UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KIT-YIN SNYDER AND RICHARD HAAS,

Plaintiffs,

22-CV-03873 (LAK)

v.

ERIC ADAMS, Mayor of the City of New York, in his official capacity, and **THE CITY OF NEW YORK**,

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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August 8, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Pages**

Statutes

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Defendants, ERIC ADAMS, Mayor of the City of New York, in his official capacity and THE CITY OF NEW YORK (collectively "Defendants") by their attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submit this memorandum of law in support of Defendants' motion to dismiss the Complaint.

PRELIMINARY STATEMENT

Plaintiffs Kit-Yin Snyder and Richard Haas (the "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 1987 and consist of: (1) a pavement design; (2) a sculpture atop the roof of the pedestrian bridge connecting the two towers of the MDC; (3) seven freestanding columns leading to the pedestrian 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 Jails Project, which was approved by the New York City Council in 2019, the City is demolishing the MDC and building a new Borough-Based Jail ("BBJ") facility in its place. As a result, parts of the Works will be salvaged and reinstalled at the new BBJ facility. Parts of the Works that cannot be salvaged will be documented and recreated on the new BBJ facility. In May of 2022, through a motion for a preliminary injunction brought on by Order to Show Cause, Plaintiffs sought to stay defendants Eric Adams, The City of New York, New York City Department of Design and Construction ("DDC"), New York City Department of Cultural Affairs ("DCLA"), New York City Department of Correction ("DOC"), and New York City Public Design Commission ("PDC")[1] from "taking any actions to alter, deface, modify, mutilate, destroy, distort and/or demolish the works of visual art…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."

On May 18, 2022, the Court denied Plaintiffs' motion for a preliminary injunction finding, in pertinent part, that the Works were not works of recognized stature as required under VARA. Defendants now move to dismiss the Complaint on the grounds that the Complaint fails to state a cause of action for a violation of VARA under Rule 12(b)(6) of the Federal Rules of Civil Procedure. More specifically, Plaintiffs have not sufficiently pled that the Works are works of recognized stature, as required by VARA. In addition, the Works are covered by an exception to VARA. Finally, Plaintiffs have not alleged that removing or relocating the Works would be prejudicial to their "honor or reputation." As a result, Plaintiffs' claims that Defendants' actions, in removing the Works, would violate VARA and copyright laws fail as a matter of law.

[1] By Order dated May 18, 2022 (ECF Dkt. 25), the Court *sua sponte* dismissed DDC, PDC, DOC, and DCLA from the action as none of these named defendants were a "suable entity distinct from the City of New York."

STATEMENT OF FACTS

A. The Works.

In 1987, Plaintiffs Kit-Yun Snyder ("Snyder") and Richard Hass ("Hass") (collectively the "Plaintiffs") executed an agreement (the "Agreement") with Urban & Litchefield Grosfield, a Joint Venture. Complaint ¶2, Declaration of Genan F. Zilkha (the "Zilkha Decl.") Exhibit A.[2] Pursuant to the Agreement, Plaintiffs were to create site-specific artwork (the "Works") for the MDC North Tower. Complaint ¶29. Title of the Works passed to the City upon "final acceptance and final payment thereafter." Zilkha Decl., Exhibit A at Art. 1, Sec. 1.9. Pursuant to the Agreement, Plaintiffs were paid a fixed fee of $385,000. Zilkha Decl., Exhibit A at Art. 2, Sec. 2.1. The City agreed that it would "not intentionally destroy, damage, alter, modify or change" Plaintiffs' artwork in any way. Zilkha Decl., Exhibit A at Art. 7, Sec. 7.4(a). Even so, nothing "preclude[d] the right of the City to relocate or remove the" Works from "public display with the prior approval of the Art Commission." *Id*.

The Works were to be installed on White Street between Centre and Baxter Streets and on Baxter Street. Zilkha Decl., Exhibit A at Exhibit I, Sec. II. On White Street, the Works were to include the following: a "Paving Pattern" consisting of a "geometric labyrinth in colored pavers that will be a pictogram of the two chinese [sic] characters for up-right and righteousness[;]" a "Colonnade" consisting of "two rows of trees" that were to be "installed bordering the [sic] White Street" together with "seven wire mesh columns" installed with "two along White Street and five at Centre Street.[;]" and a "Pedestrian Bridge" with a "wire mesh throne" installed on "top of the pedestrian skyway bridge" and "[f]our medallions representing King Solomon and Bao Kung…installed at the juncture of each bridge abutment." Zilkha Decl., Exhibit A at Exhibit I,

[2] Exhibit A to the Zilkha Declaration is identical to Exhibit A to the Complaint. The document is annexed to the Zilkha Declaration for ease of reference.

