21-0032-cv

United States Court of Appeals

for the

Second Circuit

JN CONTEMPORARY ART LLC,

Plaintiff-Appellant,

– v. –

PHILLIPS AUCTIONEERS LLC,

Defendant-Appellee.

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

BRIEF FOR DEFENDANT-APPELLEE

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Phillips Auctioneers LLC ("Phillips"), by its counsel, certifies that Phillips is a wholly owned subsidiary of Phillips Assets Limited, incorporated in the United Kingdom, and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Both contracts at issue in this case—the Stingel and Basquiat Agreements—are clear and unambiguous. On that basis, the District Court (Cote, J.), in a 36-page well-reasoned decision, correctly dismissed the Second Amended Complaint ("SAC") against Defendant-Appellee Phillips Auctioneers LLC ("Phillips"), for breach of the Stingel and Basquiat Agreements, breach of the covenant of good faith and fair dealing, equitable estoppel, and breach of fiduciary duty. The District Court properly concluded that the pleaded allegations of breach were not supported by, and were contrary to, both contracts' plain text, and therefore all claims failed as a matter of law.

The Stingel Agreement was entered into between Plaintiff-Appellant JN Contemporary Art LLC ("JN") and Phillips, for Phillips to sell JN's work by Rudolph Stingel ("Stingel Painting") at Phillips' annual Spring New York Evening Auction in May 2020 (the "New York Auction"). The Stingel Agreement's termination provision, found in Paragraph 12(a) (the "Termination Provision"), allows Phillips to terminate the Agreement with no liabilities if the auction were "postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster . . . ."

In March 2020, a mere two months before the New York Auction, the world was flipped on its head. COVID-19 spread like wildfire, and New York City became

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

JN's arguments—in the District Court and on appeal—rely solely on its unfounded claim that Phillips was required to offer the Stingel Painting at a different auction than the one required by the contract. As the District Court noted, however, JN's position contradicts the explicit contractual language that the "work *shall* be offered for sale *in New York* in *our major Spring* auction of 20th Century & Contemporary Art" in "May 2020" (emphasis added). The major spring evening auction the parties bargained for is not an online Zoom sale; it is one of the two most important art events of the year—a live, ticketed, in-person event that consigners and buyers alike clamor to be a part of and at which buyers collectively spend nine

figures to acquire works of fine art. *This* is what JN contracted for. And JN knows it: JN described this auction in these terms in its papers before the District Court. In effect, JN asks the Court to ignore that admission, ignore the specific terms in its contract, and create a new contract that the parties never bargained for and that neither party would have accepted when the deal was struck.

JN also argues that the District Court should not have concluded that COVID-19 is a "natural disaster" under the Termination Provision without scientific discovery. This is truly absurd. The Court should not entertain conspiracy-theory discovery on whether the pandemic arose "naturally" or whether its outcomes were "disastrous"—claims that go against all plain meaning, basic contract interpretation, state and federal orders regarding the pandemic, other court decisions addressing the pandemic, and common sense. The law requires JN to be held to the terms of the contract it signed, not the contract that JN now wants.

JN also claims that Phillips breached a separate Basquiat Agreement between the parties when it was forced to postpone the New York Auction and terminated the Stingel Agreement. But JN's position contradicts the plain language of the Basquiat Agreement, which does not require Phillips to *sell* the Stingel Painting. The Basquiat Agreement only required Phillips to auction the *Basquiat* painting (the "Basquiat Painting") and JN to *enter into* the Stingel Agreement—*i.e.*, it was "[c]onditional upon signature" by JN of the Stingel Agreement. In no way did the

Basquiat Agreement impose new and different obligations regarding the Stingel Painting that would have contravened the terms of the Stingel Agreement. The conditions in the Basquiat Agreement were satisfied, and the agreement was fully performed.

The bottom line is simple: JN's fanciful reading of both contracts was rightfully rejected by the District Court. A complaint must be dismissed when its allegations contradict a contract's plain meaning. *See e.g., MBIA Inc. v. Certain Underwriters at Lloyd's, London*, 33 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). That principle controls here. The District Court held that COVID-19 is a natural disaster that prevented Phillips from holding the New York Auction, and that Phillips therefore properly terminated the Stingel Agreement. The District Court correctly dismissed JN's claim for breach of the Basquiat Agreement, finding that it only required JN to sign the Stingel Agreement and Phillips to auction the Basquiat Painting and pay the seller of the Basquiat Painting a guaranteed sum, both of which occurred. Consistent with settled law, the District Court further dismissed JN's implied covenant claim as impermissibly duplicative and baseless. JN's breach of fiduciary claim was also dismissed, as Phillips' actions were explicitly authorized by the parties' contract. Finally, the District Court rightfully rejected JN's equitable estoppel claim, finding that JN had failed to plead a misrepresentation on which it was entitled to rely, given the contract's clear terms and the public notice of the

auction postponement due to COVID-19. The District Court's decision should be affirmed in its entirety.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Counts I–III of the SAC for failure to state a claim that Phillips breached the Stingel Agreement, because Phillips properly terminated the Agreement on the ground that the COVID-19 pandemic constituted a "natural disaster" under the Termination Provision.

2. Whether the District Court correctly dismissed Count IV of the SAC that Phillips breached the Basquiat Agreement because Phillips fully performed under the contract, which did not require Phillips to auction the Stingel Painting or pay JN the Guaranteed Minimum under the Stingel Agreement.

3. Whether the District Court correctly dismissed Count V of the SAC that Phillips breached the implied covenant of good faith and fair dealing, because it is duplicative of JN's breach of contract claim, and because Phillips properly terminated the Stingel Agreement.

4. Whether the District Court correctly dismissed Count VII of the SAC that Phillips breached its fiduciary duties to JN, because the Stingel Agreement explicitly permitted Phillips to terminate the contract.

COUNTERSTATEMENT OF THE CASE

A. The Parties' Agreements

On June 27, 2019, JN executed two agreements with Phillips. The first agreement obligated JN to submit a GBP 3,000,000 irrevocable bid on Lot 19, *Untitled,* by Jean-Michel Basquiat (1981) (defined above as the "Basquiat Painting") at Phillips' 20th Century & Contemporary Art Evening Sale that took place in London (the "Basquiat Agreement"). A157 (¶¶ 17–18), A160–61 (¶ 24). In exchange, Phillips agreed to pay JN a "Financing Fee" of 20% of the sale amount above GBP 3,000,000. A50 (¶ 6). The Basquiat Agreement was further "[c]onditional upon signature by you [JN] of the Consignment Agreement with Guarantee of Minimum Price in respect of the work by Rudolf Stingel, *Untitled, 2009* . . . and conditional upon the above mentioned Property [*i.e.*, the Basquiat Painting] being offered for sale with a commitment by Phillips to pay the Seller a Guaranteed Minimum." A50; A157 (¶ 17). The contract was fully performed: the parties executed the Stingel Agreement, JN placed the bid, the Basquiat Painting sold, and Phillips paid JN the Financing Fee. A160–61 (¶ 24).

Also on June 27, 2019, the parties entered into a second agreement (the "Stingel Agreement"), providing that JN would consign and Phillips would auction a work by Rudolph Stingel, *Untitled, 2009* (defined above as the "Stingel Painting"), subject to a guaranteed minimum amount of $5,000,000 to be paid to JN from the

sale of the work (the "Guaranteed Minimum"). A157 (¶ 20 n.1); A56 (¶ 6(a)). The Stingel Agreement specified the auction at which the Stingel Painting was to be sold: "[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" (defined above as the "New York Auction"). The Stingel Agreement's Termination Provision states:

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

A60 (¶ 12(a)); A159–160 (¶ 21(vi)).

JN thereafter obtained a $5,000,000 loan from third-party Muses Funding I LLC ("Muses") secured by the Stingel Painting. A160 (¶ 22). On December 27, 2019, JN, Phillips, and Muses executed an amendment to the Stingel Agreement that memorialized the lien that JN had granted to Muses on the Stingel Painting (the "Security Amendment"). *Id.*; A66–72. The Security Amendment reiterated that the Stingel Painting must be sold "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020 ('Auction')." A67 (¶ 1(c)).

