UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KIT-YIN SNYDER and RICHARD HAAS,

Plaintiffs,

v.

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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Case No.: 1:22-CV-03873-LAK

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND <u>PRELIMINARY INJUNCTION</u>

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PRELIMINARY STATEMENT

Plaintiffs Kit-Yin Snyder ("Snyder") and Richard Haas ("Haas") (together, "Plaintiffs") respectfully submit this Reply Memorandum of Law in further support of their motion brought by order to show cause for a temporary restraining order ("TRO") and preliminary injunction enjoining Defendants Mayor Eric Adams, 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 ("PDC") (together, "Defendants") from taking any actions to alter, deface, modify, mutilate, destroy, distort and/or demolish the long-standing works of visual art (the "Artwork") installed by Plaintiffs located at or around the Manhattan Detention Center, 124-125 White Street, New York, New York (the "MDC"), in violation of 17 U.S.C. § 106A (the "Visual Artists Rights Act" or "VARA") and copyright law.

Defendants primary argument is that Plaintiffs impliedly consented to the destruction of their Artwork by participating in meetings with Defendants regarding the "future of the Artwork", and that they knew the Artwork was slated to be removed for some time prior to commencing this lawsuit. A review of the evidence shows that no where did Plaintiffs consent to the destruction of the Artwork and Plaintiffs did not know that their Artwork was to be destroyed. The documents submitted by Defendants in opposition to this motion do not support that conclusion, but instead that the Artwork was not slated for destruction until the PDC voted on the issue in April 2022.

Further, Plaintiffs have established very clearly that their Artwork is protected by VARA, and they will be absolutely irreparably harmed if their Artwork is destroyed prior to them being able to assert their rights thereunder.

For these reasons, and as more fully set forth herein, Plaintiffs' motion for a TRO and preliminary injunction should be granted.

STATEMENT OF FACTS

The facts as they relate to this motion are fully set forth in the accompanying Reply Declaration of Kit-Yin Snyder, dated May 17, 2022 ("Snyder Reply Decl.") and the exhibits annexed thereto, the Reply Declaration of Richard Haas, dated May 17, 2022 (the "Haas Reply Decl."), the Declaration of Richard Haas, dated May 11, 2022 ("Haas Decl."), the Declaration of Kit-Yin Snyder, dated May 10, 2022 ("Snyder Decl."), the Declaration of Jan Lee, dated May 4, 2022 ("Lee Decl."), the Declaration of Kerri Culhane, dated May 3, 2022 ("Culhane Decl."); and the Declaration of Robert S. Friedman, dated May 11, 2022 ("Friedman Decl."); and the exhibits annexed thereto.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF AND A TEMPORARY RESTRAINING ORDER

A preliminary injunction may be granted where a party demonstrates that: (1) they are likely to succeed on the merits, (2) there is a risk of irreparable harm absent injunctive relief, (3) the balance of equities is in the party's favor; and (4) an injunction is in the public interest. *MyWebGrocer, L.L.C. v. Hometown Info., Inc.*, 375 F.3d 190, 192 (2d Cir. 2004); *Jones v. Wolf*, 467 F. Supp. 3d 74, 81 (W.D.N.Y. 2020) (internal quotation marks and citations omitted). The same standard governs consideration of an application for a temporary restraining order. *Echo Design Group, Inc. v. Zino Davidoff S.A.*, 283 F. Supp. 2d 963, 966 (S.D.N.Y. 2003).

II. PLAINTIFFS HAVE UNEQUIVOCALLY DEMONSTRATED THAT THEY WILL BE IRREPARABLY AND IMMINENTLY HARMED IF THIS RELIEF IS NOT GRANTED

Defendants incorrectly argue that Plaintiffs have failed to demonstrate that they will be irreparably harmed in the absence of injunctive relief because "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." *See* Memorandum of Law in Opposition at 8. This is an egregious mischaracterization of the facts and should be rejected outright.

First, if the relief sought in this application is not granted, Plaintiffs' Artwork will be forever destroyed. This is irreversible damage. This is indisputable and Defendants have not even attempted to address this fact. If this application is not granted, years of Plaintiffs' lives will have been wasted and their Artwork – which the City has held out as being of recognized statute and highlights on their websites, which have received an award for excellence in design, and which has deep ties to the community – will be gone.

Second, Plaintiffs have absolutely not delayed in bringing this action or seeking this relief. The PDC did not vote to permit the destruction until April 11, 2022, and the resolution specifically contemplates the action occurring as late as April, 2024. (*See* Blount Decl. at Ex. P; Haas Reply Decl. at ¶¶ 4, 6; Snyder Reply Decl. at ¶¶ 6, 7, 33, 34). The contact between Plaintiffs and Defendants prior to December 2021 always was couched in terms of "reassembly" and "restoration" and not destruction. (*See* Haas Reply Decl. at ¶¶ 13-16; Snyder Reply Decl. at ¶¶ 16-35; Blount Decl. at Ex. B, C, D, G). Further, any communications were consistent with Plaintiffs' contractual obligation to consult with the City regarding repairs to the Artwork. (*See* Haas Decl. at Ex. A, § 7.3; Haas Reply Decl. at ¶¶ 8-19). Since December 2021, the proposed

plan for the Artwork has gone through several iterations and the PDC actually rejected it at one point. (*See* Blount Decl. at Ex. N).

