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

REPLY BRIEF FOR PLAINTIFF – APPELLANT

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PRELIMINARY STATEMENT

Phillips, in its appellate opposition brief ("Opp. Br."), has utterly failed to refute any of the contentions in JN's opening appellate brief ("JN's Br."). Declining to even attempt to distinguish the vast majority of JN's caselaw and arguments, Phillips relies instead on contractual interpretation platitudes and misstatements of fact and law. Phillips' multiple breaches of the Stingel Consignment With Guarantee Agreement ("SC") are clear. Phillips' interpretation of the SC is facially nonsensical, literally belied by Phillips' public statements and actions and in direct contravention of JN's legal authority. Phillips must not be permitted to retroactively rewrite the express terms of the SC to shamelessly and belatedly exploit an inapplicable force majeure ("FM") clause.

ARGUMENT

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

The first point in an appellate brief is the strongest argument for reversal. JN's Br. starts with the irrefutable point that Phillips twice breached the SC. Phillips tellingly deferred its effete attempt to refute this argument to Opp. Br. p.37. You can run, but you cannot hide.

Phillips' false distinction between voluntary and mandatory rescheduling/postponement fails to advance its threadbare argument. Documentary

proof evidences no governmental order or legal circumstance "mandating" Phillips' published announcement on March 14, 2020, titled "Auction Update: Temporary Closures & Postponements," postponing 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" (the "March 14 Announcement") (A222-223).

Phillips acknowledged (Opp. Br., p.38, fn 8)[1] JN's clear demonstration that Phillips ***twice*** breached SC ¶6(a)(i)[2] on March 14, 2020 (A222-223) and again in May 2020 (A220) by unilaterally rescheduling the Evening Auction to June 24-25 and July 2, 2020 without obtaining JN's prior written consent or giving any FM notice.[3] ***At no time did Phillips seek JN's consent orally or in writing***.[4]

As set forth in the chronology in JN's Br. (p.13), Executive Order #202.1, dated ***March 12, 2020***, mandated that large gatherings and events must be canceled or postponed ***if 500+ people are expected***.[5] ***Two days later***, when Phillips

[1] Phillips falsely asserted that JN argued for the first time on appeal that Phillips' termination of the SC was discretionary. JN pled that Phillips pretextually and discretionarily terminated the SC because of Phillips' perceived weakness of the Stingel market (A166, ¶40; A189, ¶106).

[2] Providing 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) (A56).

[3] A157-158, ¶20; A161-164, ¶¶27-28, 30-31, 34; A166-169; ¶¶39, 43-45.

[4] Id.

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

published the March 14 Announcement (A222-223), Phillips was ***not legally prohibited*** from conducting an in-person auction of 500 attendees at a physical location in New York. Phillips conceded that it legally could not have exceeded 500 attendees as the maximum occupancy of Phillips' public auction hall at its New York City headquarters at 450 Park Avenue is ***336 people*** (see Certificate of Occupancy #120216916T005, filed with the NYC Department of Buildings).[6]

The executive orders necessitating the cancelation of in-person events ***post-dated*** Phillips' postponement and rescheduling of the Evening Auction on March 14, 2020, contradicting Phillips' assertion that "[s]imply put, there is no support for the contention that Phillips 'rescheduled' the event ***in its discretion*** under Paragraph 6(a)" (Opp. Br., p.38) (emphasis supplied), notwithstanding Phillips' use of the unequivocal phrase "we have decided" in the March 14 Announcement (A222).

Phillips' brief (Opp. Br., p.20) prejudicially paraphrases the March 14 Announcement (A222), adding the word "pandemic" and strategically omitting "we have decided":

> "On March 14, 2020, Phillips announced that the New York Auction was being postponed ***due to the COVID-19 pandemic***." (emphasis supplied).

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

The March 14 Announcement contained no reference to governmental orders, stating (A222):

> "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" (emphasis supplied).

The use of the royal "we" is not New York State and is a discretionary decision by Phillips. Phillips admits this point (Opp. Br., pp.33-34):

> "JN's argument also ignores that Phillips' public notice postponing the New York Auction identified the pandemic—and not the Governor's orders—as the cause."

Phillips' failure to obtain JN's written consent prior to postponing and rescheduling the Evening Auction post-May 2020 on March 14, 2020 is a material breach of SC ¶6(a)(i) (A56).[7] It mandates reversal of the LC, rendering Phillips unable to enforce any part of the SC. 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).

At the time of its March 14 Announcement (A222-223), Phillips did not declare FM. It waited an outsized 89 days to do so (A193-194, ¶120). Phillips concededly exercised its discretion in voluntarily postponing and rescheduling the Evening Auction on March 14, 2020. Phillips invoked FM, cited governmental

[7] 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).

orders and terminated the SC ***three months later*** only after deciding that the Stingel market was weak and anticipating a $5,000,000.00 loss.