Sec. II ¶ 1-3. On Baxter Street, there were to be "5-7 faux relief murals…installed above the street level stores, depicting the history of the two cultures that have inhabited the lower east side [sic] and Chinatown area." Zilkha Decl., Exhibit A at Exhibit I, Sec. II ¶4.

The Works were commissioned as part of the City's "Percent for Art Law" which required that one percent of the budget for "eligible City-funded construction projects be spent on public artwork in public schools, courthouses…detention centers…and other City Facilities." Complaint ¶28.

Snyder's portion of the Works, collectively referred to as "Justice" or "Judgment," consisted of a sculpture on the roof of the pedestrian bridge on White Street between Centre and Baxter Streets, titled "Solomon's Throne," a pattern in the pavement on White Street, titled "Upright," and seven sculptures on the "terrace and sidewalk" titled "The Seven Columns of the Temple of Wisdom." Complaint ¶40.

Haas' portion of the Works consisted of two sculptural friezes and a mural with seven panels. Complaint ¶50. The friezes, which were titled "The Judgments of Solomon and Pao Kung" were located on the pedestrian bridge between Baxter and Centre Streets. Complaint ¶51. They were constructed with epoxy and cast stone. *Id*. The seven-paneled mural, titled "Immigration on the Lower East Side of New York," was painted directly on the MDC. Complaint ¶52. One panel of "Immigration on the Lower East Side of New York" was repainted in 1997. Complaint ¶54.

B. The Borough-Based Jail Project.

In October of 2019, the New York City Council approved the Borough-Based Jails ("BBJ") Project, which would replace Rikers Island with detention facilities located in Manhattan, the Bronx, Brooklyn, and Queens. Complaint ¶¶5 and 25. As part of the BBJ Project, the MDC will be demolished and replaced with a new facility. Complaint ¶5.

C. The Conservation Plan.

As part of the demolition of the MDC, DDC, DCLA, and DOC have developed a plan for the removal and conservation of the Works (the "Conservation Plan"). Complaint ¶55. The Conservation Plan was first presented to PDC on February 14, 2022. Complaint ¶61; Zilkha Decl., Exhibit C.[3] The February 14, 2022 Conservation Plan was approved by PDC as it applied to "The Judgements of Solomon and Pao Kung," "The Seven Columns of the Temple of Wisdom," and "Solomon's Throne." *See* Zilkha Decl., Exhibit E[4] at 036 and 038. PDC requested that the Conservation Plan be amended such that the relevant agency "work with the artist to develop a proposal to share the artwork with the public either at the new jail facility or another appropriate location approved by the artist" for "Immigration on the Lower East Side of New York" *See* Zilkha Decl., Exhibit E at 037. PDC requested that the Conservation Plan be amended such that the relevant agency "work with the artist to develop a proposal to recreate the artwork at the new jail facility or another appropriate location approved by the artist" for "Upright." *See* Zilkha Decl., Exhibit E at 039.

A revised version of the Conservation Plan was presented to PDC on April 11, 2022. Complaint ¶69; Zilkha Decl., Exhibit D.[5] This revised version of the Conservation Plan was approved by PDC on April 11, 2022. Complaint ¶¶55 and 71; Zilkha Decl., Exhibit E at 069 and

[3] Exhibit C to the Zilkha Declaration is identical to Exhibit C to the Complaint. The document is annexed to the Zilkha Declaration and has been Bates numbered for ease of reference.

[4] Exhibit E to the Zilkha Declaration is identical to Exhibit E to the Complaint. The document is annexed to the Zilkha Declaration and has been Bates numbered for ease of reference.

[5] Exhibit D to the Zilkha Declaration is identical to Exhibit D to the Complaint. The document is annexed to the Zilkha Declaration and has been Bates numbered for ease of reference.

70. Under the Conservation Plan, all of the Works can be salvaged with the exception of "Upright" and "Immigration on the Lower East Side of New York." Complaint ¶¶60 and 62.

