

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

JN CONTEMPORARY ART LLC,

Plaintiff,

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

-against-

PHILLIPS AUCTIONEERS LLC,

Defendant.

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

THE PARTIES

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

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

JURISDICTION

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

4. Plaintiff, a New York limited liability company and citizen of New York, asserts claims arising from a breach of contract against Defendant, a limited liability company incorporated in the State of Delaware. Upon information and belief, none of the members of Defendant are domiciled in the State of New York. Complete diversity exists between the parties in this action.

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

BACKGROUND

6. Plaintiff is an art gallery in the business of buying, selling and exhibiting works of art.

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

A. The Basquiat Guarantee Agreement

8. Plaintiff and Defendant entered into a valid agreement, exclusively drafted by Defendant and dated June 27, 2019 (“Basquiat Guarantee Agreement”), concerning a work of art described as “*Untitled, Executed in 1981*” by the artist Jean-Michel Basquiat (“Basquiat Painting”).

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

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

10. The Basquiat Guarantee Agreement provides, *inter alia*, that Plaintiff must submit an irrevocable bid for the Basquiat Painting in the sum of GBP £3,000,000.00 (three million pounds sterling), plus pay all applicable fees and premium, at the June 27, 2019 auction, as follows:

- i. **“You [Plaintiff] agree that in accordance with the terms of this Agreement, you will have the obligation to Phillips to buy the Property [Basquiat Painting] for GBP 3,000,000 (three million pounds sterling) *plus* full standard buyer’s premium** (‘Buyer’s Premium’) and any applicable Artist Resale Royalty (‘ARR’), VAT and import duties (the ‘Guarantee Obligation’)” (par. 1);
- ii. **“You agree to complete and submit to Phillips an irrevocable bid (the ‘Irrevocable Bid’) on the Property at the Auction in the amount of GBP 3,000,000 (three million pounds sterling) *or*, if you fail to submit such bid, we will be entitled to record the Irrevocable Bid** in the auctioneer’s book and enter the bid **on your behalf at the above amount”** (par. 2); and
- iii. “You agree that the Irrevocable Bid is submitted on the understanding **that it may not be revoked, amended or withdrawn”** (par. 3).

B. Plaintiff Fully Performed The Basquiat Guarantee Agreement

11. The Basquiat Painting was Lot no. 19 in Defendant’s 20th Century & Contemporary Art Evening Sale, held on June 27, 2019 in London, England. Plaintiff fully performed the Basquiat Guarantee Agreement and submitted an irrevocable bid in the sum of GBP £3,000,000.00 (three million pounds sterling) at Defendant’s June 27, 2019 auction. Another bidder then submitted a higher bid in the sum of GBP £3,200,000.00 (three million and two hundred thousand pounds sterling) (the “Basquiat Hammer Price”) and the Basquiat Painting

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

12. Upon information and belief, at the time of the auction, the Basquiat Painting was owned by Defendant or one of its two owners Leonid Friedland ("Friedland"). Accordingly, Defendant or Friedland was paid the entire sum of GBP £3,802,000.00 (three million and eight hundred and two thousand pounds sterling). If Plaintiff had not bid at the auction, upon information and belief, no other bidder would have participated in the auction of the Basquiat Painting and it would not have sold for the Basquiat Hammer Price plus the buyer's premium, totaling GBP £3,842,000.00 (three million and eight hundred and forty two thousand pounds sterling), of which Defendant received GBP £3,802,000.00 (three million and eight hundred and two thousand pounds sterling).

C. The Stingel Consignment With Guarantee Agreement

13. A valid agreement, also exclusively drafted by Defendant and also dated June 27, 2019, was entered into between Plaintiff and Defendant, titled "Consignment Agreement" ("Stingel Consignment With Guarantee Agreement"). Pursuant to the Stingel Consignment With Guarantee Agreement, Plaintiff consigned to Defendant a work of art titled "*Untitled 2009*" by Rudolf Stingel (the "Stingel Work").

14. Plaintiff and Muses Funding I LLC ("MFI") executed a valid Loan and Security Agreement, dated as of December 27, 2019 (the "Loan and Security Agreement"), pursuant to which Plaintiff granted MFI a first-priority lien in the Stingel Work. The Stingel Consignment With Guarantee Agreement was amended pursuant to an Amendment to Consignment Agreement, dated as of December 27, 2019 ("Amendment") between Plaintiff,

Defendant and MFI. Pursuant to the Amendment, Defendant acknowledged that MFI is a secured party with, *inter alia*, a security interest in all of Plaintiff's rights to the Stingel Work. Defendant was fully aware and knew at all times that Plaintiff had borrowed USD \$5,000,000.00 (USD five million dollars), on December 27, 2019 against the Stingel Work.

15. The Stingel Consignment With Guarantee Agreement provides, *inter alia*, that Defendant guarantees that Plaintiff shall receive at least USD \$5,000,000.00 (USD five million dollars) with respect to the sale of the Stingel Work ("Guaranteed Minimum") (par. 11),¹ which shall be offered for sale in Defendant's major spring 2020 evening auction ("Evening Auction")² of 20th Century & Contemporary Art, then scheduled for May 2020 (par. 6(a)).³

¹ Paragraph 11 provides:

"11. GUARANTEE OF MINIMUM PRICE

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

² The term "evening auction" means Defendant's evening auction sales of contemporary works of art which take place bi-annually in May and November.

