21-32

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JN CONTEMPORARY ART LLC,
Plaintiff-Appellant,

-against-

PHILLIPS AUCTIONEERS LLC,

Defendant-Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF – APPELLANT

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant JN Contemporary Art LLC ("JN"), by its counsel, states that there are no publicly held corporate parents, affiliates and/or subsidiaries of JN.

FRAP 28(a)(4) JURISDICTIONAL STATEMENT

This is a civil action over which the Lower Court ("LC") had original jurisdiction pursuant to 28 U.S.C § 1332(a)(1). Complete diversity of citizenship exists between all parties and the amount in controversy exceeds $75,000.00, exclusive of interest and costs (Dkt. 58).[1] This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from a final order and judgment that disposes of all claims. On December 16, 2020, Judge Denise L. Cote issued an Opinion and Order ("Decision"), granting Phillips Auctioneers LLC's ("Phillips") motion to dismiss the Second Amended Complaint ("SAC") (A153-229) pursuant to FRCP 12(b)(6) (A355-390). On January 6, 2021, JN filed a notice of appeal with the LC (A396).

ISSUES PRESENTED FOR REVIEW

i. Whether, as a matter of law, JN has alleged sufficient facts to state a claim for relief for each of its causes of action that is plausible on its face and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

ii. Whether the LC impermissibly engaged in fact-finding in violation of FRCP 12(b)(6) standards;

iii. Whether the LC, in effect, erroneously converted Phillips' FRCP 12(b)(6) motion to dismiss into an FRCP 56 summary judgment motion;

iv. Whether, as a matter of law, Phillips' failure to obtain JN's prior written consent to reschedule the Evening Auction date post-May 2020 materially breached Stingel Consignment With Guarantee Agreement ("SC")[2] ¶6(a)(i)

[1] "Dkt. __" means the Pacer Docket number entry in the LC.

[2] As the SC (A52-64) and BC (A50-53) are referenced so many times throughout this Brief, JN is including the respective Appendix references just once in this footnote.

(A56) and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

v. Whether, as a matter of law, the SC restricted the auction of the Stingel Work to only an in-person auction physically located in New York in May 2020 and legally mandated that such auction could not be conducted elsewhere and/or post-May 2020 and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

vi. Whether the LC misinterpreted and overruled Kel Kim Corp. v. Cent. Mkts., 70 N.Y.2d 900, 902-03 (1976) and its progeny and misapplied New York force majeure ("FM") law by holding, as a matter of law, that COVID-19 was covered under SC ¶12(a)'s FM clause (A60) and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

vii. Whether, as a matter of law, Phillips' failure to specifically enumerate pandemics or governmental orders and regulations as an FM event in SC ¶12(a) (A60) precluded Phillips from invoking the FM clause purportedly as a result of pandemics or governmental orders and regulations concerning COVID-19 and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

viii. Whether, as a matter of law, governmental orders and regulations concerning the COVID-19 pandemic were reasonably foreseeable and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

ix. Whether, as a matter of law, Phillips was required to undertake an alternative means of performance, whether Phillips demonstrated any attempts to perform the SC despite COVID-19 and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

x. Whether, as a matter of law, circumstances beyond Phillips' reasonable control prevented Phillips from performing the SC and permitted Phillips to invoke SC ¶12(a)'s FM clause (A60) and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion with respect to, inter alia, Phillips' ability to conduct a physical, in-person auction at its premises in New York when Phillips unilaterally postponed and rescheduled post May-2020 the Evening Auction on March 14, 2020

despite no governmental order or regulation prohibiting in-person events of 500 attendees (especially in view of Phillips' certificate of occupancy allowing no more than 336 people);

xi. Whether, as a matter of law, a causal nexus existed between Phillips' claimed FM event and claimed inability to perform the SC due to circumstances beyond its reasonable control or whether Phillips made an unlawful financial decision not to perform the SC based on its perceived weakness of the Stingel market and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

xii. Whether, as a matter of law, JN was entitled to discovery concerning, inter alia, the following subjects:

(a) The ambiguous "in New York" clause of SC ¶6(a) (A56), including, inter alia, Phillips' construction of "New York auction" during and prior to the COVID-19 pandemic and the circumstances of the rescheduled Evening Auction being conducted physically in London and livestreamed to New York and globally while being called a "New York auction" by Phillips;

(b) Phillips' selective termination of the SC while declining to terminate the 24 other consignment agreements (11 with contractual guarantees) for the rescheduled Evening Auction and Phillips' true motive for terminating the SC due to Phillips' perceived weakness of the Stingel market;

(c) Whether Phillips' international advertisements used ***only*** the Stingel Work to advertise the rescheduled Evening Auction until mid-May 2020 to unlawfully test the market and surreptitiously gauge interest in the Stingel Work;

(d) Whether Phillips' auctions do not exceed 500 in-person attendees and whether the majority of bidders are bidding remotely;

(e) The parties' intent as to the interdependency of the SC and Basquiat Guarantee Agreement ("BC"); and

(f) Whether the COVID-19 pandemic is a "natural disaster"

and whether, at minimum, the foregoing raised an issue of fact that defeats the FRCP 12(b)(6) motion;

xiii. Whether, as a matter of law, the BC is interrelated, interconnected and interdependent with and consideration for the SC, whether JN's performance of the BC required Phillips to perform the SC and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion;

xiv. Whether, as a matter of law, JN sufficiently pled breach of good faith and fair dealing by alleging, inter alia, Phillips' material misrepresentations, misleading use of the Stingel Work to advertise Phillips' rescheduled Evening Auction (while not intending to auction the Stingel Work therein) and extreme 89-day delay in declaring FM and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion; and

xv. Whether, as a matter of law, JN sufficiently pled breach of fiduciary duties by alleging, inter alia, that Phillips made an unlawful commercial decision based on its self-interest to illegally terminate the SC and whether, at minimum, this raised an issue of fact that defeats the FRCP 12(b)(6) motion.

CONCISE STATEMENT OF THE CASE—FRAP 28(a)(6)

On June 27, 2019, an hour before Phillips' 20th Century & Contemporary Art Evening Sale in London ("London Auction"), JN and Phillips executed two interrelated, interconnected and interdependent agreements, the BC and SC, which were consideration for each other.[3] Both agreements were drafted exclusively by Phillips and negotiated by the same principals at the same time, same date and same

[3] A155-156, ¶10-16; A320, ¶7.

place—Phillips' offices in London, England.[4] Phillips was represented by counsel; JN wasn't.

JN and Phillips traded one guarantee for another, one hand washing the other. Pursuant to the BC, JN guaranteed that it would irrevocably bid GBP £3,000,000.00 (the "JN Guarantee") in the London Auction on a Jean-Michel Basquiat painting owned by Phillips (the "Basquiat Work").[5] The quid pro quo was that JN consigned a Rudolf Stingel painting owned by JN (the "Stingel Work") to Phillips, who guaranteed it for USD $5,000,000.00 (the "Guaranteed Minimum") (A157-160, ¶¶17-23; A320, ¶7). The Stingel Work was to be auctioned in Phillips' Spring 2020 evening auction of 20th Century & Contemporary Art, then scheduled for May 2020 in New York (the "Evening Auction") (A56, ¶6(a)).

On June 27, 2019, JN fully performed the BC (A160-161, ¶¶24-25). In March and May 2020, Phillips breached the SC and BC by twice unilaterally rescheduling the Evening Auction to June 24-25 and July 2, 2020 without obtaining JN's prior written consent pursuant to SC ¶6(a)(i) (A56).[6] Phillips did not invoke the SC's FM clause.

[4] A155-158, ¶¶13-15; A185, ¶¶93-94; A320, ¶7.

[5] A320, ¶7; A155-57, ¶¶10-16.

[6] A157-170, ¶¶20, 27-28, 30-31, 34, 39, 43-45.

On May 30, 2019—one month prior to the rescheduled Evening Auction—Phillips used the COVID-19 pandemic as a pretext to illegally terminate the SC.[7] Phillips invoked the FM clause because Phillips believed the Stingel market was weak (Id.). Phillips waited 89 days (A193, ¶120) between rescheduling the Evening Auction and terminating the SC all the while reassuring JN that it would honor ***all*** of its contractual commitments and even discussing with JN moving the Stingel Work to a November 2020 auction (with the Guaranteed Minimum intact).[8] Until mid-May 2020, Phillips used the image of ***only*** the Stingel Painting to internationally advertise the rescheduled Evening Auction.[9]

Phillips made no attempt to alternatively perform the SC despite holding at least 11 online auctions from April 8 to May 30, 2020 (A170-171, ¶49). During the COVID-19 pandemic, Phillips terminated ***no other consignment agreements*** through July 2, 2020 (with or without guarantees).[10] At the rescheduled Evening Auction, at least 11 of 25 lots had Phillips' (or a third-party's) guarantee.[11]

The Procedural History of This Action

i. **6/8/20**: JN filed its Complaint with an Order to Show Cause ("OSC") for injunctive relief (Dkt. 4-5, 7);

[7] A161-166, ¶¶26-35, 40; A189, ¶106; A193, ¶119; A199-200, ¶¶141-143.

[8] A188, ¶¶102-103; A190, ¶108; A193-94, ¶¶120-121.

[9] A161, ¶26; A320, ¶9; A188, ¶102; A193, ¶120.

[10] A167, ¶43; A322, ¶13; A189-190, ¶¶107-108; A194-195, ¶¶123-125.

