SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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WENJUAN SHI & HAPPY 8 REALTY CORP.,

Plaintiffs,

Index No. 710343/2016

-against-

57 AVENUE CORP.,

Defendant.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
PRE-ANSWER MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Respectfully submitted by:

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A. **PRELIMINARY STATEMENT**

Pursuant to §3211(a) and §3025 of the Civil Practice Law and Rules, and on documentary evidence, Defendant, 57 Avenue Corp., by its attorneys, Spence Law Office, P.C., respectfully submits this Memorandum of Law in support of Defendant's Motion to Dismiss Plaintiff's First Amended Verified Complaint ("Complaint") dated May 14, 2017 for the reasons set forth herein.

Notwithstanding that Plaintiff Wenjuan Shi has now brought three (3) separate meritless and frivolous lawsuits (and multiple frivolous Lis Pendens which have recently been stricken) on the same set of facts (the second of which was a duplicate lawsuit to the instant case and has been dismissed and a motion to dismiss is pending in the third frivolous action), and has now filed an unauthorized amended complaint with four (4) unauthorized additional causes of action for preliminary injunction, permanent injunction, fraud, and punitive damages. This is really just a garden variety contract case. Notwithstanding its mistakes in the filing of a duplicate lawsuit and incorrect Lis Pendens that encumbered multiple other properties which are not the subject of this case – all of which mistakes Plaintiff was given the opportunity to correct without prejudice and consciously chose not to correct - Plaintiff charges on despite prejudice to the Defendant at every turn in having to litigate Plaintiff's mistakes to conclusion. Plaintiff has been admonished by two courts in separate decisions dated May 15, 2017 and May 16, 2017, respectively. This Court in its May 15, 2017 decision cancelling the *lis pendens* in this case, admonished the Plaintiff for its failure to correct its *lis pendens*, calling the Plaintiff's conduct "***disingenuous, at best; without merit in law; and bordering on "frivolous within the meaning of 22 NYCRR 130-1.1***." (Citations omitted) (See **Exhibit**

"A" to Spence Affirmation submitted herewith). Similarly, Judge Dufficy states in his decision dated May 16, 2017 that forcing Defendant to ***"defend two actions arising from the same real estate transaction instead of one, and the property has been encumbered with two lis pendens instead of one …is highly inequitable, and counsel's explanation is unacceptable."*** (See **Exhibit B** to Spence Affirmation).

Defendant is again facing another inequitable situation. Plaintiff has now doubled down on its past boorish and frivolous behavior by seeking, in the face of a decision to the contrary, to again expand its complaint to additional properties which are not the subject of the underlying contract of sale and to include 4 new and unauthorized causes of action under the following theories – preliminary injunction, permanent injunction, fraud and punitive damages. Plaintiff seeks an injunction against properties that are not the subject of the underlying contract of sale. The fraud and punitive damage claims do not exist in the face of a written contract and under the undisputed facts of the instant case.

Plaintiff has been served with a copy of the Order cancelling the *lis pendens* and yet Plaintiff does nothing again to correct its missteps. The sharp practice by Plaintiff should speak volumes to the Court about the actual merits of Plaintiff's case. Plaintiff seems hell bent on causing Defendant only prejudice and cost. Having lost its Notice of Pendency through no one's fault but its own, Plaintiff has essentially cut off its notice to spite its face.

That said, this is really just a garden variety contract case with one issue: whether the Defendant had the absolute right to terminate a contract of sale under the following provision in paragraph 6 of the underlying contract of sale:

> In the event the Premises is not completed by March 31, 2014, Purchaser and Seller shall have the option to cancel the Agreement and refund the down payment.

This clause protects both parties and is unconditional. Purchaser is not stuck in a contract where the home is delayed indefinitely and Seller can also get out of the deal if the delay is long. Both side accept a risk of market fluctuations but that is not a consideration under the contract of sale (See **Exhibit C** of the Spence Affirmation). You can rest assured that we would not be in this suit in the market value decreased. Based on this clause, the Defendant returned the Plaintiff purchaser's **entire** down-payment ($277,600) and terminated the contract. Purchaser Shi refused to accept the return of his deposit despite the clear and unequivocal contract provision. Three (3) separate lawsuits followed.

Plaintiff's First Amended Verified Complaint dated May 14, 2017 (the "FAC"), asserts nine (9) causes of action under the following theories: (i) specific performance; (ii) preliminary injunction; (iii) permanent injunction; (iv) breach of contract; (v) unjust enrichment; (vi) breach of covenant of good faith and fair dealing; (vii) fraud; (viii) breach of contract by Plaintiff Happy 8 Realty Corp., and lastly, (ix) punitive damages. A copy of the FAC is annexed to the Spence Affirmation as **Exhibit D**.

The breach of contract and specific performance causes of action must be dismissed based on the express terms of the agreement between the parties. Unjust enrichment must be dismissed as there exists a written contract between the parties. The fraud claim must be dismissed as it is duplicative of the breach of contract claims. The unjust enrichment claim has no merit because the Court would need to rewrite the contract for the parties and take away a substantive right. The unauthorized causes of

action (Second, Third, Seventh and Ninth causes of action) must be dismissed because they violate the Order authorizing Plaintiff to amend its complaint dated May 8, 2017 and CPLR 3025. Even if the court had authorized these causes of action, they fail to state a cause of action against the Defendant for preliminary injunction, permanent injunction, fraud, and punitive damages.

Accordingly Defendants are entitled to dismissal of this action as to all Plaintiff's causes of action, at a minimum, based on documentary evidence, failure to state a cause of action, as a matter of law and based on the plain language of the agreement between the parties.

