

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

JN CONTEMPORARY ART LLC,

Plaintiff,

**SECOND AMENDED
COMPLAINT
(Jury Trial Demanded on All
Non-Equitable Claims)**

-against-

PHILLIPS AUCTIONEERS LLC,

Defendant.

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Plaintiff JN CONTEMPORARY ART LLC (“JNCA” or “Plaintiff”), by its attorney, AARON RICHARD GOLUB, ESQUIRE, P.C., as and for its Second Amended Complaint against Defendant PHILLIPS AUCTIONEERS LLC (“PA” or “Defendant”), alleges as follows:

THE PARTIES

1. At all relevant times, Plaintiff was and is a domestic limited liability company duly organized under the laws of the State of New York, with an office located at 980 Madison Avenue, New York, New York 10075.

2. Upon information and belief, at all relevant times, Defendant was and is a foreign limited liability company duly organized under the laws of the State of Delaware and, upon information and belief, is authorized to conduct business in the State of New York, with its principal place of business located at 450 Park Avenue, New York, New York 10022.

JURISDICTION

3. This is a civil action over which this Court has original jurisdiction under the provisions of 28 U.S.C sec. 1332(a)(1), the diversity jurisdiction statute. Complete diversity of citizenship exists between all proper parties to this action.

4. Plaintiff, a New York limited liability company and citizen of New York, asserts claims against Defendant, a limited liability company incorporated in the State of Delaware.

5. No member of Defendant is domiciled in, or a citizen of, the State of New York. Defendant is a wholly owned subsidiary company of Mercury International Ltd., which is a British Virgin Islands limited company. Mercury International Ltd. is a subsidiary of Mercury Plc, which is a foreign corporation. Complete diversity exists between the parties in this action.

6. This Second Amended Complaint seeks equitable relief and alternatively, *inter alia*, compensatory damages believed to be in excess of USD \$7,000,000.00 (USD seven million dollars) exclusive of costs, interest and consequential and incidental damages related thereto. Accordingly, the amount in controversy is in excess of the statutory minimum of USD \$75,000.00 (USD seventy-five thousand dollars).

BACKGROUND

7. Plaintiff is an art gallery in the business of buying, selling and exhibiting works of art. The Manager and principal of Plaintiff is Joseph Nahmad (“JN”).

8. Defendant is an auction house in the business of, *inter alia*, taking works of art on consignment for public or private auction.

9. Upon information and belief, Leonid Friedland (“Friedland”) is, either directly or indirectly, one of the two owners of Defendant.

A. The Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement Are Interrelated, Interconnected, Interdependent and Consideration For Each Other

10. Upon information and belief, in September or October 2018 and prior thereto, Defendant or Friedland owned the following work of art by Jean-Michel Basquiat (the “Basquiat Work”):

Jean-Michel Basquiat

Untitled

Signed, dated and inscribed “NYC 81 Jean-Michel Basquiat” on the reverse
Acrylic, oil stick, pencil, spray paint, paper collage on wood
48 x 30 x 1 1/2 in. (122 x 76.2 x 4 cm.)
Executed in 1981.

11. In or about September or October 2018, Plaintiff requested that Friedland loan the Basquiat Work for an upcoming exhibition by Plaintiff titled “Jean-Michel Basquiat | Xerox” (March 12-May 31, 2019) (the “Basquiat Exhibition”). Friedland denied the loan request unless Plaintiff agreed to guarantee that the Basquiat Work would sell at the Basquiat Exhibition. Plaintiff was unwilling to do so. In or about the end of February or the beginning of March 2019, Defendant agreed to loan the Basquiat Work to Plaintiff without any guarantee in place and stated that Defendant would entertain offers by third parties to purchase the Basquiat Work.

12. During Plaintiff’s Basquiat Exhibition, Plaintiff was unable to sell the Basquiat Work.

13. Defendant held a 20th Century & Contemporary Art Evening Sale in London on June 27, 2019, which commenced at 7:00 P.M. (“Defendant’s June 27, 2019 Auction”). The Basquiat Work was included in this auction with an estimate of £3,000,000-£5,000,000 GBP (three to five million pounds sterling) in Defendant’s auction catalogue.

14. In or about the morning of Defendant’s June 27, 2019 Auction, while JN was in London, Friedland and Miety Heiden (“Heiden”), Deputy Chairwoman of Defendant,

contacted JN and advised him that Defendant had received no interest from potential purchasers in the Basquiat Work. Friedland and Heiden asked whether Plaintiff was interested in purchasing the Basquiat Work. JN responded that Plaintiff had no such interest, but that Plaintiff would agree to a “trade” in which Plaintiff would agree to guarantee the sale of the Basquiat Work in exchange for Defendant’s agreement to guarantee the sale of Plaintiff’s “Untitled 2009” by Rudolf Stingel (the “Stingel Work”).

15. Plaintiff and Friedland negotiated the terms of the “trade”—the specific provisions of two agreements, both exclusively drafted by Defendant and dated June 27, 2019, *i.e.*, an auction agreement between Plaintiff and Defendant concerning the Basquiat Work (the “Basquiat Guarantee Agreement”) and an auction agreement between Plaintiff and Defendant concerning the Stingel Work (the “Stingel Consignment With Guarantee Agreement”). The negotiations were conducted in the London office of Defendant’s CEO Edward Dolman (“Dolman”) just prior to Defendant’s June 27, 2019 Auction with Dolman and Alexandre Reebok (“Reebok”), Defendant’s executive, also present.

16. As a matter of law, the expression “[c]onditional upon” means that Plaintiff would ***not*** have executed and agreed to be bound by and fully perform the Basquiat Guarantee Agreement had it known that Defendant would ***not*** fully perform the Stingel Consignment With Guarantee Agreement. “Conditional upon” further means that consideration for Plaintiff executing the Basquiat Guarantee Agreement included Defendant’s execution of the Stingel Consignment With Guarantee Agreement and legally required Defendant’s full performance of all of the terms and conditions therein. In this same manner, consideration for Defendant executing the Stingel Consignment With Guarantee Agreement included Plaintiff’s

execution of the Basquiat Guarantee Agreement and legally required Plaintiff's full performance of all of the terms and conditions therein.

B. The Basquiat Guarantee Agreement

17. The first paragraph of the Basquiat Guarantee Agreement provides:

“Conditional upon signature by you [Plaintiff] of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolf Stingel, *Untitled, 2009* (Contract Number 04NYD752) and conditional upon the above mentioned Property being offered for sale with a commitment by Phillips to pay the Seller [Defendant] a Guaranteed Minimum you [Plaintiff] have agreed that you will provide a third-party guarantee obligation (‘Guarantee Obligation’) as follows” (emphasis supplied).

18. Paragraphs 1-3 of the Basquiat Guarantee Agreement provide, *inter alia*, that Plaintiff must submit an irrevocable bid for the Basquiat Painting in the sum of GBP £3,000,000.00 (three million pounds sterling), plus pay all applicable fees and premium, at Defendant's June 27, 2019 Auction.

C. The Stingel Consignment With Guarantee Agreement

19. Pursuant to the Stingel Consignment With Guarantee Agreement, Plaintiff consigned the Stingel Work to Defendant.

20. The Stingel Consignment With Guarantee Agreement provides, *inter alia*, that Defendant guarantees that Plaintiff shall receive at least USD \$5,000,000.00 (USD five million dollars) with respect to the sale of the Stingel Work (“Guaranteed Minimum”) (par. 11),¹

¹ Paragraph 11 provides:

“11. GUARANTEE OF MINIMUM PRICE

(a) Subject to: (i) confirmation by Phillips following physical inspection of the Property that it is in excellent condition; and (ii) any applicable withdrawal or termination provision set forth under this Agreement, Phillips guarantees that you shall receive at least USD \$5,000,000 (five million United States dollars), with respect to the sale of the Property [the Stingel Work] (the ‘Guaranteed Minimum’).”

which shall be offered for sale in Defendant's major spring 2020 evening² auction of 20th Century & Contemporary Art, then scheduled for May 2020 (par. 6(a)) and rescheduled twice to June 24-25, 2020 and July 2, 2020 ("Spring 2020 Evening Auction").³

21. The Stingel Consignment With Guarantee Agreement also provides, *inter alia*, the following:

- i. Plaintiff shall receive 80% of the amount by which the final bid price on the Stingel Work (the "Hammer Price") exceeds the Guaranteed Minimum (par. 12(b)⁴ and par. 2);

² The term "evening auction" means Defendant's evening auction sales of contemporary works of art, which take place twice annually.

