding, "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo."

[25] Defendant is estopped from claiming that Plaintiff is subject to a heightened pleading standard when Defendant changed the status quo by illegally terminating the SC (Ex. 2).

H'Shaka v. O'Gorman, 758 F. App'x 196, 198 (2d Cir. 2019) and Cacchillo v. Insmed, Inc., 638 F.3d 401, 406 (2d Cir. 2011) (D.'s Memo at pp. 9-10) support Plaintiff.[26] H'Shaka, supra, applied two alternative tests. See also Tom Doherty Assocs. v. Saban Entmt., Inc., 60 F.3d 27, 34 (2d Cir. 1995). Plaintiff satisfies both tests (JN Rep. Decl. ¶¶ 1-5) although only one is necessary. The absence of an adequate monetary remedy is inextricably tied to the extreme difficulty in calculating lost profits and business opportunities concerning unique works of art and is an element of a claim for specific performance.[27] Irreparable harm is "a common element" for a preliminary injunction and the remedy of specific performance. See Nemer Jeep-Eagle. Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 433 (2d Cir. 1993).

The irreparable harm (FAC at ¶¶ 56-65; JN Rep. Decl ¶¶ 1-5) is a continuing wrong that cannot adequately be redressed by the ultimate relief sought. See New York Pathological & X-Ray Labs., Inc. v. Immigration & Naturalization Serv., 523 F.2d 79, 81 (2d Cir. 1975). An injury is irreparable where the loss "will be very difficult to quantify at trial." Tom Doherty, supra, 60 F.3d at 38.[28]

CONCLUSION

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

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[26] Yang v. Kosinski, 960 F.3d 119 (2d Cir. 2020) (D.'s Memo at p. 9) relies on Cacchillo, supra.

[27] See Guinness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468, 473 (2d Cir. 1980), holding, "New York follows the general rule that specific performance is available where there is no adequate monetary remedy." See also Burke v. Bowen, 40 N.Y.2d 264 (1976).

[28] Levola v. Fischer, 403 F. App'x 564, 565 (2d Cir. 2010) (D.'s Memo at pp. 3, 10), is irrelevant as it concerns a prisoner who "***did not allege any facts*** to suggest that he faced a serious and immediate danger of irreparable harm." Id., at 565 (emphasis added).

Dated: New York, New York
July 9, 2020

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