UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KIT-YIN SNYDER AND RICHARD HAAS,

Plaintiffs,

v.

22-CV-03873 (LAK)

ERIC ADAMS, Mayor of the City of New York, in his official capacity, **THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS, NEW YORK CITY DEPARTMENT OF CORRECTION, NEW YORK CITY PUBLIC DESIGN COMMISSION**,

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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May 17, 2022

Table of Contents

Page

TABLE OF AUTHORITIES

Cases **Pages**

Cases **Pages**

Statutes

Defendants, ERIC ADAMS, Mayor of the City of New York, in his official capacity, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS, NEW YORK CITY DEPARTMENT OF CORRECTION, and NEW YORK CITY PUBLIC DESIGN COMMISSION (collectively "City defendants" or "defendants") by their attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submit this memorandum of law in opposition to plaintiffs' motion for a temporary restraining order and preliminary injunction.[1]

PRELIMINARY STATEMENT

Plaintiffs are two artists who have collectively fabricated five pieces of artwork at the Manhattan Detention Complex located at 124-125 White Street, New York, New York (MDC). These artworks were commissioned by the City of New York ("City") in 1985 and consist of: (1) a pavement design; (2) a sculpture atop the roof of the bridge connecting the two towers of the MDC; (3) seven freestanding columns leading to the bridge between the two towers of the MDC; (4) four sculptural friezes depicting King Solomon and Pao Kung; and (5) seven murals depicting the waves of immigration in Lower Manhattan (collectively the "Works").

As part of its Borough-Based Jail System initiative, which was approved by the City Council in 2019, the City is demolishing the MDC and building a new Borough-Based Jail (BBJ) facility in its place. The New York City Department of Design and Construction (DDC)

[1] Plaintiffs filed an Order to Show Cause seeking an emergency Temporary Restraining Order on May 12, 2022 to enjoin defendants from proceeding with planned demolition and removal of Plaintiffs' artworks. That application was temporarily granted by this Court on May 13, 2022 until May 18, 2022. See ECF Docket No. 14.

informed plaintiffs at least as early as March and April 2021 of the proposed plan and the anticipated impact of the demolition, design, and construction of the new facility on their Works. Since early 2021, DDC has engaged with the artists on numerous occasions through in-person meetings, written correspondence, and telephone calls to update them on the status of the work at the MDC site and to seek the artists' input on the removal and preservation of the Works. In June 2021, DDC's subcontracted art conservator submitted its report and recommendations for the removal, salvage, conservation and reinstallation of the Works. The substance of this report was discussed with plaintiffs prior to its finalization in June 2021.

Despite knowing about the City's plans with regard to the Works, plaintiffs waited until almost a year later to seek the instant emergency Temporary Restraining Order (TRO) and preliminary injunction which certainly undermines any claims of immediate irreparable harm or need for emergency relief. [2] Plaintiffs seek to enjoin defendants from taking any actions that would remove, alter, or modify plaintiffs' artwork at the MDC site. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, dated May 11, 2022 (PI. Memo). Plaintiffs base their motion for a preliminary injunction on their misplaced claims that the removal of the Works from the MDC site will violate their rights under Visual Artists Rights Act of 1990 (VARA), a federal statute that protects visual works of art of a recognized stature from "intentional distortion, mutilation, or other modification of that work" that

[2] The entire BBJ site selection process, as well as the procurement and award of the contract to dismantle the MDC (commonly referred to as The Tombs) has been very public: there have been many public meetings and a lawsuit in New York State Supreme Court. Accordingly, plaintiffs were likely aware of the project well before DDC contacted them regarding the dismantling of the MDC.

would be prejudicial to the "honor or reputation" of the artist who created that work. Plaintiffs' claims that defendants' actions in removing the Works would violate VARA and copyright laws fail as a matter of law. As such, plaintiffs are unable to demonstrate a likelihood of success on the merits of their claims. Additionally, the creation a cleaner, safer, and more modern BBJ facility is indisputably in the public interest. A delay in demolition and construction at the MDC site would also create further delays in the City's timeline to close Riker's Correctional Facility by 2027 which has already been impacted by COVID-related delays. Therefore, the balance of hardships and equities tip in favor of defendants.

Accordingly, plaintiffs have not met their burden for a preliminary injunction and the motion must be denied.

STATEMENT OF FACTS

Defendants respectfully refer the Court to the Declaration of Dora Blount dated May 17, 2022 ("Blount Decl.") and the Declaration of Rebecca Clough dated May 17, 2022 ("Clough Decl.") for a complete statement of the relevant and material facts in opposition to plaintiffs' motion.

