UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JN CONTEMPORARY ART LLC, PLAINTIFF, -AGAINST- PHILLIPS AUCTIONEERS LLC, DEFENDANT.

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

PHILLIPS AUCTIONEERS LLC'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT

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Defendant Phillips Auctioneers LLC submits this Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC") (Dkt. 59) under Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

This is Plaintiff's third shot at stating a claim, and it fares no better than previous attempts. Plaintiff's claims all suffer from the same fatal defects: the contracts on which the claims are based conclusively foreclose them. No amount of re-pleading will change the contracts to which Plaintiff agreed. Plaintiff cannot undo by law what could only be undone by time machine.

Phillips Auctioneers LLC is a major auction house. JN Contemporary is owned by Joseph Nahmad, a member of the Nahmad art dealing family that Plaintiff's counsel described at oral argument as "probably the largest purchasers and sellers of art in the world." On June 27, 2019, Phillips and Plaintiff entered into two agreements. In the first agreement, Plaintiff agreed to place a GBP 3,000,000 bid on an artwork by Jean-Michel Basquiat that was consigned to Phillips for sale in London by a third party. The agreement was conditioned on two events: Plaintiff signing a separate agreement with Phillips regarding a work by Rudolph Stingel, and Phillips agreeing to pay the seller of the Basquiat work a guaranteed minimum sale price. Both of those conditions were satisfied, and the agreement was fully performed.

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

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

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

In March 2020, the world changed. COVID-19 spread rapidly, and New York City became the center of a global pandemic. Governor Cuomo declared a disaster emergency and issued Executive Orders that made it illegal to host non-essential gatherings. The White House and FEMA issued orders declaring COVID-19 a natural catastrophe. Courts recognized that "[t]he COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020). As a result, Phillips was legally prohibited from holding its major spring evening auction scheduled for May 14, 2020 in New York. Even Plaintiff's own counsel admitted at oral argument that "[Phillips'] building was shut down on Park Avenue and they couldn't have the evening auction."

Phillips had no choice but to postpone the auction. It did so, and then exercised its right under Paragraph 12(a) to terminate the consignment. Plaintiff then sued. Plaintiff's complaint alleges that Phillips breached both the Basquiat agreement and the Stingel agreement by failing to auction the Stingel work, and also breached the covenant of good faith and fair dealing implied in these agreements by wrongfully terminating the Stingel agreement under Paragraph 12(a). It also alleges equitable estoppel and a breach of Phillips' purported fiduciary obligations to Plaintiff. These claims are meritless. Each is contravened by the clear and unambiguous language of the underlying contracts, and it is the terms of those contracts, rather than the Complaint's mischaracterization of the contractual terms, that control on this motion. *See, e.g.*, *MBIA Inc. v. Certain Underwriters at Lloyd's*, 33 F. Supp. 3d 344, 353 (S.D.N.Y. 2014).

First, Plaintiff has misread the Basquiat agreement. The Complaint alleges that the

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

Second, in the Stingel agreement, Phillips agreed to auction the Stingel work at a specific sale: the major spring evening auction in New York in May 2020. The Complaint concedes this fact, and Plaintiff acknowledges that "Evening Auction" is a specific phrase used in the industry to refer to one of the two major live sales conducted annually in-person in New York. Despite admitting these key facts, the Complaint nonetheless alleges that the Paragraph 12(a) termination provision does not apply because the COVID-19 pandemic is not covered by this provision and Phillips could have auctioned the Stingel work at a later online auction. These allegations find no support in the contract or the law.

COVID-19 is a "natural disaster" within the meaning of Paragraph 12(a). Governor Cuomo said so. The White House and FEMA said so. The Courts that have addressed this issue said so. And it would defy common understanding of the English language to rule otherwise. *E.g.*, *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (discussing prison closure "because of a natural disaster *such as fire or disease*") (emphasis added). Phillips was therefore permitted to terminate under the plain terms of Paragraph 12(a). The Complaint's allegation that the contract nonetheless required Phillips to sell the Stingel work at another online auction is equally meritless. Phillips is not required to reach outside the four corners of the contract to offer alternative performance to Plaintiff when, as here, the bargained-for performance has been rendered impossible by force majeure. Plaintiff cannot rewrite the contract to impose obligations it never bargained for. Plaintiff's allegation that Phillips breached the Stingel agreement by failing to

obtain Plaintiff's written consent to postpone the auction fails for the same reason: Plaintiff's consent was not required because the auction was postponed by force majeure.

Third, the implied covenant claim fails as a matter of law because it is duplicative of the breach of contract claims and because it is contrary to the express terms of the contracts.

Fourth, the claim for equitable estoppel fails because Plaintiff was fully aware that Phillips had postponed the Spring New York Evening Auction via public announcement and, further, Phillips did not engage in any conduct inconsistent with its rights.

Fifth, the fiduciary duty claim fails because the Stingel Agreement expressly permits termination in the event of a forced postponement, and the fiduciary duties inherent in a consignor/consignee relationship may be defined and circumscribed by agreement.

Simply put, there is no authority that supports the relief Plaintiff is seeking—which is to disregard the clear contract terms and force Phillips to provide an alternate performance that is not bargained for in the contracts. The SAC should therefore be dismissed.