Furthermore, Defendants have admittedly not even awarded the design-build contract yet. Design-build is a construction delivery method that contemplates the design being performed by the design-builder, and not a separate design firm. Accordingly, there is not yet even a design for the New Facility. Defendants wish to destroy Plaintiffs' Artwork and they do not yet even have a design in place for its replacement.

Defendants also fail to mention that, on September 21, 2020, the New York State Supreme Court granted a petition annulling the approvals issued by the New York City Planning Commission and New York City Council, New York City Department of Correction, Department of City Planning, and Department of Citywide Administrative Services insofar as applicable to the proposed construction of a new jail at 124-125 White Street, New York, New York, and enjoined respondents from taking any physical steps to effectuate such construction. *Matter of Neighbors United Below Canal v. Deblasio*, 2020 NY Slip Op 33095(U), ¶ 6 (Sup. Ct.). The Supreme Court's Order annulling the entire new jail project was in place until reversed by the Appellate Division on March 30, 2021. *Matter of Neighbors United Below Canal v. Deblasio*, 2021 NY Slip Op 01947, ¶ 2, 192 A.D.3d 642, 643, 146 N.Y.S.3d 78, 80 (App. Div. 1st Dept. 2021).

Defendants reliance on *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985) is misplaced. There, the motion for injunctive relief to require that the defendant cease using the name "Citytrust" was initiated ten weeks after defendant had already opened an office, and hears after plaintiff admittedly saw advertisements for defendant doing business using that name. It is certainly not analogous to the situation here where the harm has not yet occurred and the decision to even move forward with the destruction of Plaintiffs' Artwork was not even made

until a month ago. Further, there is a huge difference between the permanent destruction of the Artwork, and the use a name, which can be addressed with money damages.

Defendants reliance on *Broecker v. N.Y.C. Dep't of Educ.*, No. 21-CV-6387 (KAM)(RLM), 2021 U.S. Dist. LEXIS 226848, at *26 (E.D.N.Y. Nov. 24, 2021), is also similarly misplaced. There, the Court held that monetary damages could compensate the plaintiffs for their loss of income during the COVID-19 pandemic. Further, plaintiffs delayed bringing the action until 44 days *after* they had already lost their income, even though they had notice that they would be losing it months before it occurred. That is not the case here, where the Artwork has not yet been destroyed, and the loss of the Artwork is irreversible.

In any event, Plaintiffs are amenable to an expedited discovery schedule to address Defendants' claim of delay and the nebulous communications since we believe they are meritless and will be proven so. In the interim, the status quo should be maintained.

III. PLAINTIFFS DID NOT CONSENT TO THE DESTRUCTION OF THEIR ARTWORK

As an initial matter, nowhere in the voluminous documents that Defendants submitted do they point to any explicit agreement with or consent from Plaintiffs to proceed with the removal of the Artworks. Defendants' papers speak to the Plaintiffs' "aware[ness] of the proposed plans," but Defendants provide zero indication that Plaintiffs consented to any such plan. See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, dated May 17, 2022 ("Opp. Memo."), pg. 9. In fact, Plaintiffs were not even aware of the possibility that their Artwork could be destroyed until December 2021. Haas Reply Decl., ¶ 13; Snyder Reply Decl., ¶ 22.

Defendants instead rely on vague, equivocal statements and actions by Plaintiffs when the truth is that, since the beginning of this process, Plaintiffs were never once asked to consent

to Defendants' plans to destroy their Artwork. Snyder Reply Decl., ¶ 10; Haas Reply Decl., ¶ 9. For example, Defendants state that "when BCA discussed the murals with Haas, he seemed to understand and even suggested that the murals would not be moveable." Opp. Memo, pg. 10 (emphasis added). However, Defendants provide no basis for this understanding. Similarly, with respect to Plaintiff Snyder, Defendants claim that Snyder "was approached with the concept of restructuring the pavement design using new materials" and "took no exception to the proposal." Opp. Memo, pg. 10 (emphasis added). To support this assertion, Defendants cite to page 15 of Exhibit A to the Blount Declaration, but this page of the June 2021 BCA report merely documents the conservation and reinstallation recommendations for Plaintiff Snyder's works. There is no indication that Plaintiff Snyder agreed to the contents of this proposal. Additionally, Defendants try to claim that Plaintiffs "confirmed their approval of the proposal in writing before the PDC presentation [on April 11, 2022]", but this is incredibly misleading. Opp. Memo., pg. 13. Paragraph 50 of the Blount Declaration, which Defendants cite in support of this assertion, merely states that the "presentation was […] reviewed in advance and approved by [Plaintiffs]." Blount Dec, ¶ 50 (emphasis added). Defendants' own documents support the fact that Plaintiffs never approved of the proposal itself.