³ Paragraph 6(a) provides, in pertinent part, the following:

"6. PRE-SALE ACTIVITIES

- (a) 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**. Subject to the foregoing, we have the sole right in our reasonable discretion, and as we deem appropriate: (i) 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 your prior written consent**" (emphasis supplied) (par. 6(a)(i)).

⁴ The Stingel Consignment With Guarantee Agreement contains two paragraph 12s. One is titled "Settlement" and the other is titled "Termination." The paragraph 12(b) referred to in this paragraph 17(i) is in the paragraph 12 titled "Settlement."

Paragraph 12(b) titled "Settlement," as amended by the Amendment, provides:

"(b) If the Property is sold in the Auction and the Hammer Price is equal to or exceeds the Guaranteed Minimum, then Phillips or one of Phillips' affiliated companies will pay to you (i) the Guaranteed Minimum no later than two (2) Business Days after Phillips receives the purchase price in full cleared funds from the buyer of the Property (in an amount equal to the Guaranteed Minimum) and (ii) (if the Hammer Price exceeds the Guaranteed Minimum) the Seller's Overage Portion within two (2) Business Days after Phillips receives the Seller's Overage Portion (or any partial payment in respect thereof) from the buyer of the Property in full cleared funds (the Guaranteed Minimum plus the Seller's Overage Portion will be considered the Net Sale Proceeds for purposes of this Agreement)."

- ii. Defendant shall receive 20% of the amount by which the Hammer Price exceeds the Guaranteed Minimum (par. 2);
- iii. The Stingel Work shall be offered for sale in Defendant's major spring 2020 evening auction of 20th Century & Contemporary Art, **scheduled for May 2020** (par. 6(a))—*see* footnote 3 quoting par. 6(a)(i);
- iv. Defendant may “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**”—*see* footnote 3 quoting par. 6(a)(i) (emphasis supplied);
- v. Defendant shall remit payment to Plaintiff in full no later than 95 calendar days after the Spring 2020 Evening Auction (the “Settlement Date”) (par. 12 (a)-(c) (“Settlement”) of the Stingel Consignment With Guarantee Agreement, as amended by Paragraphs 9(a)(i)-(iii) of the Amendment);
- vi. “In the event that the auction is postponed for circumstances beyond our [Defendant] or your [Plaintiff] 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 [Defendant] obligation to make payment of the Guaranteed Minimum shall be null and void

Paragraph 2 provides:

“2. COMMISSION

For our services, we will receive and retain from the proceeds of the sale of the Property (a) a commission from you in the amount equal to twenty percent (20%) of the amount by which the final bid price on the Property (the ‘Hammer Price’) exceeds the Guaranteed Minimum (as such term is defined in Paragraph 11(a) below): and (b) a commission from the buyer of each Lot sold, which shall be calculated as a percentage of the Hammer Price, as set forth in the Conditions of Sale printed or referred to in the auction catalogue and published at www.phillips.com (the ‘Buyer's Premium’).”

“Overage” is defined as “the amount by which the Hammer Price of the Property exceeds the Guaranteed Minimum.”

“Seller’s Overage Portion” is defined “the Overage less the commission payable by you pursuant to Paragraph 2(a) above.”

and we shall have no other liability to you [Plaintiff].” (par. 12(a));⁵ and

- vii. “(b) No term of this Agreement shall be amended, supplemented or waived unless each of us has agreed to do so in writing” (par. 17(b)) (emphasis supplied).

22. Plaintiff and Muses Funding I LLC (“MFI”) executed a valid Loan and Security Agreement, dated as of December 27, 2019 (the “Loan and Security Agreement”), pursuant to which Plaintiff granted MFI a first-priority lien in the Stingel Work. The Stingel Consignment With Guarantee Agreement was amended pursuant to an Amendment to Consignment Agreement, dated as of December 27, 2019 (“Amendment”) between Plaintiff, Defendant and MFI. Pursuant to the Amendment, Defendant acknowledged that MFI is a secured party with, *inter alia*, a security interest in all of Plaintiff’s rights to the Stingel Work. Defendant was fully aware and knew at all times that Plaintiff had borrowed USD \$5,000,000.00 (USD five million dollars) on December 27, 2019 against the Stingel Work.

23. Defendant referred Plaintiff to MFI for the USD \$5,000,000.00 bridge loan (“\$5,000,000.00 Loan”), as the \$5,000,000.00 Loan was loaned against Plaintiff’s receivable from Defendant in the sum of USD \$5,000,000.00 (USD five million dollars), *i.e.*, Defendant’s guarantee pursuant to the Stingel Consignment With Guarantee Agreement.

D. Plaintiff Fully Performed The Basquiat Guarantee Agreement

24. The Basquiat Painting was Lot no. 19 in Defendant’s June 27, 2019 Auction. Plaintiff fully performed the Basquiat Guarantee Agreement and submitted an irrevocable bid in the sum of GBP £3,000,000.00 (three million pounds sterling) at Defendant’s June 27, 2019 auction. Another bidder then submitted a higher bid in the sum of GBP

⁵ The paragraph 12(a) referred to in this paragraph 16(vi) refers to the paragraph 12 titled “Termination” in the Stingel Consignment With Guarantee Agreement.

£3,200,000.00 (three million and two hundred thousand pounds sterling) (the “Basquiat Hammer Price”) and the Basquiat Painting was sold to the higher bidder. The buyer also paid Defendant additional fees (*e.g.*, a buyer’s commission/premium). The total received by Defendant from the buyer of the Basquiat Painting was GBP £3,802,000.00 (three million and eight hundred and two thousand pounds sterling).

25. Defendant was paid the entire sum of GBP £3,802,000.00 (three million and eight hundred and two thousand pounds sterling). Upon information and belief, if Plaintiff had not bid on the Basquiat Work at the June 27, 2019 Auction, no other bidder would have bid on the Basquiat Work and it would not have sold for the Basquiat Hammer Price plus the buyer’s premium.

E. Defendant Unlawfully Terminated the Stingel Consignment With Guarantee Agreement

26. Until in or about mid-May 2020, Defendant prominently used the image of the Stingel Work on its website to advertise its Spring 2020 Evening Auction, then scheduled for June 24-25, 2020. The Stingel Work was the only work of art that Defendant repeatedly used to advertise its Spring 2020 Evening Auction on its website.

27. At no time did Defendant contractually advise Plaintiff that Defendant was rescheduling, selecting a new date and time and/or changing the date and time of the Spring 2020 Evening Auction to June 24-25, 2020 and/or July 2, 2020. Defendant did so without Plaintiff’s written consent as expressly required by Paragraphs 6(a)(i) and 17(b) of the Stingel Consignment With Guarantee Agreement.

28. Upon neither of the foregoing two auction reschedulings did Defendant invoke paragraph 12(a) titled “Termination” in the Stingel Consignment With Guarantee Agreement. Defendant changed the date and time of, selected a new date and time and/or

rescheduled the Spring 2020 Evening Auction twice (starting in or about March 19, 2020) without terminating the Stingel Consignment With Guarantee Agreement. Therefore, Defendant ratified the Stingel Consignment With Guarantee Agreement and Defendant is equitably estopped from terminating the Stingel Consignment With Guarantee Agreement for any alleged contractual reasons, including postponing the auction for reasons that were beyond the parties' reasonable control, including the facts set forth in paragraphs 36-54, *infra*.