B. Phillips Postpones Its Annual New York Auction As A Result Of The COVID-19 Pandemic

In March 2020, the COVID-19 pandemic took hold of New York. Governor Andrew Cuomo issued a series of executive orders severely restricting and eventually barring all nonessential business activities, which included art exhibitions and auctions, starting on March 23, 2020 and extending into June 2020. *See* A81–112. On March 14, 2020, Phillips issued a public announcement on its website entitled, "Auction Update: Temporary Closures & Postponements," stating: "As more of our community of staff, clients and partners becomes affected by the spread of the Coronavirus, we have decided to postpone all of our sales and events in the Americas, Europe and Asia. This includes . . . [o]ur upcoming 20th Century & Contemporary Art sales in New York[, which] will be held the week of 22 June 2020, consolidating New York and London sales into one week of auctions." A114–16. Due to COVID-19, Phillips ultimately held an auction on July 2, 2020 in a different, never-before-used format in which the auctioneer would call the lots from a showroom in London that would be live-streamed to potential bidders online, and that permitted online bids as well as absentee and telephone bidding (the "Virtual Auction"). A167–9 (¶ 43), 170–71 (¶ 49); *see also* Dkt. 35.

On June 1, 2020, Phillips electronically sent JN a termination notice (the "Termination Notice") stating, "[a]s you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the New York State and New York City

governments placed severe restrictions upon all non-essential business activities. Certain government orders were invoked that applied to and continue to apply to Phillips' business activities. Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to postpone the Auction beyond its planned May 2020 date." A163–64 (¶ 33); A118–19. Referencing Paragraph 12(a) of the Stingel Agreement, Phillips informed JN that it was terminating the agreement. Phillips mailed the Termination Notice to JN on June 2, 2020. A164 (¶ 34); A121–12.

C. Procedural History

JN has pled and re-pled its fundamentally flawed claims three times. JN first filed this lawsuit on June 8, 2020, and moved for a preliminary injunction and temporary restraining order that same day. Dkt. 7. On June 23, 2020, JN filed its First Amended Complaint (Dkt. 30), and Phillips moved to dismiss on July 7, 2020 (Dkt. 41–43). The next day, July 8, 2020, the District Court (Cote, J.) issued an order setting a briefing schedule on the motion to dismiss, and alternatively provided JN with the option to file a second amended complaint by July 31, 2020. Dkt. 45. The District Court specifically warned "[i]t is unlikely that plaintiff will have a further opportunity to amend." *Id.*

On July 15, the District Court denied JN's request for a temporary restraining order. Dkt. 53. On July 31, 2020, JN filed the Second Amended Complaint ("SAC")

(Dkt. 59), and Phillips again moved to dismiss (Dkt. 61–63). On December 16, 2020, in a 36-page decision, the District Court granted Phillips' motion and dismissed the SAC in its entirety. SA31–36.

Critically, the District Court held that "the Stingel Agreement unambiguously entitled Phillips to terminate the consignment arrangement following a force majeure event." SA33. It did so on the grounds that "[t]he pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force majeure clause." SA18. As the District Court recognized, the pandemic is "a worldwide public health crisis that has taken untold lives and upended the world economy" (SA23), and therefore, it "cannot be seriously disputed that the COVID-19 pandemic is a natural disaster" within the meaning of Paragraph 12(a) (SA18). Because Phillips "properly invoked [the] Termination Provision," the District Court held, it "was no longer required to offer the Stingel Painting at a subsequent auction or to pay JN the Guaranteed Minimum." SA20. As a result, Phillips "did not breach the Stingel Agreement when it failed to auction the Stingel Painting at the Virtual Auction in July." SA20. The District Court further held that Phillips did not breach the Stingel Agreement by failing to obtain JN's written consent to conduct the New York Auction on a date after May 2020, because "[t]hat consent requirement is only triggered by Phillips' *discretionary* rescheduling of the New York Auction." SA20 (emphasis added).

The District Court also dismissed JN's claim for breach of the Basquiat Agreement, which was premised on the theory that the Basquiat Agreement required Phillips to fully perform the Stingel Agreement because the two agreements are "interdependent." A185 (¶ 93); Br. 42–44. The District Court rejected this theory, holding that the Basquiat Agreement merely "required JN to execute the Stingel Agreement" and is otherwise "silent about Phillips' obligations pursuant to the Stingel Agreement." SA26. In any event, explained the District Court, "Phillips did *not* breach the Stingel Agreement; it exercised its contractual right to terminate the agreement following a force majeure event." SA26 (emphasis added).

The District Court properly dismissed JN's claim for breach of the implied covenant. SA27–31. The District Court held that this claim "is not distinct from the argument that Phillips had an obligation to perform under the Stingel Agreement," and that "the damages that JN seeks for this claim are identical to those it seeks for its breach-of-contract claims." SA29. The District Court further noted that "[i]t cannot be a breach of the implied covenant of good faith and fair dealing to do what a contract explicitly authorizes a party to do." SA30.

The District Court dismissed JN's claim for breach of fiduciary duty because, although "Phillips owed a duty of loyalty to JN and was required to conduct the consignment faithfully," the "scope of [that] duty . . . was modified by the parties'

contract," which "included a force majeure clause [that] permitted termination of the parties' agreement." SA32.

Finally, the District Court dismissed JN's claim for equitable estoppel because the SAC did not contain "any allegation that Phillips assured JN that it would offer the Stingel Painting at a rescheduled auction with the Stingel Agreement's Guaranteed Minimum in full force and effect." SA36. In so holding, the District Court emphasized that "JN was on actual notice since March 2020 that the New York Auction would not be going forward." SA36.

On January 6, 2021, JN filed a Notice of Appeal. *See* A396.

SUMMARY OF ARGUMENT

The District Court correctly dismissed the SAC in its entirety for failure to state a claim.

I. The District Court correctly concluded that Phillips properly terminated the Stingel Agreement under the Agreement's unambiguous Termination Provision, which allowed Phillips to terminate the Agreement "[i]n the event that the [New York Auction] is postponed for circumstances beyond [the parties'] reasonable control . . . as a result of," among other things, a "natural disaster." SA6. Specifically, the District Court found that Phillips was forced to postpone the New York Auction due to the COVID-19 pandemic and resulting government mandates, and that it "cannot be seriously disputed that the COVID-19" pandemic qualifies as

a "natural disaster" and thus fits within the Agreement's Termination Provision. SA18.

The District Court also correctly rejected JN's argument that Phillips' agreement to sell the Stingel Painting at the annual New York Auction in May 2020 nonetheless required Phillips to sell the painting at *any* auction, regardless of time, place, or format. SA17. That, too, is flatly contradicted by the plain language of the Stingel Agreement. The same goes for JN's assertion that Phillips breached the Stingel Agreement by failing to obtain JN's written consent before postponing the auction. Br. 5. The Stingel Agreement makes clear that Phillips was required to obtain JN's consent only if Phillips decided to reschedule the auction *at its discretion*. SA20. JN's self-serving and baseless theories about Phillips' motivations for not auctioning the Stingel Painting are irrelevant. Phillips was entitled to exercise its contractual right to terminate the Stingel Agreement in the wake of COVID-19. The District Court did not, as JN alleges, engage in fact finding on this point or any other. There was no need. JN's conclusory and unsupported allegations cannot overcome the unambiguous terms of the Stingel Agreement as a matter of law. On these grounds, the District Court's dismissal of Counts I–III should be affirmed.

II. The District Court also correctly dismissed JN's claim that Phillips breached the Basquiat Agreement. SA26–27. JN argues that the Basquiat

Agreement requires Phillips to perform the Stingel Agreement in full and pay JN the Guaranteed Minimum provided for in the Stingel Agreement. Br. 5. This argument makes no sense in light of the contract's plain terms. The Basquiat Agreement was only "conditional upon signature by" JN of the Stingel Agreement, and entirely silent as to Phillips' obligations with respect to the Stingel Agreement. A50. JN's interpretation of the Basquiat Agreement would render the Stingel Agreement's Termination Provision superfluous, because under that interpretation, Phillips would *never* be able to invoke the Termination Provision and exercise its rights under the Stingel Agreement without being in breach of the Basquiat Agreement. Because the plain language of the Basquiat Agreement makes clear that no breach occurred, the District Court's dismissal of Count IV should be affirmed.

III. The District Court properly dismissed JN's claim that Phillips breached the implied covenant of good faith and fair dealing. Not only is this claim duplicative of JN's breach-of-contract claims, but JN has also failed to plausibly allege that Phillips acted in bad faith by exercising its rights under the Stingel Agreement in the wake of the devastating pandemic. SA28–31. The covenant of good faith and fair dealing cannot be used to impose an obligation that is inconsistent with the express terms of the Stingel Agreement. SA27–28. For these reasons, the District Court's dismissal of Count V should be affirmed.

IV. The District Court correctly dismissed JN's claim for breach of fiduciary duty. It is hornbook law that any fiduciary duties arising out of a consignment relationship may be altered by contract. SA32–33. Any duty that Phillips owed to JN as a result of their consignor-consignee relationship was clearly modified by the parties' contract, which included a Termination Provision that Phillips properly invoked. The District Court's dismissal of Count VII should be affirmed.