As a matter of law, waiver is "an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed." *Gruppo, Levey & Co. v. ICOM Info. & Communs., Inc.*, 2003 U.S. Dist. LEXIS 11213, *24 (S.D.N.Y. July 1, 2003) (internal quotation marks and citation omitted). Waiver should not be "lightly presumed." *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 968 (N.Y. 1988). Because the waiving party is giving up a legal right, the waiver must be "unmistakably manifested" and not merely inferred from a doubtful or equivocal act. *Orange Steel Erectors v. Newburgh Steel Prods.,* 225 A.D.2d 1010, 1012 (App. Div. 3d Dep't 1996). In the context of VARA, the House Judiciary

Committee Report explains: "The purpose of [the written waiver] is to ensure that the author is made fully aware of the circumstances surrounding the installation and potential removal of the work and has nevertheless knowingly subjected the work to possible modifications that would otherwise be actionable under section 106A." H.R. Rep. No. 101-514, at 21 (emphasis added). Additionally, William Patry, who participated in the drafting of VARA in his role as a Policy Planning Advisor to the Register of Copyrights, further elaborates: "In light of this provision's purpose of ensuring that artists be made aware fully of the circumstances surrounding installation and potential destructive removal, it should be strictly construed." 5 William F. Patry, Patry on Copyright § 16:33 (2017).

In fact, Plaintiffs' communications with Defendants do not constitute a waiver of their rights under VARA. The law in the Second Circuit is clear that cooperation alone does not translate to a waiver of a right. *Gruppo, Levey & Co*, 2003 U.S. Dist. LEXIS 11213, at *25-26. Even with overt acts of acquiescence, courts have still required that consent to the act be clearly manifested. For example, in *Gruppo, Levey & Co.*, the Court held that where a party permitted another to solicit the purchase of a minority interest and even sent an email that stated "let's close the deal!", that cooperation did not translate into a willingness for the party to pay for a transaction fee related to that solicitation of the minority interest. *Id.* In the instant case, Plaintiffs' communications with Defendants similarly do not translate into a willingness to waive their rights under VARA. Any cooperation or communication from Plaintiffs took place merely to fulfill Plaintiffs' contractual obligation to consult with the City regarding the Artwork. Haas Reply Decl., ¶ 8. None of the communications that Defendants submitted contain the clear manifestation of consent that the law requires, and Plaintiffs should not be penalized for complying with the contract when the City did not hold up its end of the deal.

IV. PLAINTIFFS HAVE SHOWN A CLEAR AND SUBSTANTIAL LIKELIHOOD THAT THEY WILL SUCCEED ON THE LIKELIHOOD OF THE MERITS OF THEIR VARA CLAIM

Plaintiffs have sufficiently shown that: (1) they are the authors of "works of visual art," (2) their works are of recognized stature or that destruction would be prejudicial to Plaintiffs' honor or reputation, (3) their works of art do not fall within the exceptions to VARA, and (4) there is an imminent danger that their works will be destroyed if the injunction is not issued. *See, generally*, 17 U.S.C. § 106A; *Cohen v. G&M Realty, L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013). Contrary to the arguments advanced by Defendants, Plaintiffs' have shown that their Artwork is entitled to protection under VARA.

A. PLAINTIFFS' WORKS OF ART ARE "WORK[S] OF VISUAL ART" FOR THE PURPOSES OF VARA

VARA grants all creators of "work[s] of visual art" protection against destruction of such work. 17 U.S.C. § 106A(3)(a) protects *all* works of visual art from "any intentional distortion, mutilation, or modification of that work which would be prejudicial to [the artist's] honor or reputation. 17 U.S.C. § 106A(3)(b) provides additional protections for "work[s] of recognized stature" and prohibits "any intentional or grossly negligent destruction of that work."

Under both subsections (3)(a) and (3)(b) of 17 U.S.C. § 106A, Plaintiffs' Artwork is entitled to protection. Plaintiffs' collective Artwork, as well as each component of the Artwork, satisfies both the "positive" and "negative" prongs of the "work of visual art" analysis. *See Bd. of Managers of Soho Int'l Arts Condo. v. City of N.Y.*, 2003 U.S. Dist. LEXIS 10221, at *24 (S.D.N.Y. June 17, 2003).

Defendants do not question that the Artwork is a "work of visual art" under VARA. Defendants question only whether Plaintiff Snyder's work "Upright" is a "work of visual art." *See* Opposition at 14.

Whether a particular work falls within the scope of the definition of "works of visual art" is an individualized inquiry, specific to the art at issue. *See Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018). When determining whether a particular work falls within the scope of the definition of "works of visual art", "'[t]he courts should use common sense and generally accepted standards of the artistic community.'" *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 316 (S.D.N.Y. 1994) (reversed on other grounds) (quoting H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 11 (1990), reprinted in, 1990 U.S.C.C.A.N. at 6921).

i. The Artwork is a single, collaborative, "visual work of art" under VARA

Defendants argument that the Artwork is not a single, collaborative, visual work of art under VARA is contrary to case law, the contractual treatment of the Artwork, Plaintiffs' intent in creating the Artwork, and Defendants treatment of the Artwork throughout their attempts to plan for the future of the Artwork.