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

"6. PRE-SALE ACTIVITIES

- (a) The Property shall be offered for sale in New York in our major spring 2020 evening auction of 20th Century & Contemporary Art **currently scheduled for May 2020**. Subject to the foregoing, we have the sole right in our reasonable discretion, and as we deem appropriate: (i) to select, change or reschedule the place, date and time for the auction **but any change to a later date than May 2020 would be subject to your prior written consent**" (emphasis supplied) (par. 6(a)(i)).

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

- i. Plaintiff shall receive 80% of the amount by which the final bid price on the Stingel Work (the “Hammer Price”) exceeds the Guaranteed Minimum (par. 12(b)⁴ and par. 2);
- ii. Defendant shall receive 20% of the amount by which the Hammer Price exceeds the Guaranteed Minimum (par. 2);

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

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

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

Paragraph 2 provides:

“2. COMMISSION

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

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

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

- iii. The Stingel Work shall be offered for sale in Defendant’s major spring 2020 evening auction of 20th Century & Contemporary Art, **scheduled for May 2020** (par. 6(a))—*See* footnote 3 quoting par. 6(a)(i);
- iv. Defendant may “select, change or reschedule the place, date and time for the auction **but any change to a later date than May 2020 would be subject to [Plaintiff’s] prior written consent**”—*See* footnote 3 quoting par. 6(a)(i) (emphasis added);
- v. Defendant shall remit payment to Plaintiff in full no later than 95 calendar days after the May 2020 Evening Auction (the “Settlement Date”) (par. 12 (a)-(c) (“Settlement”) of the Stingel Consignment With Guarantee Agreement, as amended by Paragraphs 9(a)(i)-(iii) of the Amendment);
- vi. “In the event that the auction is postponed for circumstances beyond our [Defendant] or your [Plaintiff] reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our [Defendant] obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you [Plaintiff].” (par. 12(a));⁵ and
- vii. “(b) No term of this Agreement shall be **amended, supplemented or waived unless each of us has agreed to do so in writing**” (par. 17(b)).

17. Plaintiff would not have entered into the Basquiat Guarantee Agreement unless Defendant entered into the Stingel Consignment With Guarantee Agreement. Had Plaintiff known that Defendant would not comply with its guarantee obligations to Plaintiff pursuant to the Stingel Consignment With Guarantee Agreement, Plaintiff never would have executed the Basquiat Guarantee Agreement. The first paragraph of the Basquiat Guarantee Agreement (paragraph 9 above) expressly recognizes and acknowledges, by employing the expression “[c]onditional upon,” that Plaintiff would **not** have executed the Basquiat Guarantee

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

Agreement had it known that Defendant would not comply with its guarantee obligations to Plaintiff pursuant to the Stingel Consignment With Guarantee Agreement. Defendant also referred Plaintiff to MFI for the USD \$5,000,000.00 bridge loan (“\$5,000,000.00 Loan”), as the \$5,000,000.00 Loan was loaned against Plaintiff’s receivable from Defendant in the sum of USD \$5,000,000.00 (USD five million dollars), *i.e.*, Defendant’s guarantee pursuant to the Stingel Consignment With Guarantee Agreement.

18. During negotiations of the Amendment, Defendant falsely induced Plaintiff and MFI (by Cynthia Sachs) to execute the Amendment as Annette Schwaer (“Schwaer”), Defendant’s Chief Financial Officer, who signed the Amendment on behalf of Defendant, repeatedly represented to MFI that Defendant never before has invoked a force majeure termination clause such as Paragraph 12(a) of the Stingel Consignment With Guarantee Agreement (titled “Termination”). Schwaer specifically referenced the September 11, 2001 attacks and declared that Defendant did not invoke such a clause even in the aftermath of those tragic events. Plaintiff and MFI would not have signed the Amendment had they known that representation was false.

D. The Legal Relationship Between the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement

19. Pursuant to the express terms of the first paragraph of the Basquiat Guarantee Agreement (*see* par. 9 above), the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement, both executed on June 27, 2019, were consideration for each other (*see* par. 17 above). Plaintiff would not have entered into the Basquiat Guarantee Agreement unless Defendant entered into the Stingel Consignment With Guarantee Agreement.

E. Defendant Unlawfully Terminated the Stingel Consignment With Guarantee Agreement

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

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

22. Upon neither of the foregoing two auction reschedulings (*see* paragraph 21 above) did Defendant invoke paragraph 12(a) titled "Termination" in the Stingel Consignment With Guarantee Agreement. Defendant changed the date and time of, selected a new date and time and/or rescheduled the May 2020 Evening Auction twice (starting in or about March 19, 2020) without terminating the Stingel Consignment With Guarantee Agreement. Therefore, Defendant ratified the Stingel Consignment With Guarantee Agreement and waived its alleged right to terminate, and Defendant is estopped as well from terminating the Stingel Consignment With Guarantee Agreement for any alleged contractual reasons, including reasons that were beyond the parties' reasonable control, including the facts set forth in paragraphs 45-46, *infra*.