V. The District Court properly dismissed JN's equitable estoppel claim, finding that JN failed to plead a misrepresentation it relied on. SA35. Either way, JN has not raised this claim on appeal, and it is therefore waived.

STANDARD OF REVIEW

This Court "review[s] de novo a District Court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6)" for failure to state a claim. *Orchard Hill Master Fund Ltd. v. SBA Commc'ns Corp*., 830 F.3d 152, 156 (2d Cir. 2016) (citing *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014)).

Only a complaint that states a plausible claim for relief supported by sufficient factual matter may survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Pleadings that contain no more than conclusions . . . are not entitled to the assumption of truth" that is otherwise applicable on a motion to dismiss. *Dejesus*

v. HF Mgmt. Servs., LLC, 726 F.3d 85, 87–88 (2d Cir. 2013). Nor are "[a]llegations in the complaint" that are "contradicted by . . . documentary evidence . . . entitled to a presumption of truthfulness." *MBIA*, 33 F. Supp. 3d at 353; *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011) ("[W]here a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true."). A court may dismiss a breach of contract claim at the motion to dismiss stage where "the terms of the contract are unambiguous." *Orchard Hill Master Fund Ltd.*, 830 F.3d at 156. "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *Id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED JN'S CONTRACT CLAIMS BASED ON THE UNAMBIGUOUS TERMS AND PLAIN MEANING OF THE CONTRACTS

It is "crystal clear," as JN asserts, "that the parties dispute the meaning" of the contractual provisions at issue here. Br. 51. But what matters on a motion to dismiss is not whether the *parties* disagree about the meaning of the contract. Nor does it matter how the parties themselves characterize the contract. What matters is what the *contract says*, and whether a court can reasonably find more than one meaning based on the words written on the page. *See, e.g., Steiner v. Lewmar, Inc.*, 816 F.3d 26 (2d Cir. 2016) ("[A]ny ambiguity in a contract must emanate from the language

used in the contract rather than from one party's subjective perception of the terms"); *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) ("[A] party cannot create an ambiguity in an otherwise plain agreement merely by 'urging different interpretations in the litigation.'") (quoting *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990)). Each of JN's claims is barred by the unambiguous language of the contracts at issue, and for that reason, each claim was properly dismissed by the District Court. The District Court's decision should be affirmed.

"The cardinal principle for the construction and interpretation of . . . all contracts is the intentions of the parties should control." *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006). And since "the best evidence of intent is the contract itself," an agreement that is "complete, clear, and unambiguous on its face . . . must be enforced according to the plain meaning of its terms.'" *Eternity Global Master Fund, Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2d Cir. 2004). If the plain language of the contract does not support a claim for breach, the claim must be dismissed. *See Mariah Re Ltd. v. Am. Family Mut. Ins. Co.*, 52 F. Supp 3d 601, 613–614 (S.D.N.Y. 2014); *19 Recordings Ltd. v. Sony Music Entm't*, 97 F. Supp. 3d 433, 441 (S.D.N.Y. 2015). JN had three opportunities to plead its claims for breach of contract, and each time it failed for the same simple reason: it cannot now change what the contract says.

A. The Complaint Fails To State A Claim For Breach Of The Stingel Agreement

JN's appeal is premised on an unreasonable and facially implausible interpretation of the Stingel Agreement. Count I for breach of the Stingel Agreement alleges that Phillips failed "to obtain or even seek Plaintiff's written consent to reschedule" the New York Auction. A175 (¶ 61). Count II accuses Phillips of improperly "invoking force majeure to cancel" the Stingel Agreement, and Count III claims that the Stingel Agreement was breached because Phillips did not offer the work at a virtual auction or pay the Guaranteed Minimum. A179 (¶ 73); A182 (¶ 83). But as the District Court correctly concluded, Phillips permissibly invoked the Termination Provision when it was forced to postpone the auction due to the COVID-19 pandemic. SA18.

On appeal, JN presents this Court with a dizzying array of issues—all in an unsuccessful attempt to muddy the Stingel Agreement's clear and express terms.[1]

[1] *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), and *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395 (2d Cir. 2015), which JN cites repeatedly for the proposition that it is inappropriate to resolve factual disputes on a motion to dismiss (*e.g.*, Br. 9, 15, 21, 25, 30) are entirely inapposite. Neither case involved, as here, an unambiguous contract that can and should be construed as a matter of law. Rather, *Anderson* involved an alleged antitrust conspiracy and *Putnam* involved claims of fraud, negligent misrepresentation, and negligence, which require fact-intensive inquiries not present here. *See* SA14 ("If the intent of the parties is clear from the four corners of a contract, its interpretation is a matter of law for the court.") (citing *Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 316 (2d Cir. 2006)).

JN claims that the New York Auction was not required to be held live in New York in May 2020, that the COVID-19 pandemic was not a basis to terminate the Stingel Agreement, and that postponing the auction required JN's consent. Br. 1–4. None of these arguments has any merit.

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

JN contends that the contract did not require the Stingel Painting to be auctioned at the New York Auction live in New York in May 2020, and that Phillips should have delayed the auction or held it elsewhere. A167–69 (¶ 43), A175 (¶ 58), A178 (¶ 68), A181–82 (¶ 80); Br. 38–39. According to JN, "[n]owhere in the Stingel [Agreement]" is there a requirement that the New York Auction "be held in-person." A170 (¶ 49). These claims rely on an absurd misinterpretation of the Stingel Agreement based on allegations in the SAC "that are 'contradicted by . . . documentary evidence'" and "are not entitled to the presumption of truthfulness." *MBIA*, 33 F. Supp. 3d at 353.

As the District Court held, "[a] properly invoked Termination Provision ended Phillips' obligations to JN. Phillips was no longer required to offer the Stingel Painting at a subsequent auction or to pay JN the Guaranteed Minimum," and thus "did not breach the Stingel Agreement when it failed to auction the Stingel Painting at the Virtual Auction in July." SA20. The Termination Provision states that:

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

A60 (¶ 12(a)). Phillips' obligations under the Stingel Agreement were expressly subject to its ability to terminate for the reasons set forth in Paragraph 12(a), and that termination right was properly invoked before the New York Auction.

On March 14, 2020, Phillips announced that the New York Auction was being postponed due to the COVID-19 pandemic. A114–16. Beginning March 23, 2020, in response to the pandemic, Governor Cuomo issued a series of Executive Orders making illegal all non-essential gatherings in New York—which included the New York Auction—through June 2020. A81–112. Phillips therefore terminated the Stingel Agreement under the Termination Provision by electronic notice to JN on June 1 and mailed the notice on June 2. A163 (¶ 32); A164–5 (¶ 35); A118–122. Because termination was permitted under the Termination Provision, it is not a breach. *See, e.g.*, *Nemko, Inc. v. Motorola, Inc.*, 163 B.R. 927, 938 (Bankr. E.D.N.Y. 1994) ("lawful termination of a contract pursuant to an express option contained in it does not constitute a breach").

JN's arguments on appeal do not contradict the District Court's holding or the unambiguous meaning of the contract's provisions. While JN claims that no

provision of the Stingel Agreement required the work to be auctioned at the in-person New York Auction in May 2020 (Br. 18), every key term of the contract proves otherwise. The Stingel Agreement provides that "[t]he Property *shall* be offered for sale *in New York* at our major spring 2020 auction of 20th Century & Contemporary Art currently scheduled for *May 2020*." A56 (¶ 6(a)) (emphasis added); *see also* A55 ("Sale date: May 2020"); A67 (¶ 1(c)) (confirming the Stingel Painting was to be sold "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020"). And JN, a sophisticated participant in the art world, *admitted* that the New York Auction is a specific and significant industry event that takes place annually in May. A158 (¶ 20 n.2) (conceding that the term "evening auction" as used in the Stingel Agreement "means Defendant's evening auction sales of contemporary works of art which take place bi-annually in May and November"); SA17 ("The Stingel Agreement required Phillips to auction the Stingel Painting at a specific New York Auction scheduled to be held in May of 2020. As the SAC itself admits, this is an auction recognized in the industry as regularly held by Phillips."); *see also* Dkt. 22: Declaration of Joseph Nahmad ("Nahmad Decl.") ¶ 3 ("The New York Spring Auction traditionally takes place each year in May and is one of Defendant's two major evening auctions in New York."). *See Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC*, 30 A.D.3d 1, 8 (1st Dep't 2006) ("Besides the common meaning of the language

employed, the expectations and purposes of the parties in view of the factual context in which the agreement was made must be considered in interpreting a contract term, with due regard to the parties' sophistication.").