BACKGROUND

I. THE PARTIES' AGREEMENTS

On June 27, 2019, Plaintiff executed two separate agreements with Phillips.[1] The first agreement obligated Plaintiff to submit a GBP £3,000,000 irrevocable bid on Lot 19, *Untitled*, by Jean-Michel Basquiat (1981) at Phillips' 20th Century & Contemporary Art Evening Sale that took place in London (the "Basquiat Agreement"). SAC ¶¶ 17–18, 24; Ex. A.[2] The Basquiat Agreement was made "[c]onditional upon signature by you [JN Contemporary] of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolf

[1] The Court may consider the parties' agreements, all other relevant materials incorporated into the SAC, and any information subject to judicial notice on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, e.g.*, *Kalyanaram v. Am. Ass'n of Univ. Professors at New York Inst. of Tech., Inc.*, 742 F.3d 42, 44 n.1 (2d Cir. 2014).

[2] Unless otherwise noted, all citations to "Ex. __" refer to the exhibits attached to the Declaration of Luke Nikas ("Nikas Decl.").

Stingel, *Untitled, 2009* . . . and conditional upon the above mentioned Property [*i.e.*, the Basquiat work] being offered for sale with a commitment by Phillips to pay the Seller a Guaranteed Minimum." Ex. A at 1; SAC ¶ 17. The Basquiat Agreement specifically defined the "Property" as the Basquiat work, and the "Seller" referenced the owner of the Basquiat. Ex. A at 1. The agreement further stated that "[i]n consideration of you providing the Guarantee Obligation [in the form of the irrevocable bid], Phillips agrees to pay you a financing fee" of 20% of the overage of the hammer price above the guarantee if the work sells above the guarantee. *Id.* ¶ 6. The contract was fully performed: Plaintiff executed the Stingel consignment agreement, Plaintiff placed the irrevocable bid, the Basquiat work sold for more than that bid at the auction, and Plaintiff was paid the financing fee. SAC ¶ 24.

The second agreement (the "Stingel Agreement") provided that Plaintiff would consign to Phillips a work by Rudolph Stingel, *Untitled, 2009* (the "Stingel Work"), which Phillips would sell at auction subject to a guaranteed minimum amount of $5,000,000 to be paid to Plaintiff from the sale of the work (the "Guarantee"). SAC ¶¶ 20–21; Ex. B ¶¶ 1, 6(a), 11. The Stingel Agreement stated that "[t]he Property shall be offered for sale in New York in our major spring 2020 evening auction of 20th Century & Contemporary Art currently scheduled for May 2020" (the "Spring New York Evening Auction"). SAC ¶ 21 n.3; Ex. B ¶ 6(a). Paragraph 11 states, "[s]ubject to . . . any applicable withdrawal or termination provision set forth under this Agreement, Phillips guarantees that you shall receive at least USD $5,000,000 . . . with respect to the sale of the Property." Ex. B ¶ 11(a). Paragraph 12(a)[3] states:

> 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

[3] Paragraph 12(a) entitled "Termination" at page 6 of the Stingel Agreement is mis-numbered as the second paragraph 12 in the agreement. This error has no impact on the dispute here.

> Guaranteed Minimum shall be null and void and we shall have no other liability to you.

Id. ¶ 12(a); SAC ¶ 21(vi).

Plaintiff also used the Stingel Work to secure a $5,000,000 loan from third-party Muses Funding I LLC ("Muses"). SAC ¶ 22. On December 27, 2019, Plaintiff, Phillips, and Muses executed an amendment to the Stingel Agreement that memorialized the lien that Plaintiff had granted to Muses on the Stingel Work (the "Security Amendment"). *Id.*; Ex. C. The Security Amendment reiterated that the Stingel Work must be sold "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020 ('Auction')." Ex. C ¶ 1(c). The Spring New York Evening Auction was scheduled for May 14, 2020 at Phillips' Park Avenue location. *See* Ex. D.

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

In March 2020, the COVID-19 pandemic took hold in New York, and Governor Andrew Cuomo issued a series of executive orders severely restricting and eventually barring all non-essential business activities, which included art exhibitions and auctions, starting on March 23, 2020 and extending into June 2020. *See* ¶¶ 6–14 & Exs. E–M.[4] On March 14, 2020, Phillips issued a public announcement on its website entitled, "Auction Update: Temporary Closures & Postponements," stating: "As more of our community of staff, clients and partners becomes affected by the spread of the Coronavirus, we have decided to postpone all of our sales and events in the Americas, Europe and Asia. This includes . . . [o]ur upcoming 20th Century & Contemporary Art sales in New York[, which] will be held the week of 22 June 2020, consolidating

[4] The Court may take judicial notice of the Governor's executive orders and Phillips' public calendar and postponement announcements. *See, e.g.*, *Nunez v. Cuomo*, 2012 WL 3241260, at *16 (E.D.N.Y Aug. 7, 2012) (taking judicial notice of two executive orders); *In re Seracare Life Scis. Secs. Litig.*, 2008 WL 11508499, at *3 (S.D. Cal. Mar. 14, 2008) (taking "judicial notice of the existence of several public announcements").

the New York and London sales into one week of auctions." Ex. N. Phillips ultimately postponed the auction to July 2, 2020, and decided to hold it in a different, never-before-used format in which the auctioneer would call the lots from a showroom in London that would be live-streamed to potential bidders online, and permit online bids as well as absentee and telephone bidding. SAC ¶¶ 43, 49; *see also* Dkt. 35.

On June 1, 2020, Phillips electronically sent Plaintiff a termination notice (the "Termination Notice") stating, "[a]s you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the New York State and New York City governments placed severe restrictions upon all non-essential business activities. Certain government orders were invoked that applied to and continue to apply to Phillips' business activities. Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to postpone the Auction beyond its planned May 2020 date." SAC ¶¶ 33; Ex. O. Referencing Paragraph 12(a) of the Stingel Agreement, Phillips informed Plaintiff that it was terminating the agreement. Phillips mailed the Termination Notice to Plaintiff on June 2, 2020. SAC ¶ 34; Ex. P.