The Artwork includes (i) Snyder's "Solomon's Throne", which is a sculpture depicting the throne of the Old Testament judge, King Solomon, on the roof of the bridge connecting the North and South Towers of the MDC above the pedestrian plaza on White Street, (ii) Snyder's "Upright", which is a geometric labyrinth of colored pavers, including pictograms of two Chinese characters for "upright" and "righteousness," interspersed amongst two rows of apple trees on the pedestrian plaza on White Street, (iii) Snyder's "The Seven Columns of the Temple of Wisdom," which consists of a pair of freestanding column sculptures leading to the bridge between the North and South towers of the MDC and five freestanding column sculptures at the administrative entrance to the MDC representing the Seven Pillars in the Temple of Solomon, (iv) Haas' "The Judgements of Solomon and Pao Kung," which consists of four sculptural friezes illustrating King Solomon and Pao Kung, a Sung Dynasty Chinese Judge, located on the bridge connecting the North and South Towers of the MDC above the pedestrian plaza on White

Street, and (v) Haas' "Immigration on the Lower East Side of New York," which consists of a seven panel mural depicting waves of immigration on the Baxter Street facades of the North Tower of the MDC. (Snyder Decl. at ¶¶ 13, 15-18; Haas Decl. at ¶¶ 14, 16, 17).

When there are multiple pieces of artwork in the same general location, the pieces of art may be considered to be multiple components of a single work of art for determining whether the sum is a "work of visual art." *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Carter*, 861 F. Supp. at 314. Here, the Artwork is a single work of art and should be considered as one for purposes of analyzing whether it is a "work of visual art" under VARA. Plaintiffs collaborated with one another in designing the various components of the Artwork. (Snyder Decl. at ¶ 7, 20; Haas Decl. at ¶¶ 8, 14). The components of the Artwork follow the same themes of justice centering on the MDC (e.g., "Solomon's Throne", "The Seven Columns of the Temple of Wisdom" and "The Judgements of Solomon and Pao Kung"), the celebration the immigrant communities in the neighborhood (e.g., "Upright" and "Immigration on the Lower East Side"), and, in some cases, both (e.g., "Upright" and "The Judgements of Solomon and Pao Kung"). (Snyder Decl. at ¶¶ 13, 15-18; Haas Decl. at ¶¶ 16-18). This demonstrates that the components of the Artwork are interrelated and form an integrated whole.

Taking the Artwork as a whole, the Artwork clearly falls squarely within VARA's definition of "works of visual art" and mandates VARA's protection. The Artwork is comprised of sculptures and paintings, which are expressly called out in the definition of "works of visual arts" in the statutory text of VARA. 17 U.S.C. § 101. In *Pavia v. 1120 Ave. of the Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995), the court found that a sculpture consisting of four separate elements alleged to be single work of art as elements formed into creative whole was a "work of visual art" protected by VARA. The Artwork is similarly entitled to a finding that it is a single, collaborative work of art, formed into a creative whole, protected by VARA. *See also*

English v. BFC & R East 11th St. LLC, No. 97 Civ. 7446, 1997 U.S. Dist. LEXIS 19137, at *3 (S.D.N.Y. Dec. 3, 1997) (noting that *Carter v. Helmsley-Spear, Inc.*, 71 F.3d at 84, offered support for the contention that entire garden was a single work of visual art under VARA, but holding that VARA was inapplicable to artwork illegally placed on property).

The paving pattern of Snyder's "Upright" are analogous to the mosaic floors at issue in *Carter*, 71 F.3d at 84. There too, the defendants asserted that "at least parts of the work are applied art" based on the fact that some of the elements of the art at issue was affixed to a building lobby's "floor, walls, and ceiling - all utilitarian objects." *Id.* at 85. The art at issue in *Carter* was, like the Snyder and Haas' Artwork, a multi-part installation built into a building and made up of "a variety of sculptural elements constructed from recycled materials, much of it metal, affixed to the walls and ceiling, and a vast mosaic made from pieces of recycled glass embedded in the floor and walls. *Id.* at 81. The Second Circuit rejected the defendant's argument, finding that "[i]nterpreting applied art to include such works would render meaningless VARA's protection for works of visual art installed in buildings." *Id.* at 85. The court cautioned that "A court should not read one part of a statute so as to deprive another part of meaning." *Id.*

The Second District found that the work was made up of interrelated elements that form an integrated whole. *Id.* at 83. Just like Plaintiff Snyder and Haas' works, which were constructed in coordination based upon each other, "each additional element of the sculpture was based on the element preceding it so that they would mesh together." The Second Circuit held that when viewed as a single work of art, the entire work fell within the protections of VARA as a single "work of visual art." *Id.* at 84.

ii. Standing alone, "Upright" is a "visual work of art" under VARA

Even if taken as separate works of art, the components of the Artwork each still independently constitute a "work of visual art" under VARA.