JN's claim that extrinsic evidence is required to determine the meaning of the phrase "New York auction" and whether the contract contemplated a sale "globally via a live, real-time digital transmission" ignores the plain meaning of the agreement. Br. 20–21. Phillips agreed to pay the Guaranteed Minimum subject to its ability to terminate the consignment if the New York Auction—"*the* auction" under the agreement—were postponed. *See* A60 (¶ 12(a)). JN's contrary interpretation is nonsensical because it would mean that the contract merely required the Stingel Painting to be made available for 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. *See, e.g.*, *Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003) (interpretations that render contract provisions "meaningless" or "superfluous" are disfavored); *Digital Equip. Corp. v. AltaVista Tech.*, Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) ("The Internet has no territorial boundaries."). JN's own principal has admitted as much. Dkt 22: Nahmad Decl. (¶ 3 n.1) ("The New York Spring Auction traditionally takes place each year in May and is one of Defendant's two major evening auctions *in New York*."). This interpretation is 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. *See* A56 (¶¶ (3(c), 6(a)(i)).

Simply put, the "Stingel Agreement required Phillips to offer the painting for sale at an identified, regularly held, established auction for works of contemporary art. This was the Phillips[] New York Auction of 20th Century & Contemporary Art scheduled for May 2020." SA21. JN's arguments otherwise are nothing more than a post-hoc attempt to "manufacture an ambiguity in an unambiguous contract." SA24. *See, e.g., Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[A] court may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."); *Rower v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.").[2]

[2] JN cites *United Equities Co. v. First Nat'l City Bank*, 52 A.D.2d 154, 161 (1st Dep't 1976) for the premise that Phillips' "inability to perform in the exact manner it anticipated and preferred is not tantamount to being unable to perform." Br. 37–38. That case is inapplicable to the substitute performance, an online auction, that *JN* demands. *United Equities* discussed commercially reasonable substitutes for physical delivery in a sale of goods contract under the U.C.C. § 2-614. This is a services consignment contract not governed by the U.C.C. Regardless, 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

At bottom, what JN really seeks is an alternative form of performance that was not bargained for under the Stingel Agreement and that Phillips had no obligation to provide. Phillips' postponement of the New York Auction and termination of the Stingel Agreement was not a matter of whether Phillips could "perform in the exact manner it anticipated and preferred," but whether it was possible to perform *at all*. Br. 37. The Governor's orders issued in March 2020 that made it illegal to hold any in-person gatherings in New York through May 2020 and the health and safety threat stemming from the COVID-19 pandemic indisputably made it impossible for Phillips to perform under the parties' agreement by auctioning the Stingel Painting at the New York Auction. The fact that "Phillips was not prohibited from conducting an online auction" and conducted a July 2020 virtual auction in London is irrelevant. Br. 39–40. "The parties did not contract for an online auction conducted in July from London. Nor is a party to a contract required to undertake alternative performance before invoking a force majeure clause." SA25. The only relevant inquiry is the specific performance that *these parties* bargained for under *this agreement*. Phillips was not required to reach outside the four corners of the contract to offer JN some alternative performance when the bargained-for performance was made impossible by force majeure. *See, e.g.*,

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and accepted," U.C.C. § 2-614—a suggestion raised for the first time on appeal and thus waived—where the parties *specifically bargained* for the New York Auction.

Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993) (where U.S. government prevented defendant from contractual performance, constituting a force majeure event, contract did not require defendant to "provide substitute performance from its Indian licensee"); *Babcock & Wilcox Co. v. Allied-Gen. Nuclear Servs.*, 161 A.D.2d 350–2 (1st Dep't 1990) (where force majeure event prevented defendant from "reprocess[ing] spent nuclear fuel for plaintiff" per the parties' agreement, court rejected "plaintiff's contention that defendants could have engaged in alternate performance under the contract by storing and disposing of the spent nuclear fuel").[3]

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

Before the District Court, JN argued that the COVID-19 pandemic is not a "natural disaster" because, linguistically speaking, that term can only refer to

[3] *See also, e.g.*, *Int'l Paper Co. v. Rockefeller*, 146 N.Y.S. 371, 374 (3d Dep't 1914) ("We need not say that the defendant could not have furnished live wood of equal quality from other lands; but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished, and when the source is destroyed the defendant is excused from further performance"); *Jon-T Chemicals, Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1415, 1416 & n.5 (5th Cir. 1983) (rejecting plaintiff's argument that "delivery by truck would have been a commercially reasonable substitute" for delivery by train, which was prevented by force majeure, because the contract specified that delivery be made by train); *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex. App. 2009) (rejecting argument that force majeure clause did not apply when defendant could still deliver gas to alternate delivery point than specified in the contract, as that would "force [defendant] to deliver gas, notwithstanding an acknowledged force majeure event, to a location other than that to which the parties expressly agreed").

geological or ecological events such as earthquakes and typhoons. *See* Dkt. 70 at 13–14 (JN Opposition to Motion to Dismiss). On appeal, JN goes a step further, arguing that it is a topic of "worldwide controversy" whether COVID-19 was caused "naturally or by man," and that JN is therefore entitled to *discovery* on "whether COVID-19 escaped from one of two labs in Wuhan working on coronaviruses or whether such labs were genetically engineering . . . a Sars-Co-V-2-like virus." Br. 30. JN never made this argument in the District Court and raises it now for the first time on appeal—indeed, JN made *zero mention* of this theory when it *specifically requested* the opportunity to take discovery on other matters in the District Court. *See* SA74–75. JN has therefore waived this argument on appeal. *Bjorklun v. Golub Corp.*, 832 F. App'x 97, 99 (2d Cir. 2021) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal").

Even setting this clear waiver aside, JN's arguments are entirely unsupported and plainly contradicted by common dictionary definitions, a growing body of case law, and basic common sense. *See Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 567 (2d Cir. 2016) ("A plaintiff who has failed adequately to state a claim is not entitled to discovery."). As the District Court correctly noted, "[i]t cannot be seriously disputed that the COVID-19 pandemic is a natural disaster." SA18. To reach this conclusion "[o]ne need look no further than the common meaning of the words natural disaster." SA18–19. Black's Law Dictionary defines

"natural" as "[b]rought about by nature as opposed to artificial means," and "disaster" as "[a] calamity; a catastrophic emergency." *Natural, Disaster, Black's Law Dictionary* (11th ed. 2019); *see also* Br. 29. JN offers no legitimate reason as to why this term can only apply to events that cause physical environmental damage. As the District Court held, "a pandemic requiring the cessation of normal business activity is the type of 'circumstance' beyond the parties' control that was envisioned by the Termination Provision." *See* SA19–20 (quoting A60 (¶ 12(a)). Rather than credit the District Court's understanding of the English language, JN snidely accuses it of "creating a personal semantic alloy" by "melding unscientific Black's Law Dictionary definitions of the two independent words 'natural' and 'disaster.'" Br. 29. But it does not take a scientist—or any "scholarly analysis," as JN claims (Br. 30)—to understand the plain meaning of the phrase "natural disaster."[4]

A growing body of case law affirms the District Court's interpretation.[5] "Courts have consistently held, in different contexts, that a disease outbreak is a

[4] The fact that JN has seized on an inconsequential scrivener's error in the District Court's quoting of the Oxford English Dictionary, and then takes issue with which *edition* of the dictionary the District Court cites only underscores how desperately it is grasping at straws. Br. 29.

[5] Statutes, too, include disease within their definitions of "natural disaster." *See, e.g.*, Va. Code Ann. § 44-146.16 (defining "natural disaster" to include, among other things, "communicable disease of public health threat, or other natural catastrophe resulting in damage, hardship, suffering, or possible loss of life"); *Meyer v. Conlon*, 162 F.3d 1264, 1266 (10th Cir. 1998) (noting that Congress established the Federal Crop Insurance Corporation "to encourage farmers to purchase multiple peril crop

natural disaster." *Easom v. US Well Servs., Inc.*, 2021 WL 520712, at *8 (S.D. Tex. Feb. 10, 2021) ("COVID-19 also qualifies as a 'natural' disaster because human beings were not responsible for starting or consciously spreading the virus."); *Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984) (referring to "natural disasters *such as fire or disease*") (emphasis added); *NRDC v. EPA*, 896 F.3d 459, 464 (D.C. Cir. 2018) ("an ordinary reading of 'natural event' summons images . . . and organic processes, *such as viral epidemics*") (emphasis added); *Friends of Danny DeVito v. Wold*, 227 A.3d 872, 889 (2020) ("COVID-19 pandemic is, by all definitions, a natural disaster and catastrophe of massive proportions."); *Commonwealth v. Mills*, 104 Va. Cir. 350, 351–53 (Cir. Ct. Madison Cty. 2020) ("the Coronavirus rises to the level of a natural disaster as a communicable disease of a public health threat as defined in" the Virginia Code); *Commonwealth v. Vila*, 104 Va. Cir. 389, 393 (Cir. Ct. Fairfax Cty. 2020) (same). As one district court has noted:

> COVID-19 is a disease caused by a virus—a natural event. It is spread from person to person—again, a natural event. The force and effect of this disease spread quickly throughout every part of Minnesota and has persisted. . . . It difficult to understand how a pandemic caused by a deadly virus could be characterized, other than as an 'act of nature.'