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Mere conclusory statements in a complaint and "formulaic recitation[s] of the elements of a cause of action" are not sufficient. *Twombly*, 550 U.S. at 555. Further, "[a]llegations in the complaint that are 'contradicted by . . . documentary evidence' are not entitled to a presumption of truthfulness." *MBIA Inc. v. Certain Underwriters at Lloyd's*, 33 F. Supp. 3d 344, 353 (S.D.N.Y. 2014); *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011) ("[W]here a

conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true."); *L-7 Designs, Inc. v. Old Navy*, LLC, 647 F.3d 419, 422 (2d Cir. 2011).

I. PLAINTIFF'S BREACH OF CONTRACT CLAIMS MUST BE DISMISSED

"The cardinal principle for the construction and interpretation of . . . all contracts . . . is that the intentions of the parties should control." *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006). "[T]he best evidence of intent is the contract itself; if an agreement is 'complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.'" *Eternity Global Master Fund, Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2d Cir. 2004).[5] Where, as here, the plain language of the contract does not support a claim for breach, it must be dismissed. *See Mariah Re Ltd. v. Am. Family Mut. Ins. Co.*, 52 F. Supp. 3d 601, 614 (S.D.N.Y. 2014); *19 Recordings Ltd. v. Sony Music Entm't*, 97 F. Supp. 3d 433, 441 (S.D.N.Y. 2015).

A. The Complaint Does Not State A Claim For Breach Of The Basquiat Agreement

The Complaint alleges that Phillips "breached the [Basquiat Agreement] by failing to perform the [Stingel Agreement]" because the Basquiat Agreement and Stingel Agreement were "interrelated, interconnected, interdependent and consideration for each other." SAC ¶ 93.

First, these allegations misread the plain language of the Basquiat Agreement, which says no such thing. *See Lilly v. City of New York*, 934 F.3d 222, 236 (2d Cir. 2019); *Unisys Corp. v. Hercules Inc.*, 638 N.Y.S.2d 461, 463 (1st Dep't 1996) ("Mere assertion by one that contract language means something to him . . . is not in and of itself enough to raise a triable issue of fact.").

[5] "Whether the text of a contract is unambiguous is a question of law to be decided by the court." *Gruppo, Levey & Co. v. ICOM Info. & Commc'ns, Inc.*, 2003 WL 21511943, at *6 (S.D.N.Y. July 1, 2003). "[I]f the language has a definite and precise meaning that cannot reasonably be misunderstood, it is not ambiguous." *Id.*

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

The first paragraph of the Basquiat Agreement states:

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

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

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

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

This language is clear: Plaintiff's obligation to place an irrevocable bid is conditioned upon Phillips auctioning the *Basquiat work* subject to a guaranteed minimum paid to the *seller of the Basquiat work*. That makes sense, because the Basquiat Agreement is third-party financing of Phillips' obligation to guarantee a minimum price to the seller. *E.g.*, *Id.* ¶ 15. The Basquiat Agreement—which has an integration clause (*id.* ¶ 23)—was therefore performed in full with no breach by either party. The Complaint must therefore be dismissed because it is based on a clear misreading of the Basquiat Agreement's actual terms. *See Mariah Re Ltd.*, 52 F. Supp. 3d at 614.

Second, even crediting Plaintiff's inaccurate interpretation of the contract, there was still no breach of the Basquiat Agreement because Phillips *did* fully perform the terms of the Stingel Agreement, including its termination provision. *See Pearce v. Manhattan Ensemble Theater*, 528 F. Supp. 2d 175, 180 (S.D.N.Y. 2007) ("rightful termination is one means of completing performance"); *N. Shore Bottling Co. v. C. Schmidt & Sons*, 22 N.Y.2d 171, 176 (1968) (performance "is simply carrying out the contract by doing what it requires or permits."). Phillips' valid termination of the Stingel Agreement cannot constitute a breach of the Basquiat Agreement.

B. The Complaint Does Not State A Claim For Breach Of The Stingel Agreement

Plaintiff's claims for breach of the Stingel Agreement are also meritless. SAC ¶¶ 55–86. These claims, too, are based on Phillips' refusal to offer the Stingel Work at auction subject to the $5,000,000 Guarantee. SAC ¶¶ 82–83. But Phillips' obligation to do so was excused under Paragraph 12(a) of the Stingel Agreement, which permitted Phillips to terminate the contract.

Paragraph 12(a) states that "[i]n the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster,

. . . we may terminate this Agreement with immediate effect. . . . [and] our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you." Ex. B, ¶ 12(a). Phillips' obligation to pay the Guarantee was expressly subject to its ability to terminate the consignment for the reasons set forth in Paragraph 12(a). *Id.* ¶ 11.

On March 14, 2020, Phillips announced that the Spring New York Evening Auction was being postponed due to the COVID-19 pandemic. Ex. N. On March 23, 2020, in response to the pandemic, Governor Cuomo issued an Executive Order forbidding non-essential gatherings—which included the Spring New York Evening Auction—in New York through June 2020. Nikas Decl. ¶¶ 6-14 & Exs. E–M. Phillips therefore terminated the Stingel Agreement under Paragraph 12(a) by electronic notice to Plaintiff on June 1 and mailed notice on June 2. SAC ¶¶ 32, 35; Exs. O & P. Because termination was permitted under Paragraph 12(a), it is not a breach. *Nemko, Inc. v. Motorola, Inc.*, 163 B.R. 927, 938 (Bankr. E.D.N.Y. 1994) ("lawful termination of a contract pursuant to an express option contained in it does not constitute a breach.").