29. Paragraph 17(d) of the Stingel Consignment With Guarantee Agreement (the "Notice Provision") provides, in pertinent part:

"(d)... Phillips shall send notices to you at the address listed on the first page of this Agreement... **Notices shall be deemed to have been given five (5) calendar days after mailing to the address referred to above or within one (1) business day of delivery by hand, email, or facsimile.**" (emphasis supplied).

30. On May 30, 2020, well after the date the Spring 2020 Evening Auction could be held in May 2020,⁶ Friedland sent a WhatsApp message to JN. This WhatsApp message contained an image of page 6 of the Stingel Consignment With Guarantee Agreement (and nothing else) including, *inter alia*, the following excerpt from Paragraph 12(a) (titled "Termination") of the Stingel Consignment With Guarantee Agreement:

"(a) 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." (emphasis supplied).

⁶ May 30 and 31, 2020 were a Saturday and Sunday. The unsigned WhatsApp May 30, 2020 message from Friedland was sent *after* there could *not* have been a Spring 2020 Evening Auction in May 2020. Plaintiff had a contractual right to include the Stingel Work in the Spring 2020 Evening Auction in May 2020.

At this time, the Spring 2020 Evening Auction already had been rescheduled, a new date and time had been selected and the date and time thereof had been changed twice. Therefore, Defendant's alleged right, if any, to cancel the Stingel Consignment With Guarantee Agreement, for force majeure or otherwise, never arose and was never legally exercised.

31. The Spring 2020 Evening Auction was rescheduled, a new date and time was selected and the date and time thereof was changed twice because **Defendant**, exercising its subjective business judgment, decided to reschedule, select a new date and time and change the date and time thereof twice, and **not** due to any executive orders issued by the State of New York and/or by the Federal government relating to business being conducted or any government regulations, government orders or government executive orders (State, Federal, Local or otherwise).

32. On June 1, 2020, **after the fact**, Friedland sent another WhatsApp message to JN. Friedland attached to the WhatsApp message an **unsigned draft** of a letter (the "Unlawful Termination Letter"), in violation of the Notice Provision in the Stingel Consignment With Guarantee Agreement. Defendant's alleged WhatsApp message is not a legally valid notice as a WhatsApp message is neither delivery by mail, hand, email nor facsimile, as required by Paragraph 17(d) of the Stingel Consignment With Guarantee Agreement. This WhatsApp message was received **after** May 2020 and well **after** the Spring 2020 Evening Auction had been rescheduled twice.

33. The Unlawful Termination Letter purports to unlawfully terminate the Stingel Consignment With Guarantee Agreement, as follows:

"Dear Mr. Nahmad,

As 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 [emphasis supplied].

We are hereby giving you notice with immediate effect that: (1) Phillips is invoking its right to terminate the Consignment Agreement; (2) Phillips' obligation to make payment of the Guaranteed Minimum to you for the Property is null and void; and (3) Phillips shall have no liability to you for such actions that required under applicable governing law.

Our rights to act are as mutually agreed by you and us and are clearly set out in paragraph 12 of the Consignment Agreement (titled "Termination") which reads as follows:

'(a) 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.'" [emphasis in original]

34. When the Unlawful Termination Letter was written and received, the Spring 2020 Evening Auction already had been rescheduled for July 2, 2020, a new date and time had been selected and the date and time thereof had been changed twice; the Spring 2020 Evening Auction was ***not*** postponed.

35. On June 4, 2020, Plaintiff received, by mail, the Unlawful Termination Letter signed by Defendant. The postmark on the envelope containing the Unlawful Termination Letter is dated June 2, 2020. Pursuant to Paragraph 17(d) of the Stingel Consignment With Guarantee Agreement, the Unlawful Termination Letter is legally deemed to have been received by Plaintiff on June 9, 2020, well beyond the time Defendant rescheduled, selected a new date and time for and changed the date and time of the Spring 2020 Evening Auction twice. Thereafter, Defendant made no effort whatsoever to perform any of its obligations under the

Stingel Consignment With Guarantee Agreement. The Unlawful Termination Letter is defective and Defendant is equitably estopped from asserting the rights contained therein. As demonstrated *infra*, there was no causal nexus between any force majeure provision and Defendant's alleged inability to perform.

F. The Legal Doctrine of *Ejusdem Generis*

36. The Unlawful Termination Letter states in pertinent part:

“As 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” (emphasis supplied).

37. Pursuant to, *inter alia*, the legal doctrine of *ejusdem generis*, viz., words constituting general language of excuse are strictly construed and are not to be given the most expansive meaning possible, and instead are held to apply only to the same general kind or class as those specifically mentioned. The circumstances of the COVID-19 virus and/or governmental rules and regulations (“certain” or otherwise, and State, Federal, Local or otherwise) are definitively ***not*** in the same class or kind as the specific events stated in Paragraph 12(a) of the Stingel Consignment With Guarantee Agreement, *i.e.*, “natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination.” The subject force majeure clause is not applicable and Defendant invoked it as a pretext to not perform its contractual obligations.

38. Defendant's claimed postponement of the Spring 2020 Evening Auction was in bad faith and a business judgment, was not for the reason that the circumstances then existing were beyond its reasonable control and all events related to COVID-19 were

foreseeable. The Unlawful Termination Letter is legally defective and does not meet the specific standards of a legal force majeure termination letter or notice.

G. Defendant Is Disingenuously Using COVID-19 and/or Governmental Orders as a Pretext to Breach

39. After having rescheduled, selected a new date and time and/or changed the date and time of the Spring 2020 Evening Auction twice without Plaintiff's written consent and without canceling the Stingel Consignment with Guarantee Agreement, Defendant proceeded with its "major spring 2020 evening auction of 20th Century & Contemporary Art" (par. 6(a) Stingel Consignment With Guarantee Agreement) on July 2, 2020—*see* paragraph 45, *infra*.

40. Defendant made a dishonest *commercial* decision to illegally terminate the Stingel Consignment With Guarantee Agreement because of Defendant's belief that the market for works of art by Rudolf Stingel had weakened. Defendant's actions were a voluntary and discretionary business decision—nothing short of a case of buyer's remorse, a dishonest rewrite of the past and Defendant canceling a commercial liability—and not a product of force majeure. Defendant rode the coattails of COVID-19 to escape its binding contractual obligations.

41. Defendant is guilty of equitable estoppel as Defendant did not cancel the Stingel Consignment With Guarantee Agreement on the two occasions in May and June 2020 when Defendant claimed to have "postponed" the Spring 2020 Evening Auction. At no time was Defendant's obligation to perform under the Stingel Consignment With Guarantee Agreement rendered or deemed to be impossible.

42. In point of fact, as demonstrated herein, all such circumstances of conducting the Spring 2020 Evening Auction were *not* beyond Defendant's reasonable control—the COVID-19 event, together with governmental regulations, orders or executive orders (State,

Federal, Local or otherwise), does not specifically defeat Defendant's obligation to perform the Stingel Consignment With Guarantee Agreement. The exercise of business judgment is not a pretext for applying force majeure and, accordingly, Defendant breached the Stingel Consignment With Guarantee Agreement.