[11] A167-168, ¶43 fn 8; A322, ¶13; A207-214.

ii. **6/19/20**: During oral argument on the OSC, the LC ordered a virtual mediation with a third-party mediator, subsequently scheduled for July 17, 2020 (Dkt. 28);

iii. **6/23/20**: JN filed its First Amended Complaint ("FAC") (Dkt. 30);

iv. **7/7/20**: Phillips filed its FRCP 12(b)(6) motion to dismiss the FAC (Dkt. 41);

v. **7/15/20**: ***Two days before the virtual mediation on July 17, 2020***, the LC issued its Opinion and Order denying JN's OSC for injunctive relief (A32-44), ***eliminating JN's negotiating thunder and destroying any possibility of a reasonable settlement offer from Phillips or a mediated settlement***. The LC disregarded that the relief sought by JN was entry into the rescheduled Evening Auction on July 2, 2020. The LC's Opinion and Order, issued 37 days after filing of the OSC, postdated July 2, 2020 (A32-34);

vi. **7/17/20**: The LC-ordered mediation unsuccessfully transpired (Dkt. 55);

vii. **7/31/20**: JN filed its SAC (A153-229);

viii. **8/28/20**: Phillips filed its motion to dismiss the SAC (its second motion to dismiss) (A143, Dkt. 41, 61);

ix. **8/29/20**: Phillips requested oral argument on its dismissal motion (A144);

x. **9/21/20**: JN requested oral argument (A354); and

xi. **12/16/20**: The LC, ***without holding the requested oral argument***, issued its Decision granting Phillips' motion to dismiss and directing the Clerk to close the case (A355-390). See JN Contemporary Art LLC v. Phillips Auctioneers LLC, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020). The LC issued the Decision only after Phillips' counsel advised the LC that more than 60 days had elapsed since the motion was fully briefed (Dkt. 73).

The Procedural History of the LC's Repeated Refusal to Grant JN's Requests for Limited and Targeted Discovery

i. **6/19/20**: During oral argument in the Preliminary Conference, the LC inquired of JN's counsel: "[D]o you require any discovery before this

matter is brought to a head?" (A20-25, 8:15-17). JN's counsel requested depositions of Phillips' CEO Edward Dolman ("Dolman") and owner Leonid Friedland ("Friedland") (A20-21, 8:18-24). Friedland and Dolman negotiated the SC and BC and Friedland texted Phillips' unlawful termination of the SC. The LC summarily denied any discovery (A25, 13:4-8);

ii. **9/15/20**: JN's counsel filed a letter application requesting targeted discovery (A145-146);

iii. **9/17/20**: The LC denied JN's request for discovery (A145);

iv. **9/18/20**: In JN's opposition to Phillips' dismissal motion, JN again requested limited discovery to oppose the motion (Dkt. 70, pp. 2, 10, 12); and

v. **12/16/20**: The LC's Decision did not address JN's discovery request (A355-390).

STANDARD OF REVIEW

Let it be clear at the outset that the SAC (A153-229) is a detailed, well-pleaded complaint. This Court "review[s] de novo the dismissal of a complaint under Rule 12(b)(6), accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC, 709 F.3d 109, 119 (2d Cir. 2013). See also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), holding the Court must assume "all the allegations in the complaint are true (even if doubtful in fact)."[12]

[12] Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 717 (2d Cir. 2013) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)).

Factual disputes are "inappropriate for resolution on a motion to dismiss." Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 405 (2d Cir. 2015). The choice between two plausible inferences drawn from factual allegations is for the factfinder, not the Court. See Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." Id.; see also Twombly, at 556.

A denial of discovery is reviewed for abuse of discretion and, if a discovery request was not properly considered, it is subject to de novo review. See First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 175-76 (2d Cir. 1998). FRCP 12(b)(6) "simply calls for enough fact to raise ***a reasonable expectation that discovery will reveal evidence*** of illegal conduct." Lynch v. City of New York, 952 F.3d 67, 75 (2d Cir. 2020) (emphasis supplied); see also Iqbal, supra, at 678.

FRAP 28(a)(7) STATEMENT

The LC continually ignored questions of fact sufficient to defeat the FRCP 12(b)(6) motion by side-stepping the specific, detailed allegations of the SAC (A153-229), sculpting the facts to fit its legal conclusions and unilaterally adding contractual rights to Phillips and subtracting them from JN, not to mention denying JN discovery and prejudicing mediation.[13] Contrary to FRCP 12(b)(6) legal standards and the doctrine that ambiguities must be resolved against the draftsman, the LC improperly

[13] See pp. 7-8, supra.

resolved all factual issues in Phillips' favor, accepting Phillips' false premises to justify the LC's illogical conclusion that the COVID-19 pandemic afforded Phillips carte blanche to run roughshod over and methodically strip JN's contractual rights.

The LC erred in failing to recognize that Phillips clearly breached SC ¶6(a)(i) (A56) by failing to obtain JN's prior written consent to reschedule the Evening Auction post-May 2020 (see Point I). When Phillips announced its voluntary decision to postpone and reschedule the Evening Auction to the week of June 22, 2020 (A222-224, A362), ***no governmental order whatsoever*** prevented Phillips from conducting an in-person auction at a physical location in New York.

The LC based its holding that Phillips did not breach the SC on the unlawful contractual interpretation that the Stingel Work was required to be auctioned only at an in-person auction at a physical location in New York in May 2020.[14] The LC ignored SC ¶¶6(a), 6(a)(i), 12(a) and 3(c),[15] proving that the parties legally and flexibly understood the possibility that the Stingel Work could be auctioned later (e.g., June 2020 or thereafter) (see Point II). The LC further erred in narrowly construing SC ¶6(a)'s "in New York" clause [16] when the parties had no such understanding (A219-224). A jury easily could conclude that such clause permitted the Stingel Work to be sold in New York and globally via a live, real-time digital

[14] A371-72; A374-379.

[15] Respectively, A56, A60 and A56.

[16] A371-372; A375-376; A377-378.

transmission. The SC does not restrict the Stingel Work to an in-person auction, an auction at a specific physical address or an auction exclusively in New York and SC ¶¶1, 6(a)(i) and 9(a) (A56-57) expressly contemplated a change of auction location. The LC erroneously ignored Phillips-drafted evidence (i.e., Phillips' auction calendars (A220, A223, A313)) that illuminates the parties' intent at the time of contract formation with respect to the ambiguous clause "in New York" and contradicts the LC's narrow contractual interpretation of "in New York."

The LC erred in holding that Phillips was not required to attempt to perform the SC or undertake alternative performance prior to invoking FM, including, inter alia, by selling the Stingel Work in an online auction (A378-379). The LC erred in defining and/or interpreting "natural disaster" and in failing to legally construe the FM clause or permit any inquiry—let alone scientific expert testimony—concerning the critical scientific question of whether COVID-19 is of the same kind or nature as a "natural disaster" (A372-374; A376-377) (see Point III).

The LC erred in finding that the SC and BC are not interrelated, interconnected and interdependent agreements and prohibiting a factual analysis of the parties' intent at the time of contract execution (A380-381). The LC failed to credit JN's allegation that execution ***and performance*** of the two agreements was part of a single understanding (see Point IV).[17]

[17] A155-158, ¶¶10-18; A185, ¶¶93-94; A320, ¶7.

The LC erred in dismissing JN's good faith and fair dealing claim (A381-385) by holding that JN failed to plead specific allegations of bad faith, ignoring JN's allegations that, as a result of Phillips' perceived weakness of the Stingel market, Phillips terminated the SC while: (i) Materially misrepresenting its intention to auction the Stingel Work in the rescheduled Evening Auction with the Guarantee intact; (ii) Misleadingly using ***only*** the Stingel Work to advertise the rescheduled Evening Auction while not intending to auction it therein; and (iii) Waiting an exorbitant 89 days to declare FM (see Point V).

The LC erred in dismissing JN's breach of fiduciary duties claim (A385-387) by ignoring that Phillips auction house owed fiduciary duties to JN consignor, which Phillips breached by making an unlawful decision based on Phillips' financial self-interest (see Point VI).

ARGUMENT

POINT I
THE LC ERRED IN HOLDING THAT JN DID NOT PLEAD A CLAIM FOR BREACH OF THE SC FOR PHILLIPS' FAILURE TO OBTAIN JN'S WRITTEN CONSENT

The SAC (A175-177) alleges that, on March 14, 2020, Phillips breached SC ¶6(a)(i), stating that Phillips may "select, change or reschedule the place, date and time for the auction…to a later date than May 2020" ***only upon obtaining JN's "prior written consent***" (emphasis supplied). Phillips conceded this material breach. Phillips ***twice*** materially breached the SC by unilaterally rescheduling the Evening

Auction, in March and May 2020, to June 24-25 and July 2, 2020 without obtaining JN's prior written consent or giving any FM notice.[18]

CHRONOLOGY

- March 12, 2020- Pursuant to Executive Order #202.1, large gatherings and events must be canceled or postponed ***if 500+ people are expected***;[19]

- March 14, 2020- Phillips posted on its website "Auction Update: Temporary Closures & Postponements," announcing the postponement of all events in the Americas, Europe and Asia and rescheduling the Evening Auction to June 24-25, 2020, "consolidating the New York and London sales into one week of auctions" ("March 14 Announcement"), along with a "Spring 2020 Updated Calendar" (A219-224). Phillips did not reference any governmental order;

- March 16, 2020- Pursuant to Executive Order #202.3, large gatherings and events must be canceled or postponed if 50+ people are expected;[20]

- March 20, 2020- Pursuant to Executive Order #202.8, effective March 22, 2020 at 8:00 PM, all businesses must reduce in-person workforce by 100%;[21] and

- May 30, 2020- Friedland texted JN's principal an image of SC ¶12(a), the FM provision (A162-163, ¶30). A letter terminating the SC (the "Unlawful Termination Letter") followed, legally deemed received by JN on June 9, 2020 (A164-165, ¶35).

Phillips indisputably and concededly materially breached the SC ***on March 14, 2020***. Phillips never sought or received JN's written consent to reschedule post-May

[18] A157, ¶20; A161-164, ¶¶27-28, 30-31, 34; A166-169; ¶¶39, 43-45.

[19] See https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_1.pdf.

[20] See https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.3.pdf.

[21] See https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf.

2020 and did not terminate the SC when Phillips published the March 14 Announcement (with no reference to any governmental order). This Court need look no further to reverse the LC. A party breaches an agreement mandating that it obtain its counterparty's prior written consent by acting without obtaining such consent.[22] The LC erroneously held:

> "Nor was Phillips in breach for failing to obtain JN's written consent to conduct the New York Auction on a date after May 2020. That consent requirement is only triggered by Phillips' discretionary rescheduling of the New York Auction" (A374).

The March 14 Announcement was not made by Phillips pursuant to any governmental order and was a breach of the SC.