Plaintiff admits that on May 14, 2020, "[Phillips'] building was shut down on Park Avenue and they couldn't have the evening auction." Ex. Q, Tr. 9:9–10. The Complaint does not allege otherwise. Instead, the Complaint alleges that Phillips cannot invoke Paragraph 12(a) because it was not prevented from performing by the pandemic and resulting government orders. SAC ¶¶ 31, 42, 48. Plaintiff alleges that performance was within Phillips' control because Phillips could have sold the Stingel Work at any later live or online auction, including the July 2, 2020 auction held in a remote format. *Id.* It alleges that the pandemic does not fall within the events listed in Paragraph 12(a), and that Phillips used the pandemic as a pretext for its economic motives for termination. *Id.* ¶¶ 37, 100, 124–125. These allegations cannot support a claim as a matter of law.

1. The Stingel Agreement clearly designates the Spring New York Evening Auction as the exclusive venue of sale

The basic premise of Plaintiff's allegations is that the contract did not require the Stingel Work to be auctioned at the Spring New York Evening Auction live in New York on May 14, 2020. Rather, the Complaint alleges Phillips could perform its contract obligations by selling the work in an online auction anytime thereafter. SAC ¶ 43, 58, 68, 80. The Complaint alleges that "[n]owhere in the Stingel [Agreement]" is there a requirement that the Spring New York Evening Auction "shall be held in-person." *Id*. ¶ 49. This is wrong and flatly contradicts the clear contract terms. "Allegations in the complaint" such as this "that are 'contradicted by . . . documentary evidence' are not entitled to a presumption of truthfulness." *MBIA*, 33 F. Supp. 3d at 353.

The Stingel Agreement states that Plaintiff "hereby consign[s] to [Phillips] the [Stingel Work] which [Phillips], as your exclusive agent, will offer for sale at public auction . . . subject to the provisions set forth below, [and] the Conditions of Sale . . . published at www.phillips.com. . . ." Ex. B ¶ 1. Paragraph 6(a) of the contract states, "The Property *shall* be offered for sale in New York at our major spring 2020 auction of 20th Century & Contemporary Art currently scheduled for May 2020." *Id.* ¶ 6(a) (emphasis added); *see also id.* at preamble ("Sale date: May 2020."); Ex. C ¶ 1(c) (confirming the Stingel Work was to be sold "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020"). The SAC admits this. *E.g.*, SAC ¶ 20. The SAC also admits that the Spring New York Evening Auction is a specific and significant industry event—one of two major live auctions held annually. *Id*. ¶ 20 n.2 (conceding that the term "evening auction" as used in the Stingel Agreement "means Defendant's evening auction sales of contemporary works of art which take place bi-annually in May and November"). Plaintiff, whose principal is a member of the art dealing Nahmad family (Ex. Q, Tr. 12:8–13), concedes this also. Dkt 22: Nahmad Decl. ¶ 3 n.1 ("The New York Spring Auction traditionally takes place each year in May and is one of Defendant's two major evening

auctions in New York."); *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs.*, 30 A.D.3d 1, 8 (1st Dep't 2006) ("Besides the common meaning of the language employed, the expectations and purposes of the parties in view of the factual context in which the agreement was made must be considered in interpreting a contract term, with due regard to the parties' sophistication.").

The Spring New York Evening Auction is not an online auction of contemporary art. Rather, it is a specific event held live in New York in May. Plaintiff's own Order to Show Cause makes that distinction clear. *See* Dkt. 21, at 2 & n.1 (requesting a court order to force Phillips to sell the Stingel Work at "Defendant's next online auction for major contemporary works of art ***or*** Defendant's next ***in-person*** Evening Auction" and stating that the "Evening Auction" is a bi-annual event held in May and November) (emphasis added)). So does the complaint's reference to Phillips' Conditions of Sale for online auctions, which contain materially different terms than the Conditions of Sale for live auctions to which Plaintiff agreed in the Stingel Agreement. *See* Dkt. 37: Declaration of Hartley Waltman, Exs. C & D. It is for this reason that every relevant provision in the Stingel Agreement refers pointedly to "*the* auction"—meaning the Spring New York Evening Auction. *See, e.g.*, Ex. B ¶¶ 12(a)-(c); *id.* ¶ 9(b). It is also for this reason that Phillips' agreement to pay the Guarantee was expressly subject to its ability to terminate the consignment if "*the* auction" were postponed for reasons outside its control. *Id.* ¶ 11, 12(a).[6] *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[A] court may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

The contract is consistent on this point. Apart from Paragraph 12(a)'s termination provision, in every single instance in which the Stingel Work might be offered in an auction *other*

[6] Plaintiff negotiated with Phillips to strike out the second clause of the termination provision that would have been contained in Paragraph 12(b). *See* Ex. B, ¶ 12(b). If Plaintiff wanted Paragraph 12(a) to say something different, then it could have tried to do the same in Paragraph 12(a).

than the Spring New York Evening Auction, the contract requires the parties' consent and, as appropriate, new agreed sale terms before the work may be sold. Paragraph 6(a) of the Stingel Agreement, which Plaintiff erroneously relies on (SAC ¶¶ 21(iv) & n.3), supports this very point: it protects Plaintiff by requiring its prior written consent if Phillips wanted to *voluntarily* move the auction to a different place or later date—recognizing that a later auction in a different location or format is *not* what the parties agreed to and therefore such a discretionary move requires written consent to change the agreement's terms. This concept is again echoed in Paragraph 3(c), which nullifies the Guarantee and requires the parties to negotiate new sale terms if the Stingel Work cannot be sold in the Spring New York Evening Auction due to loss or damage. Ex. B ¶ 3(c). *See Spanski Enters., Inc. v. Telewizja Polska S.A.*, 2019 WL 6498257, at *5 (S.D.N.Y. Dec. 2, 2019) ("[C]ourts must endeavor to read a contractual document in a manner that gives effect to all of its provisions and that causes them to be consistent with one another").