Phillips' Brand X caselaw (Opp. Br., p.39) fails to support its false distinction between discretionary and mandatory rescheduling/postponement. SC ¶6(a)(i)—the written consent mandate (Phillips as draftsman)—does not contain the words "voluntary" or "mandatory" or impose any limitation whatsoever on Phillips' obligation to seek and obtain JN's prior written consent to "select, change or reschedule the place, date and time for the auction…to a later date than May 2020" (A56). Nor does SC ¶12(a) (A60)—the FM provision (Phillips as draftsman)—contain the words "voluntary" or "mandatory" or reference SC ¶6(a)(i)'s written consent mandate (A56).

JN has never argued that SC ¶6(a)(i) and SC ¶12(a) are incompatible or contradictory (Opp. Br., p.39). SC ¶6(a)(i) requires JN's prior written consent to reschedule the date of the Evening Auction post-May 2020 for any reason whatsoever. SC ¶12(a) states that, if the Evening Auction is postponed "for circumstances beyond [the parties'] reasonable control," then Phillips may terminate the SC. Based on the facts, Phillips had to comply with the obligatory first part of the provision (postponement), which required JN's prior written consent. Nothing prevented Phillips from seeking JN's prior written consent and JN never declined to provide such prior written consent. Phillips cannot use its

failure to seek JN's prior written consent as a shield to neutralize Phillips' breaches.

Phillips' contractual interpretation cases (Opp. Br., p.39) contradict its argument. JN's contractual interpretation reconciles SC ¶6(a)(i) and SC ¶12(a). Phillips retroactively eliminates SC ¶6(a)(i)'s written consent mandate and permits Phillips to override its breach of SC ¶6(a)(i) by invoking SC ¶12(a) 89 days later.[8] Once Phillips breaches SC ¶6(a)(i) (twice in this instance), it is game over.

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

Phillips misstated that "every key term" (Opp. Br., p.21) of the SC mandates that the Stingel Work must be auctioned at an in-person auction in New York in May 2020, citing to only ***two*** provisions of the SC: (i) The "preamble" ("Sale date: May 2020") (A55)[9]; and (ii) SC ¶6(a) ("[t]he Property shall be offered for sale in

[8] See Ross v. Thomas, 728 F.Supp.2d 274, 282 (S.D.N.Y. 2010) (Opp. Br., p.39) ("'[W]here a contract provision lends itself to two interpretations, a court will not adopt [an] interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions'…'An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract'") (internal citations omitted).

[9] Phillips' citation is incorrect, omitting the SC's critical underscoring, as follows: "Sale Date: "__ May 2020." Id. This underscoring and lack of a specific date for the Evening Auction supports JN's position that the date of the Evening Auction could be changed.

New York at our major spring 2020 auction of 20th Century & Contemporary Art currently scheduled for May 2020") (A56).[10] Several SC provisions express that the auction date and/or location may be changed, and they were changed pursuant to the SC. Phillips unilaterally changed the date and site of the Evening Auction without declaring FM. That fact cannot be refuted.

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

The express language of the SC—drafted by Phillips—clearly demonstrates the parties' contemporaneous understanding that the Stingel Work could be auctioned in June 2020 or later, as follows:

- SC ¶6(a) (A56) does not contain a specific date in May 2020 for the Evening Auction and states that the Evening Auction is "***currently scheduled*** for May 2020" (emphasis supplied);
- SC ¶6(a)(i) (A56) 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) (A60) begins, "In the event that the auction is ***postponed***…" (emphasis supplied); and
- SC ¶3(c) (A56) states, "…[O]r to include such Property ***in the next appropriate auction*** after restoration has been completed…" (emphasis supplied).

Phillips failed to address these critical SC provisions.

[10] Phillips again miscited the SC, which actually sets forth: "[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" (emphasis supplied).

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

Phillips relies ***solely*** on the term "in New York," used once in SC ¶6(a) (A56). This term is ambiguous and globally flexible, especially given the SC's additional provisions concerning the site of the Evening Auction. In Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC, 30 A.D.3d 1, 8 (1st Dep't 2006) (Opp. Br., pp.21-22), in construing the term "default," the Court sought to harmonize the various provisions of a guaranty, not prioritize one provision over another.

The SC's text supports JN's contention that "in New York" did not restrict the Evening Auction to an in-person auction in New York and that the Stingel Work could have been sold in New York and globally via a live, real-time digital transmission:

- The SC does not contain any ***specific location or physical address*** for the Evening Auction and does not require that the Stingel Work be auctioned at an ***in-person auction*** or ***exclusively in New York***;

- SC ¶1 (A55) states, "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), and does not reference an in-person auction or any site in New York;

- SC ¶6(a)(i) (A56) granted Phillips the right "to ***select, change or reschedule the place***, date and time ***for the auction***…" (emphasis supplied); and

- SC ¶9(a) (A57) 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.