Plaintiffs, Kit-Yan Snyder and Richard Haas, are two artists who were commissioned by the City in 1985 and collectively fabricated five pieces of artwork for the MDC site. Blount Decl., Exhibit A at 5. The artists' Works, which are the subject of this action, consist of the following: (1) Snyder's pavement design on the pedestrian plaza at White Street entitled "Upright"; (2) Snyder's sculpture on the bridge connecting the two towers of the MDC entitled "Solomon's Throne"; (3) Snyder's seven freestanding columns leading to the bridge entitled "Seven Columns of the Temple of Wisdom"; (4) Haas's four sculptural friezes on the bridge entitled "The Judgements of Solomon and Pao Kung"; and (5) Haas's seven murals on the exterior

second story of the North tower entitled "Immigration on the Lower East Side of New York." *Id.* at 7-11. Title of the Works transferred from the plaintiffs to the City upon the City's final acceptance and final payment to the plaintiffs. *See* Contract between plaintiffs and Urbahn & Litchfield Grosfeld, a Joint Venture and, on Behalf of the City, dated July 2, 1987 (the "Contract") Art. 1, Sec. 1.9. A copy of the Contract is annexed to the Complaint as Exhibit A. This transfer of title occurred in or around 1992.

In furtherance of the City's BBJ project, the MDC site will be dismantled to make room for the design and construction of a new Manhattan Detention Facility. Clough Decl. ¶ 9. The DDC awarded a dismantling contract for the MDC site to Gramercy at the end of 2021. Clough Decl. ¶ 13. The Notice to Proceed with the work was issued to Gramercy on or about December 23, 2021 with a proceed date of December 27, 2021. Clough Decl. ¶ 14. Since December 27, 2021, a construction fence around the perimeter of the site has been erected, including a temporary sally port area on a northern portion of 100 Centre Street, and interior demolition has been ongoing. Clough Decl. ¶ 17. The first external facility work will be the removal of the Works on the bridge connecting the two towers of the MDC over White Street followed by the dismantling of the bridge itself; this is scheduled to begin at the end of May or beginning of June 2022. Clough Decl. ¶ 20.Removal of the remaining Works is anticipated to occur in phases over the subsequent six months. The dismantling of the North tower scheduled to begin in August or September 2022. Clough Decl. ¶ 20.

Three of the five Works – Snyder's "Solomon's Throne" and "The Seven Columns of the Temple of Wisdom" and Haas's "The Judgements of Solomon and Pao Kung" – will be salvaged in their entirety and stored with the intent to incorporate them into the design of the new facility and reinstall them at a later date once the building is constructed. The other two pieces,

Snyder's "Upright" pavement design and Haas's "Immigration on the Lower East Side of New York" murals, will not be salvaged due to their physical integration with the MDC site. Haas's murals are painted directly on the building wall so they are not separable from the building itself and it is not feasible to save the entire exterior wall. Snyder's pavement design is comprised of standard construction building materials that are in poor condition and, in discussions with the artist, she agreed that it is preferable to recreate the design in new materials rather than save the existing materials in poor condition. There is an intent to reproduce both of the pieces that cannot be salvaged with new materials at a later date and incorporate them into the design of the new facility, as with the salvaged pieces.

Snyder and Haas were notified some time ago by DDC and the New York City Department Of Cultural Affairs (DCLA) that MDC was going to be dismantled and the Works would be impacted. DDC notified Haas in March 2021 and notified Snyder by certified mail in February 2021. Blount Dec ¶¶ 11, 32. DDC and DCLA met with the artists in March and April 2021 while its art conservator, Building Conservation Associates, Inc. ("BCA") was preparing a report on the existing condition of each of the Works. The artists were consulted to confirm fabrication and installation materials and methods for the Works and were provided with a draft copy of BCA's report to review before it was finalized in June 2021. The City's plans and intentions with regard to the Works were clearly communicated to the artists by the time BCA's final report was issued.

Thereafter, DDC provided the artists with updates as available. This included providing the artists with draft copies of DDC's submission materials to the Public Design Commission (PDC) seeking to obtain approval for the artwork removal plan. DDC requested statements from each artist for submission to the PDC and invited them to participate or view the

Community Board presentation and PDC presentation. The DDC provided an informal submission of proposed plans to the PDC in October 2021 and submitted the final materials in December 2021.[3]

In February 2022, DDC invited the artists to visit the MDC site so they could share information about their Works with the dismantle Design-Build Team (Gramercy), the Design-Build team overseeing all four of the BBJ projects (AECOM-Hill JV), and the short-listed designer for the design-build portion of the Manhattan BBJ project. Only Haas attended the site visit and, at that visit, he was walked through the proposed removal procedures for the Works by the conservator, BCA.