The LC grossly mischaracterized Phillips' ***voluntary and non-mandatory*** decision on March 14, 2020 to postpone and reschedule the Evening Auction as an event "beyond the parties' control" (A372) due to "circumstances beyond Phillips' control" (A376), citing to ***unspecified*** "Executive Orders" and FEMA's March 20, 2020 "major disaster declaration" (A374). The above chronology proves the falsity of the factual premises girding the LC's conclusion. At the time of the March 14 Announcement, Phillips was ***not legally prohibited*** from conducting an in-person auction of 500 attendees at a physical location in New York (see p. 13, supra). This Court respectfully should take judicial notice that, pursuant to Certificate of

[22] See Metro Funding Corp. v. WestLB AG, 2010 WL 1050315, *18 (S.D.N.Y. Mar. 19, 2010); see also US Bank Nat. Ass'n Orix Capital Markets, LLC v. NNN Realty Advisors, Inc., 614 Fed.Appx. 548, 550-51 (2d Cir. 2015).

Occupancy #120216916T005, filed with the NYC Department of Buildings, for Phillips' New York City headquarters at 450 Park Avenue,[23] the maximum occupancy of Phillips' public auction hall is ***336 people***. The LC ignored that the Executive Orders, at a minimum, raised a critical issue of FRCP 12(b)(6) fact as to whether Phillips' auctions have 500 or fewer in-person attendees and whether the majority of bidders are bidding online, on the phone or via absentee bid. See Putnam and Anderson, supra.

The March 14 Announcement did not reference any governmental orders and begins:

> "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**" (A222) (emphasis supplied).

Clearly, Phillips did not use any Executive Orders as a predicate for postponing and rescheduling the Evening Auction on March 14, 2020 and Phillips' hand-crafted phrase "we have decided" speaks for itself. Id.

The LC fashioned a false distinction between discretionary and mandatory rescheduling/postponement, as follows:

> "Nor was Phillips in breach for failing to obtain JN's written consent to conduct the New York Auction on a date after May 2020. That consent requirement is only triggered by Phillips' ***discretionary*** rescheduling of the New York Auction" (A374) (emphasis supplied).

[23] See http://a810-bisweb.nyc.gov/bisweb/CofoDocumentContentServlet?passjobnumber=null&cofomatadata1=cofo&cofomatadata2=M&cofomatadata3=120&cofomatadata4=216000&cofomatadata5=120216916T005.PDF&requestid=2.

SC ¶6(a)(i)—the written consent mandate (drafted by Phillips)—confers a binding contractual obligation on Phillips and has nothing to do with discretion in terms of relieving Phillips from discharging its binding contractual obligation to obtain JN's written consent (which never happened). The written consent mandate was contractual, not discretionary or voluntary. The LC's predicate for the triggering of JN's written consent right (A374) is a pure fiction absent any legal basis.

The LC's holding that Phillips can override its breach of SC ¶6(a)(i) by invoking the contractual FM provision—SC ¶12(a)—89 days after the breach ironically violated a basic principle of contract law cited in her Decision:

> "'…[A]n interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible'" (A369) (internal citation omitted).

With all due respect, this holding is anathema to legal reasoning and subverts JN's breach of contract claim. The LC eliminated JN's contractual rights and Phillips' contractual obligations to JN in the guise of interpreting a contract. The LC cannot rearrange the indispensable sequence of events to prioritize Phillips' latent FM rights over JN's written consent rights.

Phillips' material breach of the SC on March 14, 2020 rendered Phillips—the breaching party—unable to enforce any right under the SC against JN—the non-breaching party. See Nadeau v. Equity Resid. Props. Mgmt. Corp., 251 F.Supp.3d 637, 641 (S.D.N.Y. 2017); see also Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 75

(1966). Whatever occurred in May 2020 cannot whitewash and excuse Phillips' earlier breach.

POINT II
THE LC ERRED IN HOLDING THAT JN FAILED TO PLEAD A CLAIM FOR BREACH OF THE SC FOR PHILLIPS'UNLAWFUL TERMINATION OF THE SC

A. The Evening Auction Was Not Date-Specific or Site-Specific

The LC's holding that Phillips did not breach the SC is built on a false premise:

> "[T]he terms of the Stingel Agreement dictate that the Stingel Painting be offered ***at a specific location and time: Phillips' evening auction of contemporary art in New York in May 2020***" (A372) (emphasis supplied).

The SC contains no such restrictive or exclusive language and expressly contemplated that Phillips might change the auction date or location.

1. No Contract Term Required the Stingel Work to Be Auctioned in May 2020

The parties clearly understood the possibility of an auction of the Stingel Work in June 2020 or later, as follows in Phillips' own words:

- SC ¶6(a) sets forth that the Evening Auction is "***currently scheduled*** for May 2020" (emphasis supplied). The SC is dateless with no specific date in May 2020 recited for the Evening Auction. The word "currently" definitively contemplates a change to a future date and is tentative, making the date ambiguous. On A375, the LC conveniently omitted the word "currently" as follows: "This was the Phillips' New York Auction of 20th Century & Contemporary Art scheduled for May 2020;"
- SC ¶6(a)(i) grants Phillips the right "to ***select, change or reschedule the place, date and time for the auction*** but any change to ***a later date than May 2020*** would be subject to [JN's] prior written consent" (emphasis supplied);

- SC ¶12(a) begins, "In the event that the auction is ***postponed***…" (emphasis supplied); and

- SC ¶3(c) states, "…[O]r to include such Property ***in the next appropriate auction*** after restoration has been completed…" (emphasis supplied).

The LC acknowledged the foregoing provisions (A358-360), but counterfactually and erroneously held that "the terms of the Stingel Agreement dictate that the Stingel Painting be offered…in May 2020" (A372). As a matter of law, the SC cannot be read in this manner.

The LC further cited to the SC's "preamble," erroneously holding that "the sale date [was] identified as 'May 2020'…" (A358). This SC section actually states that the sale date is "__ May 2020." Id. This underscoring and lack of a specific date for the Evening Auction supports JN's contention that the date of the Evening Auction was not set in stone.

2. No Contract Term Required the Stingel Work to Be Auctioned Physically in New York at an In-Person Auction

The LC cited a ***single*** SC provision referencing New York—SC ¶6(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" (A358) (emphasis supplied).

It is not even clear if Phillips was referencing the city or state of New York. The SC contains no restrictive language requiring the Stingel Work to be offered for sale in an auction held ***only*** in one specific place at one specific time.

"A contract provision is ambiguous if it is 'susceptible of at least two fairly reasonable interpretations.'" St. Barnabas Hosp. v. Amisys, LLC, 2007 WL 747805, *4 (S.D.N.Y. Mar. 9, 2007) (internal citation omitted). Ambiguous language:

> "[S]uggests 'more than one meaning when viewed objectively by a reasonably intelligent person ***who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business***.'"[24]

An ambiguous contract provision "cannot be construed as a matter of law on [a] motion to dismiss." U.S. Licensing, supra, 2012 WL 1447165, *4 (citing Zuckerwise v. Sorceron Inc., 289 A.D.2d 114, 114-15 (1st Dep't 2001)).[25] Any ambiguity or competing interpretations of the SC must be construed against Phillips as draftsman. See White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007).[26] Notably, JN's principal is not an attorney and did not have an attorney present to review and/or edit the SC prior to execution. Where there is ambiguity in a contractual provision and extrinsic evidence is introduced to interpret such language, "the proper interpretation of the relevant contractual language is a question of fact" to

[24] U.S. Licensing Assoc's, Inc. v. Rob Nelson Co., 2012 WL 1447165, *3 (S.D.N.Y. Apr. 26, 2012) (internal citations omitted) (emphasis supplied); see also Topps Co., Inc. v. Cadbury Stani S.A.I.C., 526 F.3d 63, 68 (2d Cir. 2008); Fitzpatrick v. Am. Int'l Grp., Inc., 2013 WL 709048, *40 (S.D.N.Y. Feb. 26, 2013); Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992); Rothenberg v. Lincoln Farm, 755 F.2d 1017, 1019 (2d Cir.1985).

[25] See also Superior Site Work, Inc. v. Nasdi, LLC, 2016 WL 526238, *10 (E.D.N.Y. Feb. 9. 2016); Assured Guar. Mun. Corp. v. UBS Real Estate Sec's, Inc., 2012 WL 3525613, *3 (S.D.N.Y. Aug. 15, 2012).

[26] See also M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 142 (2d Cir. 2005).

be resolved by the jury. Giles v. City of New York, 41 F.Supp.2d 308, 318-19 (S.D.N.Y. 1999).

The "[i]n New York" clause of SC ¶6(a) is "susceptible of at least two fairly reasonable interpretations." St. Barnabas, supra, 2007 WL 747805 at *4. JN's interpretation—the Stingel Work may be sold in New York and globally via a live, real-time digital transmission—is amply supported by an analysis of the SC's express language:

- Nowhere in the SC's four corners is a provision requiring the Stingel Work to be auctioned at an ***in-person auction***, ***at a specific physical address*** or ***exclusively*** in New York;

- SC ¶1 reads, "You hereby consign to us the property listed on the attached Property Schedule…which we, as your exclusive agent, will offer for sale ***at public auction***…" (emphasis supplied). SC ¶1 does not set forth that the Evening Auction must be conducted physically in New York;

- The location of the Evening Auction clearly was not set in stone as SC ¶6(a)(i) granted Phillips the right "to ***select, change or reschedule the place***, date and time ***for the auction***" (emphasis supplied); and

- SC ¶9(a) states, "We have ***absolute discretion*** in all aspects of the conduct of any auction, including, but not limited to, the time, manner and ***place*** of exhibition and auction of the Property…" (emphasis supplied). Phillips had the "absolute discretion" to change the location of the Evening Auction and there was no contractual limitation mandating that the Evening Auction be held at a physical location in New York.

The proof is in the pudding that the SC permitted the location of the auction to be changed and to be anywhere. At the threshold of this case, there is an ambiguity in

the SC as to what constitutes a "New York auction," creating an issue of fact that defeats the FRCP 12(b)(6) motion to dismiss. See Putnam and Anderson, supra.