The import of this language is clear: it is the Spring New York Evening Auction, in New York in May, that the parties bargained for, not a subsequent live or online auction. *See Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include."); *Solid 21, Inc. v. Richemont N. Am.*, 2020 WL 3050970, at *3 (S.D.N.Y. June 8, 2020).

2. COVID-19 is a "natural disaster" within the meaning of Paragraph 12(a)

The Complaint alleges that Paragraph 12(a) does not apply because the COVID-19 virus is not within the same class of events enumerated in that provision and the principle of *ejusdem generis* therefore precludes the clause's application. SAC ¶¶ 37, 71. This, too, is contrary to the contract and the law. Even applying the principle of *ejusdem generis*, the COVID-19 pandemic is clearly a "natural disaster" or similar "circumstance beyond our or your reasonable control" contemplated by Paragraph 12(a). And where, as here "the parties have themselves defined the

contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure." *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (1st Dep't 2017); *see also Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 903 (1987) (an expansive force majeure provision will be enforced where the event that prevented performance is "of the same kind or nature as the particular matters mentioned").

It is beyond dispute that the COVID-19 pandemic is a natural disaster of epic proportions. The Governor's Executive Orders declared a "state disaster emergency" caused by the COVID-19 pandemic and made illegal any non-essential gatherings starting March 23, 2020 through June 2020. *See* Nikas Decl. ¶¶ 6–14 & Exs. E–M;[7] *see also* N.Y. Exec. Law § 20(2)(b) (defining "state disaster emergency"); N.Y. Exec. Law § 28(1). New York law defines a "disaster" as widespread harm "resulting from any natural or man-made causes," including "epidemic" and "disease outbreak." N.Y. Exec. Law § 20. Further, on March 20, 2020 President Trump issued a "major disaster declaration" due to the COVID-19 outbreak in New York under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq*. *See* FEMA, DR-4480-NY Initial Notice, March 20, 2020, https://www.fema.gov/disaster/notices/dr-4480-ny-initial-notice. Under the Stafford Act, a "major disaster" is strictly limited to "any natural catastrophe" or "any fire, flood, or explosion." 42 U.S.C. § 5122(2). As COVID-19 is obviously not a "fire, flood, or explosion," the White House and FEMA have clearly deemed the pandemic a "natural catastrophe." Courts have also recognized that "[t]he COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions." *Friends of Danny DeVito*, 227 A.3d at 889; *accord Commonwealth v. Mills*, 104 Va. Cir. 350, 351–53 (Cir. Ct. Madison Cty. 2020) ("the Coronavirus rises to the level of a natural disaster as a communicable disease of a public

[7] On May 22, 2020, after the scheduled May 14 date of the Spring New York Auction, Governor Cuomo modified the ban to gatherings of more than ten people through June 21, 2020, *see* Nikas Decl. ¶ 12 & Ex. K, which would still have precluded the Spring New York Evening Auction from being held at any point in May.

health threat as defined in" the Virginia Code); *Commonwealth v. Vila*, 104 Va. Cir. 389, 393 (Cir. Ct. Fairfax Cty. 2020) (same); *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (discussing prison closure "because of a natural disaster such as fire or disease").

3. The Complaint does not adequately allege pretext, which is also irrelevant

The Complaint alleges that Phillips is using the pandemic as a "pretext" for a discretionary decision to terminate the Stingel Agreement. SAC ¶¶ 37, 100, 124–125. It alleges that Phillips breached the Stingel Agreement by not offering the Stingel Work with the Guarantee at a subsequent online auction, such as the July 2, 2020 auction, which it contends was an accommodation within Phillips' reasonable control. *Id.* ¶ 48, 54. Plaintiff is wrong.

First, the Complaint does not support the allegation of pretext, which is entirely conclusory. Rather, it is clear that Phillips was required to postpone the Spring New York Evening Auction as a result of the COVID-19 pandemic—a "natural disaster" under the contract. As Plaintiff's counsel conceded, it was impossible and illegal for Phillips to hold the Spring New York Evening Auction live, in-person at its Park Avenue location on May 14, 2020, because of the COVID-19 pandemic and the resulting Executive Orders prohibiting such gatherings.[8] *See* Section I.B.1, *supra*. The Complaint does not allege otherwise. The health and safety risks posed by the virus precluded Phillips from being able to hold the auction, and the Executive Orders imposing restrictions to stem the spread of the virus applied directly to this event and carried the force of law. *See United Water New Rochelle, Inc. v. City of New York*, 687 N.Y.S.2d 576, 580 (Sup. Ct. West Cty. 1999) ("[C]ourts will not enforce or compel the specific performance of a contract where the performance compelled thereby will bring about a result which is detrimental

[8] The notion that these "governmental regulations, orders or executive orders . . . [do] not specifically defeat Defendant's obligation to perform the [Stingel Agreement]," SAC ¶ 42, is entirely absurd and baseless as a matter of law. *See Metpath Inc. v. Birmingham Fire Ins.*, 86 449 N.Y.S.2d 986, 989 (1st Dep't 1982) ("There is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused.")

to the public interest"); *Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care*, 2012 WL 6091570, at *26 (E.D.N.Y. Dec. 7, 2012) ("[C]ourts may not compel a party through specific performance to take actions in contravention of the law").