During a public hearing in February 2022, the removal and temporary storage of the three Works to be salvaged was approved by the PDC. *See* Blount Decl. ¶ 47; *see also* Exhibit N to Blount Decl. At this hearing, the removal of the murals and pavement design was rejected. *Id.* In March 2022, DDC resubmitted its plans with a revised approach for the removal of the murals and pavement design. *Id.* at ¶ 49. This included additional information about DDC's plans to document the existing installations and recreate them at the new facility, as well as DDC's plans to temporary reproduce and display the Works in the MDC sally port. *Id.* at ¶¶ 50-51. During a public hearing in April 2022, the PDC approved this revised plan for the removal of the murals and pavement design. *Id.* at ¶ 52; *see also* Exhibit P to Blount Decl.

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[3] Although DDC submitted its final materials in December 2021, the PDC did not put it on the agenda for the January PDC meeting so DDC resubmitted its materials to the PDC in January 2022 and it was put on the February 2022 agenda. There were no changes to DDC's plan between these two submissions.

LEGAL STANDARD

Plaintiffs fail to satisfy the standards for a preliminary injunction. In order to establish their entitlement to the drastic remedy of a preliminary injunction against government action taken in the public interest, plaintiffs must establish: (1) that they will be irreparably injured if the relief sought is not granted; (2) that they are likely to succeed on the merits of their claims; (3) that a balance of the hardships tips decidedly in their favor; and (4) that an injunction would be in the public interest. *See Trump v. Deutsche Bank* AG, 943 F.3d 627, 637-640 (2d Cir. 2019) (citations omitted); *Cent. Rabbinical Cong. of the United States v. NYC Dep't of Health & Mental Hygiene*, 763 F.3d 183, 192 (2d. Cir. 2014); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). *See also Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).

ARGUMENT

PLAINTIFFS FAILED TO ESTABLISH THAT THEY ARE ENTITLED TO THE DRASTIC REMEDY OF TEMPORARY OR PRELIMINARY INJUNCTIVE RELIEF.

It is well established that in the Second Circuit "the standard for an entry of a TRO is the same as for a preliminary injunction." *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). The TRO and preliminary injunction are extraordinary and drastic remed[ies] "that 'should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Grande River Enter Six Nations, Ltd. V. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (*quoting Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005)). "[C]ourts generally grant preliminary injunctions only 'where a plaintiff demonstrates "irreparable harm" and meets one of two related standards: "either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping

decidedly in favor of the moving party."' *Plaza Motors of Brooklyn, Inc. v. Cuomo*, No. 20-CV-4851, 2021 WL 222121, at *10 (E.D.N.Y. Jan. 22, 2021) (quoting *Oeoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014)). "The moving party also must demonstrate a preliminary injunction is in the public interest." *Plaza Motors*, 2021 WL 222121, at *10-11 (citing *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011)).

A. Plaintiffs Have Failed to Demonstrate Imminent or Certain Irreparable Harm

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez by Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1998) (internal citations omitted). Plaintiffs have failed to demonstrate that, in the absence of preliminary injunctive relief, they will suffer imminent or certain irreparable harm because, as set forth below, Plaintiffs waited over a year after learning about the defendants' proposed plans for their artwork to bring this action waiting until the eleventh hour when the long-anticipated construction work is scheduled to commence, and regardless of timing, Plaintiffs' VARA and copyright claims lack merit. Therefore, the harm that plaintiffs will suffer as a result of defendants' removal, temporary storage and proposed reincorporation or reproduction of their Works as part of the design for the new facility is conclusory and speculative and, as such, insufficient for purposes of satisfying the "irreparable harm" requirement for a preliminary injunction. *New York v. United States Dep't of Homeland Sec.*, 969 F. 3d 42, 86 (2d Cir. 2020); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015).

(i) Plaintiffs' Claims of Immediate Irreparable Harm Are Baseless

Plaintiff's claims of immediate irreparable harm are undermined by its delay in seeking preliminary relief. *See Citibank, N.A. v. Cityrust*, 756 F.2d 271, 276 (2d Cir. 1985) (holding delay in seeking preliminary injunction undercuts claims of "urgent need" for "such,

drastic speedy action" to protect plaintiff's rights); *Broecker v. New York City Dep't of Educ.*, 2021 WL 226848 (S.D.N.Y. Nov. 24, 2021).