The LC erred by adopting Phillips' interpretation of "[i]n New York" without examining "the customs, practices, usages and terminology as generally understood in the particular trade or business" with respect to what constitutes a "New York auction." U.S. Licensing, supra, 2012 WL 1447165, *3. Such an inquiry would have proved that Phillips shares JN's construction of "New York auction" as Phillips physically conducted the "New York" Evening Auction in London, England on July 2, 2020 as an online, virtual auction via a live, real-time digital transmission and internationally labeled and advertised it as a "New York auction."[27] This requisite factual inquiry would have established that there is a critical distinction between a literal definition of "in New York" and the import and meaning of the term as used by Phillips that can only be resolved by a jury following fact and expert discovery. See Putnam and Anderson, supra. The LC further improperly rewrote the SC, holding:

> "The Stingel Agreement required Phillips to offer the painting for sale at an ***identified, regularly held, established*** auction for works of contemporary art" (A375) (emphasis supplied).

These terms are not found in the SC.

Even where contractual "language appears straight-forward" and a party claims that it is "clear and unambiguous," "'[i]t is only where the language and the inferences to be drawn from it are unambiguous that a district court may construe the

[27] A167-169, ¶43; A171-173, ¶¶50-51; A352-353.

contract as a matter of law…'" Loral Corp. v. Goodyear Tire and Rubber Co., 1996 WL 38830, *7 (S.D.N.Y. Feb. 1, 1996). In Loral, supra, the Court could not resolve the parties' contractual interpretation dispute because there was "a genuine and material question of fact as to ***the intent of the parties***" and the Court could not "be certain at this time what the parties intended." Id. (emphasis supplied). Defendant argued that the express contract terms, read literally, made clear that a two-year statute of limitations applied to all breaches and that the doctrine of impracticability could be invoked if a breach claim could not have been brought within two years. The Court held that even though the express contractual language "seems at first glance" to support defendant, adopting this interpretation would require the Court to believe that:

> "…[T]he parties consciously chose to govern many of the covenants in their agreement through the impracticability doctrine, ***yet failed to write a single word to that effect into the contract***." Id. (emphasis supplied).

The Court held that the contract was ambiguous because plaintiff's contractual interpretation was "sufficiently logical to challenge [defendant's] literal reading" of the contract and "a plain reading of the section leaves too large a hole in the contract's enforcement scheme." Id. So too is Phillips relying on a literal, hyper-technical interpretation of a place—"in New York"—while ignoring the contradictory language in the SC. There is not "a single word" in the SC mandating that the Stingel Work be offered for sale at an in-person auction, at a specific physical address or exclusively in New York. In practice, Phillips does not construe "New York

auctions" in this literal manner. Whether "in New York" meant something different to the parties than its literal definition is an issue of fact for the jury. Id., at *7. The bottom line is that, to Phillips, "in New York" meant "physically in London and livestreamed in New York."

In In re Optimal U.S. Litig., 813 F.Supp.2d 351, fn 166 (S.D.N.Y. May 2, 2011), the Court held that the statement "WE BOUGHT FOR YOUR ACCOUNT IN: NYS" is ambiguous and "does not necessarily mean that the account-holder's account was located in New York." The Court further held, "Drawing all reasonable inferences in Plaintiffs' favor, it means the shares were purchased or issued there." Id. Phillips' use of "in New York" does not and did not mean that the Evening Auction must physically be held in New York, much less New York City, but rather that the Stingel Work could be offered for sale in as narrow or wide a jurisdiction as long as the words "New York" are included.[28] It should be noted that the SC and BC were written, negotiated and executed in London (A155-156, ¶¶14-15).

"'[T]he meaning of an ambiguous contract is a question of fact for a factfinder.'" U.S. Licensing, supra, 2012 WL 1447165, *3. With respect to an ambiguous contract, even if fully integrated, "extrinsic evidence can be admitted to determine the intent of the parties or meaning of the document." Fantozzi v. Axsys

[28] See also Carl Zeiss Microscopy, LLC v. Vashaw Scientific, Inc., 2020 WL 85195, *4 (S.D.N.Y. Jan. 2, 2020), citing City of N.Y. v. Pullman Inc,, 477 F.Supp. 438, 442 (S.D.N.Y. 1979), which held that a forum selection clause was ambiguous that allowed the parties to submit controversies "to the New York courts and the New York courts only" as the clause "was susceptible to two meanings."

Techs., Inc., 2008 WL 4866054, *6 (S.D.N.Y. Nov. 6, 2008). "[E]xtrinsic evidence may be used as a guide" to a party's contractual rights. Topps, supra, 526 F.3d at 69.

Phillips' auction schedule (A219-220)—an extract from Phillips' July 2, 2020 Evening Auction catalogue—is a crystal-clear "guide" to JN's contractual rights. The first entry in the "New York" column reads:

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

In the predecessor to Phillips' auction schedule (A219-220), Phillips wrote:

> "London and New York ***20th Century & Contemporary Art Evening Sales*** to be consolidated into one ***New York auction***" (A223) (emphasis supplied).

Phillips deemed the July 2, 2020 Evening Auction to be a "New York" auction despite the fact that it was "***broadcast live*** from Phillips's new saleroom ***in London***" purely as an online sale.[29] Phillips' General Counsel Hartley Waltman, Esq. ("Waltman") confirmed as much:

> "An online auction is *not* a different method of conducting the same live sale that would otherwise occur in person…" (A288, ¶9).

What better evidence of intent is there than performance?

The LC held that JN could not submit the foregoing evidence to "manufacture an ambiguity in an unambiguous contract" (A378), subjectively finding:

> "***The relevant inquiry*** is what the parties understood the Stingel Agreement to mean when they executed the agreement, ***not how Phillips chose to continue its operations after the pandemic disrupted its normal business activities***… Phillips' terminology in calendars scheduling and promoting the Virtual

[29] A167-169, ¶43; A171-173, ¶¶50-51; A352-353.

> Auction did not amend the Stingel Agreement or alter its right to invoke the Termination Provision" (Id.) (emphasis supplied).

The LC's emphasis on JN purportedly "amend[ing]" or "alter[ing]" the SC and "manufactur[ing] an ambiguity" based on Phillips' ***post-COVID-19 conduct*** is wrong as ***Phillips'*** actions and terminology, not those of JN, amended the SC and stripped JN's contractual rights. The timing of Phillips' auction calendars is immaterial. They would be just as probative had they been published by Phillips in 2019 or any other year.[30] The critical factual inquiry—which the LC ignored—is whether Phillips construes a virtual auction selling artwork in New York and globally to be a "New York auction." That factual inquiry, in itself, defeats the instant FRCP 12(b)(6) motion. See Putnam and Anderson, supra.

The foregoing documentary evidence plays a critical role in "determin[ing] the intent of the parties or meaning of the document" with respect to the ambiguous clause "in New York" and sheds light on Phillips' intent at the time of contract formation as to where the Stingel Work could be sold. See Fantozzi, supra, 2008 WL 4866054, *6; see also Topps, supra, 526 F.3d at 69. In denying discovery, the LC blocked JN's right to demonstrate the machinations Phillips engaged in with respect to terminating the SC and circumventing and manipulating the rescheduled "New York auction."

[30] Should this Court reverse the Decision and reinstate this case, JN intends to seek discovery concerning Phillips' construction of "New York auction" during ***and prior to*** the COVID-19 pandemic.

The LC further erred in holding:

> "… JN does not explain why the Stingel Agreement required Phillips to obtain JN's consent to move the auction of the painting to a date beyond May 2020 if the inclusion of the painting in that identified auction was not a material term of the Stingel Agreement" (A376).

It is undisputed that whereas SC ¶6(a)(i) required Phillips to obtain JN's written consent to change the date of the Evening Auction post May-2020, there was no such contractual provision requiring Phillips to obtain JN's written consent to change the location of the Evening Auction. Consistent with the LC's logic, the location of the Evening Auction must not be "a material term of the Stingel Agreement" (Id.), which is contrary to the LC's holding that the SC required the Evening Auction to be conducted physically in New York (A375-376). Evidently, the LC believes that the date is material and place is elastic and immaterial.

POINT III
THE LC ERRED IN ERRONEOUSLY APPLYING FORCE MAJEURE TO VOID THE SC

A. Phillips' Unlawful Invocation of the FM Clause Was a Breach of Contract

Having retroactively excused Phillips' breach of the SC by failing to obtain JN's written consent, the LC put another crack in the tea cup by excusing Phillips' unlawful invocation of the SC's FM clause to terminate the SC.

1. The Lower Court Failed to Narrowly Construe the Parties' FM Clause

Phillips failed to satisfy its factual burden of demonstrating that COVID-19, the Governor's Executive Orders and/or the Stafford Act (42 U.S.C. § 5122(2)) are

SC FM events.[31] The law is irrefutable that FM clauses are "applied narrowly" because "performance should be excused only in extreme circumstances." Kel Kim, supra, 70 N.Y.2d at 902-03.[32] "***[O]nly*** if the force majeure clause ***specifically*** includes the event that actually prevents a party's performance will that party be excused." Id. (emphasis supplied). General catch-all phrases in FM clauses are "***not*** to be given expansive meaning" and are "confined to things of the same kind or nature as the particular matters mentioned." Id. (emphasis supplied).[33] The LC's holding (A371-372)—reliant on the FM's ***general*** language, i.e., "postponed for circumstances beyond our or your reasonable control" (Id.)—was clear error and violated Kel Kim, supra, and its progeny. The FM's general language is modified by the specific FM events, contrary to the LC's holding, which unlawfully expanded and redefined those events.

The LC inexplicably cited Israel v. Chabra, 537 F.3d 86, 96-100 (2d Cir. 2008) (A377) for the proposition that the phrase "including, without limitation" in the FM clause should be construed to include COVID-19 as a subset of the general phrase "circumstances beyond our or your reasonable control." Israel, supra, interpreted

[31] See J.C. Penney Co. v. McLean Trucking Co., 36 N.Y.2d 733, 734 (1975).

[32] See also United Equities, supra; In re Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012); Reade v. Stoneybrook Realty, LLC, 63 A.D.3d 433, 434 (1st Dep't 2009).

[33] See Team Mktg. USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942-43 (3d Dep't 2007) (applying ejusdem generis and holding that the catch-all phrase "for any reason" did not include a third-party's rescheduling and canceling of events because the FM clause enumerated only "strikes, boycotts, Acts of God, labor troubles, riots, and restraints on public authority"); see also Madison Hill Corp. v. Cont. Baking Co., 21 A.D.2d 538, 541 (1st Dep't 1964).

contractual language broadly and had nothing whatsoever to do with force majeure and Kel Kim, supra.