43. Defendant selectively and prejudicially terminated the Stingel Consignment With Guarantee Agreement, but not the auction, because of the guarantee provision in the Stingel Consignment With Guarantee Agreement, which required Defendant to pay Plaintiff the Guaranteed Minimum in the sum of USD \$5,000,000.00 (USD five million dollars). During the COVID-19 pandemic, Defendant did not terminate any consignment agreements from January 1, 2020 through July 2, 2020 (with or without guarantees) for the twice rescheduled Spring 2020 Evening Auction with the sole exception of the Stingel Consignment With Guarantee Agreement. On July 2, 2020, the Spring 2020 Evening Auction was conducted in a minimum of three ways (none of which were in person): online; on the telephone; and by way of absentee bid.⁷ These three practices are classically established practices of purchasing art in the auction world. The auctioneer Henry Highley was at Phillips London at 30 Berkeley Square, Mayfair, London and there were no in-person rooms provided in any of Defendant's locations throughout the world, including in New York, Hong Kong, Geneva, Antwerp and Moscow, which further demonstrates that the Spring 2020 Evening Auction could have been and was fully held online. The auction was streamed live online from London and most of the artworks were located in New York. Defendant has published on its website (<https://www.phillips.com/auctions/auction/NY010320>) the 25 lots in the July 2, 2020 Spring

⁷ An "absentee bid" is a method of bidding for those individuals who do not want to attend an auction. Bidders fill out an absentee bidding form and submit it to the auction house prior to the auction. An absentee bid is also known as a "written" bid, a "commission" bid or an "order" bid.

2020 Evening Auction, which commenced at 6:00 P.M., including the estimates and actual sale results for each of the 25 lots. At least 11 of the 25 lots had Defendant's guarantee or a third-party guarantee, five sold for over USD \$1,000,000.00 (and three of those five, sold for well over USD \$1,000,000).⁸ The July 2, Spring 2020 Evening Auction was vigorously advertised by

⁸ As follows (Ex. 1):

- i. Lot no. 5: *Noël* by Joan Mitchell- guaranteed and estimated at USD \$9,500,000 to USD \$12,500,000, and sold for \$11,062,500 (Ex. 1);
- ii. Lot no. 8: *COMPANION (DETAIL OF CROWD SHOT)* by KAWS- guaranteed and estimated at USD \$1,200,000 to USD \$1,800,000 and sold for \$1,380,000 (Ex. 1);
- iii. Lot no. 10: *Victor 25448* by Jean-Michel Basquiat- guaranteed and estimated at USD \$8,000,000 to USD \$12,000,000 and sold for \$9,250,000 (Ex. 1);
- iv. Lot no. 11: *Stump Head* by George Condo- guaranteed and estimated at USD \$900,000 to USD \$1,200,000 and sold for \$1,050,000 (Ex. 1);
- v. Lot no. 12: *Monkey Poison* by Banksy- guaranteed and estimated at USD \$1,800,000 to USD \$2,500,000 and sold for \$2,000,000 (Ex. 1);
- vi. Lot no. 13: *Humpty Dumpty* by Maxfield Parrish- guaranteed and estimated at USD \$400,000 to USD \$600,000 and sold for \$740,000 (Ex. 1);
- vii. Lot no. 15: *Sometimes I Feel Like a Motherless Child* by Charles White- guaranteed and estimated at USD \$700,000 to USD \$1,000,000 and sold for \$800,000 (Ex. 1);
- viii. Lot no. 16: *Motherboard* by Ali Banisadr- guaranteed and estimated at USD \$400,000 to USD \$600,000 and sold for \$572,000 (Ex. 1);
- ix. Lot no. 19: *Notre Dame, Paris* by Thomas Struth- guaranteed and estimated at USD \$300,000 to USD \$500,000 and sold for \$400,000 (Ex. 1);
- x. Lot no. 20: *Hidden Drawing (Jordan begins 8th season as No. 1)* by David Hammons- guaranteed and estimated at USD \$150,000 to USD \$200,000 and sold for \$181,250 (Ex. 1); and
- xi. Lot no. 21: *L'arlequin / Pierrot ou Colombine* by Julio González- guaranteed and estimated at USD \$500,000 to USD \$700,000 and sold for \$920,000 (Ex. 1).

Kamila Kerimova, Specialist, Director, Head of Day Sales at Defendant. Defendant publicly, through its website, the internet and otherwise, advertised and encouraged its clients and the public to bid online in the July 2, 2020 sale and in past sales. Defendant continues to do so for all of its upcoming sales, rendering absolutely unnecessary in-person bidding in an auction room in Defendant's New York headquarters at 450 Park Avenue (as it has been for well over a decade).

44. In Ex. 4, a catalogue extract for Defendant's Spring 2020 Evening Auction,⁹ held on July 2, 2020, Defendant listed several upcoming auctions. 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."

45. In Ex. 5, a predecessor to Ex. 4, Defendant wrote:

"London and New York 20th Century & Contemporary Art Evening Sales to be consolidated into one ***New York auction***" (emphasis supplied) (Ex. 5 p. 2 in 'Spring 2020 Updated Calendar').

46. On or about June 11, 2020, Defendant circulated an advertisement in the New York Times, and upon information and belief in other media throughout the world, captioned "BID FROM ANYWHERE EASIER THAN EVER" with an image of an individual pointing to a smartphone (Ex. 2). In addition, Defendant stated on its website on June 12, 2020, the following:

"Over the coming weeks, we will host live auctions in all the categories that Phillips is proud to represent... These auctions will be held live with our auctioneers at the podium... ***and online bidding is encouraged***" (Ex. 3) (emphasis supplied).

⁹ Available at: https://issuu.com/phillipsauction/docs/ny010320_catalog?fr=sZWYxOTg1OTI2.

47. Defendant's detailed conditions of sale for online auctions (Ex. 6), including, *inter alia*, Paragraph (d) thereto, demonstrate that Defendant regularly conducts and fully embraces online auctions featuring no in-person bidders at physical, brick-and-mortar auction houses.

H. Defendant Has Not Been Prevented From Holding the Auction

48. Defendant's statement in its Unlawful Termination Letter—that “[d]ue to these circumstances and the continuing government orders, **we have been prevented from holding the Auction**” (emphasis supplied)—was false and a breach of the Stingel Consignment With Guarantee Agreement, in violation of par. 12(a) thereof titled “Termination.” Defendant's claimed postponement of the Spring 2020 Evening Auction was under circumstances that were **not** beyond Defendant's reasonable control (one cannot be prevented from doing something that one has the ability to do), as Defendant regularly, throughout 2020 and for over five years prior thereto, has been conducting online, telephone and computer bid auctions.

49. Nowhere in the Stingel Consignment With Guarantee Agreement is there a provision that the Spring 2020 Evening Auction shall be held in-person, notwithstanding Defendant's counsel's misrepresentation, on June 19, 2020 during a Court conference (Transcript p. 7, Docket no. 49-2), that the Stingel Consignment With Guarantee Agreement provides that the Spring 2020 Evening Auction must be an in-person auction. In that auction held on July 2, 2020, as in all of Defendant's auctions, there was vigorous telephone, streaming/online (click on a computer or smartphone to bid) and absentee bidding. Defendant's website at <https://www.phillips.com> advertised and conducted the following online auctions held **since April 2020**, including, without limitation, the following online 2020 auctions:

- i. Online Auction for May 26 – June 4, 2020 titled “connect /reflect/ COLLECT a selection of contemporary art Online Auction;”

- ii. Online Auction for May 20 - May 28, 2020 titled “REFRESH: RELOAD Online Auction;”
- iii. Online Auction for May 13 – May 21 titled “Happy Hour: Online Auction;”
- iv. Online Auction for May 13 – May 21 titled “Shaping the Surface: Online Auction;”
- v. Online Auction for April 2 – May 7, 2020 titled “April Showers: Online Auction;”
- vi. Online Auction for April 29 – May 7, 2020 titled “Bloom: Online Auction;”
- vii. Online Auction for April 22 – April 30, 2020 titled “Hard-Edged: Online Auction;”
- viii. Online Auction for April 22 – April 30, 2020 titled “Habitat: Online Auction;”
- ix. Online Auction for April 15 – April 23, 2020 titled “Desktop: Online Auction;”
- x. Online Auction for April 15 – April 23, 2020 titled “Current Mood: Online Auction;” and
- xi. Online Auction for April 8 - April 16, 2020 titled "Editions Online.”