Phillips nonsensically argues (Opp. Br., pp.22-23) that JN's contractual interpretation:

> "[I]s further at odds with the fact that Phillips had no right to unilaterally offer the Stingel Painting at an internet auction or postpone the auction beyond May 2020 outside of the Termination Provision, and doing so would have constituted a ***material change*** to the contract's terms" (emphasis supplied).

Phillips, not JN, "material[ly] change[d]" the SC's terms by ***twice*** unilaterally changing the date and site of the Evening Auction to the week of June 22, 2020 (A222-223) and then July 2, 2020 (A220) with the auctioneer physically located in London (thus, invoking alternative performance).[11]

Phillips' logic is internally inconsistent and self-serving. According to Phillips, the Evening Auction ***was not date and site specific*** on March 14, 2020 when Phillips ***unilaterally and voluntarily announced the consolidation of New York and London auctions (including the Evening Auction) into a single June 2020 auction*** (without referencing governmental orders) and included the Stingel Work in the rescheduled auction, but the Evening Auction ***was date and site specific*** on June 1, 2020 when Phillips suddenly and retroactively terminated the

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

SC (claiming reliance on governmental orders). With the March 14 Announcement (A222-223), Phillips expressly waived the right to enforce the Evening Auction as a date and site specific auction.

The construction of the ambiguous term "in New York"[12] and determination of what constitutes a "New York auction" are factual issues incapable of resolution on an FRCP 12(b)(6) motion to dismiss (although Phillips' construction is fully contradicted by the facts and its own actions). See Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 405 (2d Cir. 2015); see also Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012); Loral Corp. v. Goodyear Tire and Rubber Co., 1996 WL 38830, *7 (S.D.N.Y. Feb. 1, 1996) (deeming an agreement ambiguous despite express contractual language "seem[ing] at first glance" to support defendant because plaintiff's contractual interpretation was "sufficiently logical to challenge [defendant's] literal reading" of the contract).[13]

[12] See St. Barnabas Hosp. v. Amisys, LLC, 2007 WL 747805, *4 (S.D.N.Y. Mar. 9, 2007); see also U.S. Licensing Assoc's, Inc. v. Rob Nelson Co., 2012 WL 1447165, *3 (S.D.N.Y. Apr. 26, 2012); 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).

[13] Phillips' citation (Opp. Br., p.23) of Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004), is irrelevant as neither party therein claimed that the terms of the lease were ambiguous.

Phillips' duplicitous, literal reading of "in New York" ignores contradictory SC provisions and Phillips' own irrefutable course of contractual conduct and cannot be credited on a motion to dismiss.[14] Phillips' actions support a judgment in JN's favor. Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) (Opp. Br., p.22) demonstrates that Phillips' literal, hypertechnical construction was misguided in 1997 when the Court's decision was rendered, let alone in 2021 when Phillips accepts bids over the phone and via absentee bidding and has encouraged online bidding for over five years.[15] The Digital Court held:

> "The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is *everywhere* where there is Internet access. When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much *in* Massachusetts, literally or figuratively, as it does anywhere." Id. at 462.[16]

Phillips distorts JN's position and contradicts Phillips' "New York auction" in London, arguing (Opp. Br., p.22):

> "JN's contrary interpretation is nonsensical because it would mean that the contract merely required the Stingel Painting to be made available for

[14] Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69, 72 (1978) (Opp. Br., p.23) is inapposite as it concerned an implied-in-fact covenant (not an express contractual term), which "bears a heavy burden" and is generally disfavored by courts. Id. at 69. Petitioner was an experienced attorney engaged in "long and exhaustive" negotiations concerning a lease, as opposed to JN's principal, who is not an attorney and did not have an attorney present to review the SC prior to execution. Id. at 72.

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

[16] See also In re Optimal U.S. Litig., 813 F.Supp.2d 351, fn 166 (S.D.N.Y. May 2, 2011); Carl Zeiss Microscopy, LLC v. Vashaw Scientific, Inc., 2020 WL 85195, *4 (S.D.N.Y. Jan. 2, 2020).

> purchase by individuals living in New York and 'globally' online at any time, eliminating entirely any reason to specify an auction date or location at all."

The SC provided for changes to the date and site of the Evening Auction (SC ¶¶1, 3(c), 6(a), 6(a)(i) and 12(a)) (A55-56, A60). The parties' critical expectation was not that the Stingel Work needed to be auctioned physically in New York or in May 2020, but rather that the Stingel Work would be auctioned in Phillips' so-called major "New York Auction of 20th Century & Contemporary Art" (Opp. Br., p.23). That auction was conducted on July 2, 2020 in London, England as an online, virtual auction via a live, real-time digital transmission, based on the SC (A167-169, ¶43).