In ESI, Inc. v. Coastal Corp., 61 F. Supp. 2d 35, 74-75 (S.D.N.Y. 1999), the subject contractual provision stated:

> "…Nothing herein contained shall be construed as an agreement by [Tenneco] to be responsible for any other obligations or liabilities of Trigen relating to or arising from the Project, ***including but not limited to***, any obligation of Trigen to reimburse IEC for its expenses relating to the Project" (emphasis supplied).

The court restrictively interpreted the "including but not limited" clause, holding:

> "According to the *noscitur a sociis* rule of contract construction (or its cousin *ejusdem generis*), the phrase 'any other obligations or liabilities,' should be interpreted as referring to obligations or liabilities *similar in nature* to Trigen's obligation 'to reimburse IEC for its expenses relating to the Project.' [citation omitted]. The phrase 'including, but not limited to' does not alter this analysis—the general expression is not limited to the single specific example given, but should nevertheless be restricted to obligations of the same type or class [citation omitted]."

The Second Circuit has abided by Kel Kim, supra,[34] and never has used a contractual interpretation analysis to limit the holdings of Kel Kim, supra, concerning narrow application of the express terms of an FM clause. In Israel, supra, 537 F.3d at 96-100, the Second Circuit did not overrule, much less reference, the long line of well-established FM cases applying the ejusdem generis doctrine (i.e., Kel Kim, supra; Team Marketing, supra). The LC flipped the meaning of ejusdem generis on its head and bent the language of natural disaster to fit ejusdem generis. The phrase "including, without limitation" is not credited under an ejusdem generis analysis and

[34] See Beardslee v. Inflection Energy, LLC, 761 F.3d 221, 230 (2d Cir. 2014).

the LC's misinterpretation has erected an impenetrable wall of illegality. See Point III.B.2. relating to scientific evidence.

2. Whether COVID-19 Is of the Same Kind or Nature as "Natural Disaster" Is an Issue of Scientific Fact Mandating Expert Testimony

The LC held that ***"[i]t cannot be seriously disputed*** that the COVID-19 pandemic is a natural disaster" (A372) (emphasis supplied) despite conceding that no New York court has so held (Id., fn 7), failing to define "natural disaster" itself and melding unscientific Black's Law Dictionary definitions of the two independent words "natural" and "disaster" (A373), creating a personal semantic alloy that fails legally and scientifically.

The Decision purported to include an Oxford English Dictionary ("OED") definition of "natural disaster," but merely referenced an uncited, undocumented version of the OED (Id.). To the extent that the LC was referencing the definition of "natural disaster" only found in the online edition of the OED (not in the first or second complete OED editions of 1933 and 1989), the LC incorrectly read the definition. Whereas the OED definition reads, "[A] natural event that causes great damage or loss of life, ***such as an earthquake, hurricane, or flood***" (emphasis supplied), the LC wrote, "such as a flood, earthquake, or hurricane" (A373). In any event, the online OED definition of "natural disaster" cited by the LC employs specific events, viz., "flood, earthquake, or hurricane" (Id.), none of which are "pandemic," "epidemic" or "disease" and which are outside the purview of Kel Kim,

supra. The LC extended events causing physical damage to the Earth itself to a viral pandemic, clearly violating Kel Kim, supra.

What constitutes a "natural disaster" is an area of scholarly analysis.[35] Expert testimony is indispensable to determine whether COVID-19 is of the same kind or nature as "natural disaster," which is an issue of fact for a jury. See Putnam and Anderson, supra. Whether the COVID-19 pandemic was caused naturally or by man is a topic of worldwide controversy—i.e., whether COVID-19 escaped from one of two labs in Wuhan working on coronaviruses or whether such labs were genetically engineering (or manipulating) a Sars-Co V-2-like virus.[36] This alone defeats any FRCP 12(b)(6) motion. See de Becdelievre v. Anastasia Musical LLC, 2018 WL 1633769 (S.D.N.Y. Apr. 2, 2018) (denying a 12(b)(6) motion where the Court would have had to make complicated technical conclusions "without guidance by experts"); see also Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F.Supp. 405, 412-13 (N.D.N.Y. 1995) (denying a 12(b)(6) motion because "[b]oth parties are entitled to present expert proof to the jury" concerning the construction and effect of the subject

[35] E.g., Professors Ronald W. Perry and Enrico L. Quarantelli ("Quarantelli"), What Is A Disaster?: New Answers to Old Questions (2005), including chapters titled "The Meaning Of Disaster" and "Disasters, Definitions And Theory Construction;" Professor Quarantelli ,What Is A Disaster? Perspectives on the Question (1998); Professors Havidán Rodríguez, Quarantelli, Russell R. Dynes, Handbook of Disaster Research (2007).

[36] See https://www.wsj.com/articles/the-world-needs-a-real-investigation-into-the-origins-of-covid-19-11610728316; https://www.independentsciencenews.org/health/the-case-is-building-that-covid-19-had-a-lab-origin/; https://nymag.com/intelligencer/article/coronavirus-lab-escape-theory.html; https://www.pbs.org/wgbh/frontline/film/chinas-covid-secrets/.

disputed language).[37] As detailed on pp. 7-8, supra, JN thrice requested limited and targeted discovery and was thrice denied by the LC. When the LC made the ultimate factual and scientific determination that COVID-19 was a "natural disaster," the LC improperly converted Phillips' FRCP 12(b)(6) motion into a summary judgment motion without notice or any discovery whatsoever.

The LC's citation to Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) (A372, fn 7)—in support of the LC's improper legal conclusion that COVID-19 is a natural disaster—is utterly irrelevant. Badgley, supra, concerns a class action by inmates at a Nassau County jail, claiming that their constitutional rights were violated by overcrowding. The Court's off-hand remark regarding natural disasters is mere dicta within dicta. The definition of "natural disaster" in a force majeure clause was not at issue in that case. It is far from a settled legal conclusion that, in defining and construing the term "natural disaster," the Second Circuit intended to be bound by its passing reference to "natural disaster" in an inapposite 1980s jail overcrowding case.

3. The Lower Court Failed to Analyze Whether COVID-19 Is the Proximate Cause of Phillips' Non-Performance

The FM clause does not enumerate governmental orders. Governmental lock-down orders, not the COVID-19 pandemic itself, shuttered Phillips'

[37] Natural Resources Defense Council, Inc. v. F.A.A., 564 F.3d 549, 561(2d Cir. 2009); Carpenters Pension Trust Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 234 (2d Cir. 2014); M.C. and G.C., v. The Mamaroneck Union, 2018 WL 4997516 (S.D.N.Y. Sept. 28, 2018); In re Global Crossing, Ltd. Secs. Litig., 322 F.Supp.2d 319 (S.D.N.Y. 2004); In re AMBAC Fin. Grp. Inc. Sec. Litig., 693 F. Supp.2d 241 (S.D.N.Y. 2010); Novartis Vaccines and Diagnostics, Inc. v. Regeneron, 2019 WL 3812035 (S.D.N.Y. Aug. 14, 2019).

operations.[38] As discussed in Point I, supra, Phillips was rendered unable to hold an in-person auction only when Executive Orders forced Phillips to close its doors. Whether Phillips could have conducted an in-person auction despite the COVID-19 pandemic in the absence of such Executive Orders is a question of fact that defeats the FRCP 12(b)(6) motion. See Putnam and Anderson, supra. The parties struck SC ¶12(b), which would have granted Phillips a termination right for economic downturn (A241), deciding that Phillips bore the risk of an economic downturn.[39] See Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 34 Misc. 3d 1222(A) (Sup. Ct. New York Co. 2009), aff'd, 68 A.D.3d 562 (1st Dep't 2009).

As the March 14, 2020 Executive Order #202.1 limited gatherings to 500 persons (see p. 13, supra), there is a pure question of fact as to why Phillips could not have held a 500-or-fewer-person auction. Executive Order #202.1 did not prohibit Phillips from holding an in-person auction at the time of Phillips' March 14 Announcement.

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[38] See Arkell & Douglas v. N.H. Borenstein & Sons, 188 A.D. 158, 161 (1st Dep't 1919) (Plaintiff had the burden "to show that it was actually prevented from performing its contracts by conditions over which it had no control ***and which resulted from the causes set forth in the contracts***") (emphasis supplied).

[39] Holding:

> "…[T]he parties to the [contract] considered the possibility of a change in the financial circumstances of either party, even if not specifically anticipating the nature or extent of such economic downturn, and determined that this provision would not shield the parties from liability for any non-performance of their respective obligations on such basis."

The LC failed to recognize the distinction between the COVID-19 virus and governmental orders combatting the spread of the COVID-19 virus. The specific events in the FM clause are acts of disorder—events beyond the control of organized civil society—as opposed to COVID-19 governmental restrictions—which are acts of law and order.[40] Natural disasters are localized events resulting from natural processes of the earth—i.e., hurricanes, tsunamis, earthquakes, tornadoes and other geological processes—that generally are geographically contained and relatively short in duration. The COVID-19 pandemic is a global viral event requiring a years-long hands-on response. Unlike the natural disasters specifically enumerated in the FM provision, the COVID-19 pandemic has not caused widespread destruction to physical infrastructure.

4. Whether COVID-19 Was Reasonably Foreseeable Is a Question of Fact

FM excuses performance ***only*** when the specific intervening event is ***truly unforeseeable and*** the risk associated with it ***could not have been built into the agreement*** at the time of contract formation. See Rochester Gas and Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, *7 (W.D.N.Y. Feb. 13, 2009).[41] Phillips' inability

[40] See Reade v. Stoneybrook Realty, LLC, 63 A.D.3d 433 (1st Dep't 2009) holding that a judicial TRO was included in a force majeure clause because the clause included governmental orders; see also Stasyszyn v Sutton East Assocs., 161 A.D.2d 269 (1st Dep't 1990) holding economic distress attributable to governmental rules and regulations is not a force majeure event; In re Republic Airways Holdings Inc., 2016 WL 2616717 (Bankr. S.D.N.Y. 2016).