Free Minn. Small Bus. Coalition v. Walz, 2020 Minn. Dist. LEXIS 256, *50 (Minn. Dist. Sept. 1, 2020).

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insurance, which protects farmers against loss from natural disasters, such as hail and disease").

The actions taken by the Federal Government and State of New York also support the District Court's conclusion. SA20. The Governor's Executive Orders declared a "state disaster emergency" caused by the COVID-19 pandemic, and made illegal any non-essential gatherings as of March 23, 2020 through June 2020. *See* A81–112; *see also* N.Y. Exec. Law § 20(2)(b) (defining "state disaster emergency"); N.Y. Exec Law § 28(1). New York law specifically defines a "disaster" as the "occurrence 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 an "epidemic." N.Y. Exec. Law § 20. On March 20, 2020, President Trump issued a "major disaster declaration" due to the COVID-19 outbreak in New York under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. *See* FEMA, DR-4480-NY Initial Notice, March 20, 2020, https://www.fema.gov/disaster/notices/dr-4480-ny-initial-notice. Under the Stafford Act, a "major disaster" is strictly limited to "any natural catastrophe" or "any fire, flood, or explosion." 42 U.S.C. § 5122(2). As COVID-19 is obviously not a fire, flood, or explosion, the White House and FEMA could only have meant that it was a type of "natural catastrophe."

JN offers *no* support whatsoever for its conclusory statement that "[n]atural 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." Br. 33. To the contrary, the District Court properly relied on dictionaries (SA18–19), case law (*id.*), and multiple government proclamations (SA20) to reach the conclusion that COVID-19 qualifies as a natural disaster as a matter of law.

The remainder of JN's argument that COVID-19 is not a "natural disaster" hangs on its misapplication of the principle of *ejusdem generis*. JN argues that the District Court allowed the phrase "without limitation" in the Termination Provision to "unlawfully expand[] and redefine[]" the events that are specifically enumerated in the Termination Provision as examples of "circumstances that are beyond the parties' reasonable control." Br. 27; SA23. In allegedly doing so, JN argues, the District Court "bent the language of natural disaster to fit ejusdem generis" and "erected an impenetrable wall of illegality" through its "misinterpretation." Br. 28–29. This argument misses the point. The principle of *ejusdem generis* has no application here, where the District Court correctly held that COVID-19 indisputably falls within one of the *specifically enumerated* categories of the termination provision. SA18. The District Court did not dismiss Counts I–III because the COVID-19 pandemic is a "circumstance[] beyond the parties' reasonable control" that is *similar* to a natural disaster; it dismissed those claims because COVID-19 *is* a natural disaster, which places it "squarely under the ambit of Paragraph 12(a)'s force majeure clause" and eliminates the need for interpretive

canons. SA18. Because the phrase "without limitation" in the Termination Provision played no part in the District Court's analysis of whether COVID-19 fell within its terms, JN's reliance on the principle of *ejusdem generis* is misplaced. For the same reason, JN's claim that the District Court "violated" *Kel Kim* "and its progeny" is wrong. Br. 27. *Kel Kim* has no application here, because the District Court's conclusion that COVID-19 is a "natural disaster" had nothing to do with the Termination Provision's purported "catch-all" language. *See Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902–03 (1987) (event that did not fall within the catchall phrase of "other similar causes beyond the parties' control" could not serve as basis for excusing performance under force majeure provision); *see also* Br. 27.

Yet even if COVID-19 were not a natural disaster (which it is), and the principle of *ejusdem generis* did apply (which it doesn't), there would still be no basis for finding that COVID-19—a deadly pathogen that has naturally and unforeseeably made its way around the globe, claimed the lives of over 2 million people, and disrupted the lives of *billions* more—is not "of the same kind or nature " as the events that are specifically enumerated in Paragraph 12(a), which notably include natural disaster, terrorist attack, and nuclear or chemical contamination. *Kel Kim*, 70 N.Y.2d at 902–03; Br. 27. This is especially true considering "[f]orce majeure clauses are to be interpreted in accord with their purpose, which is '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.'" *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (1st Dep't 2017).

Equally unavailing is JN's assertion that COVID-19 and its devastating aftermath were somehow foreseeable to the parties at the time of contracting. Br. 33–34. According to JN, COVID-19 was neither "unanticipated" nor something "that could not have been foreseen or guarded against in the contract." Br. 33–34. Aside from the absurdity of these assertions (Phillips could not possibly have foreseen COVID-19), JN's argument ignores that Phillips *did* contract to shift the risk of termination to JN in precisely this circumstance by including "natural disaster" in the Termination Provision. JN cannot escape this unavoidable conclusion and avoid dismissal by baselessly characterizing the foreseeability of the pandemic as "a question of fact." Br. 33–34. *See Melendez v. City of New York*, 2020 WL 7705633, at *13 (S.D.N.Y. Nov. 25, 2020) ("[T]he pandemic . . . was entirely unforeseeable."). JN's cited cases do not support its position. *See* Br. 33–34 (citing *Ebert v. Holiday Inn*, 628 F. App'x 21, 24 (2d Cir. 2015); *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508, at *7 (W.D.N.Y. Feb. 13, 2009)). In those cases, the triggering event was an *economic* event that made performance

untenable from a *financial* perspective.[6] Not a single one of JN's cited cases, on the other hand, involves a triggering event like the COVID-19 pandemic that made performance *physically impossible* and *illegal*.

Finally, JN argues that the District Court "failed to recognize the distinction between the COVID-19 virus and governmental orders combatting the spread of the COVID-19 virus." Br. 33. In other words, according to JN, regardless of whether the virus itself was natural or unforeseeable, the resulting governmental response involved predictable "acts of law and order" and therefore cannot be the basis for termination under the Termination Provision. *Id*. This argument defies logic. It is also refuted by the plain language of the contract itself. The Termination Provision provides that "[i]n the event that the auction is postponed for circumstances beyond [Phillips'] or [JN's] reasonable control, including, without limitation, *as a result of* natural disaster . . . [Phillips] may terminate this Agreement with immediate effect." A60 (¶12(a) (emphasis added)). There is no question that Phillips' postponement of the auction and the governmental orders requiring it were a result of the COVID-19 pandemic. JN's argument also ignores that Phillips' public notice

[6] For example, in *Ebert*, the triggering event was lender foreclosure. 628 F. App'x at 24. In *Rochester Gas & Elec. Corp.*, the triggering event was the increased price of steel. 2009 WL 368508, at *4. And *Kel Kim* arose in the mundane context of defendant's inability to procure insurance. 70 N.Y.2d at 901–02.

postponing the New York Auction identified the pandemic—and not the Governor's orders—as the cause. A114–16 (stating that 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," including the New York Auction). There is no question that Phillips could not safely conduct the auction in New York (then the American epicenter of the virus) without endangering the health and lives of employees and attendees, and its prudent decision to postpone the auction as a result of the rapid spread of the virus throughout New York in spring 2020—a circumstance wholly outside its control—falls squarely within the plain terms of the Termination Provision.

3. JN's allegations of pretext are both inadequate and irrelevant.

JN's allegations that Phillips "nefariously made a financial decision not to perform" are inadequately pled, and in any event, irrelevant. Br. 40; A165 (¶ 37); A187 (¶ 100); A195 (¶¶ 124–25). As the District Court properly held, "Phillips was entitled to exercise its contractual right to terminate the Stingel Agreement," and "its motives for doing so are irrelevant." SA25 (citing *SATCOM Int'l Grp. PLC v. ORBCOMM Int'l Partners, L.P.*, 2000 WL 729110, at *21 n.15 (S.D.N.Y. June 6, 2000); *Newfield v. General Motors Corp*., 443 N.Y.S.2d 239, 241 (2d Dep't 1981)).[7]

[7] JN's reliance on *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 2010 WL 1945738 (S.D.N.Y. May 12, 2010), which applied Pennsylvania not New York law,

Simply put, where a party has an "unconditional right to terminate" under the contract, "New York courts will not examine the *actual* motives behind a decision to exercise such an option." *Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, 2008 WL 650403, at *7 (S.D.N.Y. Mar. 7, 2008); *see also Oneida Indian Nation of N.Y. State v. Cty. of Oneida*, 802 F. Supp. 2d 395, 427 (N.D.N.Y. 2011) (under New York Law, a "party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive"). JN's contention that Phillips terminated the Stingel Agreement for "nefarious" reasons (Br. 40) is irrelevant and unfounded, and the District Court soundly rejected it. *See* SA33 ("[T]he Stingel Agreement unambiguously entitled Phillips to terminate the consignment arrangement following a force majeure event.").