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

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

24. On May 30, 2020, well after the date the May 2020 Evening Auction could be held in May 2020,⁶ Friedland sent an electronic message to Plaintiff’s Manager Joseph Nahmad via the computer app known as ‘WhatsApp.’ This electronic message contained an image of page 6 of the Stingel Consignment With Guarantee Agreement (and nothing else) including, *inter alia*, the following excerpt from Paragraph 12(a) (titled “Termination”) of the Stingel Consignment With Guarantee Agreement:

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

25. On May 30, 2020, when Friedland sent the electronic WhatsApp message to Plaintiff (*see par. 24 above*), the May 2020 Evening Auction already had been rescheduled, a new date and time had been selected and the date and time thereof had been changed twice. Therefore, the alleged right, if any, to cancel the Stingel Consignment With Guarantee Agreement, for force majeure or otherwise, never arose.

26. The May 2020 Evening Auction was rescheduled, a new date and time was selected and the date and time thereof was changed (twice) because ***Defendant***, exercising its subjective business judgment, decided to reschedule, select a new date and time and change

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

the date and time thereof, and **not** due to any executive orders issued by the State of New York and/or by the Federal government relating to the conduct of business or any government regulations or government orders or government executive orders (State, Federal, Local or otherwise).

27. On June 1, 2020, **after the fact**, Friedland sent another electronic message to Joseph Nahmad via WhatsApp. Friedland attached to the WhatsApp message an **unsigned draft** of a letter (“Unlawful Termination Letter”), in violation of the Notice Provision in the Stingel Consignment With Guarantee Agreement. The WhatsApp message was received **after** May 2020 and well **after** the scheduled May 2020 Evening Auction.

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

“Dear Mr. Nahmad,

As you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the New York State and New York City governments placed severe restrictions upon all non-essential business activities. Certain government orders were invoked that applied to and continue to apply to Phillips’ business activities.

Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to **postpone** the Auction beyond its planned May 2020 date [emphasis added].

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

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

“(a) In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed

conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with Immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.” [emphasis in original]

29. When the Unlawful Termination Letter was written and received, the May 2020 Evening Auction already had been rescheduled for July 2, 2020, a new date and time had been selected and the date and time thereof had been changed; the May 2020 Evening Auction was ***not*** postponed. On June 4, 2020, Plaintiff received, by mail, the Unlawful Termination Letter signed by Defendant. The postmark on the envelope containing the Unlawful Termination Letter is dated June 2, 2020. Pursuant to Paragraph 17(d) of the Stingel Consignment With Guarantee Agreement, the Unlawful Termination Letter is legally deemed to have been received by Plaintiff on June 9, 2020, well beyond the time Defendant rescheduled, selected a new date and time for and changed the date and time of the May 2020 Evening Auction. Thereafter, Defendant made no effort whatsoever to perform any of its obligations under the Stingel Consignment With Guarantee Agreement. As demonstrated below, there was no causal nexus between any force majeure provision and the alleged inability of Defendant to perform.

**AS AND FOR A FIRST CAUSE OF ACTION
(Defendant’s Breach of the Stingel Consignment With Guarantee Agreement)**

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

31. At all relevant times, Defendant’s performance was not rendered impossible for the reason of force majeure or any other reason and Defendant failed to meet any standard for invoking force majeure. Defendant could have performed its obligations under the Stingel Consignment With Guarantee Agreement.

32. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Stingel Consignment With Guarantee Agreement and did perform all of the terms and conditions of the Stingel Consignment With Guarantee Agreement required to be performed on Plaintiff's part.

33. Defendant breached the Stingel Consignment With Guarantee Agreement in the following enumerated respects:

A. Defendant Did Not Obtain Plaintiff's Written Consent to Reschedule, Select a New Date and Time and/or Change the Date and Time of the May 2020 Auction

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

B. The Legal Doctrine of *Ejusdem Generis*

35. Pursuant to, *inter alia*, the legal doctrine of *ejusdem generis*, viz., words constituting general language of excuse are strictly construed and are not to be given the most expansive meaning possible, and instead are held to apply only to the same general kind or class as those specifically mentioned. The circumstance of the COVID-19 virus is definitively ***not*** in the same class or kind as the specific events stated in Paragraph 12(a), *i.e.*, "natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination."

The subject force majeure clause is not applicable and by invoking it and/or using it as a pretext to not perform, Defendant breached the Stingel Consignment With Guarantee Agreement.

36. The Unlawful Termination Letter states in pertinent part:

“As you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the *New York State and New York City governments* placed severe restrictions upon all non-essential business activities. *Certain government orders* were invoked that applied to and continue to apply to Phillips’ business activities” (emphasis supplied).

37. Pursuant to, *inter alia*, the legal doctrine of *ejusdem generis*, the circumstance of government regulations or government orders or government executive orders (“certain” or otherwise, and State, Federal, Local or otherwise) is not in the same specific class of events stated in Paragraph 12(a). Defendant’s claimed postponement of the May 2020 Evening Auction was in bad faith and a business judgment, was not for the reason that the circumstances then existing were beyond its reasonable control and all events related to COVID-19 were foreseeable. The Unlawful Termination Letter is legally defective and does not meet the specific standards of a legal force majeure termination letter or notice. The subject force majeure clause is not applicable, the Unlawful Termination Letter is legally defective as aforesaid and by invoking the force majeure clause and/or the Unlawful Termination Letter, and/or using either or both as a pretext to cancel and not perform the Stingel Consignment With Guarantee Agreement, Defendant breached the Stingel Consignment With Guarantee Agreement.