Defendants cite to *Pollara v. Seymour*, to support the argument their argument that "Upright" is not a "work of visual art" under VARA. *Pollara v. Seymour*, 344 F.3d 265, 269 (2nd Cir. 2003). That case is inapposite. In *Pollara*, the plaintiff attempted to protect a banner created to advertise a non-profit group. *Id.* at 265. The Second Circuit found that the banner fell outside the protections of VARA on the basis that the "banner was created for the purpose of drawing attention to an information desk, as part of a lobbying effort, and the banner overtly promotes in word and picture a lobbying message." *Id.* at 270. That is not the situation before this Court. Plaintiffs' Artwork was commissioned for the enjoyment of the public as part of the Percent for Art law. There is no advertising or lobbying purpose behind the Artwork. It is solely intentioned to be enjoyed by the public and to serve as a reminder of the immigrant struggle and wish for justice that are depicted in the Artwork.

Moreover, in reaching its holding the *Pollara* court specifically reserved that Congress "explicitly stated" that "whether a particular work of art falls within the definition should not depend on the medium or materials used." *Id.* at 269; *see also* H.R. Rep. No. 101-514, at 6 101st Cong., 2d Sess. 11 (1990), reprinted in, 1990 U.S.C.C.A.N. at 6921. Rather, the decision should be based on common sense and generally accepted standards of the artistic community. *Carter*, 71 F.3d at 84.

The underlying trial court in *Carter*, distinguished the mosaic floor and sculptural components of the artwork from the "'entrance steps 31st Street entrance,' and the ceiling and wall lighting," which the court held were "works of applied art or strictly utilitarian objects." *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. at 315. Snyders' "Upright" is a geometric labyrinth

of colored pavers and is more akin to the mosaic floor in *Carter* than the utilitarian components of the stepped entrance and ceiling and wall lighting. The situation of the labyrinth on the ground does not deprive it of its status as a "work of visual art." Like the mosaic floor in *Carter*, “Upright” constitutes a “work of visual art” under VARA.

Courts in the 9th Circuit have also opined on this issue, and, while not-binding, have come to results consistent with the Second Circuit's holding in *Carter* and are persuasive. *See Lew v. City of L.A.*, No. 2:20-cv-10948-DDP-PLA, 2021 U.S. Dist. LEXIS 244442, *13-14 (C.D. Cal. Dec. 22, 2021) (reasoning that “[w]hen an artist is denied moral rights in his or her work, his or her creativity is implicitly stifled through nonrecognition.” Brandon J. Pakkebier, *Form Over Function: Remedying VARA's Exclusion of Visual Art with Functional Qualities*, 103 Iowa L. Rev. 1329, 1345 (2018). Moreover, “if judges continue to interpret VARA as exclusive of functional items, then artists working in these fields of art may succumb to the pressures of the market and may lose their drive to continue creating solely for the purpose of creating, instead choosing to create art as a commissioned artist unprotected by VARA.” *Id.* Such consequence “undermines the very goal [VARA] sought to implement: protection of artists working in the visual arts.” *Id.* at 1345-46 (citing H.R. Rep. No. 101-514, at 6 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6916 (2018) (“If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished and replaced with a purely profit motivation. The [VARA] mitigates against this and . . . protects our historical legacy.”)).

Like in *Carter*, Snyder and Haas’ collaborative art installation is a single work conveying a unified vision, and the entire work is protected under VARA as a "work of visual art."

B. PLAINTIFFS' WORKS OF VISUAL ART ARE WORKS OF RECOGNIZED STATURE.

It is frankly ridiculous that Defendants have challenged that Defendants' Artwork is not of recognized stature. Under the two-part test formulated in *Carter*, Plaintiffs' Artwork is of "recognized stature" under VARA. *Carter*, 861 F. Supp. at 325. As explained in *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d at 214, the Seventh Circuit in *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999), noted that the test from *Carter*, "may be more rigorous than Congress intended." Nevertheless, plaintiffs meet even the more "rigorous" test set forth in *Carter*. The Artwork (i) is viewed as meritorious, and (ii) is of stature that is recognized by art experts and other members of the artistic community, as well as the public at large, by whom the Artwork was intended to be enjoyed, and whose tax payer dollars funded the installation of the Artwork.

Defendants own actions have held out the Artwork to be of recognized stature. As acknowledged in Defendants' Opposition, the City did award the Artwork with the Award for Excellence in Design in 1989. Since then, the Artwork has continued to be highlighted on the DCA website. Defendants have acknowledged that the Artwork is meritorious and of stature recognized by art experts and the community, and is worthy of preservation. In choosing Snyder and Haas to install the Artwork in 1987, Defendants acknowledged the considerable success of Snyder and Haas' respective careers. To this day, Defendants acknowledge the Plaintiffs' respected careers as artists as well as the history of the Artwork , both of which support the findings that the works are of recognized stature.