H.1. Judicial Notice

50. The Court is referred to, and Plaintiff respectfully requests the Court to take judicial notice of, the plethora of news articles related to the 2020 online art sales and the ongoing streaming and online auctions previously, currently and in the future being conducted throughout the world by Defendant, Christie’s and Sotheby’s, including, without limitation, the world’s most important art fair, Art Basel Switzerland, which ran this year from June 17-26, 2020, and which, for the first time, was conducted entirely via the internet by online viewing

rooms with no physical presence of collectors or dealers. Plaintiff respectfully requests that the Court take judicial notice of three articles incorporated herein (among many on the same subject from various major publications): (i) From the Wall Street Journal May 27, 2020 edition, titled “Online Auctions, Sidewalk Concerts and Virtual Tours;” (ii) From the New York Times May 29, 2020 edition, titled “Sotheby’s to Hold ‘Live’ Auctions in June, Remotely;” and (iii) From Artnet, June 18, 2020, titled “A \$10 Million Basquiat and a \$35 Million Barnett Newman Are the Latest Big-Ticket Lots Secured for the Socially Distanced Summer Auction Season.” **The Basquiat work, valued at USD \$10,000,000.00 (USD ten million dollars), was offered by Defendant in the Spring 2020 Evening Auction sale held on July 2, 2020.** These articles fully describe the importance and dominant method of selling artworks throughout the world since and prior to the onset of COVID-19 and as this case is being litigated.

51. The Court respectfully should take judicial notice that well before Defendant illegally notified Plaintiff that it was declaring force majeure, Defendant was contradicting itself, as stated *supra* and *infra*. In the Wall Street Journal article of May 27, 2020, Defendant’s Chairman and CEO is quoted as saying:

“The situation would even be more dire had the major houses not already **consigned the bulk of their offerings for their benchmark sales before the pandemic hit, shoring up supply throughout the summer**” (emphasis supplied).

Prior thereto, on March 19, 2020, Defendant issued a press release, published by the Robb Report and other publications, that stated in part:

“Our experienced team of industry specialists remains committed to working with the community in the coming weeks and engaging with them over the phone and across digital lines.”

There was no mention of an in-person auction. On June 12, 2020, Defendant’s Chairwoman, Cheyenne Westphal, circulated a worldwide internet announcement, stating:

“We are hopeful that this season will bring some much needed color and positive energy to the art world and we look forward to seeing you, **be it remotely** or in person” (emphasis supplied).

The above-referenced Artnet article of June 18, 2020 (*see par. 50*) also reports as follows:

“The Phillips auction, on July 2, 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.

The sale will be broadcast live from Phillips’s new saleroom in London. The company’s principal auctioneer, Henry Highley, will lead the sale in real time while a video wall will show Phillips’s specialists on the phone with bidders.

“We’re thrilled to bring our marquee evening sale to collectors worldwide in a format that will capture the intimacy and excitement of being in the room,” Jean-Paul Engelen, Phillips’s deputy chairman and worldwide co-head of 20th Century & Contemporary Art, says in a statement.

Painted in 1987, a year before his death, Basquiat’s canvas *Victor 25448* was last offered at auction in 2008, when it went for \$3.5 million at Christie’s post-war and contemporary art evening sale. Now, Phillips is hoping to replicate the luck it had in 2018, when it sold another major Basquiat work, a 1984 painting titled *Flexible*, for \$43 million—doubling the work’s low estimate.

Other highlights from the Phillips sale next month include Joan Mitchell’s 1961-62 abstraction *Noël* (estimated at \$9.5 million to \$12.5 million); a never-before-offered 1921 *Humpty Dumpty* painting by pop-surrealist Maxfield Parrish (\$400,000 to \$600,000); and a 1958 ink and wash drawing by Charles White (\$700,000 to \$1 million). All three artworks, as well as the Basquiat, carry a guarantee.

The Newman work notably is not guaranteed, however, suggesting that the seller is confident in its hefty price tag.”

52. The Court respectfully should take further judicial notice that:

(i) Defendant’s website contains an online bidding guide and an online viewing room and Defendant advertises in newspapers and elsewhere to the public that bidders can bid from anywhere, even with their telephones;

(ii) Defendant's website advertised two online auctions for its Contemporary Art department for the periods of May 26-June 4, 2020 and June 5-15, 2020 with an online viewing room; and

(iii) Defendant's website advertised three auctions for its 20th Century & Contemporary Art department to take place on July 2, 2020, *viz.*, a morning online auction commencing at 10:00 A.M., an afternoon auction commencing at 2:00 P.M. and its Evening Auction commencing at 6:00 P.M.

53. Upon information and belief, over 100 consignors consigned their works of art to Plaintiff for inclusion in the foregoing multiple online auctions, including those on July 2, 2020. Defendant failed to offer any explanation whatsoever as to why it could not include the Stingel Work in an online auction such as the Spring 2020 Evening Auction, rescheduled twice for June 24-25 and July 2, 2020.

54. Defendant's statements, actions and past and future online and live real time auctions, such as the Spring 2020 Evening Auction, held on July 2, 2020 and originating in London, demonstrate beyond the pale that the circumstances of conducting the Spring 2020 Evening Auction were not beyond the reasonable control of Defendant and were objectively possible to perform because, *inter alia*, Defendant's auctions are regularly conducted online, on the telephone and by way of absentee bid. At all relevant times, conducting an online auction, like the twice rescheduled Spring 2020 Evening Auction held on July 2, 2020, was and is not beyond Defendant's reasonable control, Defendant's performance was not rendered impossible for the reason of force majeure or any other reason and Defendant failed to meet any standard for invoking force majeure. All events related to COVID-19 were foreseeable.

**AS AND FOR A FIRST CAUSE OF ACTION
(Defendant's Breach of the Stingel Consignment With Guarantee Agreement—
Defendant Failed to Obtain Plaintiff's Written Consent to Reschedule, Select a New Date
and Time and/or Change the Date and Time of the Spring 2020 Auction)**

55. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

56. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement, dated June 27, 2019.

57. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement required to be performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

58. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement and chose not to do so.

59. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement.

60. Pursuant to Paragraphs 6(a)(i) and/or 17(b) of the Stingel Consignment With Guarantee Agreement, Defendant was required to obtain Plaintiff's written consent to reschedule, select a new date and time and/or change the date and time of the Spring 2020 Evening Auction to a date later than May 2020, including June 24-25, 2020, July 2, 2020 or any date thereafter.

61. Defendant failed to obtain or even seek Plaintiff's written consent to reschedule, select a new date and time and/or change the date and time of the Spring 2020 Evening Auction to a date later than May 2020. By twice rescheduling, selecting a new date and

time and/or changing the date and time of the Spring 2020 Evening Auction to June 24-25, 2020 and subsequently to July 2, 2020 without Plaintiff's written consent, Defendant breached the Stingel Consignment With Guarantee Agreement. *See* Paragraphs 26-35, *supra*.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

62. Plaintiff has suffered significant monetary damages from Defendant's breaches of the Stingel Consignment With Guarantee Agreement, including, *inter alia*, Defendant's failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant's "burning" of the Stingel Work (*see* Paragraphs 104, 126, *infra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;

- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

63. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement.

64. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A SECOND CAUSE OF ACTION
(Defendant's Breach of the Stingel Consignment With Guarantee Agreement—
Defendant Unlawfully Terminated the Stingel Consignment With Guarantee Agreement)**

65. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

66. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement, dated June 27, 2019.

67. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement required to be performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

68. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement, including, *inter alia*, auctioning the Stingel Work and paying the Guaranteed Minimum if due, and chose not to do so.

69. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement.

70. Pursuant to Paragraph 12(a) ("Termination") of the Stingel Consignment With Guarantee Agreement, Defendant could terminate the Stingel Consignment With Guarantee Agreement only "[i]n the event that the auction is postponed for circumstances beyond our or your reasonable control...."