Phillips failed to address, let alone distinguish, virtually every case cited in JN's Br. (pp.19-25) concerning ambiguous contractual provisions and using extrinsic evidence to determine the parties' intent or the meaning of a document. Phillips made no attempt to reconcile its twisted contractual interpretation of "in New York" with Phillips' own auction schedules (A220; A222-23) that clearly demonstrate that Phillips publicly defined the July 2, 2020 Evening Auction as a "New York auction" despite the fact that it was "***broadcast live*** from Phillips's new saleroom ***in London***" with the auctioneer physically located in London as an online, virtual auction via a live, real-time digital transmission.[17]

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

Nor did Phillips address the concession of its General Counsel Hartley Waltman, Esq. that "[a]n online auction is *not* a different method of conducting the same live sale that would otherwise occur in person…" (A288, ¶9). In light of this admission and the fact that the Evening Auction was held on July 2, 2020 as an online auction (A220; A222-23), it is irksome that Phillips attempted to neutralize the critical holding of United Equities Co. v. First Nat'l City Bank, 52 A.D.2d 154, 163 (1st Dep't 1976), by dissembling:

> "JN has not plausibly demonstrated that an online auction is a 'commercially reasonable substitute' for a major in-person black tie event in New York that must be 'tendered and accepted…" (p. 23, fn 2) (internal citations omitted).

Phillips' claim that the Evening Auction is a "black tie event" is yet another lie.

Phillips' unsupported contention that the SC "is a services consignment contract not governed by the U.C.C." (Id.) is false. Art sales are governed by the UCC. See Foxley v. Sotheby's Inc., 893 F.Supp. 1224, 1232 (S.D.N.Y. 1995); see also In re G.S. Distribution, Inc., 331 B.R. 552, 562-63 (Bankr. S.D.N.Y. 2005); In re Morgansen's Ltd., 2005 WL 2370856, at *7–8 (E.D.N.Y. Sept. 27, 2005).

POINT III
THE LC ERRONEOUSLY APPLIED FORCE MAJEURE TO VOID THE SC

An FM clause must be construed narrowly and excuses performance only if it "specifically includes the event that actually prevents a party's performance."[18]

[18] Rochester Gas and Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, *7 (W.D.N.Y. Feb. 13, 2009), quoting Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 295 (1987).

Pioneer Navigation Ltd. v. Chem. Equip. Labs, Inc., 2019 WL 8989864 (S.D.N.Y. Dec. 11, 2019), followed Kel Kim, supra, to the letter, holding that catch-all language does not override specific FM events recited in an FM clause.[19]

Phillips falsely argued that the two catch-all phrases in the parties' FM clause were ***not*** a basis of the LC's holding that COVID-19 triggered the FM clause (Opp. Br., pp.30-31). The LC cited these catchall phrases ***seven times*** in the Decision (SA6, SA18, SA19, SA22 and SA23). If these catch-all phrases have no significance, why did the LC underline one when first quoting SC ¶12(a) (SA6)?

Phillips concedes that Israel v. Chabra, 537 F.3d 86, 99-100 (2d Cir. 2008)—cited by the LC (SA23)—had nothing to do with FM and Kel Kim, supra and interpreted contractual language broadly (JN's Br., pp.27-29).[20] Phillips cites Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (2020) (Opp. Br., pp.2, 28), ignoring JN's citation of three subsequent Pennsylvania cases holding that Friends, supra, interpreted a ***statute*** triggering executive authority to declare a disaster and has no bearing on how to interpret a ***contractual*** FM provision (JN's Br., p.35). See Wilson v. Hartford Cas. Co., 2020 WL 5820800, at *8 (E.D. Pa. Sept. 30,

[19] See Kinzer Const. Co. v. State, 125 N.Y.S. 46 (1910).

[20] Phillips irrelevantly cites (Opp. Br., p.28) NRDC v. EPA, 896 F.3d 459, 464 (D.C. Cir. 2018), which holds:

> "The statutory language is far from unambiguous and is, instead, a classic example of Congress leaving a gap for EPA to fill with reasonable regulations" (citation omitted).

2020); see also Pennsylvania Dep't of Pub. Welfare v. U.S., 48 Fed. Cl. 785, 791 (2001) (holding that contracts and statutes cannot be construed in the same manner). Phillips compounds its error by citing five additional inapposite cases concerning statutory definitions of "disaster," not contractual FM clauses (Opp. Br., p.28).

For the same reasons, the Governor's Executive Orders, the President's FEMA Declaration, the Stafford Act and Executive Law §20 (Opp. Br., p.29)—concerning executive ***statutory*** emergency health powers—do not support the LC's holding concerning the parties' ***contractual*** FM clause.

Phillips' reliance on Easom v. US Well Servs., Inc., 2021 WL 520712, at *8 (S.D.Tex. Feb. 10, 2021) ("Easom I") is misguided. Phillips cites Easom I, but fails to cite Easom v. US Well Servs., Inc., 2021 WL 1092344, at *15-16 (S.D.Tex. Mar. 19, 2021) ("Easom II"). In Easom II, supra, at 29, the Court granted permission for an interlocutory appeal, certifying the following question:

> "Does COVID-19 qualify as a natural disaster under the WARN Act's natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B)?"