Like the question of whether a work is a "work of visual art" under VARA, the question of whether a work of visual art is of recognized stature is left to the discretion of the judge. *See Cohen*, 320 F. Supp. at 438. Courts "use common sense and generally accepted standards of the

artistic community" in determining whether a particular work is of recognized stature. *Id.* at 438. Expert testimony, newspaper and magazine articles, and the generally accepted standards of the artistic community are used to establish that the artist's work was of recognized stature. *Id.* That has been presented here. Moreover, the site of the Artwork is relevant to the import of the Artwork, and The site of a work is also relevant to its recognition and stature and may, in certain cases, render the recognition and stature of a work beyond question. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020). Even inferred recognition from a successful career can be considered in determining whether a visual artist's work has achieved recognized stature. *Cohen*, 320 F. Supp. at 438.

Here, the recognition of the Artwork as works of visual art, its creation as part of the Percent for Art Law, and the public outcry in light of its threatened destruction, are sufficient to establish that the Artwork is of recognized stature. The works are treasured by the community and their merit was acknowledged by the Art Commission's Award for Excellence in Design in 1988. (Haas Decl. at ¶ 22; Snyder Decl. at ¶ 22). The location of the works is important, as both works are situated in Chinatown, a geographical site that is critical to the cultural value and message behind the works. (Lee Decl. at ¶ 15; Haas Decl. at ¶ 22; Snyder Decl. at ¶¶ 8, 27). Moreover, Snyder and Haas have each achieved significant recognition as artists. (Haas Decl. at ¶¶ 23-27, Ex. B; Snyder Decl. at ¶¶ 24-26, Ex. B). Throughout a career spanning over five decades, Snyder has made major contributions to the art scene, exhibiting her work at sites in both the United States and abroad, and is known for her environmental art practice. (Snyder Decl. at ¶ 24-26). Both Snyder and Haas have received numerous awards and grants recognizing their achievements. (Haas Decl. at ¶ 26, Ex. B; Snyder Decl. at ¶ 26, Ex. B). Further, even the City advertises and acknowledges the status of Plaintiffs and the Artwork. *See* NYC Percent for Art, "Completed Projects – Kit-Yin Snyder", available at

https://www1.nyc.gov/site/dclapercentforart/projects/projects-detail.page?recordID=230; NYC Percent for Art, "Completed Projects – Richard Haas", available at https://www1.nyc.gov/site/dclapercentforart/projects/projects-detail.page?recordID=115.

C. PLAINTIFF'S HONOR AND REPUTATION AS ARTISTS WILL BE DAMAGED IF DEFENDANTS ACT ON THEIR STATED INTENTIONS.

Defendants also boldly claim that their destruction of the Artwork and indefinite storage of the Artwork with no definitive plans for reinstallation will not harm Plaintiffs' reputation and moral rights. This argument must be rejected.

Moral rights stem from "a belief that an artist […] injects his spirit into the work and that the artists personality, as well as the integrity of the work, should be protected and preserved." *Carter v. Helmsley-Spear, Inc.*, 71 F.3d at 81 (citation omitted). Even if a work is not of "recognized stature," VARA gives the artist the right "to prevent any intentional distortion, mutilation, or other modification . . . [that] would be prejudicial to [the artist's] honor or reputation." 17 U.S.C. 106A(a)(3)(A). In determining whether intentional distortion, mutilation, or modification of a work would be prejudicial to the artists' honor or reputation,' courts consider whether such alteration would cause injury or damage to the artists' good name, public esteem, or reputation in the artistic community. *Carter*, 861 F. Supp. at 323. An artist may show that their honor or reputation may be harmed if the artwork will "present[] to viewers an artistic vision materially different from that intended by [the artist]." *Id.*

By removing Plaintiffs' Artwork from its current location, the works of art will be deprived of the context in which they are situated, thus obliterating the cultural value of the artwork. (Lee Decl. at ¶ 15). Without the context of the geographical location in which the works are installed, the vision depicted by Plaintiffs' work will be destroyed and the immigrant struggle and fight for justice that are depicted in the works will lose its value.

The "consultation" with Snyder and Haas promised in the Removal Plan has not been meaningful as promised. (Haas Decl. at ¶ 39; Snyder Decl. at ¶¶ 39-42). To date, no substantive commitment has been made to Snyder or Haas ensuring the details of the preservation and reinstallation of the original Artwork and the artists' visions behind the Artwork. (Haas Decl. at ¶¶ 40-42, 45-47; Snyder Decl. at ¶¶ 39-42).

D. PLAINTIFFS' WORKS OF VISUAL ART DO NOT FALL WITHIN THE OTHER VARA EXCEPTIONS.

i. The Artwork does not fall under the "VARA Building Exception" because Plaintiffs did not consent to the installation of the Artwork in a building that may subject the work to destruction by reason of its removal

In opposition to this motion, Defendants argue that VARA does not apply to artwork that has been incorporated into a building if (1) 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, and the artist "consented to the installation of the work in the building . . . in a written instrument." In fact, Defendants have omitted a key part of the 17 U.S.C. § 113(d)(1), which also provides that the written instrument must be "signed by the owner of the building and the author and that specifies that the installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal. . ."

Here, neither Plaintiff has consented to the destruction of their Artwork either before or after the effective date of VARA, and in fact, the Contract specifically promises otherwise. See Haas Decl. at Ex. A, § 7.4.