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and *Rivas Paniagua, Inc. v. World Airways, Inc.*, 673 F.Supp 708, 713 (S.D.N.Y. 1997), is misplaced. Both cases stand for the inapplicable and non-controversial principle that changing economic conditions, without more, are insufficient grounds for excusing performance under the doctrines of impossibility and force majeure. *See Route 6*, 2010 WL 1945738, at *4 ("Courts generally are reluctant to excuse contractual non-performance based on claims of economic hardship and changing economic conditions"); *Rivas Paniagua*, 673 F.Supp 708 at 709 ("Where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused"). Neither case applies here, as Phillips' invocation of force majeure rests on the occurrence of a natural disaster—the COVID-19 pandemic—not economic hardship.

Regardless, any notion of pretext is rebutted by Phillips' consistent, contemporaneous statements of postponement, all of which identified the pandemic as the cause. A163–64 (¶ 33), A165 (¶ 36), A169 (¶ 44); A118–22; A114–16. It is rebutted by the fact that Phillips postponed "all of [its] sales and events in the Americas, Europe and Asia" as a result of the pandemic, not just the New York Auction that was the subject of the Stingel Agreement. A114. It is rebutted by the Executive Orders. And it is rebutted by the experience of all New Yorkers. That "Phillips terminated ***no other consignment agreements*** through July 2, 2020," even if true, is irrelevant. Br. 6 (emphasis original). Whether Phillips did not terminate its other consignment agreements, or entered into new contractual arrangements with certain consignors for another auction, has no bearing on its right to terminate the Stingel Agreement upon postponing *this* auction under *this* contract. *See Greenfield v. Scriva*, 841 N.Y.S.2d 218, 218 (Dist. Ct. Nassau Cty. 2007) ("Defendant either did or did not properly perform pursuant to the contract into which he entered with the Plaintiff, regardless of what he might or might not have done on other contracts, with other customers.").

JN concedes that it was both impossible and illegal for Phillips to hold the New York Auction live, in-person at its Park Avenue location in May 2020 because of the COVID-19 pandemic and the resulting Executive Orders prohibiting such gatherings. JN does not allege that Phillips could have held such an event, even if it

wanted to, because JN cannot dispute the public health and safety hazards, in addition to the legal ramifications, that holding such an event would have posed. *See Ross Univ. Sch. Of Med., Ltd. v. Brooklyn-Queens Health Care*, 2012 WL 6091570, at *26 (E.D.N.Y. Dec. 7, 2012) ("[C]ourts may not compel a party through specific performance to take actions in contravention of the law"); *United Water New Rochelle, Inc. v. City of New York*, 687 N.Y.S.2d 576, 580 (Sup. Ct. West Cty. 1999) ("[C]ourts will not enforce or compel the specific performance of a contract where the performance compelled thereby will bring about a result which is detrimental to the public interest"). The notion that the "governmental regulations, orders or executive orders . . . [do] not specifically defeat Defendant's obligation to perform the [Stingel Agreement]" (A166–67 (¶ 42)), is meritless as a matter of law and does not even begin to account for the life-threatening health hazards posed by the pandemic. *See Metpath Inc. v. Birmingham Fire Ins.*, 449 N.Y.S.2d 986, 989 (1st Dep't 1982) ("There is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused."); *United Water New Rochelle*, 687 N.Y.S.2d at 580.

4. Phillips was not required to obtain JN's consent to postpone the auction

JN also argues that the District Court "erred in failing to recognize that Phillips clearly breached [Paragraph 6(a)(i) of the Stingel Agreement] by failing to obtain JN's prior written consent to reschedule" the New York Auction. Br. 10, 12–

17. Yet, as the District Court acknowledged, "[t]hat consent requirement is only triggered by Phillips' *discretionary* rescheduling of the New York Auction." SA20 (emphasis added). Phillips did not voluntarily reschedule the New York Auction in March 2020; it postponed it due to a deadly pandemic under the Termination Provision. A14–16. Phillips' decision to postpone the auction was not voluntary; it was mandatory from a public health and safety perspective.[8] Further, even if Phillips had wanted to host the auction in May 2020, as the Stingel Agreement specifically requires (*see* A56 (¶ 6(a)); SA4), Phillips was legally forbidden from doing so. Simply put, there is no support for the contention that Phillips "rescheduled" the event in its discretion under Paragraph 6(a). And no consent was required for Phillips to exercise its rights under the Termination Provision. JN's conclusory allegation that "Phillips' termination of the Agreement was a discretionary business decision" does not alter this conclusion. A166 (¶ 40).

[8] JN now argues, for the first time on appeal, that Phillips' exercise of its termination right was somehow discretionary because Phillips postponed the auction on March 14, 2020—two days *before* Governor Cuomo issued Executive Order No. 202.3, prohibiting gatherings of 50 people or more. Br. 13–14. This argument is directly at odds with JN's argument that "[g]overnmental lock-down orders, and not the COVID-19 pandemic itself, shuttered Phillips' operations" (Br. 31– 32), and *supports* that Phillips postponed the auction because of the spread of the virus, *see supra*, at 8, 20. It is also immaterial, as JN does not dispute that it still would have been *illegal* for Phillips to host the in-person auction it bargained for in New York in at any point in May 2020.

JN's argument that Phillips could not invoke Paragraph 12(a) of the Stingel Agreement without breaching Paragraph 6(a)(i) ignores the hornbook principle that "[a] contract should be interpreted in a way which reconciles all its provisions, if possible." *Green Harbour Homeowners' Ass'n, Inc. v. G.H. Dev. & Const., Inc.*, 789 N.Y.S.2d 319, 321 (3d Dep't 2005); *see also Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969) ("All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency."); *Paulsen v. Stifel, Nicolaus & Co.*, 2019 WL 2415213, at *6 (S.D.N.Y. June 4, 2019) ("It is well established that a court interpreting any contractual provision . . . must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."). The District Court did not "eliminate[] JN's contractual rights and Phillips' contractual obligations to JN in the guise of interpreting" the Stingel Agreement, because it didn't have to. Br. 16. Phillips' rights and obligations under Paragraphs 6(a)(i) and 12(a) are wholly consistent with one another. *See India.com, Inc. v. Dalal*, 412 F.3d 315, 323 (2d Cir. 2005) (under New York law, "effect and meaning must be given to every term of the contract, and reasonable effort must be made to harmonize all of its terms."); *Ross v. Thomas*, 728 F. Supp. 2d 274, 276 (S.D.N.Y. 2010) ("[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.").

B. The Complaint Fails To State A Claim For Breach Of The Basquiat Agreement

The District Court properly dismissed JN's claim for breach of the Basquiat Agreement. SA26–27; A184–87 (¶¶ 87–97). The theory behind this claim is that Phillips "breached the [Basquiat Agreement] by failing to perform the [Stingel Agreement]" because the Basquiat Agreement and Stingel Agreement were "interrelated, interconnected, interdependent and consideration for each other." A185 (¶ 93); Br. 42. The District Court rejected this argument "for several reasons" (SA 26), all of them rooted in the plain language of the Basquiat Agreement (A50–53).

The subject line of the Basquiat Agreement states, "Re: 20th Century & Contemporary Art Evening Sale, London, 27 June 2019, London (the 'Auction') Lot 19, Jean-Michel BASQUIAT, *Untitled*, Executed in 1981. (the 'Property')." A50. The first paragraph of the Basquiat Agreement states:

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

A50 (Preamble).[9] The first prong of this paragraph required JN to sign the Stingel Agreement. That condition was satisfied: JN did sign the Stingel Agreement. *See* A62.

The second prong of this paragraph was also satisfied. That prong states that the Basquiat Agreement was "conditional upon the above mentioned Property [*i.e.*, the Basquiat Painting] being offered for sale [at the June 27, 2019 auction in London] with a commitment by Phillips to pay the Seller [*i.e.*, the owner of the Basquiat Painting] a Guaranteed Minimum" of GBP 3,000,000.[10] As consideration for JN providing the Guarantee Obligation by submitting an Irrevocable Bid on the Basquiat Painting, Phillips agreed to pay JN a "Financing Fee" equal to 20% of "the amount by which the Hammer Price exceeds the Irrevocable Bid." A50–51 (¶ 6). JN placed the irrevocable bid, the Basquiat Painting sold for more than GBP 3,000,000 at auction, and JN was paid the financing fee. A160–61 (¶ 24).