71. As set forth in Paragraphs 36-38, *supra*, and in accordance with the legal doctrine of *ejusdem generis*, as the COVID-19 pandemic and governmental orders were not enumerated in or of the same general kind or class as the circumstances specifically included in the force majeure clause of the Stingel Consignment With Guarantee Agreement, such clause is not applicable and cannot be invoked to terminate the Stingel Consignment With Guarantee Agreement.

72. In any event, as set forth in Paragraphs 39-54, *supra*, the circumstances of the Spring 2020 Evening Auction were not beyond Defendant's reasonable control as Defendant was not prevented from conducting the Spring 2020 Evening Auction as an online, real-time

auction livestreamed to bidders throughout the world (including the Stingel Work) as Defendant did on July 2, 2020 (without offering the Stingel Work for sale).

73. Defendant illegally postponed the Spring 2020 Evening Auction and, on two occasions in March and May 2020, rescheduled, selected a new date and time and/or changed the date and time of the Spring 2020 Evening Auction to June 24-25, 2020 and July 2, 2020, respectively, without giving legal force majeure notice to Plaintiff. On May 30, 2020, the Spring 2020 Evening Auction had not been postponed, but rather twice rescheduled with a new date and time selected and the date and time thereof changed to July 2, 2020. If Defendant is deemed to have postponed the Spring 2020 Evening Auction, the Stingel Consignment With Guarantee Agreement does not give Defendant the right to postpone the Spring 2020 Evening Auction for Defendant's stated reasons in the Unlawful Termination Letter. Accordingly, invoking force majeure to cancel the Stingel Consignment With Guarantee Agreement on the basis of postponement is and was a breach of the Stingel Consignment With Guarantee Agreement as Defendant no longer had such force majeure right and Defendant is equitably estopped from asserting any force majeure right.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

74. Plaintiff has suffered significant monetary damages from Defendant's breaches of the Stingel Consignment With Guarantee Agreement, including, *inter alia*, Defendant's failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant's "burning" of the Stingel Work (*see* Paragraphs 104, 126, *infra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

75. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto

and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement.

76. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A THIRD CAUSE OF ACTION
(Defendant's Breach of the Stingel Consignment With Guarantee Agreement—
Defendant Failed to Offer the Stingel Work for Sale in the Spring 2020 Evening Auction
With the Guaranteed Minimum and Unlawfully Refused to Pay Plaintiff in Full By the
Settlement Date)**

77. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

78. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement, dated June 27, 2019.

79. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement required to be performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

80. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement and chose not to do so.

81. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement.

82. Pursuant to Paragraphs 6(a) and 11(a) of the Stingel Consignment With Guarantee Agreement, Defendant was required to offer the Stingel Work for sale in the Spring 2020 Evening Auction while guaranteeing that Plaintiff would receive at least USD \$5,000,000.00 (USD five million dollars) in connection with the auction. Pursuant to Paragraphs 12(a)-(c) (“Settlement”) of the Stingel Consignment With Guarantee Agreement, as amended by Paragraphs 9(a)(i)-(iii) of the Amendment, Defendant was required to pay Plaintiff in full no later than the Settlement Date—95 calendar days after the Spring 2020 Evening Auction.

83. As Defendant failed to offer the Stingel Work for sale in the Spring 2020 Evening Auction and has unequivocally stated that it will not pay the Guaranteed Minimum or any other amount to Plaintiff by the Settlement Date or at any time thereafter, Defendant breached the Stingel Consignment With Guarantee Agreement.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

84. Plaintiff has suffered significant monetary damages from Defendant’s breaches of the Stingel Consignment With Guarantee Agreement, including, *inter alia*, Defendant’s failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant’s “burning” of the Stingel Work (*see* Paragraphs 104, 126, *infra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant’s next auction of Contemporary Art;

- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

85. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan

from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement.

86. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A FOURTH CAUSE OF ACTION
(Defendant's Breach of the Basquiat Guarantee Agreement)**

87. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

88. Plaintiff and Defendant entered into the Basquiat Guarantee Agreement, dated June 27, 2019.

89. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Basquiat Guarantee Agreement and did perform all of the terms and conditions of the Basquiat Guarantee Agreement required to be performed on Plaintiff's part. Defendant was fully given what it contracted for on June 27, 2019 and Defendant reaped the full benefit and profit contracted for. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

90. As a result of Plaintiff's full performance of its obligations pursuant to the Basquiat Guarantee Agreement, Defendant received the entire proceeds of the auction of the Basquiat Work with costs and a buyer's premium fee for a total sum of GBP £3,802,000.00 (three million and eight hundred and two thousand pounds sterling).

91. At all relevant times, Defendant could have performed all of its obligations under the Basquiat Guarantee Agreement and chose not to do so.

92. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Basquiat Guarantee Agreement.

93. As a matter of law, as the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement were interrelated, interconnected, interdependent and consideration for each other, the use of the word “conditional” in the Basquiat Guarantee Agreement, referring to the Stingel Consignment With Guarantee Agreement, bound Defendant to fully perform the terms of the Stingel Consignment With Guarantee Agreement. Defendant breached the Basquiat Guarantee Agreement by failing to perform the Stingel Consignment With Guarantee Agreement as set forth in Paragraphs 55-61, 65-73 and 77-83, *supra*.

94. As the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement were consideration for each other and Plaintiff fully performed pursuant to the Basquiat Guarantee Agreement, the only act left was for Defendant to fully perform pursuant to the Stingel Consignment With Guarantee Agreement.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

95. Plaintiff has suffered significant monetary damages from Defendant’s breaches of the Basquiat Guarantee Agreement, including, *inter alia*, Defendant’s failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant’s “burning” of the Stingel Work (*see* Paragraphs 104, 126, *infra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Basquiat Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

96. In the event the Court does not grant specific performance by Defendant of the Basquiat Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including,

without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Basquiat Guarantee Agreement.

97. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A FIFTH CAUSE OF ACTION
(Defendant's Breach of the Implied Covenant of Good Faith and Fair Dealing)**

98. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

99. An implied covenant of good faith and fair dealing is present in every contract, including the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement, and compelled Defendant to abstain from taking any actions that would destroy or injure Plaintiff's right to receive the fruits of the subject agreements.

100. Defendant made an unlawful business decision motivated by the fear that Defendant would lose money on the Guaranteed Minimum and schemed to use the COVID-19 pandemic as a pretext to escape a perceived financial burden. Defendant deprived Plaintiff of the right to receive Plaintiff's bargained-for benefits under the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement by economically rewriting the past.

101. Implied in the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not put Plaintiff in a position where Plaintiff could not protect the value of the Stingel Work—by

making alternative arrangements in March, April and/or May 2020 to privately sell the Stingel Work or offer it for sale at a Christie's or Sotheby's public auction—by misrepresenting to Plaintiff that Defendant would include the Stingel Work in the rescheduled Spring 2020 Evening Auction and, in the eleventh hour, canceling the Stingel Consignment With Guarantee Agreement.

102. Subsequent to announcing on its website on March 14, 2020 that it was postponing auctions, Defendant, through Heiden, materially misrepresented to Plaintiff in April 2020 that Defendant would honor all contractual commitments with consignors. In fact, Defendant prominently used the image of the Stingel Work on Defendant's website until in or about mid-May 2020 to advertise and attract bidders for the twice rescheduled Spring 2020 Evening Auction, leading Plaintiff and the art world to believe that the Stingel Work would be included in the rescheduled Spring 2020 Evening Auction.

103. On May 26, 2020, Heiden and Friedland told JN that Defendant was considering moving the Stingel Work to an auction in November 2020 **with the Guaranteed Minimum still in place**. JN and Friedland discussed potential payment and interest terms. There was never any indication that Defendant would attempt to eliminate the Guaranteed Minimum in the Stingel Consignment With Guarantee Agreement.