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

38. After having rescheduled, selected a new date and time and/or changed the date and time of the May 2020 Evening Auction twice without Plaintiff’s written consent and without cancelling the Stingel Consignment with Guarantee Agreement, Defendant is proceeding with its “major spring 2020 evening auction of 20th Century & Contemporary Art” (par. 6(a)

Stingel Consignment With Guarantee Agreement) presently scheduled for July 2, 2020—*see* pars. 42-43 and 47-51 below.

39. As aforesaid, Defendant's unlawful termination of the Stingel Consignment With Guarantee Agreement is ***not*** based on an alleged force majeure provision, COVID-19, government regulations or government orders or government executive orders (State, Federal, Local or otherwise). Defendant has made a ***commercial*** decision to illegally terminate the Stingel Consignment With Guarantee Agreement because of Defendant's belief that the market for works of art by Rudolf Stingel has weakened. Defendant's actions were a voluntary and discretionary business decision and not a product of force majeure, riding the coat tails of COVID-19 to escape its binding contractual obligations.

40. Defendant's invoking of government regulations or government orders or government executive orders (State, Federal, Local or otherwise) is a false pretext for an unlawful termination, nothing short of a case of buyer's remorse, a dishonest rewrite of the past and Defendant cancelling a commercial liability. Furthermore, Defendant is guilty of estoppel and waiver as Defendant did not cancel the Stingel Consignment With Guarantee Agreement on the two occasions in May and June 2020 when Defendant claimed to have postponed the May 2020 Evening Auction. At no time was Defendant's obligation to perform under the Stingel Consignment With Guarantee Agreement rendered or deemed to be impossible.

41. In point of fact, as demonstrated herein, all such circumstances of conducting an Evening Auction were ***not*** beyond Defendant's reasonable control—the COVID-19 event, together with government regulations or government orders or government executive orders (State, Federal, Local or otherwise), does not specifically defeat Defendant's obligation to perform the Stingel Consignment With Guarantee Agreement. The exercise of business

judgment is not a pretext for applying force majeure and, accordingly, Defendant breached the Stingel Consignment With Guarantee Agreement.

42. Defendant selectively and prejudicially terminated the guarantee but not the auction because of the guarantee provision in the Stingel Consignment With Guarantee Agreement, which required Defendant to pay Plaintiff the Guaranteed Minimum in the sum of USD \$5,000,000.00 (USD five million dollars). Defendant is proceeding with its other contractual consignments for its May 2020 Evening Auction sale now scheduled for July 2, 2020, which is being conducted in a minimum of three ways (none of which are in person): online; on the telephone; and by way of absentee bid.⁷ The auctioneer Henry Highley will be at Phillips, London at 30 Berkeley Square, Mayfair, London and there will be no in-person rooms provided in any of Phillips' locations throughout the world, including in New York, Hong Kong, Geneva, Antwerp and Moscow, which further demonstrates that the May 2020 Evening Auction could have been fully held online. The auction will be streamed live online from London, a viewing room is available in New York, and most of the works of art are located in New York. Defendant has published on the internet 25 lots (Ex. 1) in the July 2, 2020 sale (<https://www.phillips.com/auctions/auction/NY010320>) which commences at 5:00 P.M. in the afternoon. At least 11 of the 25 lots have Defendant's guarantee or a third party guarantee and five are expected to sell for well over USD \$1,000,000.00.⁸ The July 2, 2020 sale is being

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

⁸ As follows (Ex. 1):

- i. Lot no. 5: *Noël* by Joan Mitchell and is guaranteed and estimated at USD \$9,500,000 to USD \$12,500,000 (Ex. 1);

vigorously advertised by Kamila Kerimova, Specialist, Director Head of Day Sales at Defendant as this First Amended Complaint is being completed today. Defendant has publicly, through its website, the internet and otherwise, advertised and vigorously encouraged its clients and the public to bid online. Defendant continues to do so for all of its past and upcoming sales, rendering absolutely unnecessary in-person bidding in an auction room in Defendant's New

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

York headquarters at 450 Park Avenue (as it has been for well over a decade). These three practices are classically established practices of purchasing art in the auction world.⁹

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

“Over the coming weeks, we will host live auctions in all the categories that Phillips is proud to represent...

These auctions will be held live with our auctioneers at the podium... **and online bidding is encouraged**” (Ex. 3) (emphasis supplied).

44. For the foregoing reasons, Defendant has breached the Stingel Consignment With Guarantee Agreement.

⁹ Previously, the following was alleged as paragraph 44 in the complaint:

“Upon information and belief, Defendant is not cancelling any other consignment agreements for its July 2, 2020 Evening Auction, to wit, the following four works of art which were consigned for the May 2020 Evening Auction and which can be viewed on Defendant’s website at <https://www.phillips.com/auctions/auction/NY010320>:

- i. JOAN MITCHELL *Noël*, 1961-1962;
- ii. GERHARD RICHTER *Abstraktes Bild (801-3)*, 1994;
- iii. CHRISTINA QUARLES *Placed*, 2017; and
- iii. BANKSY *Monkey Poison*, 2004.”