The City's BBJ project has been in progress since at least as early 2018 when the City hired a company to create a master plan for the project.[4] In 2019 the project went through the City's public Uniform Land Use Review Procedure (ULURP) and was approved by City Council on March 25, 2019.[5] Clough Decl. ¶ 7. Plaintiffs were directly notified by DDC at least as of February and March of 2021 of the City's proposed plan to dismantle the existing Manhattan Detection Complex (MDC) and construct a new facility in its place as part of the widely publicized BBJ project, and the impact this would have on plaintiffs' Works at the site which are at issue in this action. Blount Decl. ¶¶ 11, 32.

Since early 2021, DDC has consistently engaged and consulted with plaintiffs to ensure that they were aware of the proposed plans for their Works as well as the tentative schedule for the proposed removal. *See generally* Blount Decl. Indeed, DDC had in-person meetings with its art conservator, BCA, and the artists on March 30, 2021 (Haas) and April 1, 2021 (Snyder) to discuss its plans to decommission, conserve, and reinstall three of the five Works: Snyder's sculpture entitled "Solomon's Throne," Snyder's seven sculptures entitled "The Seven Columns of the Temple of Wisdom," and Haas's friezes entitled "The Judgements of Solomon and Pao King." Blount Decl. ¶¶ 12, 32. At these same meetings, discussions with the artists were had

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[4] https://rikers.cityofnewyork.us/timeline/ (last accessed May 16, 2022).

[5] https://rikers.cityofnewyork.us/uniform-land-use-review-procedure/ (last accessed May 16, 2022). The City also filed a ULURP application in 2019 forbidding the incarceration of individuals on Rikers after the BBJ system is completed. *Id.* Additionally, City Council passed legislation in February 2021 transferring Rikers Island to the Department of Citywide Administrative Services no later than August 31, 2027 and requiring that it shall no longer be used by DOC for the housing of incarcerated persons.

regarding the condition of Snyder's pavement design on White Street entitled "Upright" and Haas's seven-paneled mural entitled "Immigration on the Lower East Side of New York" painted on the exterior of the second story of the North tower. Blount Decl. ¶¶ 12-14, 32-33. Due to these artworks being part of the actual building and physical site, their salvage and conservation was determined not to be possible. BCA's June 2021 report, which was sent to both artists for review prior to being finalized, goes into extensive detail about the observed conditions of all five of plaintiffs' artworks. *See* Blount Decl. ¶¶ 13, 35; *see also* Exhibit A. It also provides detailed recommendations for the removal and salvage and conservation and reinstallation of "Solomon's Throne," "The Seven Columns of the Temple of Wisdom," and "The Judgements of Solomon and Pao King." *See* Blount Decl., Exhibit A at 14-20.

At the March 30, 2021 meeting, when BCA discussed the murals with Haas, he seemed to understand and even suggested that the murals would not be moveable. Blount Decl. ¶ 32; *see also* Exhibit J to Blount Decl. Haas also engaged in conversations about the artwork's potential reproduction and "expressed hopes that the reinstallation location bears some connection to the subject matter that inspired [the murals]." Blount Decl., Exhibit J at 2. Indeed, BCA comprehensively documented the murals by taking pictures of the actual artwork as well as the maquettes in the artist's possession, and interviewing Haas about the types of materials and paint colors he used so that appropriate replication could be possible in the new facility. Blount Decl. Exhibit A at 10-11, 29-36, 67-72; *see also* Exhibit J.

Similarly, at the April 1, 2021 meeting with Snyder, she was approached with the concept of reconstructing the pavement design using new materials, particularly since the existing condition of the artwork consisted of missing and non-matching pavers and damaged and deteriorated pavers and Snyder took no exception to the proposal. Blount Decl., Exhibit A at 15.

BCA's report notes that "[t]he artist emphasized that the overall integrity of her design was more important than the pavers themselves and emphasized executing a simple and straight forward approach to its restoration." *Id.*

Plaintiffs had ample notice and opportunity to challenge defendants' proposed actions at least as of June 2021 when BCA's final report was issued and defendants' intentions and plans with regard to the Works was clear. To wait almost a year to bring a motion for preliminary injunction when the removal work is just about to begin in a matter of weeks, is completely unreasonable and any claims of immediate irreparable harm are clearly disingenuous.[6]

(ii) Claims of Prejudice to Plaintiffs' Honor and Reputation are Without Merit

Plaintiffs claim, without any evidence whatsoever in support, that removing the Works will be damaging and prejudicial to their honor and reputation and that the destruction of the artwork cannot be compensated by monetary damages. *See* Pl. Memo at 12-13, 17. On the contrary, defendants have demonstrated through their actions and plans, described in section (i) *supra*, how they intend to ensure the artwork will be shown the proper care and respect in its decommissioning and preservation, and how the artists and their representatives will be consulted with regard to reinstallation and reproduction of the artwork in the new facility once it is designed. Furthermore, as discussed in Section B (vi) *infra*, VARA does not protect artwork from destruction