COVID-19 as a natural disaster under the WARN Act is undecided and subject to appeal.

The term "natural disaster" under the WARN Act is inapplicable to the term "natural disaster" in the subject FM clause.[21] The WARN Act's FM statutory provision in 29 U.S.C. 2102(b)(2)(B) includes the term "***any form*** of natural disaster" (emphasis supplied). Easom II, supra, 2021 WL 1092344, at *18, emphasized that Congress intentionally inserted the phrase "***any form***" to give "natural disaster" the broadest meaning possible and that ejusdem generis (and noscitur a sociis) "typically do not apply when a generic term is preceded by 'any.'" At bar, the parties' FM clause does not preface the term "natural disaster" with the words "any form of."

In discussing whether ejusdem generis applies when the general term precedes the specific terms, as in the instant FM provision, Easom II, supra, at fn 8, cites a treatise,[22] which concludes that "applying ejusdem generis when the general term comes first appears to be the majority view" and "make[s] good sense." Id., at 54. That treatise cites, inter alia, Holy Angels Academy v. Hartford Insurance Group, 487 N.Y.S.2d 1005 (Sup. Ct. N.Y. Co. 1985).

Whether the COVID-19 pandemic is a natural disaster is a complex, unresolved question of fact that is hotly debated by scientific and legal experts.

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[21] That Phillips is forced to rely on a Virginia statute and a 10th Circuit decision concerning the Federal Crop Insurance Corporation (Opp. Br., pp.27-28, fn 5) indicates that whether the COVID-19 pandemic is a natural disaster is not settled, particularly in New York.

[22] Gregory R. Englert, The Other Side of Ejusdem Generis, 11 Scribes J. Leg. Writing 51 (2007).

AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020), required a five-day trial with six fact witnesses and eight expert witnesses. There were 5,277 exhibits and 46 deposition transcripts. "Both sides retained legal experts who conducted studies of the prevalence of pandemic-specific exceptions." Id., at 63. One such expert examined 144 transaction documents, finding that some distinguished pandemics from natural disasters. Id., at 63-64.[23]

The LC made factual and expert conclusions, relying solely on random dictionary definitions and inapposite cases, such as Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) (SA18, fn7; Opp. Br., p.28), in which the definition of "natural disaster" in an FM clause was not at issue. SC ¶12(a) (A60) is a classically ambiguous provision to be construed against Phillips as draftsman. See Kass v Grais, 66 A.D.3d 587, 587 (1st Dep't 2009); see also McCarthy v. Am. Int'l Group, Inc., 283 F.3d 121, 124 (2d Cir. 2002); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995).

The LC ignored (SA18) that premier medical and scientific research institutes are embroiled in fevered debate about COVID-19's origins, i.e., whether

[23] See also Day v. Johnston, 2020 WL 7711681 *3 (S.D. Fla. Dec. 29, 2020), holding:

> "…COVID-19, while deadly and severe, does not present the same concerns of looting, chaos, and violence during riots that may result from a natural disaster."

COVID-19 was a man-made phenomenon emanating from a Chinese laboratory or transmitted from bats to humans. On March 30, 2021,[24] Dr. Tedros Adhanom Ghebreyesus, director-general of the World Health Organization ("WHO"), acknowledged that the March 30, 2021 WHO report did not adequately determine whether COVID-19 might have emerged from a Chinese laboratory. Dr. Ghebreyesus publicly cast doubt on the WHO report, stating:

i. That he hoped future studies would include "more timely and comprehensive data sharing;"

ii. "I do not believe that this assessment was extensive enough;" and

iii. "Further data and studies will be needed to reach more robust conclusions." (see NY Times Article, fn4).

The NY Times Article further quotes Raina MacIntyre,[25] stating that reports dismissing the idea of a laboratory leak do so "without strong evidence" and that "[a] lab accident is certainly a possibility." Id.

Phillips incorrectly frames the foreseeability question as whether it could foresee the possibility of ***this particular pandemic*** (Opp. Br., p.32). The relevant inquiry is whether Phillips reasonably could have foreseen and contractually

[24] New York Times 3/30/21- https://www.nytimes.com/2021/03/30/world/asia/who-covid-china.html ("NYT Article"); Wall Street Journal 3/29/21- https://www.wsj.com/articles/who-report-into-covid-19-origins-leaves-key-questions-unanswered-11617027920 ("WSJ Article").

[25] Head of the biosecurity program at the Kirby Institute of the University of New South Wales in Sydney, Australia.

guarded against ***a pandemic***. See Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 34 Misc. 3d 1222(A), *11-12 (Sup. Ct. N.Y. Co. 2009):

> "The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, ***even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed***" (citation omitted) (emphasis supplied).