D. Defendant Has Not Been Prevented From Holding The Auction

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

46. Nowhere in the Stingel Consignment With Guarantee Agreement is there a provision that the May 2020 Evening Auction shall be held in-person, notwithstanding Defendant’s counsel’s misrepresentation on June 19, 2020 during a Court conference (Transcript p. 7), that the Stingel Consignment With Guarantee Agreement provides that the May 2020 Evening Auction must be an in-person auction. In that auction, like all Phillips’ auctions, there will be vigorous telephone, streaming/online (click on a computer or smartphone to bid) and absentee bidding. Defendant’s website at <https://www.phillips.com> advertised and conducted the following online auctions held *since April 2020*, including, without limitation, the following online 2020 auctions:

- i. Online Auction for May 26 – June 4, 2020 titled “connect /reflect/ COLLECT a selection of contemporary art Online Auction;”
- ii. Online Auction for May 20 - May 28, 2020 titled “REFRESH: RELOAD Online Auction;”
- iii. Online Auction for May 13 – May 21 titled “Happy Hour: Online Auction;”
- iv. Online Auction for May 13 – May 21 titled “Shaping the Surface: Online Auction;”

- v. Online Auction for April 2 – May 7, 2020 titled “April Showers: Online Auction;”
- vi. Online Auction for April 29 – May 7, 2020 titled “Bloom: Online Auction;”
- vii. Online Auction for April 22 – April 30, 2020 titled “Hard-Edged: Online Auction;”
- viii. Online Auction for April 22 – April 30, 2020 titled “Habitat: Online Auction;”
- ix. Online Auction for April 15 – April 23, 2020 titled “Desktop: Online Auction;”
- x. Online Auction for April 15 – April 23, 2020 titled “Current Mood: Online Auction;” and
- xi. Online Auction for April 8 - April 16, 2020 titled "Editions Online.”

D.1. Judicial Notice

47. The Court is referred to, and Plaintiff respectfully requests the Court to take judicial notice of, the plethora of news articles related to the 2020 online art sales and the ongoing streaming and online auctions currently being conducted throughout the world by Defendant, Christie’s and Sotheby’s, including, without limitation, the world’s most important art fair, Art Basel Switzerland, which runs this year from June 17 through June 26, 2020, and which, for the first time, is being conducted entirely through the internet by online viewing rooms with no physical presence of collectors or dealers. Plaintiff respectfully requests that the Court take judicial notice of three articles incorporated herein (among many on the same subject from various major publications): (i) From the Wall Street Journal May 27, 2020 edition, titled “Online Auctions, Sidewalk Concerts and Virtual Tours;” (ii) From the New York Times May

29, 2020 edition, titled “Sotheby’s to Hold ‘Live’ Auctions in June, Remotely;” and (iii) From Artnet, June 18, 2020, titled “A \$10 Million Basquiat and a \$35 Million Barnett Newman Are the Latest Big-Ticket Lots Secured for the Socially Distanced Summer Auction Season.” **The Basquiat work, valued at USD \$10,000,000.00 (USD ten million dollars), is being offered by Defendant in the May 2020 Evening Auction sale now scheduled for July 2, 2020.** These articles fully describe the importance and dominant method of selling works of art throughout the world since and prior to the onset of COVID-19 and as this case is being litigated.

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

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

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

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

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

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

The above-referenced Artnet article of June 18, 2020 (see par. 47) also reports as follows:

“The Phillips auction, on July 2, will be live streamed and will feature a host of multimedia content for remote bidders, including on-the-spot art-historical and market analysis for its lots.

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

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

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

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

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

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

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

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

(iii) Defendant’s website presently advertises three auctions for its 20th Century & Contemporary Art department to take place on July 2, 2020, *viz.*, a morning online auction commencing at 10:00 A.M., an afternoon auction commencing at 2:00 P.M. and its Evening Auction commencing at 5:00 P.M.

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

51. Defendant's statements, actions and past and future online and live real time auctions such as the July 2, 2020 Contemporary Art Evening Auction originating in London demonstrates beyond the pale that the circumstances of conducting the May 2020 Evening Auction were not beyond the reasonable control of Defendant and were objectively possible to perform because, inter alia, Defendant's auctions are regularly conducted online, on the telephone and by way of absentee bid and that the cancellation of the Stingel Consignment With Guarantee Agreement was a breach of contract. Accordingly, conducting an online auction which Defendant will be engaged in on July 2, 2020, was and is not beyond Defendant's reasonable control and Defendant has breached the Stingel Consignment With Guarantee Agreement.

E. Defendant's Unlawful WhatsApp Notice

52. Pursuant to the Notice Provision in Paragraph 17(d) of the Stingel Consignment With Guarantee Agreement quoted above, "***Notices shall be deemed to have been given five (5) calendar days after mailing to the address referred to above or within one (1) business day of delivery by hand, email, or facsimile***" (emphasis supplied).