[6] Plaintiffs allege that apple trees that were part of Snyder's original concept and design for "Upright" have already removed by defendants. Complaint ¶ 43. While DDC is aware that an apple tree colonnade along White Street was part of Snyder's original design concept, it is unclear if the apple tree colonnade was ever planted. *See* Blount Decl. ¶¶ 27-29. As of 2018, when the BBJ project began and Gramercy commenced dismantling the MDC site, no apple trees existed on White and Baxter Street nor were there any apple trees in planters at the MDC site. *See* Blount Decl. ⁋ 29; Clough Decl. ⁋ 15. As such, DDC did not remove any apple trees as part of the BBJ project.

via wear and tear; so, the pavement design for "Upright" being in poor condition and thus unsalvageable is not a violation under VARA. *See Tobin v Rector*, 2017 U.S. Dist. LEXIS 187792 (S.D.N.Y. 2017)[7] (holding that simply relocating a site-specific piece of visual art does not, by itself cause "distortion, mutilation or modification under VARA" because VARA does not protect "the public presentation, including . . . placement, of the work.").

The Request for Proposals (RFP) issued by the City for design of the new detention facility includes a provision that the design-builder has to work with the artists to investigate and incorporate the salvaged Works into the new design. Blount Decl. ¶ 10. If a particular piece of artwork cannot be included in the new design, then it may be placed in an alternative facility but the design-builder would work with the Artist to determine this. *Id.* ¶¶ 10, 46, 51. Plaintiffs allegations that defendants have not provided specifics with regard to alternative sites for the Works is misleading. *See* Complaint at ¶ 61; Pl. Memo at 18. As the selection of the design-builder and the design of the new building itself have not yet been finalized (*see* Clough Decl. ¶ 10; Blount Decl. ¶¶ 9-10), it is not only premature for defendants to provide any alternative sites for the Works, but also not the primary goal of the design-builder since defendants want the Works to be incorporated into the design for the new detention facility in Manhattan.

Plaintiffs' claims of threat to their legacy are also unfounded, as are the claims that "[d]estruction of the Artwork will permanently deny the community of the enjoyment of the Artwork, thus depriving Plaintiffs of the achievement of the intended purpose of the Artwork." Pl. Memo at 18. The DDC and its art conservator, BCA, have extensively documented all of Plaintiffs'

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[7] In accordance with the Court's Individual Practices, all unreported LEXIS cites are annexed as an appendix to this Memorandum.

artworks so that they may be accurately reinstalled in the new facility, paying special attention to the materials and construction involved in the "Upright" pavement design and "Immigration on the Lower East Side of New York" murals so that those artworks may be reproduced or reconstructed to resemble the originals as closely as possible. Blount Decl. ¶¶ 14, 34-35; *see also* Exhibit A. Indeed, defendants are endeavoring to ensure Plaintiffs' legacies live on beyond the MDC for years to come. Additionally, DDC is currently working with the artists on temporary print reproductions of these two pieces – the "Upright" and the "Immigration on the Lower East Side of New York" – so that the reproductions can be publicly displayed at the Manhattan Interim Sally Port at MDC while construction is active and the actual works will not be seen. Blount Decl. ¶¶ 24-25, 42-43. This plan was previously presented to the PDC last month and had a follow-up presentation just yesterday, May 16, 2022. *Id.* ¶¶ 50, 52. Both Snyder and Haas confirmed their approval of the proposal in writing before the PDC presentation last month. *Id.* ¶ 50.

Accordingly, Plaintiffs have failed to demonstrate that they will suffer any irreparable harm or injury or that there exists an emergency here to warrant continuation of the TRO or the need for a further injunction against defendants.

B. Plaintiffs Fail to Show a Clear or Substantial Likelihood of Success on the Merits of Their Claims

(i) The Visual Arts Rights Act of 1990

The Visual Artists Rights Act of 1990 ("VARA") grants the creators of a "work of recognized status" protection against destruction of such work. "[A]ny intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. § 106A(3)(b)). For the purposes of VARA, "a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020). VARA applies only to works of visual art, "a narrow class of art

defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer." *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (*citing* 17 U.S.C. § 101). Where multiple works are considered to be a single work of art they are "to be analyzed under VARA as a whole," while separate works are "considered individually." *Carter*, 71 F3d at 83. Multiple works are considered to be a single work if they are "thematically consistent, interrelated work whose elements could not be separated without losing continuity and meaning." *Id.* at 84.