104. Defendant's misrepresentations, among other things, lulled Plaintiff into a false sense of security as Defendant declared force majeure at the last moment and made it impossible for Plaintiff to arrange with Christie's or Sotheby's to have the Stingel Work offered for sale in their prominent upcoming auctions with a replacement guarantee. The removal of the Stingel Work from the rescheduled Spring 2020 Evening Auction "burned" the Stingel Work in the art world with prospective buyers now aware that Defendant failed to generate sufficient

purchase interest in the Stingel Work. The interest that could have been generated in the Stingel Work was corrupted by Defendant's actions, which gravely devalued the Stingel Work in the art world.

105. Implied in the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not act in bad faith by terminating the Stingel Consignment With Guarantee Agreement because of Defendant's decision to rid itself of the financial risk of guaranteeing the Stingel Work.

106. Defendant's unlawful actions destroyed Plaintiff's right to receive the fruits of the Stingel Consignment With Guarantee Agreement insofar as Defendant terminated the Stingel Consignment With Guarantee Agreement despite Defendant's ability and intention to hold the Spring 2020 Evening Auction as an online, real-time auction (as it did on July 2, 2020). Throughout the COVID-19 pandemic, Defendant has held online auctions and Defendant advertised the rescheduled Spring 2020 Evening Auction that was held on July 2, 2020 by trumpeting the ease of online bidding (Exs. 1-3). Upon information and belief, discovery will demonstrate that Defendant terminated the Stingel Consignment With Guarantee Agreement because of the perceived weakness of the art market for Stingel works and for no other reason.

107. Implied in the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not, as aforesaid, prejudicially and discriminatorily treat the Stingel Work differently than the other artworks consigned for the Spring 2020 Evening Auction (as a result of Defendant's legal obligation to remit to Plaintiff the Guaranteed Minimum) and unlawfully terminate the Stingel Consignment With Guarantee Agreement while maintaining in place the other consignment agreements for the Spring 2020 Evening Auction.

108. By unlawfully terminating the Stingel Consignment With Guarantee Agreement while declining to terminate or amend and in fact honoring all other consignment agreements (with or without guarantees) for the Spring 2020 Evening Auction, Defendant is treating Plaintiff prejudicially and punitively as a result of Defendant's Guaranteed Minimum financial obligation and Defendant's negative concerns about the art market for the Stingel Work are superseding Defendant's obligations with respect to the Stingel Consignment With Guarantee Agreement. Buyer's remorse is not a legal basis for terminating an agreement.

109. Further implied in the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not induce Plaintiff to fully perform under the Basquiat Guarantee Agreement and then refuse to perform its obligations under and instead terminate the interrelated Stingel Consignment With Guarantee Agreement.

110. Despite the parties' understanding that the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement were interrelated, interconnected, interdependent and consideration for each other and subsequent to Plaintiff's submission of an irrevocable bid for the Basquiat Work in the sum of GBP £3,000,000.00 (three million pounds sterling), Defendant turned its back on its legal obligations and unlawfully terminated the Stingel Consignment With Guarantee Agreement. Plaintiff would not have entered into the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement had Plaintiff known of and/or had Defendant not concealed from Plaintiff that Defendant intended to duplicitously uncouple the two agreements and thwart Plaintiff's reasonable expectations.

111. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement, dated June 27, 2019.

112. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement required to be performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

113. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement and chose not to do so.

114. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

115. Plaintiff has suffered significant monetary damages from Defendant's breaches of the Basquiat Guarantee Agreement, the Stingel Consignment With Guarantee Agreement and the implied covenant of good faith and fair dealing, including, *inter alia*, Defendant's failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant's "burning" of the Stingel Work (*see* Paragraphs 104, *supra* and 126, *infra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;

- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

116. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan

from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement.

117. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A SIXTH CAUSE OF ACTION
(Equitable Estoppel)**

118. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

119. Defendant intentionally failed to disclose to Plaintiff that, regardless of Defendant's ability to conduct online auctions during the COVID-19 pandemic, Defendant intended to terminate the Stingel Consignment With Guarantee Agreement because Defendant formed the opinions that the Stingel market was weak and that Defendant would have difficulty selling the Stingel Work and/or meeting the Guaranteed Minimum, thereby incurring a financial loss.

120. Prior to sending the Unlawful Termination Letter a prejudicial 89 days after Defendant's March 14, 2020 announcement on its website that it was postponing auctions, Defendant, through Heiden, materially misrepresented to Plaintiff in April 2020 that Defendant would honor all contractual commitments with consignors. In fact, Defendant prominently used the image of the Stingel Work on Defendant's website until in or about mid-May 2020 to advertise and attract bidders for the rescheduled Spring 2020 Evening Auction, leading Plaintiff

and the art world to believe that the Stingel Work would be included in the rescheduled Spring 2020 Evening Auction.

121. On May 26, 2020, Heiden and Friedland told JN that Defendant was considering moving the Stingel Work to an auction in November 2020 **with the Guaranteed Minimum still in place**. JN and Friedland discussed potential payment and interest terms. There was never any indication that Defendant would attempt to eliminate the Guaranteed Minimum in the Stingel Consignment With Guarantee Agreement.

122. Defendant rescheduled the Spring 2020 Evening Auction twice without seeking Plaintiff's written consent, a clear breach of the Stingel Consignment With Guarantee Agreement, and is equitably estopped from invoking Paragraph 12(a) to terminate the Stingel Consignment With Guarantee Agreement.

123. Defendant further is equitably estopped from asserting that the Stingel Consignment With Guarantee Agreement was exclusively limited to an in-person auction in New York in May 2020. As discussed in Paragraphs 41-43, *supra*, the Spring 2020 Evening Auction, which was rescheduled twice and held on July 2, 2020, was conducted online, on the telephone and by way of absentee bids with Defendant's auctioneer Henry Highley physically located in London and the auction livestreamed online in real time globally. There were no in-person rooms provided in any of Defendant's locations throughout the world. As set forth in Exs. 4 and 5, Defendant unequivocally declared that the twice rescheduled online Spring 2020 Evening Auction, held on July 2, 2020 with the auctioneer physically located in London, was a "New York auction," which renders meaningless Defendant's contractual interpretation that pursuant to the Stingel Consignment with Guarantee Agreement, the Spring 2020 Evening Auction had to be held in May 2020 in person in New York at Defendant (*see* Declaration of Hartley Waltman,

sworn to July 2, 2020, at par. 7; *see also* Defendant's Opposition to Plaintiff's Order to Show Cause for Preliminary Injunction and Temporary Restraining Order, dated July 2, 2020, at p. 6). Defendant's interpretation of the Stingel Consignment with Guarantee Agreement as requiring a physical, in-person auction in New York in May 2020 is flatly contradicted and obviated by Defendant's choice of language and actions in dubbing an online auction with the auctioneer physically located in London a "New York auction." Upon information and belief, Defendant did not terminate or amend any other consignment agreements for the twice rescheduled Spring 2020 Evening Auction that referenced a May 2020 New York auction.

124. Defendant concealed from Plaintiff material facts relating to Defendant's real business justification for terminating the Stingel Consignment With Guarantee Agreement (Defendant hijacked the COVID-19 pandemic as a pretextual smokescreen) and Defendant's decision not to terminate or amend 24 other consignment agreements for artworks to be offered in the Spring 2020 Evening Auction despite the COVID-19 pandemic.

125. Defendant took the foregoing actions knowing that it would not honor its binding contractual commitments to Plaintiff and instead would use the COVID-19 pandemic as a pretext for severing a perceived liability while deciding not to terminate or amend other purportedly more advantageous consignment agreements for the Spring 2020 Evening Auction.