B. PROCEDURAL HISTORY

This is an action seeking to enforce specific performance, breach of a contract for sale and unjust enrichment, among other causes of action, involving a parcel of property located at 35-05 Leavitt Street, Queens, New York. A Summons and Verified Complaint together with a Notice of Pendency, were filed in the office of the Queens County Clerk on or about August 29, 2016 under Index No. 710343/2016. The Notice of Pendency contained a defective property description and encumbered not only the subject property but also two adjacent properties owned by Defendant which are not the subject of the underlying contract between the parties.

On November 14, 2016, Plaintiff also commenced a duplicate second action involving the same parcel of property, and substantially the same parties and filed a second Notice of Pendency, in the office of the Queens County Clerk under Index No. 713636/2016. Plaintiff inexplicably refused to dismiss the second action warranting a

motion to dismiss by Defendant. The duplicate second action was dismissed by Order of the Court dated May 16, 2017. (See **Exhibit B** of the Spence Affirmation).

Similarly, the Plaintiff refused to amend its Notice of Pendency in this action notwithstanding the many acknowledgements in its various filings of the correct boundaries of the Property, and Defendant was compelled to move to cancel the Notice of Pendency.

On or about October 11, 2016, issue was joined by Defendant, by the filing and service of a Verified Answer with Counter-Claims.

Plaintiff's served and filed their Reply to Defendant's counter-claims on or about November 14, 2016.

By Notice of Motion dated November 17, 2016, Defendant moved for summary judgment on all causes of action in the original complaint. This motion was submitted for decision on February 2, 2017.

By Order to Show Cause, Defendant moved on January 13, 2017 to vacate the defective Notice of Pendency filed by Plaintiff. Plaintiff opposed the application and the application was submitted for decision on February 23, 2017. This relief was granted to Defendant in the May 16, 2017 Order.

By decision dated April 24, 2017, the Court denied Defendant's motion for summary judgment "without prejudice, on the grounds that the motion to amend the complaint was granted."

By Order of the Court dated May 15, 2016, the Court cancelled the Notice of Pendency. (See **Exhibit A** of the Spence Affirmation). In its decision, the Court stated:

> Plaintiff's conduct in arguing that the purchase agreement was meant to encompass the entire "50 foot by 65 foot" lot, given the contrary

> allegations in plaintiff's own complaint(s), is disingenuous, at best; without merit in law; and bordering on "frivolous within the meaning of 22 NYCRR 130-1.1" [citation omitted] …. even without a definitive showing of an ulterior motive on the part of plaintiff, plaintiff's continued obstinacy to abandon or moderate this obviously overreaching notice of pendency, demonstrates sufficient conduct to mandate its being vacated and cancelled for failing to comply with CPLR 6501.

The Complaints

Plaintiff's original complaint contained three causes of action for (1) breach of contract,[1] (2) specific performance and (3) breach of good faith and fair dealing. A copy of the Original Complaint is annexed as **Exhibit E** to the Spence Affirmation. On January 20, 2017, Plaintiff moved for leave to file an Amended Complaint to add **one** additional cause of action for unjust enrichment. By Order of the Court dated May 8, 2017, Plaintiff was authorized to add the single cause of action for unjust enrichment in the form of its 12 page proposed amended complaint which was annexed to its moving papers. A copy of the Order dated May 8, 2017 is annexed as **Exhibit F** to the Spence Affirmation. A copy of the Proposed Amended Complaint is annexed as **Exhibit G** to the Spence Affirmation. Instead of filing the Proposed Amended Complaint and in complete disregard of the May 8, 2017 Order and CPLR 3025, Plaintiff filed the 35 page FAC without any authorization, with the 3 original causes of action (splitting the broker and purchaser contract breach claims into 2 claims) and adding **four** additional unauthorized causes of action. So, the FAC includes the following causes of action: (1) specific performance; (2) preliminary injunction; (3) permanent injunction; (4) breach of contract; (5) unjust enrichment; (6) breach of covenant of good faith and fair dealing; (7)

[1] The Original Complaint included both the Breach under the Contract of Sale and the broker's commission under the same cause of action. The Proposed Amended Complaint and the FAC split this one cause of action into 2 separate causes of action. Unjust enrichment was the only additional cause of action authorized by the Court in its May 8, 2017 Order.

fraud; (8) breach of contract by Plaintiff Happy 8 Realty Corp., and lastly, (9) punitive damages. A copy of the FAC is annexed as **Exhibit D** to the Spence Affirmation.

Defendant now moves this Court by way of the instant motion to dismiss the unauthorized First Amended Verified Complaint.

C. STATEMENT OF FACTS

This action arises from Plaintiff Shi's refusal to abide by the express terms of his contract with Defendant 57 Avenue. A contract was entered between Plaintiff Shi and Defendant for the sale of real property containing a to-be-constructed four family home upon it. The contract of sale expressly granted each party with reciprocal rights to terminate the agreement if any delays in the construction prevented the parties from closing before a specific date. Despite Defendant's best efforts, construction was substantially delayed by multiple stop work orders issued by the Department of Buildings. Work by the Defendant commenced immediately and on schedule prior to the first Partial Stop Order on or about August 20, 2013 through August 28, 2013, issued by the Department of Buildings. (A copy of the Department of Buildings records regarding the August 28, 2013 Partial Stop Work Order is attached hereto as "**Exhibit H**").

The second stop order was on or about September 5, 2013, by the Department of Buildings and was a Full Stop Work Order.(A copy of the Department of Buildings records regarding the September 5, 2013 Full Stop Work Order is attached hereto as **Exhibit I**). All work on the Construction Project remained stopped for a period of approximately two and one-half (2 1/2) months, until on or about November 20, 2013, when the Department of Buildings rescinded the September 5, 2013 Full Stop Work Order, and dismissed the violation. **(Exhibit I**

Stop work Order).