(ii) Not All of the Pieces of Artwork are Visual Art for the Purpose of VARA

Plaintiffs argue that all of the alleged Works are artwork for the purposes of VARA. While some Works are, undeniably, visual art, at least one part – Snyder's "Upright" is not visual art under VARA because it is applied art. Applied art is not covered by VARA. Applied art for the purposes of VARA consists of "utilitarian works." For example, "VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture." *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003). Here, "Upright" is a utilitarian work – namely a walkway made out of "standard construction material" – and is not protected visual art under VARA. This can be contrasted from *Carter*, 71 F.3d at 85, cited by Plaintiffs, where the sculptural elements were "affixed to the lobby's floor, walls, and ceiling" and included a mosaic embedded in the floor and walls but *were not* the lobby's floor, walls, and ceiling. *See also Cheffins v. Stewart*, 825 F.3d 588, 594 (9th Cir 2016) (holding that an "object constitutes a piece of 'applied art'—as opposed to a 'work of visual art'—where the object initially served a utilitarian function and the object continues to serve such a function after the artist made embellishments or alterations to it.")

(iii) The Works Are Not All One Piece of Art for the Purpose of VARA

Plaintiffs argue in their Memorandum of Law that the five distinct Works constitute a single work of art for the purpose of VARA because the "Plaintiffs collaborated with one another in designing the various components of the Artwork[,]" and that the "components of the Artwork follow the same themes of justice centering on the MDC…the celebration of immigrant communities in the neighborhood…and, in some cases, both." Pl. Memo at 10. While some individual pieces of the art together could be considered a single work of art, it is impossible to claim that *all of* the Works are one work of art. For example, while Snyder's "Solomon's Throne," the "Seven Columns of the Temple of Wisdom," and Haas's "Judgment of Solomon and Pao King" deal with the theme of King Solomon and justice, Snyder's "Upright" deals with general theme of "upright" and "righteousness," and does not deal with either the themes of King Solomon or justice. Similarly, Haas's "Immigration on the Lower East Side of New York" deals with the immigrant experience and has nothing to do with justice, King Solomon, or the themes in "Upright."

For the purposes of VARA, the Court can find that some of the Works are interrelated and constitute one work of art while others are separate. *See Carter*, 71 F.3d at 84. ("The trial court was free to find that a few items of 'the Work' were separate works of art, while the remainder of 'the Work' was a single, interrelated, indivisible work of art.") In *Carter*, the Second Circuit upheld a preliminary injunction under VARA for pieces of the interrelated work at issue that were considered to be one piece of the work. The Court found that the pieces that were not interrelated were not part of the work and thus, were not covered by the injunction.

If the Court here determines that the Works are considered to be one work of art, then, as discussed in section (iv), *infra*, for the purposes of the VARA building exception, Snyder's portion of the Works are part of the building at the MDC site.

(iv) The Works are Covered by an Exception to VARA

a. The VARA Building Exception.

VARA contains provisions that apply to artwork that has been incorporated into a building. If such artwork has been incorporated in a way that "'removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work,' then the artist's rights may be waived if and only if he 'consented to the installation of the work in the building . . . in a written instrument.'" *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 165 (2d Cir. 2020) (*citing* 17 U.S.C. § 113(d)(1)). The instrument must be executed prior to VARA's effective date of December 1, 1990. Where an artist has consented to the installation of work on a building prior to VARA's effective date of December 1, 1990, the artists have no right under VARA to "block or otherwise object to the permanent removal of the work from the building. *Bd. of Mgrs. of Soho Intl. Arts Condominium v. City of N.Y.*, 2005 U.S. Dist LEXIS 9139, at *13-14 (S.D.N.Y. May 13, 2005).

Here, the Works created by Haas are not covered by VARA because they fall under this building exemption. Even though the Works were not completed until 1992, at the earliest, the agreement to create and install the artwork was executed in 1987 – well before VARA became effective. Indeed the agreement itself was notably for the placement of art on a building and that, although the City agreed not to "intentionally destroy, damage, alter, modify or change" the Works, this did not preclude the "right of the City to relocate or remove the [the Words] from public display[.]" Contract Art. 7, Sec. 7.4.

Thus, the Works are explicitly exempted from protection under VARA. Demolition of the MDC that might cause the destruction, distortion, or mutilation of portions of the Works

would not violate VARA because the agreement was executed on July 2, 1987 which is *more than three years* before VARA became effective.

b. VARA Does Not Prevent Relocation of the Works.

In addition, although Plaintiffs claim that the future of all three of Snyder's pieces are at risk – only the pavement design "Upright" will not be salvaged. The other two pieces will be salvaged with the intent to be relocated and, as discussed in section (vi), *infra*, VARA does not protect the Works from being relocated, only from being destroyed (if applicable herein).

c. VARA Does Not Protect Against Modification of the Works Caused by the Passage of Time.