Any notion of pretext is also rebutted by Phillips consistent, contemporaneous statements of postponement, all of which identified the pandemic as the cause. SAC ¶¶ 33, 36, 44; Exs. O & P; *Id.*, Ex. N. It is rebutted by the fact that Phillips postponed "all of [its] sales and events in the Americas, Europe and Asia" as a result of the pandemic, not just the Spring New York Evening Auction that was the subject of the Stingel Agreement. Ex. N at 1. It is rebutted by the Executive Orders. And it is rebutted by the experience of all New Yorkers. The only explanation offered in the Complaint for this allegation is that Phillips is "proceeding with its other contractual consignments for its May 2020 Evening Auction sale now scheduled for July 2, 2020," but not with the Stingel Agreement. *Id.* ¶ 42. Whether Phillips entered into new contractual arrangements with certain consignors for another auction has no bearing on its right to terminate the Stingel Agreement under Paragraph 12(a) upon postponing *this* auction. *See* Section II, *infra*. The SAC's allegations of pretext are legally inadequate and implausible.

Second, the allegation that Phillips should offer the Stingel Work at a later online auction (SAC ¶¶ 48, 54) is devoid of contractual support. *See MBIA*, 33 F. Supp. 3d at 353. Even if alternate performance were within Phillips' control, that has no bearing on the effect of the Paragraph 12(a) termination provision or whether Phillips' postponement of the Spring New York Evening Auction was within its control. The Stingel Agreement defines performance as offering the work in the Spring New York Evening Auction in New York in May 2020. *See* Section I.B.1, *supra*. That auction was postponed and rescheduled to July 2 in a *different* format *and* location.

Plaintiff concedes this. *See* SAC ¶ 43; Plaintiff's Second Letter (Dkt. 35).[9] No contractual provision permits the Stingel Work to be offered at the July 2, 2020 auction without *both* parties' consent (Ex. B, ¶¶ 3(c), 6(a)(i), 17(b); SAC ¶¶ 20 n.3, 21, 60).

Further, Plaintiff's allegations that Phillips should have offered the Stingel Work at another auction are contrary to law, because Phillips is not required to reach outside the four corners of the contract to offer alternative performance to Plaintiff when, as here, the bargained-for performance has been rendered impossible by force majeure. *See, e.g.*, *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (where U.S. government prevented defendant from contractual performance, constituting a force majeure event, contract did not require defendant "to provide substitute performance from its Indian licensee"); *Babcock & Wilcox Co. v. Allied-Gen. Nuclear Servs.*, 161 A.D.2d 350, 350–52 (1st Dep't 1990) (where force majeure event prevented defendant from "reprocess[ing] spent nuclear fuel for plaintiff" per the parties' agreement, court rejected "plaintiff's contention that defendants could have engaged in alternate performance under the contract by storing and disposing of the spent nuclear fuel"); *Int'l Paper Co. v. Rockefeller*, 146 N.Y.S. 371, 374 (3d Dep't 1914) ("We need not say that the defendant could not have furnished live wood of equal quality from other lands; but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished, and when the source is destroyed the defendant is excused from further performance"); *Jon-T*

[9] The allegation that the Spring New York Evening Auction was not "postponed" but rather "rescheduled" to a later date (SAC ¶ 34) is nonsensical. The plain dictionary definition of "postpone" makes no such distinction. Obviously, an event that is postponed can also be later rescheduled. *See, e.g.*, Oxford Lexico English Dictionary, at https://www.lexico.com/en/definition/postpone (postpone: "Cause or arrange for (something) to take place at a time later than that first scheduled."); Merriam-Webster English Dictionary, at https://www.merriam-webster.com/dictionary/postpone (postpone: "to put off to a later time."). Moreover, the fact that Paragraph 12(a) permits termination if the specified auction is "postponed" means that Phillips may terminate the consignment *even if* the same exact auction is held in the same form and location but at a later date than originally scheduled.

Chemicals, Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1415, 1416 & n.5 (5th Cir. 1983) (rejecting plaintiff's argument that "delivery by truck would have been a commercially reasonable substitute" for delivery by train, which was prevented by force majeure, because the contract specified that delivery be made by train); *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex. App. 2009) (rejecting argument that force majeure clause did not apply because defendant could deliver gas to alternate delivery point than specified in the contract, as that would "force [defendant] to deliver gas, notwithstanding an acknowledged force majeure event, to a location other than that to which the parties expressly agreed").

Plaintiff's allegations not only ignore settled law, they would also render the termination clause meaningless because the postponement of a specific auction would always happen against the backdrop of other, later or online auctions occurring subsequently at which a work could potentially be offered instead. SAC ¶¶ 48–49. *See Virginia Power* , 297 S.W.3d at 403 (where contract specified precise delivery location and contained force majeure clause excusing performance, holding that "both of these contract provisions would be rendered meaningless under [plaintiff's] interpretation of the [force majeure] clause, which would force [defendant] to deliver gas, notwithstanding an acknowledged force majeure event, to a location other than that to which the parties expressly agreed" and refusing to require alternate performance because "[w]e must presume that the parties intended each contract provision to have effect").

4. Phillips was not required to obtain plaintiff's consent

Plaintiff's claim that Phillips' termination was a discretionary business decision, and therefore breached Paragraphs 6(a)(i) and 17(b), also fails. SAC ¶¶ 27, 55–61. Paragraph 6(a)(i) does not apply because it governs Phillips' *voluntary* rescheduling of the Spring New York Evening Auction beyond May 2020 in its "reasonable discretion." Ex. B ¶ 6(a)(i). It does not apply to a situation where, as here, Phillips was forced to postpone the auction because of a natural disaster, which falls squarely within Paragraph 12(a). Paragraph 6(a)(i) supports *Phillips'* position

that the contract required the Stingel Work to be offered *exclusively* at the Spring New York Evening Auction, because any discretionary change to a later date would require written consent. Paragraph 17(b), requiring modifications to be in writing by both parties (SAC ¶ 21(vii), 27; Ex. B ¶ 17(b)), also supports Phillips' position that neither party is permitted to unilaterally change the performance obligation from the Spring New York Evening Auction to any other auction.