Work on the entire Construction Project, once again came to a stop on or about February 12, 2014, by the Department of Buildings by issuing a Full Stop Work Order . **(**A copy of the Department of Buildings' disposition history concerning the February 12, 2014 Full Stop Work Order for the balcony work is attached hereto as **"Exhibit J")**. Then on or about November 20, 2014, the Department of Buildings partially rescinded the February 12, 2014 Stop Work Order, and allowed Defendant to perform limited amount of work. **("Exhibit "J").**

Nearly two years later, with on and off work due to Stop Work Orders which Defendant had to comply with, on or about October 29, 2015, the Department of Buildings, partially rescinded the February 12, 2014 Stop Work Order further, to allow Defendant to perform partial additional work. ("**EXHIBIT J**"). It was not until May 10, 2016 that the Department of Buildings fully rescinded the entirety of the Stop Work Order issued regarding the balcony work. **(**A copy of the Department of Buildings records for the February 12, 2014 Full Stop Work Order is attached hereto as **"Exhibit J**").

After it became obviously clear that the construction would definitely neither be completed within the time specified in the contract of sale, nor within a reasonable time following the agreed upon date, Defendant elected to terminate the agreement pursuant to the terms of the Contract Agreement. The $277,000 deposit on the Contract of Sale was returned by 57 Avenue on termination but refused by Plaintiff on three separate occasions and over a time period of (Spence Affirmation, **Exhibit K**, Answer With Counterclaims,

¶¶42-48). Plaintiff Shi refused to accept Defendant's termination even after 3 attempts by defendant to send back Shi's full contract down payment.

This action also arises from the broker, Plaintiff Realty Corp's refusal to abide by the express terms of its contract with Defendant. Defendant 57 Avenue and Plaintiff Happy 8 Realty Corp (hereinafter referred to as "Realty Corp.") entered a written commission agreement, pursuant to which Plaintiff Realty Corp's entitlement to commission was made expressly contingent upon the transfer of title. (A copy of the Contract of Sale is attached hereto as **"Exhibit C"**). Since Defendant elected to terminate its contract with Plaintiff Shi due to the construction delays, title to the real property never transferred. Notwithstanding the fact that title never transferred, and notwithstanding the fact that Plaintiff Realty Corp expressly agreed that its entitlement to its commission would be contingent upon the transfer of title, Plaintiff Realty Corp. believes it should nevertheless receive its commission from Defendant. (A copy of the Commission Agreement is attached hereto as **"Exhibit L").**

D. **LEGAL STANDARD**

In considering a motion to dismiss for failure to state a cause of action made pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Marinez*, 34 N.Y. 2d 83, 87-88 (1994); see also *Sokoloff v Harriman Estates Dev. Com.*, 96 N.Y.2d 409, 414 (2001). A CPLR 3211(a) motion may be directed against a portion of the cause of action, the pleading as a whole, or even against an individual cause of action. *See*,

generally, Practice Commentary 3211:9 under N.Y.C.P.L.R. 3211 in McKinney's Consolidated Laws of New York, Book 7B.

E. **ARGUMENT**

1) ACCORDING TO CPLR 3211(A) THE COURT SHOULD DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION CLAIM FOR SPECIFIC PERFORMANCE BECAUSE THE PARTIES HAD A CONTRACTED TERMINATION CLAUSE

The Court of Appeals, in addressing the specific issue of the right to terminate an agreement pursuant to the provisions contracted for in an agreement, has held that where parties agree to a termination clause in their agreement it must be enforced as written. *A.S. Rampell, Inc. v. Hyster Co.,*3 N.Y.2d 369, 382 (1957).

Plaintiffs and Defendant contracted for a termination clause, which must be construed and enforced as written. Where, as in the instant action, the contract "affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms." *Red Apple Child Dev. Ctr. v. Cmtv. Sch. Districts Two,* 303 A.D.2d 156, 157, 756 N.Y.S.2d 527, 529 (1st Dep't 2003). "[A] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive" *A.J. Temple Marble & Tile, Inc. v. Long Island R.R.,* 256 A.D.2d 526, 527, 682 N.Y.S.2d 422, 423 (2nd Dep't 1998) *citing Big Apple Car, Inc. v. City of N.Y.,* 204 A.D.2d 109, 111, 611 N.Y.S.2d 533, 534 (1st Dep't 1994); *see also Div. of Triple T Serv., Inc. v. Mobil Oil Corp.,*_60 Misc. 2d 720, 726, 304 N.Y.S.2d 191, 198 (Sup. Ct. 1969), *aff'd sub*

nom. Div. of Triple T Serv. v. Mobil Oil Corp., 34 A.D.2d 618, 311 N.Y.S.2d 961 (2nd Dep't 1970).

The clear and unambiguous terms of the Contract of Sale make clear that Defendant had an absolute and unconditional right of cancellation if the Defendant could not complete the Construction Project and obtain the Certificate of Occupancy required to transfer title at a Closing on or before June 2014. *Ying-Qi Yang v. Shew-Foo Chin,* 42 A.D.3d 320, 320, 839 N.Y.S.2d 90, 90-91 (1st Dep't 2007); *Red Apple Child Dev. Ctr. v. Community School Dists. Two,* 303 A.D.2d 156, 157-158, 756 N.Y.S.2d 527 (1st Dep't 2003), *Iv. denied* 1 N.Y.3d 503, 775 N.Y.S.2d 240, 807 N.E.2d 290 (2003).

As stated above, the Court of Appeals has held that termination clauses must be enforced as written. Here, since the Contract of Sale granted the Defendant the contractual right to terminate the agreement, and since Defendant elected to terminate the Contract of Sale pursuant to the termination clause, the Court must find that such termination does not constitute a breach of the Contract of Sale. Accordingly, dismissal in favor of Defendant 57 Avenue must be granted on Plaintiff s cause of action for breach of contract, and the same must be dismissed with prejudice.