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[9] The "as follows" required JN to "complete and submit to Phillips an irrevocable bid . . . on the Property [*i.e.*, the Basquiat Painting] at the Auction [*i.e.*, the June 27, 2019 auction held that night in London] in the amount of GBP 3,000,000. . . ." A50 (¶ 2).

[10] This condition has nothing to do with the Stingel Agreement, as Paragraphs 18 and 19 of the Basquiat Agreement make clear. *See* A52 (¶ 18) ("This Agreement is expressly conditional upon the sale of the Property"—*i.e.*, the Basquiat Painting—"in circumstances where Phillips has guaranteed the Seller" of the Basquiat "a guaranteed minimum amount (and the Seller having accepted such guaranteed minimum amount)."); *id.* (¶ 19) ("If the Property is not offered for sale at the Auction for any reason or is offered for sale without a guarantee to the Seller of a guaranteed minimum amount, then this Agreement will be null and void.")

The language of the Basquiat Agreement is clear: JN's obligation to place an irrevocable bid is conditioned upon Phillips auctioning the *Basquiat Painting* subject to a guaranteed minimum paid to the *seller of the Basquiat Painting*. That makes sense, because the Basquiat Agreement is third-party financing of Phillips' obligation to guarantee a minimum price to the seller of the Basquiat. *See*, *e.g.*, A51 (¶ 15). The Basquiat Agreement—which has an integration clause (A52 (¶ 23))—was performed in full.

JN's claim that Phillips somehow breached the Basquiat Agreement nonetheless is premised on the notion that the Basquiat Agreement required Phillips to *fully perform* the Stingel Agreement. A156 (¶ 16), A185 (¶¶ 93–94). Nothing in the text of the Basquiat Agreement supports this interpretation. As the District Court correctly observed, "the Basquiat Agreement is *silent* about Phillips' obligations pursuant to the Stingel Agreement." SA26 (emphasis added). Contrary to JN's baseless assertions, the Basquiat Agreement "*did not* require Phillips to auction the Stingel Painting or pay JN the Guaranteed Minimum" set forth in the Stingel Agreement; it merely "required JN to execute the Stingel Agreement and Phillips to auction the Basquiat Painting and pay the seller of the Basquiat Painting a guaranteed sum." SA26 (emphasis added).

Unable to dispute what the contract actually says, JN argues, in effect, that the Basquiat Agreement does not reflect the parties' true intent. The agreement that the

parties *intended* to enter into, JN alleges, was "a 'trade' in which [JN] would agree to guarantee the sale of the Basquiat [Painting] in exchange for [Phillips'] agreement to guarantee the sale of [the Stingel Painting]." A155–56 (¶ 14). Fully aware that these allegations are inconsistent with the plain language of the Basquiat Agreement itself, which notably includes an integration clause (A233 (¶ 23)), JN argues that the District Court erred by "improperly prohibit[ing] a factual analysis of the parties' intent at the time of contract execution" and refusing to consider "the well-pled history" of the purported "discussions and negotiations" around this alleged "trade." Br. 45. Accepting JN's self-serving characterization of the parties' motives for entering into the two agreements, however, "does not enlarge JN's rights to enforce the contracts *as written*." SA27 (emphasis added). There is nothing improper about staying within the four corners of an agreement that is unambiguous on its face, as the District Court was required to and did do here. *See Eternity Global Master Fund, Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2d Cir. 2004) ("[T]he best evidence of intent is the contract itself; if an agreement is 'complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.'"). Rather, it is JN that improperly asks this Court to "rewrite, under the guise of interpretation," the plain terms of the agreements to obtain some never-bargained-for performance. *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992).

What *would* have been improper is if the District Court had relied on nothing more than JN's conclusory assertions about the parties' intent when the agreements themselves are crystal clear as to the scope of the parties' rights and obligations. *Shipping & Fin., Ltd. v. Aneri Jewels LLC*, 2019 WL 5306979, at *3 (S.D.N.Y. Oct. 21, 2019) (where "the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence"). Therefore, the District Court properly rejected JN's allegations, and repeated requests for discovery, concerning "[t]he parties' intent as to the interdependency of" the two agreements (Br. 42–43; Dkts. 65 & 67; A20–27)—particularly because "doing so would be inconsistent with the two Agreements' integration clauses." SA27; *see also Schron v. Troutman Saunders LLP*, 945 N.Y.S.2d 25, 29 (1st Dep't 2012) (use of extrinsic evidence to show claimed interdependence was properly precluded where "there was absolutely no language of condition [in the contract] making the funding of the loan an express condition precedent to the right to exercise the $100 million option"); *Transammonia, Inc. v. Enron Cap. & Trade Res. Corp.*, 718 N.Y.S.2d 62, 62 (1st Dep't 2000) ("The parol evidence rule precludes defendant from relying on extrinsic evidence to establish that the subject swap contract was one of two interdependent

components of a single contract, the other being a contract . . . to which no reference is made in the fully integrated swap contract documents").[11]

Finally, even if the Basquiat Agreement *did* require Phillips to "comply[] with its guarantee obligations" under the Stingel Agreement (Br. 45; A185 (¶¶ 92–93)), such a requirement would have been satisfied here because Phillips *fully performed the Stingel Agreement as written.* SA26. As the District Court properly concluded, "Phillips did not breach the Stingel Agreement; it exercised its contractual right to terminate the agreement following a force majeure event." *Id*. "Because Phillips was entitled to terminate the Stingel Agreement, JN cannot complain of nonperformance." *Id*. (citing *N. Shore Bottling Co. v. C. Schmidt & Sons*, 22 N.Y.2d 171, 176 (1968) (explaining that performance "is simply carrying out the contract by doing what it requires or permits")); *see also Pearce v. Manhattan Ensemble Theater, Inc.*, 528 F. Supp. 2d 175, 180 (S.D.N.Y. 2007) ("rightful termination is one means of completing performance.").

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[11] Not one of the cases JN cites in its failed attempt to show interdependence involved two agreements with integration clauses. *See, e.g., Nat'l Union Fire Ins. Co. v. Turtur*, 892 F.2d 199 (2d Cir. 1989); *Lowell v. Twin Disc, Inc.*, 527 F.2d 767, 770 (2d Cir. 1975) (no integration clause, stating that parol evidence of intent is only admissible if it does not contradict the agreement); *Nat'l Convention Servs., L.L.C. v. Applied Underwriters Captive Risk Assurance Co.*, 239 F. Supp. 3d 761 (S.D.N.Y. 2017). Here, the integration clauses *and* the plain language of the contracts demonstrate that the two agreements were not interdependent, despite JN's self-serving attempts to characterize them as such.

II. THE DISTRICT COURT CORRECTLY DISMISSED JN'S IMPLIED COVENANT CLAIM AS DUPLICATIVE

JN's implied covenant claim, based on Phillips' supposedly "pretextual" termination of the Stingel Agreement, was properly dismissed by the District Court as duplicative of JN's contract claims because it is "not distinct from the argument that Phillips had an obligation to perform under the Stingel Agreement." SA29. It is well settled that "when a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 125 (2d Cir. 2013). Here, as the District Court noted, "the damages that JN seeks for this claim are identical to those it seeks for its breach-of-contract claims." SA29–30; *compare* A187–191 (¶¶ 98–114) *with* A174–6 (¶¶ 55–61), A177–9. (¶¶ 65–73) *and* A181–2 (¶¶ 77–83); *compare* A191–92 (¶¶ 115–17), *with* A166–17 (¶¶ 62–64), A179–81 (¶¶ 74–76) *and* A182–84 (¶¶ 84–86). The District Court's dismissal of this claim should be affirmed.