For Plaintiffs to fall under this exception to VARA they would have needed to consent or waive their rights under VARA and the Contract, and the facts simply do not support that outcome.

VARA protection also does not apply where the artwork being destroyed is incorporated in or made part of a building in such a way that removing the work from the building will cause its destruction, *and* the author consented to the installation of the work in the building either before the effective date of VARA or in writing with the acknowledgment that the installation of the work may subject the work to destruction. 17 U.S.C. § 113.

Here, "Justice" is not incorporated in or made part of the MDC; it is in the pedestrian plaza (Snyder Decl. at ¶ 30), so this exception clearly does not apply to Snyder's portion of the Artwork.

While "Immigration on the Lower East Side of New York," is painted directly on the second story cement wall of the MDC (Haas Decl. at ¶ 17), Haas did not give the consent required for application of this exclusion. To the contrary, prior to Plaintiffs installing the Artwork, Plaintiffs were given explicit assurance in Section 7.4 of the Contract: "**The City agrees that it will not intentionally destroy, damage, alter, modify or change the Art Work in any way**. . ." (Snyder Decl. at ¶ 36, Ex. A at § 7.4; Haas Decl. at ¶ 36, Ex. A at § 7.4) (emphasis added).

Plaintiffs have not executed or signed a written instrument after VARA's effective date, June 1, 1991, that specifies that installation of the works may subject the works to destruction, distortion, mutilation, or other modification, by reason of their removal from 124-125 White Street. (Haas Decl. at ¶ 48; Snyder Decl. at ¶ 49).

Accordingly, the exclusion of 17 U.S.C. § 113 is inapplicable here.

ii. This is not a mere "relocation" of the Artwork

While Courts have found that simply relocating a work " does not by itself constitute distortion, mutilation or modification under VARA," no "relocation" of the Artwork is threatened by Defendants. Pursuant to the Removal Plan, and as acknowledged by Defendants,

Snyder's "Upright," and Haas' "Immigration on the Lower East Side of New York" will be completely destroyed. The Removal Plan proposes the destruction of the original materials of the works, and accounts only for documentation and reproduction of the Artwork in changed media. The remaining portions of the Artwork will be dismantled separately from "Upright" and "Immigration on the Lower East Side of New York," destroying the unity of the collaborative Artwork. As a result, the portions of the Artwork that are to be dismantled and stored on Riker's Island will be deprived of the ability to convey the full message behind the Plaintiffs' Artwork.

iii. No modification of the Artwork has been caused by "the passage of time"

While it is true that modifications resulting from "the passage of time or the inherent nature of the materials" are excluded from the scope of section 106A(a)(3)(A), as are modifications that are the result of conservation. However, modifications caused by "gross negligence" are not so excepted. 17 U.S.C. 106A(c)(2).

Defendants have violated the terms of the Agreement with Plaintiffs to safeguard, repair and maintain the Artwork. The City has modified the art with gross negligence and indeed, intent, by purposefully painting parking lot divider lines over Snyder's work "Upright." The City cannot escape its obligations to Plaintiffs under VARA by virtue of its gross negligence in allowing the Artwork to be thrust into a state of disrepair. The City must not be permitted to benefit from its breach of its contractual promise to maintain the Artwork.

V. VARA CONFERS RIGHTS ON ARTISTS WHO HAVE PRODUCED WORKS OF "RECOGNIZED STATURE," *OR* WHOSE "HONOR OR REPUTATION" WOULD BE PREJUDICED BY THE MODIFICATION OF A WORK

As stated above at IV.B, Plaintiffs have shown that the Artwork is of "recognized stature" as defined by VARA. However, even if the Artwork was not of "recognized stature," the Artwork would be within the scope of VARA protections, because Plaintiffs' honor and

reputation will be prejudiced by the Removal Plan's treatment of the Artwork. 17 U.S.C. 106A(a)(2)(A).

VI. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

The Second Circuit has repeatedly held that "perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (citing *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 431 (1973) (footnote omitted)). Without question, Plaintiffs will be irreparably harmed before a decision on the merits can be rendered if the City is permitted to proceed with their plan to remove and destroy the Artwork in May 2022.

In the copyright and VARA context, "irreparable harm is presumed once a likelihood of success on the merits is shown." *See English*, 1997 U.S. Dist. LEXIS 19137, at *3; *Tienshan v. C.C.A. Int'l*, 895 F. Supp. 651, 655 (S.D.N.Y. 1995); *Quaker Oats Co. v. Mel Appel Enterprises, Inc.*, 703 F. Supp. 1054, 1061 (S.D.N.Y. 1989). As already established herein, Plaintiffs have demonstrated that their Artwork is of recognized stature and Plaintiffs have the right to prevent the destruction of their works. Thus, there is a presumption of irreparable harm here.