2. THE MOTION TO DISMISS PLAINTIFF'S BREACH OF CONTRACT CLAIM SHOULD BE GRANTED PURSUANT TO BOTH CPLR §3211(a)(1) & (7) AS IT FAILS TO STATE A CAUSE OF ACTION FOR WHICH RELIEF MAY BE GRANTED AND IS ALSO BASED ON DOCUMENTARY EVIDENCE

A dismissal pursuant to both CPLR 3211(a)(1) and (7) is no less on the merits than a dismissal pursuant to CPLR 3211(a)(1) alone. *Randall's Island Aquatic Leisure,*

LLC, v. City of New York, 2013 WL 2951945; *see also DDR Const Servs.*, 770 F.Supp.2d at 647-48; *see also Feigen,* 536 N.Y.S.2d at 787-88.

It is a fundamental principle of New York Law, that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.,* 98 N.Y.2d 562, 569, 780 N.E.2d 166, 170 (2002); *R/S Associates v. N.Y. Job Dev. Auth*., 98 N.Y.2d 29, 32, 771 N.E.2d 240, 242 (2002); *Regal Realty Servs., LLC v. 2590 Frisby, LLC*, 62 A.D.3d 498, 501, 878 N.Y.S.2d 363, 366 (1st Dep't 2009).

An action may be disposed as a matter of law where the role of the Court is to interpret and apply the plain meaning of the undisputed documents. *1550 Fifth Avenue Bay Shore, LLC v. 1550 Fifth Avenue, LLC.,* 297 A.D.2d 781, 783, 748 N.Y.S.2d 601, 603 (2nd Dep't 2002) ("[t]he interpretation of a contract is a matter of law for the court"); *National Granite Title Ins. Agency, Inc. v. Cradlerock Properties Joint Venture, LP.,* 5 A.D.3d 361, 362, 773 N.Y.S.2d 86, 87 (2nd Dep't 2004), *quoting Riley v. South Somers Dev. Corp.,* 222 A.D.2d 113, 117, 644 N.Y.S.2d 784 (2nd Dep't 1996)("[w]here the contract, as here, is unambiguous, 'its interpretation is a matter of tow and effect must be given to the parties as reflected by the express language of the agreement'"); *Van Wagner Adv. Corp. v. S & M Enters.,* 67 N.Y.2d 186, 191, 501 N.Y.S.2d 628, 492 N.E.2d 756 (1986) (whether or not a writing is ambiguous is a question of law to be resolved by the courts).

Similarly, it is well settled that contractual provisions placing limitations on the remedies available upon the non-performance of the other contracting party, is enforceable. That is, "[w]hen a contract for the sale of real property contains a clause

specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that we limit the buyer to the remedies for which it provided in the sale contract'." *Gindi v. Intertrade Internationale Ltd*., 50 A.D.3d 575, 576, 856 N.Y.S.2d 104, 105 (1st Dep't 2008), citing *Mehlman v. 592-600 Union Ave. Corp*., 46 A.D.3d 338, 343, 847 N.Y.S.2d 547 (1st Dep't 2007), quoting *101123 LLC. v. Solis Realty LLC.*, 23 A.D.3d 107, 108, 801 N.Y.S.2d 31 (1st Dep't 2005). The Court of Appeals, in addressing the specific issue of the right to terminate an agreement pursuant to the provisions contracted for in an agreement, has held that where parties agree to a termination clause in their agreement it must be enforced as written. *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 382 (1957).

In *Randall's Island Aquatic Leisure, LLC,* supra., Plaintiff's filed an action against Defendants in the New York State Supreme Court for New York County. *Randall's Island Aquatic Leisure, LLC, v. City of New York,* 2013 WL 2951945. Plaintiff's complaint alleged six causes of action against the State Defendants, three counts of breach of contract, and one count of breach of implied duty of good faith and fair dealing, among other counts. *Id., Randall's Island Aquatic Leisure, LLC;* WL 2951945. The lower Court granted Defendant's Motion to Dismiss based on Rule 3211(a)(1) and supporting documentary evidence and found that the plain terms of the agreement between the parties demonstrated the dismissal on all counts. *Id.* The New York State Appellate decision affirmed the lower courts decision to grant Defendant's Motion to Dismiss pursuant to NY CPLR 3211(a)(7) and (1) and found:

"In dismissing counts 1, 2, and 3 (breach of contract), and count 4

> (breach of the implied duty of good faith, cooperation, and fair dealing), Justice Smith resorted exclusively to the Concession Agreement, finding that its plain terms contradicted Plaintiff's claims." The Court went on to say: "Accordingly, an 'examination of Justice [Smith's] ruling clearly demonstrates that dismissal of counts 1, 2, 3, 4, and 6 [estoppel] was based on the documentary evidence submitted to the court, and 'not merely because of technical pleading defects.'" citing *Feign*, 536 N.Y.S.2d at 788.

In addition, the court also found that:

> "all of Plaintiff's state claims ran afoul of the documentary evidence in the record, **and in particular the terms of the Concession Agreement, which was the most important document before her**. The outcome would have been no different after discovery."
> Emphasis added. *Id., Randall's Island Aquatic Leisure, LLC;* WL 2951945.