Regarding "Upright," it is worth noting that while VARA does "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the artist's] honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right," it does not protect against the "modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials[.]" If "Upright" is determined to be a piece of visual art for the purposes of VARA, any destruction that would prevent it from being relocated would be based on the fact that it is "in poor condition overall" because it is a walkway in a public space that has been in use for more than two decades. *See* Blount Decl., Exhibit A at 13, 15. Thus, even if "Upright" were considered to be a piece of visual art, its existence as a walkway and the wear it has endured as such would exempt it from the protection VARA. This can be compared to *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001) where a VARA claim was dismissed for a clay statue that deteriorated when it was left outside and exposed to environmental elements. Here, DDC's conservator's findings were that the work was in poor condition overall and, as a result, could potentially be unsalvageable. Blount Decl., Exhibit A at 13, 15; *see also* Exhibit C. Even so, DDC has noted that

samples of each material used in the existing installation would be salvaged and stored for future reference so that the artwork could be reproduced. *Id.*

(v) Plaintiffs Have Not Proven That the Works are of Recognized Stature

Plaintiffs claim that the Works are artworks of recognized stature. In support of this claim, Plaintiffs cite to an award for public work received from the New York City Public Design Commission, which is the City agency responsible for selecting public art work[8] Together with the Works, the 1989 Art Commissioner's Award for Excellence in Design also included the reconstruction of a park, a prototype design for an intermediate school, and the design of transitional housing facilities. That the only recognition Plaintiffs can provide comes from the City, who sponsored the Works and ultimately holds title to the Works, speaks to the fact that the Works are not of a recognized stature.

Plaintiffs have not submitted anything else that would demonstrate that its works are of widely recognized stature – such as news articles or other widely disseminated public acclaim. Courts should use common sense and "not rigid views as to whether a particular work is worthy of protection as a work of visual art" but also note that "VARA was not intended to denigrate plaintiffs' profound works but was more likely designed to "bar[] nuisance law suits[.]"

[8] *See* New York City Charter § 854(c) ("On request or on its own initiative, the art commission may consult with and advise any such agency as to the suitability of preliminary plans for any work of art under consideration for acquisition or the design or location of any work of art or any structure under consideration for installation or erection in, on or over any property of the city.") The Art Commission was renamed the Public Design Commission by Executive Order 119 of 2008. https://www1.nyc.gov/assets/records/pdf/executive_orders/2008EO119.pdf (last accessed May 16, 2022).

Cohen v. G&M Realty L.P., 2018 U.S. Dist. LEXIS 99250, at *19 (E.D.N.Y. June 13, 2018, No. 13-CV-05612(FB)(RLM)).

Although it is undeniable that Plaintiffs are recognized artists, for the purpose of VARA, "it is not enough that works of art authored by the plaintiff, other than the work sought to be protected, have achieved such stature. Instead, it is the artwork that is the subject of the litigation that must have acquired this stature." *Scott v. Dixon*, 309 F.Supp. 2d 395, 400 (E.D.N.Y. 2004). Although the Plaintiff artists have notable and impressive resumes, they have not demonstrated that the Works in question have achieved the same stature.

The Declarations submitted in support of Plaintiffs' preliminary injunction motion discuss the impact that the new BBJ facility will have on Chinatown's character, but do not speak to the unique and valuable nature of the Works currently housed in and around the MDC. For example, the Declaration of Kerri Culhane (the "Culhane Decl.") discusses how the demolition of MDC would further the "alienation of public space and threaten[] further erasure of Chinatown's unique character." Culhane Decl. ¶ 13. Culhane further mentions the "importance of the Artwork to the community, to the history of Chinatown, and the pattern of abuse the community has experienced at the hands of the City during the April 2022 hearing…" Culhane Decl. ¶ 15. Although Culhane discusses the importance of the works to the community at the April 11, 2022 hearing, at no point within her Declaration does she support this conclusory statement, instead speaking to how the demolition of the MDC will impact the community. Culhane Decl. ¶ 13. At the April 11, 2022 hearing, Culhane stated that she was "not just talking just about artwork [but] also talking about the alienation of public space."[9] She only discusses the actual Works in as much

[9] *See* Video of April 11, 2022 meeting https://youtu.be/r3pkQh9Q1Zk at 1:04:21 (last accessed May 16, 2022).

as she describes the "public art and pedestrian plaza with its distinguished pavers representing the characters for upright and righteousness was intended to better integrate"[10] the MDC into Chinatown.