53. Defendant's alleged WhatsApp message, sent by Defendant to Plaintiff on June 1, 2020, is not a legally valid notice as a WhatsApp message is neither delivery by mail, hand, email nor facsimile, as required by Paragraph 17(d) of the Stingel Consignment With

Guarantee Agreement. By not giving appropriate notice, Defendant breached the Stingel Consignment With Guarantee Agreement.

F. Defendant Never Legally Postponed the May 2020 Evening Auction

54. Defendant did not legally postpone the May 2020 Evening Auction and, on two occasions in March and May 2020, rescheduled, selected a new date and time and/or changed the date and time of the May 2020 Evening Auction to June 24-25, 2020 and July 2, 2020, respectively, without giving legal force majeure notice to Plaintiff. In fact, Defendant rescheduled, selected a new date and time and/or changed the date and time of the May 2020 Evening Auction of the Stingel Work as aforesaid. On May 30, 2020, the May 2020 Evening Auction had not been postponed, but rather rescheduled with a new date and time selected and the date and time thereof changed to July 2, 2020. If Defendant is deemed to have postponed the May 2020 Evening Auction (which it legally did not do), the Stingel Consignment With Guarantee Agreement does not give Defendant the right to postpone the May 2020 Evening Auction more than once on account of alleged force majeure. Accordingly, invoking force majeure to cancel the Stingel Consignment With Guarantee Agreement on the basis of postponement is and was a breach of the Stingel Consignment With Guarantee Agreement as Defendant no longer had such force majeure right.

G. Defendant's Unlawful Refusal to Pay Plaintiff in Full By the Settlement Date

55. Pursuant to Paragraphs 12(a)-(c) ("Settlement") of the Stingel Consignment With Guarantee Agreement, as amended by Paragraphs 9(a)(i)-(iii) of the Amendment, Defendant is required to pay Plaintiff in full no later than the Settlement Date—95

calendar days after the May 2020 Evening Auction. Defendant has unlawfully declared that it will not pay Defendant, in part or in full, by the Settlement Date or at any time thereafter.

Accordingly, Defendant has breached the Stingel Consignment With Guarantee Agreement.

H. The Judicial Relief Sought by Plaintiff as a Result of Defendant's Multiple Breaches of the Stingel Consignment With Guarantee Agreement Is Specific Performance (Alternatively Damages)

56. Despite due demand, Defendant has, *inter alia*, refused to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement and has breached both agreements in the manner set forth in Sections A-G above and Defendant is estopped and barred from terminating an agreement which has been, in part and substantially, performed.

57. Plaintiff has performed the obligations on its part pursuant to the Stingel Consignment With Guarantee Agreement and the Basquiat Guarantee Agreement.

58. Defendant's continuing refusal to comply with its obligations pursuant to the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement is a continuing breach of the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement.

59. Plaintiff has no adequate remedy at law and has suffered irreparable injury from Defendant's breaches of the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement and will continue to suffer such injury unless the Court specifically enforces the Stingel Consignment With Guarantee Agreement with a mandatory injunction, *inter alia*:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible;

- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than a date certain in August 2020 to be set by the Court, taking into account the express provisions of Paragraphs 9(a)(i)-(iii) of the Amendment concerning the Settlement Date—95 calendar days after the Evening Auction—as well as the fact that Defendant never set a specific date in May 2020 as to when the May 2020 Evening Auction would transpire; and
- vii. Adjudging and declaring that the Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

60. Monetary damages are not sufficient to provide a full and complete remedy to Plaintiff, as, *inter alia*, Plaintiff is entitled to receive 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum and Plaintiff cannot calculate the amount of the 80% unless and until an auction of the Stingel Work actually has occurred.

61. Defendant is and was capable of performing its obligations pursuant to the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement and Plaintiff performed its obligations pursuant to the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement, and is ready, willing and able to perform any of its remaining contractual obligations, if any.

62. The balance of the equities tips sharply in Plaintiff's favor and the issuance of a mandatory injunction.

63. The public interest would not be disserved by entry of the specific performance injunctive relief requested in this First Amended Complaint.

64. Plaintiff has demonstrated a likelihood of success on the merits or that the balance of the equities tips sharply in Plaintiff's favor for the enumerated reasons hereinabove.

65. Plaintiff is therefore entitled to specific performance of Defendant's obligations pursuant to the Stingel Consignment With Guarantee Agreement.

Monetary Damages (Alternatively)

66. In the event the Court will not grant specific performance by Defendant of the Stingel Consignment With Guarantee Agreement, Plaintiff has been damaged in a sum no less than USD \$7,000,000.00 (USD seven million dollars), the precise amount to be proven at trial, with appropriate legal interest, including, without limitation, all consequential and incidental damages related thereto and additional damages for the additional interest payments

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

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

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

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

69. The first paragraph of the Basquiat Guarantee Agreement provides that Plaintiff's execution of the Basquiat Guarantee Agreement is conditioned upon the following three events—see paragraph 9 above for the full quote:

- i. The execution of the Stingel Consignment With Guarantee Agreement;
- ii. And the Stingel Work being offered for sale by Defendant;
- iii. And that Defendant shall pay Plaintiff the Guaranteed Minimum, *i.e.*, USD \$5,000,000.00 (USD five million dollars).