In the present action, alike *Randall's Island Aquatic Leisure*, the Contract of Sale contains the entire agreement between the Defendant and Plaintiff Shi. We plead that this Court, like in *Randall's Island Aquatic Leisure, LLC*, supra, holds that the terms of the Contract of Sale is the most important document and that the Contract of Sale expressly limited the Plaintiff's remedy in the event of the Defendant's breach, non-performance, or termination. Further, the agreement expressly granted Defendant the right to terminate the Contract of Sale. While Defendant terminated the agreement in accordance with the terms of the Contract of Sale, even assuming arguendo, that Defendant's actions constituted a default or breach under the terms of the agreement, Plaintiff's remedies as limited by the express terms of the Contract of Sale would nevertheless be restricted to a return of the Initial Deposit and Second Deposit. This is because, as Plaintiff agreed to, in two (2) different Paragraphs of the Contract of Sale, that:

> The home shall be constructed and completed in accordance with plans and specifications signed by the Purchaser no later than March 31, 2014... In event there are substantial delays purchasers shall have option to cancel

> the contract if not completed by June 2014... In the event the Premises is not completed by March 31, 2014, Purchaser and *Seller shall have the option to cancel the Agreement and refund the downpayment.* (Emphasis Added)
>
> (**Exhibit " C",** Contract of Sale, ¶6)
>
> * * * * * *
>
> in the event of *any breach, default, non-performance, and/or failure to deliver the Premises by Seller [Defendant]* for any reason other than willful default, *Purchaser's [Plaintiff Shi's] sole remedy is to cancel this Contract* and be entitled to the full return of the down payment of *and Purchaser is not entitled to any damages (direct or consequential).* (Emphasis Added).
>
> (**Exhibit "C"** Contract of Sale, ¶ 24).

The fact that the restrictions on the available remedies and the limitations of the Defendant's liability for non-performance is found within two (2) separate Paragraphs of the Contract of Sale make it unequivocally clear that the parties waived the right to seek specific performance. This was a routine contract of sale that Plaintiff's have spun into meritless claims and unjustified and frivolous motions and actions. Plaintiff's cause of action for breach of contract should be dismissed. In addition, for all of the foregoing reasons, Defendant Motion to Dismiss should be granted.

Similarly, the Broker's contract claim should also be dismissed. Since Defendant elected to terminate its contract with Plaintiff Shi due to the construction delays, title to the real property never transferred. Plaintiff Realty Corp expressly agreed that its entitlement to its commission would be contingent upon the transfer of title. Since title did not transfer no fee is due and the broker's cause of action for breach of contract should be dismissed. (A copy of the Commission Agreement is attached hereto as **"EXHIBIT H").**

3. THE SIXTH CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING MUST BE DISMISSED AS A MATTER OF LAW

In the Second cause of action in the FAC, Defendants argue that plaintiff breached a duty of good faith and fair dealing. However, a party exercising its rights under a contract cannot be guilty of a breach of the covenant of good faith and fair dealing.

Under New York law, "[t]he implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement. *1357 Tarrytown Road Auto, LLC v Granite Properties, LLC,* 142 A.D.3d 976 (Second Dept., 2016)(*citing Frankini v. Landmark Constr. of Yonkers, Inc.,* 91 A.D.3d 593, 595, 937 N.Y.S.2d 80; *P.T. & L. Contr. Corp. v. Trataros Constr., Inc.,* 29 A.D.3d 763, 764, 816 N.Y.S.2d 508). However, the implied covenant creates no additional implied obligation that would be inconsistent with other terms of the contractual relationship Id. (*citing Dalton v. Educational Testing Serv.,* 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289; *Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 448 N.E.2d 86).

In *1357 Tarrytown*, the Court stated that "a finding that the defendants breached the covenant of good faith and fair dealing would necessarily contradict explicit and unambiguous terms of the lease agreements and create additional obligations not contained in them" and that "[i]mposing a duty on the landlord to disclose [certain local law restrictions that he specifically had no responsibility to disclose under provisions in the agreements] would render those provisions ineffective. Id. (citing *Phoenix Garden Rest. v. Chu,* 245 A.D.2d 164, 667 N.Y.S.2d 20). The Court concluded that "[t]hese

express and specific provisions in the lease itself conclusively establish a defense to causes of action alleging breach of the implied covenant of good faith and fair dealing. Id. (*citing Minovici v. Belkin BV,* 109 A.D.3d 520, 521, 971 N.Y.S.2d 103; *cf. Sunset Cafe, Inc. v. Mett's Surf & Sports Corp.,* 103 A.D.3d 707, 708–709, 959 N.Y.S.2d 700; *Laxer v. Edelman,* 75 A.D.3d 584, 586, 905 N.Y.S.2d 649), and for rescission (*cf. generally Jack Kelly Partners LLC v. Zegelstein,* 140 A.D.3d 79, 33 N.Y.S.3d 7).

Based on the existence of the express right to terminate in the PSA, Defendant was exercising its right to terminate the PSA. Forcing Defendant to sell to Plaintiff notwithstanding the express right to terminate and finding Defendant in default of the covenant of good faith and fair dealing for not doing so would render the express provisions of the PSA ineffective and meaningless.

4. PLAINTIFF'S UNJUST ENRICHMENT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION FOR WHICH RELIEF MAY BE GRANTED UNDER CPLR 3211(a)(7).

To plead a claim for unjust enrichment a plaintiff must allege "'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'" *Mandarin Trading Ltd. v Wildenstein,* 16 N.Y. 3d 173, 182 2011 (citations omitted).

An unjust enrichment claim is a quasi-contractual claim that "can be maintained only in the absence of a valid, enforceable contract." *Ohio Players, Inc. v. Polygram Records, Inc.,* No. 99-CV-0033, 2000 WL 1616999, at *4 (S.D.N.Y. Oct. 27, 2000); *Clark–Fitzpatrick v Long Is. R.R. Co.,* 70 N.Y.2d 382, 389, 516 N.E.2d

190 (1987); *McGee v. State Farm Mut. Auto. Ins. Co.*, No. 09 Civ. 3579, 2011 WL 5409393, at *9 (E.D.N.Y. Nov. 8, 2011) ("An unjust enrichment claim is duplicative of a breach of contract claim where the cause of action stems from the contractual relationship") (internal citations omitted); *Air Atlanta Aero Engineering Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009) ("[Plaintiff's] failure to allege that the contracts at issue are invalid or unenforceable precludes it . . . from seeking quasi- contractual recovery for events arising out of the same subject matter.").