C. Performance Of The Contracts Is Excused Under The Doctrine Of Impossibility

Phillips' performance is also independently excused by the common law doctrine of impossibility. Impossibility excuses a party's performance "when destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *LeRoy v. Sayers*, 635 N.Y.S.2d 217, 223 (1st Dep't 1995). For the reasons explained in Section I.B, *supra*, the pandemic was an unforeseeable event that made it objectively impossible for Phillips to hold the Spring New York Evening Auction in May 2020 in New York. Because the sale of the Stingel Work at that specific event was the basis of the parties' agreement, Phillips' performance is excused. *See, e.g.*, *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 29 A.D.2d 754, 754 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 842 (1969); *Leisure Time Travel, Inc. v. Villa Roma Resort and Conference Center, Inc.*, 52 N.Y.S.3d 621, 622–23 (Sup. Ct. Queens Cty. 2017).

"There is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused." *Metpath Inc. v. Birmingham Fire Ins. Co. of Pennsylvania*, 86 A.D.2d 407, 411 (1st Dep't 1982); *see also, e.g.*, *Baron Leasing Corp. v. Raphael*, 103 A.D.3d 763, 764 (2d Dep't 2013) (defendant did not breach contract where "compliance with [New York City] regulations rendered continued performance under the terms of the agreement impossible"); *Radiosurgery New York L.L.C. v. Cabrini Med. Ctr.*, 859 N.Y.S.2d 906, 906 (Sup. Ct. Richmond Cty. 2008) (performance excused where defendant medical center was "closing involuntarily as a result of" New York State mandate and "can no longer operate its acute care facility nor can it perform in accordance with the terms of the contract"). The pandemic

triggered a series of executive orders that made it illegal for the Spring New York Evening Auction to take place as scheduled. To hold Phillips in breach of an agreement it could not have performed without violating state law would both be contrary to the plain terms of the parties' agreement and fundamentally inequitable. *See Moyer v. City of Little Falls*, 510 N.Y.S.2d 813, 815 (Sup. Ct. Herkimer Cty. 1986). Phillips' obligations under the Stingel Agreement were rendered objectively impossible. Plaintiff cannot now demand that the Court "rewrite, under the guise of interpretation," the plain terms of the contract to provide Plaintiff with some never-bargained-for performance. *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992).

II. THE IMPLIED COVENANT CLAIM MUST BE DISMISSED AS DUPLICATIVE

Where, as here, "a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant." *Gravier Prods., Inc. v. Amazon Content Servs.*, 2019 WL 3456633, at *4 (S.D.N.Y. July 31, 2019); *see also MBIA Ins. Corp. v. Merrill Lynch*, 916 N.Y.S.2d 54, 55 (1st Dep't 2011).

The allegations underlying Plaintiff's contract claims and implied covenant claim are substantively identical, *compare* SAC ¶¶ 98–114, *with id.* ¶¶ 55–61, *id.* ¶¶ 65–73, *and id.* ¶¶ 77–83; and seek identical relief, *compare id.* ¶¶ 115–117, *with id.* ¶¶ 62–64, *id.* ¶¶ 74–76, *and id.* ¶¶ 84–86. The implied covenant claim, like the contract claims, is based entirely on Phillips' allegedly wrongful termination of the Stingel Agreement under Paragraph 12(a) and refusal to offer the Stingel Work at online auctions at which it allegedly offered other consigned works. *Id.* ¶¶ 86, 88, 90.

Plaintiff cannot avoid dismissal merely by alleging that "[i]mplied in the [Stingel Agreement] is the requirement that [Phillips] would not . . . prejudicially and discriminatorily treat the Stingel Work differently than the other artworks consigned for the Spring 2020 Evening Auction . . . while maintaining in place the other consignment agreements for the Spring 2020 Evening Auction." SAC ¶ 107. The Stingel Agreement contains no such promise between the

parties—implied or otherwise—and to interpret the contract as if it did would drastically alter what the parties actually bargained for in express terms. Plaintiff does not get to retroactively insert such a promise into the contract simply because it feels that it has been treated differently relative to third parties. *See Rowe v. Great Atl. & Pac. Tea Co., Inc.*, 46 N.Y.2d 62, 69 (1978); *Fesseha v. TD Waterhouse Inv'r Servs., Inc.*, 761 N.Y.S.2d 22, 22 (1st Dep't 2003). And in any event, Phillips' alleged willingness to enter into different contractual arrangements with third parties to consign different works, SAC ¶ 43, does not imply that Phillips must extend the same extra-contractual offer to Plaintiff. *Greenfield v. Scriva*, 841 N.Y.S.2d 218, 218 (Dist. Ct. Nassau Cty. 2007) ("Defendant either did or did not properly perform pursuant to the contract into which he entered with the Plaintiff, regardless of what he might or might not have done on other contracts, with other customers."). Finally, the allegation that Phillips represented to Plaintiff that Phillips "would honor all contractual commitments with consignors," SAC ¶ 102, 120, gets Plaintiff nowhere. That alleged representation does not foreclose Phillips from exercising its contractual rights, and cannot possibly be interpreted to mean that Phillips intended to waive its rights.