Additionally, the damage that will be experienced by Plaintiffs if Defendants destroy the Artwork cannot be compensated after-the-fact by monetary damages. (Haas Decl. at ¶ 51; Snyder Decl. at ¶ 53). Defendants' intentional distortion, mutilation, modification or destruction of Plaintiffs' Artwork will be prejudicial to Plaintiffs' honor and reputation, a harm for which no dollar value can be assigned. Indeed, the threat to Plaintiffs' Artwork has already caused Snyder

and Haas distress from the proposed demolition of their treasured Artwork and lasting legacy. (Haas Decl at ¶¶ 7-11; Snyder Decl. at ¶¶ 7-10, 45).

As the District Court held in *Carter*:

> "VARA grants artists certain rights … [that are], by definition, not an economic right…. Plaintiffs, therefore, could not be made whole by an award of money damages. In light of defendants' stated intention to dismantle the Work, plaintiffs have demonstrated that they will suffer irreparable harm absent injunctive relief; once the Work is destroyed, this Court could not effectively reverse that action. Stated another way, if the Work is altered or destroyed during the pendency of this action, and if plaintiffs ultimately prevail on the merits of their suit, this Court would be left without the power to remedy the violation of plaintiffs' rights. Thus, plaintiffs have demonstrated that they will be irreparably harmed absent preservation of the status quo.

Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228, 232 (S.D.N.Y. 1994).

Here, the Artwork is a unique work of art, and the effect of the Artwork's destruction will be irreversible. *See Kammeyer v. U.S. Army Corps of Eng'rs,* CV 15-0869 (C.D. Cal. June 3, 2015) ("*Kammeyer*"), Dkt. No. 18 ("Order Granting TRO") at 2 (unpublished decision), granting preliminary injunction at *id.*, 2015 WL 5031959 (C.D. Cal. 2015) ("[o]nce the mural is destroyed, there is no way to bring it back"). Plaintiffs' Artwork is not merely at risk of removal or obstruction. It is threatened by complete destruction. (Haas Decl. at ¶¶ 34-35, 37-38, Ex. D; Snyder Decl. at ¶ 34-35, 37-38, Ex. D). The Artwork will cease to exist in any form if the Removal Plan is not stopped. (*Id.*)

Moreover, the Artwork was constructed by Snyder and Haas using tax payer dollars for the enjoyment and education of the public. (Haas Decl. at ¶ 13; Snyder Decl. at ¶ 12; Lee Decl. at ¶ 15; Culhane Decl. at ¶ 11). The Removal Plan does not provide any definite plan for "Upright" and "Immigration on the Lower East Side" to be salvaged and provides only vague references to future attempts of restoration based on photos taken of the Artwork, with no

meaningful plan to accomplish any the restoration of the works. (Haas Decl. at ¶¶ 37-42, Ex. C, D; Snyder Decl at ¶¶ 37-42; Lee Decl. at ¶ 16). Destruction 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. (Lee Decl. at ¶¶ 14, 17-19). Thus, Plaintiffs will suffer irreparable harm if injunctive relief is not issued.

VII. THE BALANCE OF EQUITIES FAVORS GRANTING INJUNCTIVE RELIEF BECAUSE THE IRREPARABLE HARM TO PLAINTIFFS OUTWEIGHS ANY HYPOTHETICAL INJURY TO DEFENDANTS

The balance of equities is clearly in Plaintiffs' favor. In arguing that there is no public interest in favor of granting an injunction here, Defendants completely ignore the value of public artwork. Defendants completely ignore that "Upright" contains Chinese characters, and these will be destroyed just like the Chinese language signage in Chinatown. Defendants completely ignore the fact that there are no public buildings with public artwork in the Chinatown area except for the Artwork. Defendants completely ignore the message of the hardships of immigration and calls for justice contained in the Artwork. Defendants completely ignore that the community has spoken and want the public space and the public Artwork in their community. They also completely ignore the permanence of any action to demolish the Artwork.

Instead, Defendants claim that Rikers needs to close and imply that the issuance of a preliminary injunction will delay that from occurring. Defendants have not even awarded a design-builder for the construction project yet, and they have no plans for construction. There will be no delay. Further, if Defendants wish to proceed with construction, since they do not have their design yet, perhaps they can design the New Facility in such a manner as to not destroy the Artwork. The planned New Facility is only increasing the beds for prisoners in by 40 people from the MDC and the New Facility, so maintaining the status quo is hardly burdening

Rikers Island. Further, even Mayor Adams has stated that the New Facility is unnecessary and will cause a disparate impact to Chinatown. (*See* Complaint at ¶ 8).

Additionally, for the reasons stated clearly herein and in the Reply Haas Decl. and Reply Snyder Decl., there was no delay in commencing this action, and therefore the timing of initiating this action has no bearing on the balancing of the equities.

Defendants should not be rewarded because they have started along a path that would require them to breach its contracts, completely ignore Plaintiffs' rights under VARA and steamroll the Chinatown community.

Accordingly, Plaintiffs' motion for injunctive relief should be granted in its entirety.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant a temporary restraining order and preliminary injunction, enjoining and restraining Defendants and their agents, servants, and/or employees from taking any action or actions that would alter, deface, modify, mutilate, destroy, distort and/or demolish Plaintiffs' Artwork, as set forth in the Complaint herein

Dated: May 17, 2022

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