See also Sage Realty Corp. v. Jugobanka, 1998 WL 702272 (S.D.N.Y. Oct. 3, 1998).

In the wake of the 2002 SARS outbreak, the insurance industry modified its standard business interruption insurance policies to exclude interruptions caused by viruses and bacteria:

> "***The forced closure of businesses nationwide because of COVID*** would seem to be the perfect scenario for filing a 'business interruption' insurance claim. But most companies will probably find it difficult to get an insurance payout because of ***policy changes made after the 2002-2003 SARS outbreak***, according to insurance experts and regulators….[M]any insurers added exclusions to standard commercial policies for ***losses caused by viruses or bacteria***."

See Frankel, "Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage," Washington Post, Apr. 2, 2020.

Melendez v. City of New York, 2020 WL 7705633, at *13 (S.D.N.Y. Nov. 25, 2020), is irrelevant. In analyzing whether the Guaranty Law substantially impaired plaintiff's contracts, the Court held, "Here, the Court finds that the

imposition of the Guaranty Law, like the pandemic itself, was entirely unforeseeable." Id. This en passant statement is the only time the Court addressed the foreseeability of the COVID-19 pandemic in its 17-page decision. The Court did not analyze COVID-19 foreseeability or even address the foreseeability of ***a pandemic*** (not COVID-19, specifically) at the time of contract formation.

Phillips barely attempted to distinguish any of JN's alternative performance or mitigation cases (JN's Br., pp.37-41), instead citing five inapplicable cases (Opp. Br., p.25 and fn3). In Int'l Paper Co. v. Rockefeller, 161 A.D. 180, 183-84 (3d Dep't 1914), defendant was excused from delivering timber that was destroyed by a fire where the parties contracted for a timber delivery ***from a specific location***.[26] In Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1415 (5th Cir. 1983), defendant was not required to deliver phosphoric acid by truck, instead of the ***contracted-for rail***, because:

> "[T]he sales contract…provided that delivery was to be made by rail '*unless otherwise agreed*' to by both parties" (emphasis in original).

In Virginia Power Energy Mktg., Inc. v. Apache Corp., 297 S.W. 3d 397, 403 (Tex. App. 2009), alternate delivery was not required where "the parties expressly

[26] The Court further held, "The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it." Id. at 185.

agreed that [defendant] was to deliver 610,000 MMBtu of natural gas to a *specific* Delivery Point" (emphasis in original).

In Babcock & Wilcox Co. v. Allied-General Nuclear Servs., 161 A.D.2d 350, 352 (1st Dep't 1990), defendant was not required to store and dispose of spent nuclear fuel because:

> "[T]he agreement is one for the ***reprocessing*** of spent fuel to which the ***transportation, storage and disposal*** of nuclear waste products (after reprocessing and recovery of usable fuel) are ***merely incidental***" (emphasis supplied).

In Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993), defendant was not required to arrange for substitute performance after an embargo where the parties anticipated the embargo and included "governmental interference" in their FM provision.

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

Phillips' contention that JN did not cite any cases "involv[ing] two agreements with integration clauses" (Opp. Br., p.45, fn11) is false. See, i.e., Aktiv Assets LLC, et al v. Centerbridge Partners, L.P., et al, Index No. 653259/2019 (Sup. Ct. N.Y. Co. Dec. 24, 2019) (JN's Br., p.47). Phillips failed to address JN's five cases (JN's Br., pp.47-48 and fn 9) holding that two agreements may be deemed interrelated where they form a single, unified transaction despite the presence of integration clauses or contractual language indicating the absence

of any related agreements. Phillips attempted to distinguish only ***three*** of JN's ***24 interrelatedness cases*** (Opp. Br., p.45, fn11).

Phillips astonishingly fails to mention that the SC and Basquiat Guarantee Agreement ("BC") were executed simultaneously in the same room by the same parties and took effect on the same date and that the BC was conditioned on the execution of the SC (JN's. Br., p.45; A156, ¶15).

Phillips incorrectly stated (Opp. Br., p.45, fn11) the holding of Nat'l Convention Servs., L.L.C. v. Applied Underwriters Captive Risk Assurance Co., Inc., 239 F.Supp.3d 761, 786 (S.D.N.Y. 2017) (JN's Br., pp.43-44). Nat'l Convention, supra, held 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." Id. "Whether the parties intended [two agreements] to be treated as one contract raises issues of fact that cannot be resolved at the pleading stage." Id., at 785.

Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168 (2d Cir. 2004), Cruden v. Bank of New York, 957 F.2d 961 (2d Cir. 1992) and Shipping & Fin., Ltd. v. Aneri Jewels LLC, 2019 WL 5306979, at *3 (S.D.N.Y. Oct. 21, 2019) (Opp. Br., pp.43-44), are irrelevant as they did not involve multiple contracts or the interpretation of interrelated agreements. Schron v. Troutman Saunders LLP, 97 A.D.3d 87, 92-94 (1st Dep't 2012) (Opp. Br., p.44),

is inapposite. The two agreements involved different parties, contained no cross-references to each other, did not include any conditional language and included explicit merger and integration clauses that clearly referenced the terms of the agreements as opposed to "boilerplate" merger and integration provisions. In the two-paragraph decision in Transammonia, Inc. v. Enron Cap. & Trade Res. Corp., 718 N.Y.S.2d 62, 62 (1st Dep't 2000) (Opp. Br., pp.44-45), the Court emphasized that the fully integrated swap contract documents made no reference to the physical sale that purportedly constituted the second half of a single transaction.

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

Phillips' reference (Opp. Br., p.50) to Ferguson v. Lion Holding, Inc., 478 F.Supp. 2d 455, 469 (S.D.N.Y. 2007), fails.[27] Phillips posits (Opp. Br., p.50):

> "To the extent Phillips' purported actions or statements ***incidentally dampened*** the outcome that JN hoped to achieve from the contract…" (emphasis supplied).

Far from alleging that Phillips "incidentally dampened" JN's expected fruits of the contract, JN has pled that, after obtaining JN's full performance of the BC and after indicating that the Stingel Work would be sold in the postponed and

[27] Philips failed to distinguish or address Donerail Corp. N.V. v. 405 Park LLC, 2011 WL489188, *12 (Sup. Ct., N.Y. Co. Feb. 2, 2011), Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 117 A.D.2d 285 (1st Dep't 1986) and Katz v. Colonial Life Ins. Co. of Am., 951 F. Supp. 36, 41 (S.D.N.Y. 1997).

rescheduled Evening Auction, Phillips—in bad faith—terminated the SC after an extraordinary 89-day delay and ***utterly destroyed*** JN's ability to receive any fruits of the contract whatsoever.[28] In Ferguson, supra, at 475-76, the Court denied ***summary judgment*** because of factual questions concerning whether defendants intentionally misled plaintiffs.

Phillips argues (Opp. Br., p.49):

> "The bottom line is that the SAC alleges no actions by Phillips that were inconsistent with its contractual rights."

Suthers v. Amgen Inc., 441 F. Supp.2d 478, 485 (S.D.N.Y. 2006) and Gravier Prods., Inc. v. Amazon Content Servs., LLC, 2019 WL 3456633, at *4 (S.D.N.Y. July 31, 2019) fail to support Phillips' argument (Opp. Br., p.49). In Suthers, supra, at 485, the Court held that a party did not violate the implied covenant by engaging in conduct expressly permitted by contract, even if allegedly unreasonable. In Gravier, supra, at *4, plaintiffs' claim was dismissed as duplicative because "[t]he plaintiffs essentially claim that [defendant] is bound by an implied promise to abide by the terms of the MAA" and "not repudiate it regardless of a legal right to do so." This is hardly the case at bar. Gravier and Suthers are centered on a party's decision to take an action expressly permitted by contract. JN's good faith and fair dealing claim is not premised on Phillips'

[28] A187-189, ¶¶101-04; A193-194, ¶120; A317, ¶3; A322, ¶¶12-13.

decision to terminate the SC, but rather on specific ***extracontractual*** bad faith actions:

(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 and that "no art consignments were being cancelled because of COVID-19," lulling JN into a false sense of security that Phillips would not terminate the SC;[29]

(ii) Until mid-May 2020, Phillips used ***only*** the image of the Stingel Work to advertise worldwide the rescheduled Evening Auction on Phillips' website, leading JN and the art world to believe the Stingel Work would be auctioned therein (A188, ¶102);

(iii) On May 26, 2020, Heiden and Leonid Friedland ("Friedland"), one of Phillips' owners, informed JN that Phillips was considering offering the Stingel Work in a November 2020 auction—with the Guaranteed Minimum intact—and discussed potential payment and interest terms with JN (A188, ¶103); and

(iv) Phillips waited 89 days 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).[30]

Phillips' pernicious bad faith led JN down the primrose path.

In Richards v. Direct Energy Servs., LLC, 915 F.3d 88, 99 (2d Cir. 2019) (Opp. Br., p.47), concerning actions "expressly permit[ted]" by contract, the Court held that ***even if a contract grants a party discretion to act, that party is obliged to***

[29] A188, ¶102; A322, ¶¶12-13.

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

"exercise that discretion in good faith." (emphasis supplied). Phillips willfully ignores (Opp. Br., p.46) that Heiden made representations to JN's principal in April 2020 to falsely convince JN that Phillips would auction the Stingel Work in the rescheduled Evening Auction.[31] That is bad faith defined. Though Phillips baselessly argues (Opp. Br., p.48) that JN has not proven that Heiden's and Friedland's May 26, 2020 statement was intentionally false when made and that they knew JN would be harmed, there is no such requirement at the pleading stage. JN has pled that Heiden and Friedland intentionally misled JN.[32]

Phillips further obfuscates (Opp. Br., p.48):

> "[N]othing about the Stingel Agreement could reasonably give rise to a presumption that Phillips would *only* display the Stingel Painting on its website if it intended to waive its right to terminate the contract."