[41] See also Team Mktg., supra, 41 A.D.3d at 942-943; A + E Television Networks, LLC v. Wish Factory Inc., 2016 WL 8136110, at *12 (S.D.N.Y. Mar. 11, 2016); RW Holdings, LLC v. Mayer,

to perform "must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." Ebert v. Holiday Inn, 628 Fed.Appx. 21, 24 (2d Cir. 2015).[42]

The LC should have taken judicial notice of the following non-exhaustive list of pandemics:

- MERS pandemic (2015-present);
- Ebola pandemic (2014-2016);
- H1N1 Swine flu pandemic (2009);
- SARS pandemic (2002-2004);
- H1N1 Russian flu pandemic (1977);
- H3N2 Hong Kong flu pandemic (1968-1970);
- Cholera pandemic (1961-1975);
- H2N2 influenza pandemic (1957-1958); and
- H1N1 Flu pandemic (1918-1920).

At the time of contract formation, the likelihood of a pandemic affecting the contractual arrangement was no less probable than other enumerated FM events drafted by Phillips including, inter alia, "general strike, war, armed conflict, terrorist

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131 A.D.3d 1228, 1230 (2d Dep't 2015); Warner v. Kaplan, 71 A.D.3d 1, 6 (1st Dep't 2009); Vernon Lumber Corp. v. Harcen Const. Co., 60 F. Supp. 555, 558 (E.D.N.Y. 1945).

[42] See also Millgard Corp. v. E.E. Cruz/NAB/Frontier-Kemper, 329 Fed.Appx. 307, 310 (2d Cir. 2009); Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., 52 Fed.Appx. 528, 530 (2d Cir. 2002).

attack or nuclear or chemical contamination." See SC ¶12(a); see also Putnam and Anderson, supra.

5. The LC Cited Inapposite Cases Concerning the Construction of FM Clauses

The LC cited two utterly inapplicable Pennsylvania cases (A372-373, fn 7), Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (2020) and Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 370 (2020), for the proposition that "the COVID-19 pandemic qualifies as a natural disaster" (A372-373, fn 7). Three subsequent Pennsylvania cases—Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co., 2021 WL 131556, *7 (E.D.Pa. Jan. 14, 2021), Clear Hearing Sols., LLC v. Cont'l Cas. Co., 2021 WL 131283, *8 (E.D. Pa. Jan. 14, 2021) and TAQ Willow Grove, LLC v. Twin City Fire Ins., 2021 WL 131555, *5 (E.D. Pa. Jan. 14, 2021)—have elucidated that DeVito and Democratic, supra, have "no bearing on how the Court must construe the plain language of [a] contract." Ultimate Hearing, supra, 2021 WL 131556 at *7. DeVito and Democratic, supra, which interpreted a ***statute*** triggering executive authority for natural disasters, shed no light whatsoever on how a court may interpret a ***contractual provision*** concerning natural disasters.

6. The Governor's Executive Orders, the President's FEMA Declaration, the Stafford Act and Executive Law §20 Do Not Support the LC's Holding

Though the LC relied on Governor Cuomo's Executive Orders declaring a "State disaster emergency" and the President's March 19, 2020 FEMA notice

(interpreting the Stafford Act) (A374), neither source declared COVID-19 a "natural disaster." See Moore v. Circosta, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020); Wise v. N.C. State Bd. of Elections, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020) ("Notably, neither the Governor's Emergency Proclamation nor the Presidential Proclamation identified COVID-19 as a natural disaster").

Exec. Law §20 supports JN, not Phillips, as it defines "disaster" as:

> "[O]ccurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, ***including, but not limited to…disease outbreak***…" (emphasis supplied).

JN's and Phillips' FM clause does not reference "disease outbreak." Moreover, the definition of "disaster" in Exec. Law § 20(2)(a) was amended to include "disease outbreak" ***only on March 2, 2020*** (L.2020, c. 23, § 4), well after the SC was executed.

7. A Party Cannot Invoke FM to Obtain a Better Deal Than Bargained for

As the SC and BC are interrelated, interconnected and interdependent agreements and JN fully performed the BC (JN's contractual obligation pursuant to the "trade") in June 2019 before the COVID-19 pandemic (see Point IV, infra), Phillips cannot invoke FM to obtain a greater profit than contracted for. See United Equities Co. v. First Nat'l City Bank, 52 A.D.2d 154, 163 (1st Dep't 1976):

> "Force majeure… has no application where there has been no frustration and where on the contract date of performance, October 14, 1971, plaintiff was given what it realistically contracted for…and where plaintiff has realized and been paid the full benefit and profit contracted for."

FM clauses are meant "to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties" Id. at 157.[43] There is no question of frustration or limitation of damages as Phillips received the full benefit and profit contracted for. Phillips cannot invoke the FM clause.

8. Phillips Was Not Prevented from Performing the SC and Made No Attempt to Perform the SC

The LC erred in accepting at face value Phillips' contention that the SC only governed a physical, in-person auction in New York in May 2020 and that once Phillips was prohibited from conducting such a physical, in-person auction as a result of Governmental Orders relating to COVID-19, that was the end of the FM analysis. A party invoking an FM defense must prove that, even if circumstances beyond their reasonable control prevented them from performing a contract in the manner they originally anticipated, performance was ***impossible*** under the contract. See Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep't 2001); see also Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F.Supp. 312, 318 (S.D.N.Y. 1989).

[43] See also Constellation Energy Servs. of New York, Inc. v. New Water St. Corp., 146 A.D.3d 557, 558 (1st Dep't 1976); Goldstein v. Orensanz Events LLC, 146 A.D.3d 492, 492 (1st Dep't 2017).

Phillips' inability to perform in the exact manner it anticipated and preferred is not tantamount to being unable to perform. See United Equities, supra, 52 A.D.2d at 161:

> "It may be that the contract could not be carried out in quite the way that the parties may well have contemplated originally. But ***this was a mere matter of mechanics***" (emphasis supplied).

"[T]he non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure." Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d Cir. 1985). Even when an event is included in an FM clause, the party invoking the clause must demonstrate that it took all reasonable steps to seek to avoid or mitigate the event, its consequences and/or its non-performance. See Air et Chaleur S.A. v. Janeway, 757 F.2d 489, 494 (2d Cir.1985); see also Tynan Incinerator v. Int'l Fidelity Ins. Co., 117 A.D..2d 796, 797 (2d Dep't 1986). An impossibility defense is not available to a party that did not take virtually every action within its power to perform under the subject agreement. See U.S. v. Int'l Bhd. of Teamsters, 816 F. Supp. 864, 874 (S.D.N.Y. 1992), aff'd, 986 F.2d 15 (2d Cir. 1993).[44]

If alternative means of performing a contract exist and the contract does not expressly state that performance must be conducted in one specific, narrow manner, a

[44] See also Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990); East River Sav. Bank v. Secretary of HUD, 702 F.Supp. 448, 460 (S.D.N.Y. 1988).

party cannot invoke FM to excuse its nonperformance. In Aukema v. Chesapeake Appalachia, LLC, 904 F.Supp.2d 199, 210 (N.D.N.Y. 2012) and Beardslee v. Inflection Energy, LLC, 904 F.Supp.2d 213, 220 (N.D.N.Y. 2012), the Court held that FM was not triggered by the Governor's moratorium on the only viable, profitable method of oil and gas drilling as performance remained possible using other drilling methods and defendants made no efforts to perform. The Court held that the draftsman is "in the best position" to insert specific terms into a contract. Id.

Phillips as draftsman failed to insert in the SC that the Evening Auction could be conducted only as an in-person auction in New York in May 2020. In Rochester Gas and Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, *10 (W.D.N.Y. Feb. 13, 2009), the Court rejected an FM defense as defendant still could perform, as follows:

> "The mere fact that this undertaking may have become burdensome, as a result of subsequent, perhaps unanticipated, developments, does not operate to relieve [defendant] of [its] obligation." Id. (internal citation omitted).

Phillips was not prohibited from conducting an online auction during the COVID-19 pandemic. All Phillips auctions (historically over the last 20 years) have accepted bids in person, over the phone and via absentee bidding and online bidding has been available and encouraged for well over five years.[45] This Court can take judicial notice of videos and television broadcasts of Phillips, Sotheby's and Christie's auctions where the rooms are lined with scores of employees on the phone with remote bidders. In April and May 2020, Phillips advertised and conducted at

[45] A167, ¶43; A169-174, ¶46, ¶¶48-49, ¶¶51-52, ¶54; A226.

least 11 online auctions (A170-171, ¶49). On or about June 11, 2020, a Phillips advertisement in the New York Times was captioned "BID FROM ANYWHERE EASIER THAN EVER" with an image of an individual pointing to a smartphone (A215-216). On June 12, 2020, Phillips' website stated:

> "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***" (A217-218) (emphasis supplied).

On July 2, 2020, Phillips conducted the "New York" Evening Auction as an online auction physically based in London and livestreamed in New York and globally (A171-173, ¶¶50-51). An online auction is, at bare minimum, a "commercially reasonable substitute" that "must be tendered and accepted." UCC 2-614(1). The Official UCC Comment states that UCC 2-614(1) requires the tender of a commercially reasonable substituted performance where agreed-to facilities have failed or become commercially impracticable.

Phillips' failure to take any steps to perform pursuant to the SC, including selling the Stingel Work in an online auction, is fatal. Instead, Phillips nefariously made a financial decision not to perform. See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., 2010 WL 1945738, *5 (Sup. Ct. Albany Co. May 12, 2010).[46] Phillips selectively terminated the SC while declining to terminate the 24 other consignment

[46] See also Rivas Paniagua, Inc. v. World Airways, Inc., 673 F.Supp.708, 713 (S.D.N.Y. 1987) (Defendant "unilaterally chose to cancel commercial flights, presumably for its own economic benefit").

agreements (11 with contractual guarantees) for the rescheduled Evening Auction[47] as Phillips perceived the Stingel market as weak (A166, ¶40). This goes to the heart of Phillips' intent and is a question of fact defeating the instant FRCP 12(b)(6) motion and mandating discovery and the depositions of Phillips' principals. See Putnam and Anderson, supra.