70. At all times herein mentioned, Plaintiff was ready, willing and able to perform the terms and conditions of the Basquiat Guarantee Agreement and did perform all of the terms and conditions of the Basquiat Guarantee Agreement required to be performed on Plaintiff's part. Defendant was fully given what it contracted for on June 27, 2019 and Defendant reaped the full benefit and profit contracted for. All events related to COVID-19 were foreseeable.

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

A. The Judicial Relief Sought by Plaintiff as a Result of Defendant's Breach of the Basquiat Guarantee Agreement Is Specific Performance (Alternatively Damages)

72. Despite due demand, Defendant has, *inter alia*, refused to comply with its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement and Defendant is estopped and barred from terminating an agreement which has been, in part and substantially, performed.

73. Plaintiff has performed the obligations on its part pursuant to the Basquiat Guarantee Agreement.

74. Defendant's continuing refusal to comply with its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement is a continuing breach of the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement.

75. Plaintiff has no adequate remedy at law and has suffered irreparable injury from Defendant's breaches of the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement and will continue to suffer such injury unless the Court specifically enforces the Basquiat Guarantee Agreement with a mandatory injunction, *inter alia*:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than the Settlement Date—95 calendar days

after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;

- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;
- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant’s next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than a date certain in August 2020 to be set by the Court, taking into account the express provisions of Paragraphs 9(a)(i)-(iii) of the Amendment concerning the Settlement Date—95 calendar days after the Evening Auction—as well as the fact that Defendant never set a specific date in May 2020 as to when the May 2020 Evening Auction would transpire; and
- vii. Adjudging and declaring that the Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

76. Monetary damages are not sufficient to provide a full and complete

remedy to Plaintiff, as, *inter alia*, Plaintiff is entitled to receive 80% of the amount by which the

Hammer Price exceeds the Guaranteed Minimum and Plaintiff cannot calculate the amount of the 80% unless and until an auction of the Stingel Work actually has occurred.

77. Defendant is and was capable of performing its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement and Plaintiff performed its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement and is ready, willing and able to perform any of its remaining contractual obligations, if any.

78. The public interest would not be disserved by entry of the specific performance injunctive relief requested in this First Amended Complaint.

79. Plaintiff has demonstrated a likelihood of success on the merits or that the balance of the equities tips sharply in Plaintiff's favor for the enumerated reasons hereinabove.

80. Plaintiff is therefore entitled to specific performance of Defendant's obligations pursuant to the Basquiat Guarantee Agreement.

Monetary Damages (Alternatively)

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

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

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

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

84. Defendant deprived Plaintiff of the right to receive Plaintiff's bargained-for benefits under the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement in a craven attempt to economically rewrite the past.

85. Implied in the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would invoke paragraph 12(a) thereof and terminate the Stingel Consignment With Guarantee Agreement only if Defendant actually was forced to postpone the May 2020 Evening Auction because circumstances beyond the control of Plaintiff or Defendant prevented Defendant from holding the May 2020 Evening Auction, not merely because Defendant no longer wanted to take the financial risk of guaranteeing the Stingel Work.

86. Defendant's unlawful actions destroyed Plaintiff's right to receive the fruits of the Stingel Consignment With Guarantee Agreement insofar as Defendant has invoked paragraph 12(a) of the Stingel Consignment With Guarantee Agreement to terminate that binding contract despite Defendant's ability and intention to hold the May 2020 Evening Auction as an online auction. Throughout the COVID-19 pandemic, Defendant has held online auctions and Defendant continues to advertise the May 2020 Evening Auction and trumpet the ease of online bidding (Exs. 1-3). Any claim that Defendant was forced to postpone and terminate the May

2020 Evening Auction as a result of the COVID-19 pandemic and/or government regulations or government orders or government executive orders (State, Federal, Local or otherwise) is clearly untrue as Defendant only rescheduled, selected a new date and time and/or changed the date and time of the May 2020 Evening Auction twice, as aforesaid.

87. Implied in the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not discriminatorily treat the Stingel Work different than the other artworks consigned for the May 2020 Evening Auction (as a result of Defendant's legal obligation to remit to Plaintiff the Guaranteed Minimum of USD \$5,000,000.00) (USD five million dollars) and unlawfully terminate the Stingel Consignment With Guarantee Agreement while maintaining in place the other consignment agreements for the Evening Auction.

88. By unlawfully terminating the Stingel Consignment With Guarantee Agreement while declining to terminate any other consignment agreements for the May 2020 Evening Auction, Defendant is treating Plaintiff punitively as a result of Defendant's Guaranteed Minimum financial obligation and improperly prioritizing Defendant's concerns about the market for the Stingel Work over Defendant's binding financial obligation with respect to the Stingel Work. Defendant is breaching the Stingel Consignment With Guarantee Agreement and its business relationship with Plaintiff over a premature and unfounded case of buyer's remorse.

89. Further implied in the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement is the requirement that Defendant would not induce Plaintiff to fully perform under the Basquiat Guarantee Agreement and then defeat Plaintiff's contractual expectations under the interconnected Stingel Consignment With Guarantee Agreement by Defendant's non-performance and unlawful cancellation.