The Contract of Sale is an enforceable contract, and Plaintiff already asserts claims for breach of that contract. Thus, Plaintiff's unjust enrichment claim must be dismissed because it is already based on an existing contract governing the same subject matter, and duplicates Plaintiff's breach of contract claims. *See, e.g., Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 587 (2d Cir. 2006) (affirming dismissal of unjust enrichment claim because of the existence of an enforceable written contract governing the subject matter); *Clark–Fitzpatrick*, 70 N.Y.2d at 388-390 (same); *McGee*, 2011 WL 5409393, at *9 (dismissing unjust enrichment claim because it "stems from the alleged contractual relationship" between the parties). *See also, e.g., Gross Foundation, Inc. v. Goldner*, No. 12 Civ. 1496, 2012 WL 6021441, at *11-12 (E.D.N.Y. Dec. 4, 2012) (dismissing unjust enrichment claim as duplicative of breach of contact claim); *Spread Enterprises, Inc. v. First Data Merchant Services Corp.*, No. 11 Civ. 4743, 2012 WL 3679319, *5-6 (E.D.N.Y. Aug. 22, 2012) (same).

5. PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT IS NOT

AUTHORIZED AS A MATTER OF LAW UNDER CPLR §3025 AS IT VIOLATES THE ORDER OF THE COURT AND SHOULD ALSO BE DISMISSED IN ITS ENTIRETY IT SHOULD ALSO BE DISMISSED AS THE CLAIMS ARE MERITLESS AND FAILURE TO STATE A CAUSE OF ACTION UNDER CPLR 3211(a)(7).

CPLR §3025 (b) provides in part that "…a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." N.Y. C.P.L.R. 3025 (McKinney). The Order authorizing the amendment in this case provides:

> "UPON the Notice of Motion for Leave to File an Amended Complaint (motion sequence number two (#002) (the "Motion") to add a cause of action for unjust enrichment, filed by Plaintiff on January 20, 2017, ..."
>
> "ORDERED, that Plaintiffs shall file and serve their Amended Complaint within 30 days of service of this Order with notice of entry."

When a pleading is amended by leave of court, it must go **no further than the order permits**. If it does, the adverse party's remedy is "'a motion to strike out the excessive portions.'" Emphasis added. *Ias Bicor Corp. v. Mezrahi,* 22 A.D.2d 898, 255 N.Y.S.2d 402 (2d Dep't 1964). The defense may do this by a Motion to Dismiss, which may request the Court to consider null any part of the amended pleading deemed inconsistent with the court's order. *Id.* The original complaint must give notice of the transaction upon which the allegations in the amended complaint are based. *Sabella v. Vaccarinol,* 263 A.S.2d 451. The determination of whether to allow such an amendment is reserved for the court's discretion, and exercise of that discretion will not be overturned without a showing that the facts offered for the amendment do not support the new claim(s) *Murray v. City of New York,* 43 N.Y.2d 400, 401 N.Y.S.2d 773. Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied (*see Davis & Davis v. Morson,* 286 A.D.2d 584, 585, 730 N.Y.S.2d 293 [2001]);

Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 875 N.Y.S.2d 8, 8–9 (N.Y. App. Div. 1st Dept. 2009).

In *Sabella,* leave to amend the complaint was granted, and plaintiff's served an amended complaint containing additional causes of actions which did not relate back to the allegations in the original complaint. *Id.* The Court held that the amended complaint must conform to the proposed amended complaint which the Court had given them leave to serve, by ruling that: "the original complaint gives no notice whatsoever of the transaction upon which these allegations are based...". *Id.*

Accordingly, the Second, Third, Seventh, and Ninth Causes of action for preliminary injunction, permanent injunction, fraud, and punitive damages, respectively, do not relate back and are otherwise all unauthorized and must be stricken by the Court.

6. PLAINTIFF CANNOTE SUSTAIN ITS PRELIMINARY AND PERMANENT INJUNCTION CLAIMS

The party seeking a preliminary injunction must demonstrate (1) a probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) a balance of equities in its favor." '(*Nobu Next Door, LLC v. Fine Arts Hous., Inc.,* 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 833 N.E.2d 191 [2005]; *see also Ricca v. Ouzounian,* 51 A.D.3d 997, 998, 859 N.Y.S.2d 238 [2d Dept. 2008].) Specifically, these standards have been applied in an action for specific performance of a contract for the sale of real property where the plaintiffs sought a preliminary injunction "prohibiting the defendants from conveying or taking any action with respect to the subject property which would be adverse to the plaintiffs' interest therein" (*see Gresser v. Princi,* 128 A.D.2d 752, 752–53,

513 N.Y.S.2d 462 [2d Dept. 1987]; *see also Vincent v. Seaman*, 152 A.D.2d 841, 842–43, 544 N.Y.S.2d 225 [3d Dept. 1989]).

Generally, in a pure contract money action, there is no right of the plaintiff in some specific subject of the action, and hence no prejudgment right to interfere in the use of the defendant's property, and no entitlement to injunctive relief pendente lite. *Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.*, 889 N.Y.S.2d 793 (N.Y. App. Div. 4th Dept. 2009). (See also, *Serio v. Black, Davis & Shue Agency, Inc.*, No. 05-CV-15, 2005 WL 3642217, at *6 (S.D.N.Y. Dec. 30, 2005) (explaining that to obtain a preliminary injunction, the movant must "satisfy the court that he is asserting an equitable claim ... and that the injunctive relief that he is seeking is related to that claim, or, alternatively, that he should be deemed to have an equitable lien, or other interest enforceable in equity, on the assets that he is seeking to attach or otherwise freeze"); *Micnerski v. Sheahan*, 02-C-7025, 2002 WL 31415753, at *1 (N.D. Ill. Oct. 25, 2002) (instructing that "the relevant inquiry is not simply whether plaintiff seeks *any* equitable relief, but whether there is a 'nexus' between the assets sought to be frozen ... and the equitable relief requested in the lawsuit"); Coley *v. Vannguard Urb. Improvement Assn., Inc.*, 2016 WL 7217641, at *2 (E.D.N.Y. Dec. 13, 2016); when the injunctive relief requests freezing of assets more generally, rather than those connected to a particular property or fund that is the object of the ultimate equitable relief sought, courts have found that they lack the authority to issue injunctions "to effectuate the collection of money in satisfaction of ... alleged legal liability." *JSC Foreign Econ. Ass'n. Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 389 (S.D.N.Y. 2003); *see also Walczak v. EPL Prolong, Inc., 198 F.3d 725, 729*–30 (9th Cir. 1999).