Under the Conservation Plan, "Solomon's Throne," "The Seven Columns of the Temple of Wisdom," and "The Judgments of Solomon and Pao Kung" will be documented, "carefully remove[d]…and store[d] in custom creates during dismantle of existing MDC buildings and design of new BBJ MN [Manhattan] Facility." Zilkha Decl., Exhibit D at 009. The salvaged parts of the Works will be stored in Rikers Island. Complaint ¶63. The salvaged works will then be reinstalled "at the new BBJ MN [Manhattan] Facility or at an alternative site, in consultation with artist." Zilkha Decl., Exhibit D at 009. "Upright" and "Immigration on the Lower East Side of New York" cannot be salvaged. Zilkha Decl., Exhibit D at 010. "Upright" and "Immigration on the Lower East Side of New York" will be documented, "representative samples of original materials [will be stored] for reference" and then they will be recreated "in new materials, at the new BBJ MN [Manhattan] Facility or at an alternative site, in consultation with artist." *Id*. at 10. The Conservation Plan does not provide the date at which the salvaged Works will be installed in the new BBJ Facility in Manhattan. Complaint ¶65.

D. The Order to Show Cause.

By Order to Show Cause, dated May 11, 2022, Plaintiffs sought a preliminary injunction enjoining defendants Eric Adams, the City of New York, DDC, DCLA, DOC, and PDC from taking any actions to "alter, deface, modify, mutilate, destroy, distort and/or demolish the" Works.

Following oral argument held on May 18, 2022, the Court denied Plaintiffs' request for a preliminary injunction. *See* Zilkha Decl., Exhibit F. On May 31, 2022 the parties executed a stipulation under which Plaintiffs were to file an Amended Complaint by July 8, 2022 (*see* ECF Dkt. 30). Defendants were to file their response to such an Amended Complaint by August 8, 2022.

Plaintiffs have not filed an Amended Complaint pursuant to the stipulation and, thus, Defendants are proceeding with filing a motion to dismiss the original Complaint filed in this action.

STANDARD OF REVIEW

When deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is required to accept the facts alleged in the complaint as true and to construe all reasonable inferences in the nonmoving party's favor. *See Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1988); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994) (*citing Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989)).

A complaint must nevertheless "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citations and quotations omitted).

Further "although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (citations omitted). Similarly, "[b]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations and will not defeat the motion." *New Jersey Carpenters Vacation Fund v. Royal Bank of Scot. Group, PLC*, 720 F. Supp. 2d 254, 261 (S.D.N.Y. 2010) (*quoting Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 610 (S.D.N.Y. 2008)).

The Supreme Court in *Iqbal* set forth a "two-pronged" approach for analyzing a motion to dismiss. *Id.* First, a court should "identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Once the court has stripped away the conclusory allegations, it must determine whether the complaint's "well-pleaded factual allegations… plausibly give rise to an entitlement to relief." *Id.* In making its evaluation, a court must undertake a "context-specific task" that requires it to draw on its judicial experience and common sense. *Id.* at 679. Where the well-pleaded facts do not permit the court to infer more than the mere "plausible claim for relief" the motion to dismiss must be granted and the Complaint must be dismissed. *Id.* at 678-79.

In assessing a Rule 12(b)(6) motion, a court may look to the facts alleged in the complaint, documents attached thereto or incorporated by reference, documents that are "integral" to the plaintiff's claims even if not expressly incorporated by reference, as well as matters of public record and documents in plaintiff's possession, or that plaintiff knew of or relied upon, in bringing suit. *Chambers v. Time Warner*, 282 F.3d 147, 152-53 (2d Cir. 2002); *see also Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 46-48 (2d Cir. 1991).

ARGUMENT

PLAINTIFFS CANNOT MAINTAIN A CLAIM UNDER THE VISUAL ARTISTS RIGHTS ACT OF 1990.

(i) The Visual Artists 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 F.3d. 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) The Works are not of Recognized Stature.

VARA "affords artists the right to prevent destruction of their work if that work has achieved 'recognized stature' and carries over this protection even after the work is sold." *Castillo*, 950 F.3d. at 163. "[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. A work's high quality, status, or caliber is its stature, and the acknowledgement of that stature speaks to the work's recognition." *Id*. at 166. Although "work of recognized stature" is not defined in VARA, the court in *Carter v. Helmsley-Spear, Inc*., 861 F. Supp. 303 (S.D.N.Y. 1994) created a two-prong test to determine if a work is of recognized stature. "[F]or a work of visual art to be protected under this Section, a plaintiff must make a two-tiered showing: (1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." *Carter*, 861 F. Supp. at 325.