90. Despite the parties' understanding that the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement were bilateral, interconnected and consideration for each other and subsequent to Plaintiff's submission of an irrevocable bid for the Basquiat Work in the sum of GBP £3,000,000.00 (three million pounds sterling), Defendant turned its back on its legal obligations and unlawfully terminated the Stingel Consignment With Guarantee Agreement without offering the Stingel Work for sale at the Evening Auction or paying the Guaranteed Minimum to Plaintiff. Plaintiff would not have entered into the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement had Plaintiff known of and/or had Defendant not concealed from Plaintiff that Defendant intended to duplicitously uncouple the two agreements and thwart Plaintiff's reasonable expectations. Accordingly, Defendant has breached the covenant of good faith and fair dealing in the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement.

A. The Judicial Relief Sought by Plaintiff as a Result of Defendant's Breach of the Implied Covenant of Good Faith and Fair Dealing is Specific Performance (Alternatively Damages)

91. Despite due demand, Defendant has, *inter alia*, refused to comply with its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement.

92. Plaintiff has performed the obligations on its part pursuant to the Basquiat Guarantee Agreement and the Stingel Consignment With Guarantee Agreement and Defendant is estopped and barred from terminating an agreement which has been, in part and substantially, performed.

93. Defendant's continuing refusal to comply with its obligations pursuant to the Basquiat Guarantee Agreement and/or the Stingel Consignment With Guarantee Agreement

is a continuing breach of the Basquiat Guarantee Agreement, the Stingel Consignment With Guarantee Agreement and/or the implied covenant of good faith and fair dealing.

94. Plaintiff has no adequate remedy at law and has suffered irreparable injury from Defendant's breaches of the Basquiat Guarantee Agreement, the Stingel Consignment With Guarantee Agreement and/or the implied covenant of good faith and fair dealing and will continue to suffer such injury unless the Court specifically enforces the Stingel Consignment With Guarantee Agreement with a mandatory injunction, *inter alia*:

- i. Ordering Defendant to auction the Stingel Work at Defendant's next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible;
- ii. If the Stingel Work is unsold, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;
- iii. If the Hammer Price is less than the Guaranteed Minimum, ordering Defendant to pay Plaintiff the full amount of purchase proceeds no later than two business days after Defendant receives such purchase proceeds from the buyer and the difference between the Hammer Price and the Guaranteed Minimum no later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraph 9(a)(i) of the Amendment;
- iv. If the Hammer Price is equal to the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95 calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;
- v. If the Hammer Price exceeds the Guaranteed Minimum, ordering Defendant to pay Plaintiff the Guaranteed Minimum and 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum no later than two business days after Defendant receives the purchase price from the buyer and, in no event, later than the Settlement Date—95

calendar days after the Evening Auction—as set forth in Paragraphs 9(a)(ii)-(iii) of the Amendment;

- vi. In the event that the Court does not compel Defendant to auction the Stingel Work at Defendant's next Evening Auction of Contemporary Art on July 2, 2020 or as soon thereafter as possible, ordering Defendant to pay Plaintiff the Guaranteed Minimum no later than a date certain in August 2020 to be set by the Court, taking into account the express provisions of Paragraphs 9(a)(i)-(iii) of the Amendment concerning the Settlement Date—95 calendar days after the Evening Auction—as well as the fact that Defendant never set a specific date in May 2020 as to when the May 2020 Evening Auction would transpire; and
- vii. Adjudging and declaring that the Termination Letter, which, *inter alia*, purports to terminate the Stingel Consignment With Guarantee Agreement, is null and void, and of no legal force or effect.

95. Monetary damages are not sufficient to provide a full and complete remedy to Plaintiff, as, *inter alia*, Plaintiff is entitled to receive 80% of the amount by which the Hammer Price exceeds the Guaranteed Minimum and Plaintiff cannot calculate the amount of the 80% unless and until an auction of the Stingel Work has actually occurred.

96. Defendant is and was capable of performing its obligations pursuant to the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement and Plaintiff performed its obligations pursuant to the Stingel Consignment With Guarantee Agreement and/or the Basquiat Guarantee Agreement, and is ready, willing and able to perform any of its remaining contractual obligations, if any.

97. The public interest would not be disserved by entry of the specific performance injunctive relief requested in this First Amended Complaint.

98. Plaintiff has demonstrated a likelihood of success on the merits or that the balance of the equities tips sharply in Plaintiff's favor for the enumerated reasons hereinabove.

99. Plaintiff is therefore entitled to specific performance of Defendant's obligations pursuant to the Stingel Consignment With Guarantee Agreement.

Monetary Damages (Alternatively)

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

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

RESERVATION OF RIGHTS

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

JURY DEMAND

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

WHEREFORE, Plaintiff demands judgment as follows:

- a. On the First Cause of Action, issuing a permanent injunction specifically enforcing the Stingel Consignment With Guarantee Agreement.

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

- b. On the Second Cause of Action, issuing a permanent injunction specifically enforcing the Basquiat Guarantee Agreement.

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

- c. On the Third Cause of Action, issuing a permanent injunction specifically enforcing the Stingel Consignment With Guarantee Agreement.

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

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

Dated: New York, New York
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