III. THE COMPLAINT DOES NOT ADEQUATELY ALLEGE EQUITABLE ESTOPPEL OR WAIVER

Equitable estoppel is an "'extraordinary remedy'" that "should be 'invoked sparingly and only under exceptional circumstances.'" *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014), *aff'd,* 579 F. App'x 7 (2d Cir. 2014). The complaint alleges that Phillips should be estopped from terminating the Stingel Agreement because it did not do so until May 30, 2020. SAC ¶ 30 n.6, 73. It alleges that Phillips' actions through mid-to-late May ratified the Stingel Agreement. SAC ¶ 28.[10] This claim fails because Plaintiff knew and was on notice since March 14—two months before the auction's scheduled date—that Phillips had postponed the Spring

[10] The allegations that Phillips is estopped from terminating the agreement "illegally" and as a "pretext" and from interpreting the agreement to be limited to an in-person New York auction (SAC ¶ 40, 42, 73, 100) are nonsensical and fail for the reasons set forth in Section I.B.4, *supra*.

Evening New York Auction due to COVID-19, and thus could exercise its termination rights at any time. SAC ¶ 120; Ex. N at 2.[11] Critically, Paragraph 12(a) does not require any specific form or date of notice; it says only that Phillips "may terminate this Agreement with immediate effect." *Id.* ¶ 32. The Complaint alleges no actions by Phillips that were inconsistent with its contractual rights, and Plaintiff's allegations of estoppel based on the timing of the termination notice are insufficient as a matter of law. *See Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67-68 (S.D.N.Y. 1991) (late force majeure notice did not preclude defense because notice was not a condition precedent under the contract); *Tendler v. Lazar*, 141 A.D.2d 717, 719–20, 529 N.Y.S.2d 583, 585 (2d Dep't 1988) (plaintiff's failure to exercise contractual termination right "as soon as possible" did not waive right to terminate, where "[t]he contract itself contained no requirement that the plaintiffs' option to cancel pursuant to the mortgage contingency clause be exercised by a particular time."); *Ixe Banco, S.A.*, 2008 WL 650403, at *8.

Further, the Complaint concedes that Phillips notified Plaintiff on May 26 that it did not intend to offer the Stingel Work at the rescheduled auction. SAC ¶ 103. Phillips terminated the Stingel Agreement a few days later. SAC ¶¶ 30, 35; Exs. O & P. Plaintiff therefore knew that it was not entitled to rely on Phillips' intention to offer the Stingel Work at the June 24 auction well in advance. SAC ¶¶ 126–27. *Randolph Equities, LLC v. Carbon Capital, Inc.*, 648 F. Supp. 2d 507, 524 (S.D.N.Y. 2009) ("New York courts have "consistently held that the doctrine of equitable estoppel cannot be invoked to create a right where one does not otherwise exist."); *415 Fifth Ave. Co. v. Finn*, 146 F.2d 592, 593 (2d Cir. 1944) ("[M]ere delay in the exercise of the lessor's power to terminate was not a persuasive consideration without a showing that he had abandoned it or that

[11] A screenshot of Phillips' March 14, 2020 postponement announcement is attached as Exhibit N, and may be considered by the Court because it is referenced in the Complaint. *See* SAC ¶ 120. This public announcement is "a public record which Plaintiff easily could have [and should have] discovered," *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 267 (S.D.N.Y. 2006), and a clear "red flag" that Phillips was within its right to terminate and may elect to do so, *JPMorgan Chase Bank, N.A. v. Freyberg*, 171 F. Supp. 3d 178, 186 (S.D.N.Y. 2016).

the lessee to his detriment had relied upon the landlord's delay; and a delay of six months was held not unreasonable"); *JPMorgan,* 171 F. Supp. 3d at 186 (plaintiff must show "lack of knowledge and of the means of the true facts" and "reliance upon the conduct of the party to be estopped"). Plaintiff cannot complain that this lawsuit's publicity has unfairly damaged its ability to sell the work since Plaintiff made this dispute public. SAC ¶ 126. The estoppel claim must be dismissed.

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY

Plaintiff's fiduciary duty claim boils down to the allegation that Phillips breached its fiduciary duties by exercising a contractual right. (SAC ¶¶ 136–49). This claim fails because the fiduciary duty inherent in a consignor/consignee relationship can be circumscribed by contract and does not (and cannot) be stretched to prevent either party from exercising its contractual rights. *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, 967 N.Y.S.2d 649, 649 (1st Dep't 2013) ("Sotheby's did not breach the contract or its fiduciary duty to plaintiff by withdrawing the [consigned] work from auction" where "[t]he consignment agreement between plaintiff and Sotheby's permitted Sotheby's to withdraw the artwork owned by plaintiff from auction if Sotheby's had any doubt, in its sole judgment, as to the work's 'attribution'"); *Greenwood v. Koven*, 880 F. Supp. 186, 195 (S.D.N.Y. 1995) ("Whether Christie's action was taken to further the interest of [the consignor] . . . is irrelevant to this particular issue because the Consignment Agreement explicitly allowed Christie's to act against the interest of [the consignor] by providing Christie's authority to rescind the sale"); *Reale v. Sotheby's, Inc.*, 718 N.Y.S.2d 37, 38 (1st Dep't 2000) (Sotheby's failure to disclose to consignor the involvement of an expert did not constitute a breach of fiduciary duty because consignment agreement gave Sotheby's absolute discretion to consult with experts). Indeed, "[i]t is elementary agency law doctrine . . . that the legal duties of an agent may be defined and circumscribed by agreement between principal and agent." *Mickle v. Christie's, Inc.*, 207 F. Supp. 2d 237, 244 (S.D.N.Y. 2002). That is precisely what happened here.

CONCLUSION

The Court should grant Phillips' motion to dismiss Plaintiff's complaint, with prejudice.

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Respectfully submitted,

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