126. Plaintiff acted upon Defendant's conduct and reasonably relied on Defendant's misrepresentations and concealment to its detriment by refraining from contracting with private purchasers or with Christie's or Sotheby's to offer the Stingel Work for sale at a public auction. Had Plaintiff known that Defendant would illegally terminate the Stingel Consignment With Guarantee Agreement and decline to include the Stingel Work in the rescheduled Spring 2020 Evening Auction, Plaintiff would have tried to sell the Stingel Work

privately or negotiated a replacement guarantee with Christie's or Sotheby's. Such alternatives were foreclosed to Plaintiff as a result of Defendant's last-minute declaration of force majeure. As a result of Defendant's conduct, including the attendant international publicity connected to this lawsuit (*i.e.*, Bloomberg News on June 26, 2020 and Artnet News on July 8, 2020), the value of the Stingel Work has been substantially reduced in the eyes of potential purchasers and the Stingel Work has been "burned" in the marketplace with prospective buyers now aware that Defendant failed to generate sufficient purchase interest in the Stingel Work.

127. Plaintiff did not know, and had no reasonable means of knowing, the foregoing, including, inter alia, Defendant's illegal scheming. To the contrary, all indications were that Defendant would include the Stingel Work in the twice rescheduled Spring 2020 Evening Auction.

128. As a result of the foregoing, Plaintiff has been significantly damaged insofar as, *inter alia*: (i) Defendant has deprived Plaintiff of the Guaranteed Minimum or 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum; and (ii) Defendant's termination of the Stingel Consignment With Guarantee Agreement has "burned" the Stingel Work, reducing its value in the eyes of collectors and the art world.

129. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement, dated June 27, 2019.

130. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement required to be

performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

131. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement and chose not to do so.

132. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

133. Plaintiff has suffered significant monetary damages as a result of Defendant's conduct, including, *inter alia*, Defendant's failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant's "burning" of the Stingel Work (*see* Paragraphs 104, 126, *supra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;

- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

134. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement.

135. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of

moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to imply a criminal indifference to civil obligations.

**AS AND FOR A SEVENTH CAUSE OF ACTION
(Defendant's Breach of Its Fiduciary Obligations to Plaintiff)**

136. Plaintiff repeats and realleges all of the foregoing allegations as if fully set forth herein.

137. Pursuant to the Stingel Consignment With Guarantee Agreement and as a matter of law, commencing on June 27, 2019, and continuing at all relevant times thereafter, Defendant had a fiduciary relationship with Plaintiff and owed to Plaintiff, among other fiduciary duties, the duties of undivided loyalty, full disclosure, honesty, good faith and care.

138. During this period, Defendant, as an auction house, acted at all times as an agent on behalf of Plaintiff, its consignor, and had a fiduciary duty to act in the utmost good faith and in the interest of Plaintiff throughout their relationship.

139. Defendant's fiduciary duties include obligations to exercise good business judgment on behalf of Plaintiff, to act prudently in the consignment of the Stingel Work and the operation and execution of the Stingel Consignment With Guarantee Agreement, to discharge Defendant's actions in good faith and to put the interests of Plaintiff before Defendant's own self-interest.

140. Defendant was further duty-bound to use reasonable efforts to give Plaintiff any information relevant to the affairs entrusted to Defendant by Plaintiff, to use Defendant's best efforts to promote the Stingel Work and to act in a manner commensurate with Defendant's special skill and expertise in the art world.

141. Unbeknownst to Plaintiff, Defendant made an unlawful commercial decision based on Defendant's self-interest, as set forth *supra*, to illegally terminate the Stingel

Consignment With Guarantee Agreement because of, *inter alia*, Defendant's belief that the market for works of art by Rudolf Stingel had weakened. Defendant's illegal termination of the Stingel Consignment With Guarantee Agreement was not a product of purported force majeure.

142. At all relevant times and in breach of Defendant's fiduciary obligations to Plaintiff:

- i. Defendant never advised Plaintiff that it intended to terminate the Stingel Consignment With Guarantee Agreement for reasons *other* than the COVID-19 pandemic or governmental regulations;
- ii. Defendant never advised Plaintiff that it intended to terminate the Stingel Consignment With Guarantee Agreement because of, *inter alia*, Defendant's belief that the market for works of art by Rudolf Stingel had weakened;
- iii. Defendant never advised Plaintiff that it intended to illegally single out, as set forth *supra*, the Stingel Consignment With Guarantee Agreement for termination while declining to terminate or amend the other consignment agreements for artworks to be offered for sale at the twice rescheduled Spring 2020 Evening Auction because Defendant was motivated by the perceived weakness in the Stingel market;
- iv. Defendant "burned" the Stingel Work as aforesaid;
- v. The aforesaid actions by Defendant were in furtherance of its own self-interest; and
- vi. Defendant put its own financial interests above Plaintiff's financial interests.

143. Plaintiff and Defendant entered into the Stingel Consignment With Guarantee Agreement, dated June 27, 2019.

144. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee

Agreement required to be performed on Plaintiff's part. Defendant is equitably estopped and barred from terminating an agreement which has been, in part and substantially, performed.

145. At all relevant times, Defendant could have performed all of its obligations under the Stingel Consignment With Guarantee Agreement and chose not to do so.

146. Despite due demand, Defendant has refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement.

Relief Sought—Specific Performance and/or Alternatively Monetary Damages

147. Plaintiff has suffered significant monetary damages as a direct and proximate consequence of Defendant's breaches of its fiduciary obligations to Plaintiff, including, *inter alia*, Defendant's failure to remit to Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeded the Guaranteed Minimum and Defendant's "burning" of the Stingel Work (*see* Paragraphs 104, 126, *supra*). Plaintiff will continue to suffer such monetary damages and, accordingly, requests that this Court specifically enforces the Stingel Consignment With Guarantee Agreement as follows as there is no other adequate remedy at law:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than 95 calendar days after the auction;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than 95 calendar days after the auction;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no

later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;

- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than 95 calendar days after the auction;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next auction of Contemporary Art, ordering Defendant to immediately pay Plaintiff the Guaranteed Minimum no later than a date certain to be set by the Court; and
- vii. Adjudging and declaring that the Unlawful Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

148. In the event the Court does not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement and all other relief specified above, alternatively, Plaintiff requests monetary damages in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement.

149. Plaintiff is further entitled to punitive damages in a sum not less than USD \$10,000,000.00 (USD ten million dollars) as Defendant's conduct evidenced a high degree of moral culpability and/or was so flagrant and/or so willful, wanton, negligent and/or reckless as to

imply a criminal indifference to civil obligations. Punitive damages are especially appropriate as an auctioneer's business concerns and affects the public interest.

RESERVATION OF RIGHTS

This Second Amended Complaint is without any prejudice whatsoever to, and Plaintiff reserves all of its rights to, amend this Second Amended Complaint to include causes of action for, *inter alia*, fraud and/or fraudulent inducement, as discovery in this action progresses.

JURY DEMAND

Plaintiff demands a jury for all non-equitable claims stated herein.

WHEREFORE, Plaintiff demands judgment as follows:

- a. On the First Cause of Action, specific performance and all other relief set forth in Par. 62.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- b. On the Second Cause of Action, specific performance and all other relief set forth in Par. 74.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement. Plaintiff is further entitled to

exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- c. On the Third Cause of Action, specific performance and all other relief set forth in Par. 84.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- d. On the Fourth Cause of Action, specific performance and all other relief set forth in Par. 95.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Basquiat Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- e. On the Fifth Cause of Action, specific performance and all other relief set forth in Par. 115.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no

less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- f. On the Sixth Cause of Action, specific performance and all other relief set forth in Par. 133.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial;

- g. On the Seventh Cause of Action, specific performance and all other relief set forth in Par. 147.

In the event the Court does not grant specific performance, alternatively, a judgment for a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments from Plaintiff to MFI on the loan from MFI to Plaintiff pursuant to the Loan and Security Agreement, which loan would have been paid off by Plaintiff by August 2020 had Defendant not breached the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement. Plaintiff is further entitled to exemplary damages in a sum no less than USD \$10,000,000.00 (USD ten million dollars), the precise amount to be determined at trial; and

- h. Such other and further relief as the Court may deem just and proper.

Dated: New York, New York
July 31, 2020

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