Coley v. Vannguard Urb. Improvement Assn., Inc., 12CV5565PKCRER, 2016 WL 7217641, at *3 (E.D.N.Y. Dec. 13, 2016). Courts consistently refuse to allow preliminary injunctions when such injunctions essentially "seek[ ] security for a potential future award of money damages" and are requested merely because of a "feared inability to collect a prospective judgment." *Essroc Cement Corp. v. CPRIN, Inc.*, 593 F. Supp. 2d 962, 971 (W.D. Mich. 2008); *see also Henderson v. Biltbest Prods. Inc.*, 4:10-CV-01503, 2010 WL 5392828, at *7 (E.D. Mo. Dec. 22, 2010).

Here, Plaintiff's alleges that its "irreparable injury" is the loss of non-subject properties Lots 114 and 115. Based on the May 15, 2017 Order, the law of the case is that these properties are not part of the underlying contract. Plaintiff cannot show likelihood of success as Plaintiff has already lost. Obviously, the equities do not favor Plaintiff on these facts. Plaintiff is limited to a recovery of it down payment and therefore an action for injunctive relief does not exist. Hence, in addition to dismissal of these cause of action as being unauthorized by the Court or CPLR 3025, the preliminary injunction cause of action has no merit and must be dismissed.

Similarly, with regard to the cause of action for a permanent injunction, Plaintiff seeking permanent injunction must demonstrate that: (1) it has suffered irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering balance of hardships between plaintiff and defendant, remedy in equity is warranted; and (4) public interest would not be disserved by permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

In this case, Plaintiff can satisfy none of these elements. There is a remedy under the contract – return of the down payment - there is no irreparable injury, the equities do not favor the Plaintiffs and Plaintiffs are under no hardships, and public interest would be disserved particularly by enjoining the sale of unrelated lots 114 and 115 which Plaintiff seeks to enjoin Defendant from selling. (See i.e., FAC ¶¶ 127-128). The decision of the Court dated May 15, 2017 makes this very clear, (not to mention the Contract of Sale itself and the Plaintiff's own admissions) , Lots 114 and 115 are not the subject properties in this case.

7. THE FRAUD ALLEGATIONS IN THE FAC ARE DUPLICATIVE OF CONTRACT CLAIMS

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark- Fitzpatrick*, 70 N.Y.2d at 389. "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract." *Id.* Using "familiar tort language" in a complaint does not create "a tort claim in the absence of an underlying tort duty." *N.Y. Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 319-20 (1995). Similarly, "[m]erely alleging scienter . . . does not convert a breach of contract cause of action into one sounding in fraud." *Del Ponte v. 1910-12 Ave. U. Realty Corp.*, 7 A.D.3d 562, 562 (2d Dep't 2004). "[W]here a party is merely seeking to enforce its [contractual] bargain, a tort claim will not lie." *N.Y. Univ.*, 87 N.Y.2d at 316.

Thus, New York courts have held that a fraud claim cannot be stated when the fraud claim is duplicative of the breach of contract claim. A fraud claim is duplicative of a breach of contract claim when the alleged fraud does not rest on a breach of a duty

independent of the contract and does not assert damages distinct from the alleged breach of contract damages. *Manas v. VMS Assocs., LLC,* 53 A.D.3d 451, 454 (1st Dep't 2008) (even if representations extraneous to the contract are alleged, the fraud-based causes of action must be dismissed for an "independent reason" when the plaintiff fails to "allege that [it] sustained any damages that would not be recoverable under [its] breach of contract cause of action."); *Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004) (for "a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract."). *Tsilogiannis v. 53-11 90th St. Assocs.*, 739 N.Y.S.2d 633, 633, 293 A.D.2d 468 (2d Dep't 2002); *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988).

The allegations supporting the unauthorized fraud cause of action in the FAC (¶¶ 202-217) are devoid of any facts that are separate from the Contract of Sale or any facts that allege any fraud extraneous from the Contract of Sale.

Such a duplicative fraud claim must be dismissed. *Id. See also, e.g., Mosaic Caribe, Ltd. v. AllSettled Group, Inc.*, 117 A.D.3d 421, 423-24 (1st Dep't 2014) (dismissing fraud claim as duplicative where plaintiff's fraud claim sought the same damages as plaintiff's breach of contract claim, namely return of the contract deposit); *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 600-01 (1st Dep't 2014) (dismissed fraud claim as duplicative of breach of contract claim for seeking same damages).

It is black letter law that a cause of action for fraud does not arise when the only fraud charged relates to a breach of contract. *Gorman v. Fowkes,* 97 A.D.3d 726, 727 (2d Dep't 2012); *Clark-Fitzpatrick, Inc. v. Long Island R. Co*., 70 N.Y.2d 382, 389 (1987) ("a breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"). A fraud claim may coexist with a breach of contract claim only where the alleged fraud constitutes a breach of a duty separate and apart from, or collateral to, the contract itself. See *W.I.T. Holding Corp. v. Klein*, 282 A.D.2d 527, (2d Dep't 2001).