The LC's holding that as "[t]he parties did not contract for an online auction conducted in July from London," Phillips was not required to conduct an online auction of the Stingel Work post-May 2020 (A378-379), is a misapplication of FM law. The parties need not spell out the terms of alternative performance in an agreement. If performance is possible through alternative means, such alternative performance is mandatory prior to invoking FM, even if not originally contemplated by the parties. See United Equities, supra, 52 A.D.2d at 161. Clearly, selling the Stingel Work in an online auction was not a burdensome action requiring Phillips to "exhaust all efforts" (A378-379), seeing as Phillips conducted at least 11 online auctions in April and May 2020 (A170-171, ¶49) and held the "New York" Evening Auction as an online auction on July 2, 2020 (A171-173, ¶¶50-51).[48]

[47] A166-170, ¶¶42-47; A189-190, ¶¶107-108.
[48] The LC did not address JN's third claim. JN sufficiently pled that Phillips committed breaches of contract by violating SC ¶¶6(a), 11(a) and 12(a)-(c) concerning: (a) The sale of the Stingel Work with the Guaranteed Minimum intact; and (b) Payment requirements to JN (A181-184, ¶¶77-86).

POINT IV
THE LC ERRED IN HOLDING THAT JN DID NOT PLEAD A CLAIM FOR BREACH OF THE BC

The LC erred in declining to treat the SC and BC—executed simultaneously in the same location—as interrelated, interconnected and interdependent agreements as opposed to two separate agreements.

"The issue of the dependency of separate contracts...boils down to the intent of the parties." Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turtur, 892 F.2d 199, 205 (2d Cir. 1989). The Nat'l Union Court further held:

> "Two separate written agreements executed at the same time may be considered in law as one agreement, but only if the parties so intended. Whether the parties intended that the two agreements should be interdependent is a question of fact which turns upon the circumstances of each case." Id. at 204 (internal citation omitted).

The parties' "expressed intention and meaning, ascertained from the whole instrument…are the guides in determining the character and force of their respective covenants." Rosenthal Paper Co. v. Nat'l Folding Box & Paper Co., 226 N.Y. 313, 320 (1919).[49] Courts also rely on "the application of common sense." Id. In Lowell v. Twin Disc, Inc., 527 F.2d 767, 769-70 (2d Cir. 1975), the Court held:

> "[T]he test is as follows: 'It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, ***so that there would have been no bargain whatever, if any promise or set of promises were struck out***…'" (emphasis supplied) (internal citation omitted).

The parties' intent as to the interdependency of the SC and BC is a question of

[49] See also Rudman v. Cowles Comms., Inc., 30 N.Y.2d 1, 13 (1972); Greasy Spoon Inc. v. Jefferson Towers, Inc., 75 N.Y.2d 792, 795 (1990).

fact that requires discovery and defeats the instant FRCP 12(b)(6) motion, particularly in light of the unrefuted declaration of JN's principal. See A155-157, ¶¶14-16; A320, ¶ 7; see also Putnam and Anderson, supra. An additional question of fact concerns "the breach of one [contract] undoing the obligations under the other" and "the primary standard is the intent manifested, viewed in the surrounding circumstances." Nat'l Union, supra, 892 F.2d at 204 (internal citation omitted).

In holding that questions of intent generally are not disposable ***even on a summary judgment motion*** (let alone a motion to dismiss), the Nat'l Union Court emphasized that the purportedly interrelated agreements were presented together, all had to be signed for the transaction to be consummated and one of the parties alleged that he executed the documents "as part of one whole transaction." Id. at 205.[50]

In Nat'l Convention Servs., L.L.C. v. Applied Underwriters Captive Risk Assurance Co., Inc., 239 F.Supp.3d 761, 785 (S.D.N.Y. 2017), the Court held, "Whether the parties intended [two agreements] to be treated as one contract raises issues of fact that cannot be resolved at the pleading stage." Denying defendants' motion to dismiss, the Court held that it was plausible that the two agreements were mutually dependent as coverage under one agreement was conditioned on execution

[50] See also Medinol Ltd. v. Boston Scientific Corp., 346 F.Supp.2d 575, 618 (S.D.N.Y. 2004) ("Whether or not [defendant] actually breached the Supply and Transaction Agreements, and whether or not the Supply, Transaction, and Stockholder Agreements should be read as an integrated whole or severed…are questions of fact which I should not resolve on summary judgment"); Cooperative Centrale Raiffeisen-Boerenleen Bank B.A. v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 778 F.Supp. 1274, 1280 (S.D.N.Y. 1991) ("Whether these documents were ever executed and whether they may be considered interdependent, involve issues of fact which warrant further discovery, including discovery from third parties").

of the second agreement and one agreement "clearly reference[d] the second agreement." Id. at 786. See also Enzo Biochem, Inc. v. PerkinElmer, Inc., 2013 WL 5943987, *5 (S.D.N.Y. Oct. 28, 2013) (holding "the Settlement Agreement and the Distribution Agreement should be read as one integrated contract" where, inter alia, both agreements were executed and took effect on the same day and one agreement referenced the second agreement); Cooperative Centrale, supra, 778 F.Supp. at 1280 ("The fact that all of the documents at issue took effect on the same day…supports the argument that the separate documents may be considered interdependent"); Elite Promotional Mktg., Inc. v. Stumacher, 8 A.D.3d 525, 526-27 (2d Dep't 2004) ("The record shows that the GTE contract was conditioned on the execution of the [confidentiality] agreement. Accordingly, since the GTE contract and the [confidentiality] agreement were parts of the same transaction and the parties were, for all practical purposes, the same entities, 'there was clearly a manifest intent on the part of the parties that the agreements should be read together'") (internal citation omitted).[51]

Whether the parties intended the SC and BC to be interdependent is clear from the first paragraph of the BC and can be decided as a matter of law. At the very least, it is a question of fact that defeats the instant FRCP 12(b)(6) motion. See Putnam and

[51] Transportation Ins. Co. v. Star Indus's, Inc., 2005 WL 1801671, *5 (Jul. 28, 2005) ("The Second Circuit has recognized that New York law requires that 'all writings that form part of a single transaction and are designed to effectuate the same purpose be read together, even [if] they were executed on different dates...'").

Anderson, supra. The two agreements were executed by the same parties on the same date and took effect on the same date (A156, ¶15). The two agreements concern the terms of a "trade" whereby JN guaranteed the sale of the Basquiat Work in exchange for Phillips' guarantee of the sale of JN's Stingel Work (A155-157, ¶¶10-16). The introductory paragraph of the BC acknowledges that JN expressly conditioned execution of the BC on Phillips complying with its guarantee obligations to JN pursuant to the SC, confirming that the parties intended a sale and guarantee of the Stingel Work and Basquiat Work to be part of a unified transaction:

> "Conditional upon signature by you of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolf Stingel, Untitled, 2009 (Contract Number 04NYD752)…" (A157, ¶17).

The LC's holding that the BC merely required JN to sign the SC and did not require Phillips to abide by the SC's express terms—i.e., auction the Stingel Work and pay the Guaranteed Minimum (A380)—violates Rosenthal's "common sense" test and the well-pled history of the parties' "trade" discussions and negotiations. See Rosenthal, supra, 226 N.Y. at 320; see also A155-157, ¶¶10-16.

As a matter of law, multiple agreements should be construed as a single agreement if the parties assented to all of the promises as a whole so that there would have been no bargain if any promise or set of promises had been stricken.[52] There would have been no bargain whatsoever unless the parties executed ***both*** the SC and

[52] See World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp., 2010 WL 3155176, *15 (S.D.N.Y. 2010), aff'd, 694 F.3d 155 (2d Cir. 2012); see also Resources Funding Corp. v. Congrecare, Inc., 1994 WL 24825 *8 (S.D.N.Y. 1994); In re: Residential Capital, LLC, 533 B.R. 379, 396 (S.D.N.Y. 2015).

BC (A155-156, ¶¶14-16; A320, ¶7). The conditional language in the first paragraph of the BC unequivocally demonstrates that the parties contemplated the fulfillment of all contractual promises in the SC and BC as the quid pro quo for its counterparty's performance and that such contractual promises were indivisible.

By dismissing JN's "trade" allegations (A380-381), the LC improperly prohibited a factual analysis of the parties' intent at the time of contract execution that would defeat the FRCP 12(b)(6) motion. Novick v. AXA Network, LLC, 642 F.3d 304, 312-13 (2d Cir. 2011) confirms that such a factual analysis was mandatory as the SC and BC:

> "[C]annot be reviewed properly without consideration of the parties' intent…and the circumstances surrounding those Agreements, for the independence or interdependence of promises cannot be determined by examining one promise in isolation."

See also Kamin v. Koren, 621 F. Supp. 444, 447 (S.D.N.Y. 1985), holding:

> "The fact that the agreements did not state in haec verba they were interdependent does not control. Separate written agreements executed at the same time may be considered in law as one agreement…"

The LC further erred in holding:

> "In opposition to dismissal, JN argues that the two agreements were the product of a 'trade': JN would guarantee the sale of the Basquiat Painting in exchange for Phillips guaranteeing the sale of the Stingel Painting. Accepting that statement as accurately describing the parties' motives does not enlarge JN's rights to enforce the contracts as written. Indeed, doing so would be inconsistent with the two Agreements' integration clause" (A380-381).

As an initial matter, JN pled the specific factual details of this "trade" in the SAC (A155-156, ¶¶13-16), not "[i]n opposition to dismissal" (A380-381). JN is not seeking to "enlarge" its contractual rights by alleging the interrelatedness of the BC and SC; rather, JN simply is attempting to enforce its contractually-bargained for rights under both agreements. The only material difference between the BC and SC is that one sets forth the details of the auctioning of the Basquiat Work and the other the auctioning of the Stingel Work.