Here, Plaintiffs have alleged, in a conclusory manner, that the Works are a "work of recognized stature" and that they are "viewed as meritorious and [are] recognized by art experts and other members of the artistic community[.]" Complaint ¶35. They note that the Works were

awarded the "Art Commission[6] Award for Excellence in Design in 1988."[7] *Id*. They have further alleged that the Works have "received wide public acclaim and approval" and that the Works are "of recognized stature." Complaint ¶¶80 and 81. Yet, such "bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss." *Citibank, N.A. v. Itochu Intl., Inc.*, 01 Civ. 6007 (GBD), 2003 WL 1797847 at *1 (S.D.N.Y. Apr. 3, 2003).

During oral argument on the motion for a preliminary injunction, the Court found that the "only evidence submitted on that point was, first, the assertions by each artist that their works are of recognized stature." Zilkha Decl., Exhibit F at 59:10-12. While the court "respect[ed] the good faith in which it was said," it found that such assertions were "unpersuasive." *Id*. at 59:12-13. The Court noted that, in terms of evidence to support the claim that the Works were of recognized stature, Plaintiffs relied on the 1989 Art Commissioner's Award for Excellence which was "one piece of recognition, one, in 30 years." *Id*. at 59:18. The Court highlighted that this award came from "the City, which commissioned the work." *Id*. at 59:19. The Court also noted that it was not clear "from this record at what stage, in terms of conception and construction, the art was when the award was decided upon….The art certainly had not been installed, and so it's of limited weight, all things considered." *Id*. at 59:20-24.

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[6] *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).

[7] *See* Eighth Annual Awards for Excellence in Design, June 8, 1989, https://www1.nyc.gov/site/designcommission/awards/past-awards/design-awards-8.page (last accessed July 28, 2022).

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.

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)(citations omitted, emphasis added). Although Plaintiffs have notable and impressive resumes, they have not successfully alleged that the Works in question have achieved the same stature.

(iii) Not All of the Works are Visual Art for the Purpose of VARA.

Plaintiffs allege that all of the Works are works of visual art for the purposes of VARA. Complaint ¶75. 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). In *Cheffins v. Stewart*, 825 F.3d 588 (9th Cir. 2016), the Court of Appeals for the Ninth Circuit affirmed the trial court's grant of summary judgment finding that a school bus that had been transformed into a 16th century Spanish galleon was applied art because "it began as a rudimentary utilitarian object, and despite being visually transformed through elaborate artistry, it continued to serve a significant utilitarian function upon its completion."

Cheffins, 825 F.3.d at 595. The converted school bus's continuing utility made it a piece of applied art and thus it was not protected under VARA. *Id.*

Here, "Upright," like the bus in *Cheffins* 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 with *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), 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,* 825 F.3d at 594 (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.")

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

Plaintiffs allege that the Conservation Plan "improperly treats each portion of the Artwork as a separate piece and makes no provision for reuniting the different pieces of the Artwork at a later date." Complaint ¶58. 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 "The Judgments of Solomon and Pao Kung" 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."

At oral argument, the Court correctly found that the Works should not be considered one piece of art for the purposes of VARA because the "extent of the thematic unity between Mr. Haas' work and Ms. Snyder's is limited." Zilkha Decl., Exhibit F at 57:7-9.

The Court further found that the "friezes on the pedestrian bridge and 'Upright' and Ms. Snyder's other work have to do with the theme of justice, and it's a common element." *Id*. at 57:10-12. To the contrary, the Court found "much less commonality with the murals on Baxter Street by Mr. Haas." *Id*. at 57:15-16. Similarly, the Court found that the Works were not spatially related. The "Haas murals on the east side of the north tower are on Baxter Street. The 'Throne of Solomon' and the friezes by Mr. Haas are on the pedestrian bridge on White Street….The Seven Columns are on or close to Centre Street." *Id*. at 47:17-22. The Court thus did not find the "general location argument at all persuasive." *Id*. at 48:12-13.

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 Court of Appeals for 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 determines that the Works are considered to be one work of art, then, as discussed in section (v)(a), *infra*, for the purposes of the VARA building exception, all of the Works are covered by the VARA building exception.

(v) 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 artist has 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.*, 01 Civ. 1226 (DAB), 2005 WL 1153752, at *4 (S.D.N.Y. May 13, 2005).

Here, "Immigration on the Lower East Side of New York" is not covered by VARA because it is painted directly on a building and therefore falls under this building exception. 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. As set forth in that agreement, 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 Works] from public display[.]" Zilkha Decl., Exhibit A at Art. 7, Sec. 7.4. Thus, "Immigration on the Lower East Side of New York" is explicitly exempted from protection under VARA.