JN's claims that Phillips acted in bad faith were also properly rejected by the District Court. Despite JN's post hoc explanation that its implied covenant claim "is not simply predicated on the fact that Phillips terminated the [Stingel Agreement], but rather on the full context of Phillips' bad faith actions surrounding its unlawful termination decision" (Br. 48), dismissal of the claim was proper. As the District Court found, none of Phillips' purported actions —even if accepted as true—support

a claim or rise to the level of bad faith. SA27–31. For example, the allegation that Phillips "stated to JN's principal that Phillips would honor all contractual commitments with consignors despite COVID-19," even if true, does not demonstrate bad faith because Phillips *did* honor its contractual commitments to JN. As explained above, Phillips fully complied with and performed the Stingel Agreement by properly exercising its rights under the Termination Provision. *See supra*, at 18–39. Phillips' alleged representation that it would honor its contractual commitments does not foreclose Phillips from exercising its contractual rights, and cannot possibly be interpreted to mean that Phillips intended to waive those rights. Indeed, as the District Court properly concluded, "[i]t cannot be a breach of the implied covenant of good faith and fair dealing to do what a contract explicitly authorizes a party to do." SA30; *accord Richards v. Direct Energy Servs., LLC*, 915 F.3d 88, 99 (2d Cir. 2019) ("There can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract.").

Next, JN argues that Phillips conducted itself in bad faith by "prominently and misleadingly us[ing] ***only*** the image of the Stingel Work . . . 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." Br. 49. According to JN, this was part of Phillips' "scheme to placate JN and convince JN that Phillips would not terminate the [Stingel Agreement]," which allegedly "caused JN to forego negotiating a replacement sale or guarantee of the Stingel Work." *Id.* These allegations, even if true, come nowhere near the "specific factual allegations of . . . bad faith acts [that] are required" to survive a motion to dismiss. *Kortright Cap. Partners LP v. Investcorp Inv. Advisers Ltd.*, 257 F. Supp. 3d 348, 360 (S.D.N.Y. 2017). Moreover, nothing 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. *See M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) ("Integral to a finding of a breach of the implied covenant is a party's action that directly violates an obligation that may be presumed to have been intended by the parties."). The same is true for JN's allegation that, before terminating the contract, Phillips told JN that it was "considering" offering the Stingel Painting in a November 2020 auction. Br. 49. The SAC is devoid of allegations that Phillips made this entirely vague statement knowing that it would somehow damage JN. Nor does the SAC allege that this purported statement was not true when it was supposedly made. *See* A188 (¶ 103); A194 (¶ 121).

Similarly, the allegation that Phillips "waited 89 days . . . between rescheduling the Evening Auction and terminating the [Stingel Agreement]" (Br. 6) cannot give rise to a finding of bad faith because it is entirely consistent with Phillips' rights under the termination provision, which does not require any specific form or date of notice. A60 (¶ 12(a)); *see also Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67–68 (S.D.N.Y. 1991) (late force majeure notice did not preclude defense because notice was not a condition precedent under the contract); *Tendler v. Lazar*, 141 A.D.2d 717, 719–20, 529 N.Y.S.2d 583, 585 (2d Dep't 1988) (plaintiff's failure to exercise contractual termination right "as soon as possible" did not waive right to terminate, where "[t]he contract itself contained no requirement that the plaintiffs' option to cancel pursuant to the mortgage contingency clause be exercised by a particular time").

The bottom line is that the SAC alleges no actions by Phillips that were inconsistent with its contractual rights. *See Gravier Prods., Inc. v. Amazon Content Servs., LLC*, 2019 WL 3456633, at *4 (S.D.N.Y. July 31, 2019) ("[T]he implied covenant of good faith and fair dealing cannot be used to impose an obligation that is inconsistent with express contractual terms."); *Suthers v. Amgen Inc.*, 441 F. Supp.2d 478, 485 (S.D.N.Y. 2006) ("[C]ourts have refused attempts to impose liability on a party that engaged in conduct permitted by a contract, even when such conduct is allegedly unreasonable."). JN's assertion that Phillips' conduct somehow

"deprive[d]" JN of its contractual benefits while maximizing Phillips' own benefits under the contract is not only unsupported and conclusory—it is legally irrelevant. Br. 52. To the extent Phillips' purported actions or statements incidentally dampened the outcome that JN hoped to achieve from the contract, that alone is patently insufficient to give rise to a claim for breach of the implied covenant of good faith and fair dealing. *See Ferguson v. Lion Holding, Inc.*, 478 F. Supp. 2d 455, 469 (S.D.N.Y. 2007) ("[T]he implied covenant does not extend so far as to undermine a party's 'general right to act on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract.'"). The District Court properly dismissed JN's claim for breach of the implied covenant on these grounds as well.

III. THE DISTRICT COURT CORRECTLY DISMISSED JN'S CLAIM FOR BREACH OF FIDUCIARY DUTY

JN's claim for breach of fiduciary duty was also properly dismissed. This claim boils down to the allegation that Phillips breached its fiduciary duties by exercising a contractual right. A199–203 (¶¶ 136–49). Quoting from the District Court's opinion, JN observes that "Phillips owed JN a fiduciary duty by virtue of the consignment relationship," and that Phillips therefore "owed a duty of loyalty to JN and was required to conduct the consignment faithfully with JN's business interests at the forefront." Br. 53 (quoting SA32). Tellingly, JN omits the *very next sentence* of the District Court's opinion, which states that "[t]he scope of [Phillips'] duty,

however, was modified by the parties' contract . . . ." SA32. Thus, "[w]hether Phillips' conduct violated its fiduciary duty to JN . . . depends upon how the Stingel Agreement shaped that duty." SA32–33. Here, the shape of that duty is clear: "the Stingel Agreement unambiguously entitled Phillips to terminate the consignment arrangement following a force majeure event." SA33.

It is "elementary" that "the legal duties of an agent may be defined and circumscribed by agreement between principal and agent." *Mickle v. Christie's, Inc.*, 207 F. Supp. 2d 237, 244 (S.D.N.Y. 2002); *see also Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, 967 N.Y.S.2d 649, 649 (1st Dep't 2013) ("Sotheby's did not breach the contract or its fiduciary duty to plaintiff by withdrawing the [consigned] work from auction" where "[t]he consignment agreement between plaintiff and Sotheby's permitted Sotheby's to withdraw the artwork owned by plaintiff from auction if Sotheby's had any doubt, in its sole judgment, as to the work's 'attribution'"); *Greenwood v. Koven*, 880 F. Supp. 186, 195 (S.D.N.Y. 1995) ("Whether Christie's action was taken to further the interest of [the consignor] . . . is irrelevant to this particular issue because the Consignment Agreement explicitly allowed Christie's to act against the interest of [the consignor] by providing Christie's authority to rescind the sale."). That is exactly what happened here: the contract the parties entered into "included a force majeure clause which permitted termination of the parties' agreement." SA32. The District Court rejected JN's

argument that dismissal of this claim would ignore the "vast scope" of the fiduciary duties Phillips owed to JN, because "the scope of those duties was circumscribed by the parties' arms-length agreement" and the agreement "unambiguously entitled Phillips to terminate the consignment arrangement following a force majeure event." SA32–33. Whatever the scope of the fiduciary duty that remained after the agreement was executed, it does not (and cannot) be stretched to prevent either party from exercising its contractual rights.

IV. THE DISTRICT COURT CORRECTLY DISMISSED JN'S CLAIM FOR EQUITABLE ESTOPPEL

JN has not raised on appeal the dismissal of its equitable estoppel claim (A193–99 (¶¶ 118–35)), and therefore, the claim has been waived. *See, e.g.*, *Williams v. Marinelli*, 987 F.3d 188, 206 (2d Cir. 2021) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.") (citing *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d. Cir. 1998)).

In any event, the District Court properly dismissed JN's equitable estoppel claim. JN knew and was on notice as of March—two months before the New York Auction's original date—that Phillips had postponed the Auction due to COVID-19, and that there was no way for Phillips to offer the Stingel Painting for sale at the Auction in May 2020 without endangering the public and incurring serious criminal and civil liability. A193–94 (¶ 120); A115. As explained above, Phillips was not required to provide notice of its termination in any specific form or by any specific

date, *supra* at 49–50, and JN cannot ask the Court to fashion a contractual notice requirement where none exists. A195–96 (¶¶ 126–27); *Randolph Equities, LLC v. Carbon Capital, Inc.*, 648 F. Supp. 2d 507, 524 (S.D.N.Y. 2009) ("[T]he doctrine of equitable estoppel cannot be invoked to create a right where one does not otherwise exist."). JN has not adequately stated a claim warranting this "extraordinary remedy," because it could not have reasonably believed and detrimentally relied on the fact that the New York Auction would take place as contracted given the indisputable reality of the pandemic and its awareness that the Auction had been postponed. *See JP Morgan Chase Bank, N.A. v. Freyberg*, 171 F. Supp. 3d 178, 186 (S.D.N.Y. 2016) (plaintiff must show "lack of knowledge" and "reliance upon the conduct of the party to be estopped"). JN's failure to even challenge the District Court's dismissal of this claim speaks for itself.

CONCLUSION

For all the foregoing reasons, the District Court's decision should be affirmed in its entirety.

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