The LC is wrong, as a matter of law, that two agreements cannot be deemed interrelated in the presence of an integration clause (A381) or contractual language indicating the absence of any related agreements; in fact, two agreements may be deemed interrelated where they form a single, unified transaction. See Aktiv Assets LLC, et al v. Centerbridge Partners, L.P., et al, Index No. 653259/2019 (Sup. Ct. N.Y. Co. Dec. 24, 2019) ("[T]he presence of an integration clause, while significant, does not preclude a finding that [two] Agreements should be read together"); see also Wells Fargo Bank Minn., Nat'l Ass'n v. CD Video, Inc., 2004 WL 3029875, *6 (Sup. Ct., N.Y. Co. Jun. 30, 2004) (holding that two documents "form a single transaction and constitute one agreement" and the integration clause was not violated because "all writings forming part of a single transaction and are designed to effectuate the same purpose…are to be read together" where the two documents were executed by the same parties on or about the same date "during the course of the same transaction" and, in most respects, were consistent with each other); Rhythm & Hues,

Inc. v. Terminal Mktg. Co., Inc., 2002 WL 1343759, *6 (S.D.N.Y. Jun. 19, 2002) (holding that an integration clause did not prevent certain documents from being read together with a lease because they constituted "writings forming part of a single transaction" and "the integration clause is merely boilerplate language on a form contract, and was apparently not the product of extended negotiations between the parties").[53]

POINT V
THE LC ERRED IN HOLDING THAT JN DID NOT PLEAD A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The LC incorrectly held:

> "[T]he SAC fails to plead adequately that Phillips acted in bad faith when it chose to exercise its contractual right to terminate the Stingel Agreement" (A384).

JN's good faith and fair dealing claim is not simply predicated on the fact that Phillips terminated the SC, but rather on the full context of Phillips' bad faith actions surrounding its unlawful termination decision. JN's "specific factual allegations" of bad faith include, inter alia:

[53] Williams v. Mobil Oil Corp., 83 A.D.2d 434, 439 (2d Dep't 1981) ("Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement [citations omitted]. ***The rule is applied even though in one of the contracts it is stated that there are not other contracts between the parties***") (emphasis supplied); Nat'l Convention Servs., supra, 239 F.Supp.3d at 785 (holding that "it is plausible that the two [agreements] can be treated as one undertaking" ***despite language "imply[ing] that they should be treated as separate"***) (emphasis supplied); Carvel Corp. v. Diversified Mgmt. Grp., Inc., 1989 WL 58025, *1 (S.D.N.Y. May 23, 1989) ("***Despite their facially absolute language***, the notes are interdependent with the Distributorship Agreement…") (emphasis supplied).

(i) In April 2020, Miety Heiden ("Heiden"), Phillips' Deputy Chairwoman, stated to JN's principal that Phillips would honor all contractual commitments with consignors despite COVID-19;[54]

(ii) Phillips prominently and misleadingly used ***only*** the image of the Stingel Work (and no other artwork) on Phillips' website until mid-May 2020 to advertise and attract worldwide bidders for the rescheduled Evening Auction, leading JN and the art world to believe that the Stingel Work would be included therein, while not intending to auction the Stingel Work therein (A188, ¶102);[55]

(iii) On May 26, 2020, Heiden and Friedland stated to JN that Phillips was considering offering the Stingel Work in a November 2020 auction, represented that the Guaranteed Minimum would remain in place and discussed potential payment and interest terms with JN (A188, ¶103); and

(iv) Phillips engaged in an extreme 89-delay between rescheduling the Evening Auction and declaring FM and terminating the SC (pulling the Stingel Work from the rescheduled Evening Auction after alternative means of obtaining a guarantee were foreclosed to JN).[56]

Phillips' scheme to placate JN and convince JN that Phillips would not terminate the SC caused JN to forego negotiating a replacement sale or guarantee of the Stingel Work (Id.; A317, ¶3). Once Phillips terminated the SC 89 days after the March 14 Announcement, such alternatives were foreclosed to JN (Id.). The Stingel Work was "burned" in the marketplace (and its value plummeted) as prospective buyers came to believe that Phillips failed to generate purchase interest in the Stingel Work (A188, ¶104, A317, ¶3).

[54] A188, ¶102; A322, ¶¶12-13.

[55] Discovery will show that Phillips' international advertisements surreptitiously used ***only*** the Stingel Work to unlawfully test the market and gauge interest in the Stingel Work.

[56] A187-189, ¶¶101-04; A193-194, ¶120.

"Good faith and fair dealing require a party 'to speak' if it does not intend to perform an express or implied promise under the agreement." Donerail Corp. N.V. v. 405 Park LLC, 2011 WL489188, *12 (Sup. Ct., N.Y. Co. Feb. 2, 2011). "Intent 'is generally an issue of fact to be established at a hearing or trial.'" Id.[57] Phillips consignee owed fiduciary duties to JN consignor and, as such, was required to reveal its true intentions to JN. See Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 117 A.D.2d 285 (1st Dep't 1986). A party's silence "act[s] as a 'representation' for purposes of estoppel...when one has a duty to speak or one knows that the other party was acting under a mistaken belief." Katz v. Colonial Life Ins. Co. of Am., 951 F. Supp. 36, 41 (S.D.N.Y. 1997). There are critical questions of fact that defeat the subject FRCP 12(b)(6) motion concerning Phillips' misrepresentations and advertisements, as well as when Phillips decided to terminate the SC, that foreclose dismissal of the SAC. See Putnam and Anderson, supra.

The LC cited (A382) Prospect St. Ventures I, LLC v. Eclipsys Sols. Corp., 804 N.Y.S.2d 301, 302 (1st Dep't 2005), an utterly irrelevant case. The Prospect Court dismissed plaintiff's good faith and fair dealing cause of action, holding that it was devoid of "any specific factual allegations other than the use of the term 'good faith.'" Id. It is astounding that the LC failed to note that JN has enumerated ***specific factual allegations*** of bad faith conduct ***and*** set forth Phillips' improper motive (i.e.,

[57] See also Foscarini, Inc. v. The Greenestreet Leasehold P'ship, 2017 WL 2998846 (Sup. Ct. N.Y. Co. 7/14/17) (Plaintiff violated implied duty to send renewal notice only if it intended to renew by sending a faulty notice to make defendant believe it was renewing while searching for a better deal).

Phillips' belief in a weak Stingel market) (A166, ¶40), a standard JN was not even required to meet. "[A] plaintiff need not present direct evidence of an improper motive. Rather, bad faith can be inferred from evidence that the defendant's conduct was arbitrary or contrary to reasonable expectations." Dreni v. PrinterOn America Corp., 2020 WL 5518170, *11 (S.D.N.Y. Sept. 14, 2020).

The LC improperly dismissed JN's claim as duplicative of its breach of contract claims despite holding (A382-383):

> "'…[W]here…there is a dispute over the meaning of the contract's express terms, there is no reason to bar a plaintiff from pursuing both types of claims in the alternative…'" (internal citation omitted).[58]

As discussed in Points I-II, supra, it could not be more crystal clear that the parties dispute the meaning of Phillips-drafted contractual provisions (i.e., SC ¶¶6(a) and 12(a)) and terms (i.e., "in New York" and "New York auction"). A plaintiff may plead breach of contract and implied breach claims seeking similar damages as long as "the factual bases thereof are distinct and independent." Foscarini, supra. ***The bad faith actions set forth in detail on pp. 49-50, supra—all of which are collateral to the SC—render the two claims non-duplicative*** (A187-191, ¶¶99-114; A193-194, ¶120). A good faith and fair dealing claim is deemed non-duplicative of a breach of

[58] See also Longhi v. Lombard Risk Syst's, Inc., 2019 WL 4805735, *10 (S.D.N.Y. Sep. 30, 2019).

contract claim, even where premised on similar facts, where a party deprives another of contractual benefits while maximizing its own.[59]

> The LC further misrepresented JN's claim, holding:
>
> "JN argues that its implied covenant claim survives because Phillips was under an obligation to notify JN promptly if Phillips intended to cease performance. This theory fares no better. As of March, JN was on notice that there would be no New York Auction held in May 2020. On or about June 1, Phillips formally terminated the parties' agreement. ***The Stingel Agreement imposed no duty on Phillips to provide earlier notice of the termination***" (A385) (emphasis supplied).

The LC's reference to a contractual notice provision is a red herring and a misstatement of legal requirements to plead a good faith and fair dealing claim. Phillips' breach of the implied covenant of good faith and fair dealing does not stem from any contractual provision (notice-related or otherwise), but rather from the "reasonable expectations" of the parties, which "encompass[] any promises that a reasonable promisee would understand to be included." See Spinelli v. Nat'l Football League, 903 F.3d 185, 205 (2d Cir. 2018). Phillips acted in bad faith and counter to JN's "reasonable expectations" by waiting an extraordinary ***89 days*** to terminate the SC following the March 14 Announcement[60] while lulling JN into a false sense of security by expressly stating and impliedly indicating that Phillips would not

[59] See Commercial Lubricants, LLC v. Safety-Kleen Sys's, Inc., 2019 WL 6307241, *2-3 (E.D.N.Y. Nov. 25, 2019); see also Longhi, supra, at *9-10; Spinelli, supra, at 205-06; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152-54 (2002).
[60] A187-189, ¶¶101-04; A193-194, ¶120.

terminate the SC and would auction the Stingel Work in the rescheduled Evening Auction. See pp. 49-50, supra.

POINT VI
THE LC ERRED IN HOLDING THAT JN DID NOT PLEAD A CLAIM FOR BREACH OF FIDUCIARY DUTIES

It is undisputed that Phillips owed fiduciary duties to JN, as follows:

> "…Phillips owed JN a fiduciary duty by virtue of the consignment relationship. Accordingly, Phillips owed a duty of loyalty to JN and was required to conduct the consignment faithfully with JN's business interests at the forefront" (A386).

As the LC based its dismissal of this claim entirely on its holding that "JN has not adequately alleged that Phillips failed to comply with the terms of" the SC (A387), JN respectfully refers this Court to Points I-III, supra.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the LC's dismissal of the SAC (A153-229) be reversed and that the action be reinstated and reassigned to a different judge, together with such other and further relief as to this

Court seems just and proper.

Dated: New York, New York
February 17, 2021

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of FRAP Local Rule 32.1(a)(4)(1) because the brief contains 13,983 words, as counted by Microsoft Word For Mac v.16 (2016), excluding the cover, table of contents, table of authorities, signature block, and certificates of counsel.

2. This brief complies with the typeface requirements of FRAP Rule 32(a)(5) and the type style requirements of FRAP Rule 32(a)(6) because this brief has been prepared in 14 point Times New Roman font, a proportionally spaced typeface, using Microsoft Word For Mac v. 16 (2016).

Dated: February 17, 2021

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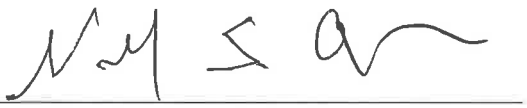

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