Of note, Plaintiffs allege in their Complaint that all of the Works have "been incorporated in and made part of 124-125 White Street in such a way that removing it, or any part thereof, from 124-125 White Street would cause its destruction, distortion, mutilation or modification." Complaint ¶56. In other words, Plaintiffs argue that all of the Works are part of the MDC. To the extent that this argument is credited by the Court, the City submits that the VARA building exception, which is clearly applicable to "Immigration on the Lower East Side of New York," would extend to all portions of the Works, thereby ensuring that none of the Works are protected by VARA.

b. 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[.]"17 U.S.C. § 106A(a)(3) and (c)(1). 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* Zilkha Decl., Exhibit C at 030. 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 protection under 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 "Upright" was in poor condition overall and, as a result, was unsalvageable. S*ee* Zilkha Decl., Exhibit C at 030. Even so, DDC has noted that samples of each material used in the existing installation would be saved and stored for future reference so that it could be reproduced. S*ee* Zilkha Decl., Exhibit C at 031.

c. 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 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*, 17 Civ. 2622 (LGS), 2017 WL 5466705 (S.D.N.Y. 2017 November 14, 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*, 17 Civ. 2622 (LGS), 2017 WL 5466705, at *5 (S.D.N.Y. 2017 November 14, 2017).

Plaintiffs do not even allege any gross negligence by Defendants in the anticipated removal and relocation of the Works. Thus, even if any of the Works are found to be protected under VARA, Defendants' relocation of the Works is in accordance with the law.

(vi) Plaintiffs' Honor and Reputation as Artists will not be Damaged by the Removal and Relocation of the Works.

Plaintiffs allege that their "honor and reputation as artists will be damaged if Defendants act on the City's stated intentions to demolish 124-125 White Street." Complaint ¶79. This allegation fails as a matter of law. In *Carter v. Helmsley-Spear, Inc*., 861 F. Supp. 303 (S.D.N.Y. 1994), the Court noted that "in determining whether 'intentional distortion, mutilation, or modification' of the Work would be 'prejudicial to [plaintiffs'] honor or reputation,' this Court

will consider whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community." *Carter*, 861 F. Supp. at 323.

Plaintiffs do not allege how their honor and reputation will be damaged by the demolition of the MDC and relocation and reconstruction of the Works. As set forth in the Conservation Plan, Defendants are taking great care to ensure that the art is salvaged and relocated, if possible, or documented if it cannot be salvaged. In addition, the Conservation Plan notes that the salvaged Works will be installed "at the new BBJ MN Facility or at an alternative site in consultation with artist" and that the Works that cannot be salvaged with be recreated "at the new BBJ MN [Manhattan] Facility or at an alternative site, in consultation with artist[.]" Zilkha Decl. Exhibit D at 009.

Thus, although the Works will be dismantled and, if possible, relocated, there is no allegation that this will happen in a way that might cause damage to the Plaintiffs' good name. The instant action can be distinguished from *Pavia v. 1120 Ave. of the Ams. Assoc.*, 901 F. Supp. 620 (S.D.N.Y. 1995), where the Court found that the plaintiff had adequately plead that the plaintiff's honor and reputation as an artist would be damaged where the work at issue had been "displayed improperly by distorting, altering, defacing, modifying and mutilating it, thus harming his honor and reputation as an artist." *Pavia*, 901 F. Supp. at 627.

Plaintiffs do not allege how the deconstruction and relocation or recreation of the Works will damage their honor or reputation. Any such allegation is further disputed by the fact that the Plaintiffs will be involved in the relocation and recreation of the Works. And indeed, at oral argument, this Court found that while the Plaintiffs "are extraordinarily well regarded artists. I simply do not believe that the plaintiffs have established that there would be any prejudice to the

honor or reputation of either one of them by anything complained of here." Zilkha Decl., Exhibit F at 54:3-7.

The Court also found that the Plaintiffs had "failed to show that the threatened use of their names as author in the event of any distortion and so forth, if any has been shown, they have failed to show that any such use would be prejudicial to his or her honor or reputation. " *Id*. at 53:22-25, 54:1-2.

Although the Plaintiffs allege that their honor and reputation will be damaged, "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *see also Gebhardt v. Allspect, Inc.*, 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (citations omitted).

CONCLUSION

For the foregoing reasons, defendants Eric Adams, Mayor of the City of New York, in his official capacity and The City of New York respectfully request that this Court dismiss the Complaint in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 8, 2022

By: /s/
Gati Dalal
Genan Zilkha
Assistant Corporation Counsels