Similarly, the Declaration of Jan Lee (the "Lee Decl.") speaks to the impact of the demolition of the public plaza, and the loss of "light and air" that reaches the "lower scale neighborhood" which is the "main passage for pedestrians and bikers leading from eastern Chinatown to west of Centre Street." Lee Decl. ¶ 7. However, Lee does not discuss the recognized stature of the Works. Likewise, although he discusses the Works, he does not speak to the Works being of recognized stature, but rather the impact the demolition of MDC will have on the community. He does not discuss the stature of the artwork but rather the "immediate and very long term, wide-ranging impacts on the Chinatown community and the character of the neighborhood the New Facility will have" and the fact that the removal of the artwork would further the "continued erasure of our culture." Lee Decl. ¶ 13. He then states, without context, that the works are "culturally significant" but does not say how or why the artwork is of recognized stature. Lee Decl. ¶ 17. Indeed, the declarations submitted by plaintiffs purportedly in support of the recognized statute of the Works are in essence statements about the impact of the demolition of the MDC and construction of a new state of the art facility as part of the BBJ project, and not about the significance of the artwork itself.

(vi) VARA Does Not Protect Against Relocation

Although artworks covered by VARA are protected against "intentional distortion, mutilation, or other modification of" those works, VARA does not protect against the relocation

[10] *Id.* at 1:04:27

of works, whether or not they are site-specific. More specifically, VARA contains an exception that specifically states that the "modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and ***placement***, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." 17 U.S.C. 116A(c)(2) (emphasis added). In other words, VARA does not require that a site-specific work of art be kept in the same location. In *Tobin v Rector*, 2017 U.S. Dist. LEXIS 187792 (S.D.N.Y. 2017), the Court determined that the relocation of a piece of site-specific artwork, related to September 11, 2001, did not violate VARA when it was relocated from Lower Manhattan to Connecticut because relocating the work at issue did not "by itself constitute distortion, mutilation or modification under VARA. Even assuming that [the Works are] site-specific art, and that changing its location results in its 'modification,' that modification 'is the result of . . . the public presentation, including . . . placement, of the work' and therefore is not actionable unless the modification is caused by gross negligence." *Tobin v Rector*, 2017 U.S. Dist. LEXIS 187792, at *14 (S.D.N.Y. 2017).

Plaintiffs do not even argue any gross negligence by defendants in the anticipated removal and relocation of the Works. Nonetheless, given the level of engagement and attention to detail DDC and its conservator BCA have paid to the Works, any such claim would be without merit. Thus, even if any of the Works are found to be protected under VARA, defendants' actions are in accordance with the law.

C. A Balance of Hardships and Equities Tips in Favor of Defendants

There is no public interest in favor of granting an injunction here. In fact, granting plaintiffs' motion would only serve to stall the City's work at the MDC site and cause further delays to the BBJ project goal (and requirement by law) of closing Riker's Correctional Facility

by 2027 which has already been delayed due to the COVID-19 pandemic.[11] The pandemic has only further highlighted the urgent need to close Rikers as it has precipitated the public health crisis that already existed at the jail.[12] Deteriorating conditions, and in light of continued COVID variants, this project cannot wait.

Undoubtedly, there is a significant public interest in closing Rikers, which would only be possible if MDC is dismantled and the design and construction of "more humane jail facilities" in the boroughs "designed to foster safety and wellbeing for both those incarcerated and for staff…" moves forward. *See* https://rikers.cityofnewyork.us/nyc-borough-based-jails/ (last accessed May 16, 2022). Creating cleaner, safer, and better facilities for the City promotes the public interest, and with the BBJ facilities there is also a hope to potentially "serve as a catalyst for positive change in the community and the broader justice system." *Id.*

As plaintiffs have failed to demonstrate any immediate irreparable harm by waiting almost a year to bring this lawsuit, have not shown how there would be any prejudice to their honor or reputation in the absence of an injunction, and have failed to show a clear likelihood of success on the merits under VARA, the strong public interest in the BBJ project moving forward on schedule so that Rikers can be closed and the new state of the art jail facility be constructed in its place, tips the balance of hardships and equities in favor of defendants.

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[11] See timeline at BBJ website cited to in note 2, *supra*.

[12] These are just two of many reports and articles published on conditions at Rikers: https://www.nytimes.com/2022/02/01/nyregion/rikers-island-medical-care.html; https://www.nytimes.com/2022/01/28/nyregion/rikers-island-prisoner-deaths.html (last accessed May 16, 2022).

CONCLUSION

For all the reasons set forth herein, defendants respectfully request that plaintiffs' motion for a preliminary injunction be denied in its entirety.

Dated: New York, New York
May 17, 2022

By: /s/

Gati Dalal
Genan Zilkha
Assistant Corporation Counsels