What is a reasonable person to conclude from the continued promotional use of the Stingel Work alone to advertise the rescheduled Evening Auction other than that the Stingel Work would be for sale in that very auction? It is galling that Phillips exercised its right to use the Stingel Work to globally advertise the rescheduled Evening Auction—pursuant to SC ¶6(a)(ii-iii) (A56)—after twice breaching the SC and while not intending to auction the Stingel Work therein.[33] Phillips' tunnel

[31] A188, ¶102; A322, ¶¶12-13.

[32] A188, ¶102; A322, ¶¶12-13.

[33] A157-158, ¶20; A161-164, ¶¶27-28, 30-31, 34; A166-169; ¶¶39, 43-45; A188, ¶102; A322, ¶¶12-13.

vision focusing on a purported right to terminate ignores that all of its bad faith actions, up until the very date of SC termination, were calculated to convince JN and the art world that the Stingel Work would be sold in the rescheduled Evening Auction. The suit in the window was not for sale.

Kortright Cap. Partners LP v. Investcorp Inv. Advisers Ltd., 257 F.Supp.3d 348, 360 (S.D.N.Y. 2017) and M/A-COM Sec. Corp. v. Galesi, 904 F.2d 134, 136 (2d Cir. 1990), are irrelevant (Opp. Br., p.48). In Kortright, supra, 257 F. Supp. 3d at 360, the Court dismissed the implied covenant claim because plaintiff alleged defendant's mere negligence in failing to disclose critical information and "more than negligence is needed" (internal citation omitted). In stark contrast, JN has pled that Philips intentionally lied to JN to Phillips' financial and commercial advantage.[34] M/A-COM, supra, 904 F.2d at 136, supports JN:

> "[W]here a party's acts subsequent to performance on the contract so directly destroy the value of the contract for another party that the acts may be presumed to be contrary to the intention of the parties, the implied covenant of good faith may be implicated."

Phillips cited Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp., 771 F. Supp. 63, 67–68 (S.D.N.Y. 1991) and Tendler v. Lazar, 141 A.D.2d 717, 719–20, 529 N.Y.S.2d 583, 585 (2d Dep't 1988), for the proposition that Phillips' egregious 89-day delay in terminating the SC cannot be deemed a bad

[34] A187-189, ¶¶101-04; A193-194, ¶120; A322, ¶¶12-13.

faith action (Opp. Br., p.49). In Toyomenka, supra, 771 F. Supp. at 719-20, the FM notice was 6 days late and defendant made "a reasonable effort to notify [plaintiff] of force majeure as soon as possible." In Tendler, supra, 141 A.D.2d at 720, the option to cancel was exercised 36 days late, ***more than three weeks before*** the original closing date. Neither case rises to Phillips' 89-day delay stratosphere.

Phillips' contention that SC ¶12(a) (A60) does not require "any specific form" of notice (Opp. Br., p.49) is flatly incorrect. SC ¶17(d) (A61) states that notices may be sent by "hand, email, or facsimile"—not via an imperious WhatsApp message from Friedland, attaching an image of a single page of the SC (A162-163, ¶30).

Phillips' contention that JN's implied covenant claim is duplicative is flatly wrong. In Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 125 (2d Cir. 2013) (Opp. Br., p.46), the claims were duplicative because the breach of contract claim concerned defendant's failure to use best efforts and ***act in good faith*** to execute customer orders. Implied covenant and breach of contract claims seeking similar damages are not duplicative where "the factual bases thereof are distinct and independent." Foscarini, Inc. v. The Greenestreet Leasehold P'ship, 2017 WL 2998846 (Sup. Ct. N.Y. Co. July 14, 2017). Such claims are non-duplicative, even

where premised on similar facts, where a party deprives another of contractual benefits while maximizing its own.[35] The LC clearly held (SA28-29):

> "'…[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).

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

For the reasons set forth in Points I-IV, supra, Phillips breached the SC and BC by taking actions not authorized by either agreement. Phillips' cases concerning Sotheby's or Christie's taking actions ***expressly permitted*** by contract (Opp. Br., p.51) are irrelevant.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the LC's dismissal of the Second Amended Complaint (A153-229) be reversed and the action be reinstated and reassigned to a different judge, together with such other

[35] 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 v. Lombard Risk Syst's, Inc., 2019 WL 4805735, *10 (S.D.N.Y. Sep. 30, 2019); Spinelli v. Nat'l Football League, 903 F.3d 185, 205-06 (2d Cir. 2018); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152-54 (2002).

and further relief as to this Court seems just and proper.

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Dated: April 9, 2021

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