In determining what constitutes a representation "collateral" to the contract, courts inquire: i) whether the misrepresentations are based on the same facts that underlie the contract cause of action; ii) whether the misrepresentations are of future intent rather than a misrepresentation of present fact. *Selinger Enterprises, Inc. v. Cassuto,* 50 A.D.3d 766, 768 (2008) ("the elements of fraud are representation of a material existing fact, falsity, *scienter,* deception and injury.") Therefore, a misrepresentation of future intent is not actionable in either fraud. *See DaCosta v. Trade-Winds Environmental Restoration, Inc.*, 61 A.D.3d 627, 628 (2d Dep't 2009).

Here, the Complaint does not plead any type of misrepresentations of present fact collateral to the alleged contract and separate and apart from that contract, and therefore, the Complaint does not state a cause of action for fraud. This is a garden-variety contract lawsuit, and there are no circumstances under which there is a representation separate and apart from the breach of contract. The allegations specific to the Fraud cause of action are the same breach of contract allegations repackaged as fraud claims.

Moreover, a misrepresentation of "future intent" is not actionable in fraud. *Financial Structures Limited*, 77 A.D.3d at 419. At bottom, the Complaint does not plead any type of misrepresentations of "present fact" that is collateral to the alleged contract, and thus actionable in fraud. Accordingly , there is no basis for Plaintiff's fraud claim against Defendant and for this reason the Fraud claim should be dismissed as duplicative to the Breach of Contract claim.

Moreover, the fraud claims fail because there is no detail of the fraud. "[T]he circumstances constituting the wrong shall be stated in detail." *see* CPLR 3016(b); *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011). The FAC fails to, plead the misstatements of material facts, specify how Plaintiffs relied upon Defendant's misrepresentations of fact, and the general details surrounding the fraud. As such, "[g]eneral allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim." *MBIA Ins. Corp. v. Countywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dept. 2011).

CPLR §3016(b) requires that the "circumstances constituting the wrong be stated in detail." To satisfy the heightened pleading requirements for fraud, courts have held that the complaint must state "who made the misrepresentation to whom, the date the misrepresentation was made, and its content." See *El Entertainment v. Real Talk Entertainment, Inc.*, 85 A.D.3d 561, 562 (1st Dept. 2011).

Most importantly, an element of fraud is "a material misrepresentation of a fact" with "knowledge of its falsity". *Nicosia v. Board of Managers of Weber House Condominium*, 77 A.D.3d 455, 456 (1st Dept. 2010).

Accordingly, the Fraud cause of action should also be dismissed on grounds that

Plaintiffs utterly failed to satisfy the heightened pleading requirements for fraud.

8. PUNITIVE DAMAGES BE STRICKEN FROM THE FAC BECAUSE SUCH DAMAGES ARE NOT RECOVERABLE IN ORDINARY BREACH OF CONTRACT CLAIMS SEEKING TO REDRESS PRIVATE WRONGS.

In the FAC, Plaintiff seeks "punitive damages" against the Defendants. (See FAC). However, as shown below, punitive damages are improper as a matter of law.

It is settled law that:

> Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations , punitive damages are recoverable if the conduct was aimed at the public generally.

Rocanova v. Equitable Life Assur. Soc. of U.S. , 83 N.Y.2d 603, 613 (1994) (internal citations and quotations omitted); *Fioramonti v. McGrath* , 83 A.D.3d 658, 659 (2d Dept. 2011).

However, at bar , the controversy has absolutely no element of fraud against the public and/or a high degree of moral turpitude, as required to be awarded punitive damages. To the contrary, the Complaint makes abundantly clear that it involves "a run-of-the-mill commercial dispute, involving only [private] parties, [and] does not rise to the standard necessary to recover punitive damage." *Lax* , 955 N.Y.S.2d at 35.

Accordingly , Defendant’s motion to strike the Ninth Cause of Action for punitive damages claims pursuant to CPLR § 3211(a)(7) and 3025 must be granted.

9. BASED UPON THE RECENT DECISION OF THE COURT TO VACATE AND CANCEL PLAINTIFF'S NOTICE OF PENDENCY, PLAINTIFF'S AMENDMENTS TO THE PROPERTY BOUNDARIES TO INCLUDE LOTS 114 AND 115 MUST BE STRICKEN AS UNAUTHORIZED AND DISMISSED AS VIOLATIVE OF THE MAY 15, 2017 ORDER

Defendant moved to vacate and/or cancel the notice of pendency filed by Plaintiff, dated August 25, 2016, on the grounds that it was improper not because it was not a proper subject for the filing of a notice of pendency but because the breadth of the notice far exceeded the subject property in the lawsuit. The Court held that the lis pendens filed by Plaintiff was overreaching and:

> "Further, plaintiff's conduct in arguing that the purchase agreement was meant to encompass the entire "50 foot by 65 foot" lot, given the contrary allegations in plaintiff's own complaint(s), is disingenuous, at best; without merit in law; and bordering on "frivolous within the meaning of 22 NYCRR 130-11.1" citing *Didimitropoulos v Karantinidis,* 142 AD3d 439 [2007]."

The Court goes on to explain that:

> "even without a definitive showing of an ulterior motive on the part of plaintiff, plaintiff's continued obstinancy to abandon or moderate this obviously overreaching notice of pendency, demonstrates sufficient conduct to mandate its being vacated and cancelled for failing to comply with CPLR 6501."

Accordingly, any mention of a property description in the FAC that goes beyond the boundaries of those in the Proposed Amended Complaint (50'x22') must be stricken as not only unauthorized but violative of the May 15, 2017 Order of the Court. The improper measurements are mentioned in the FAC ¶¶ 11, 12 and 13. Lot 114 is mentioned 30 times in the FAC and Lot 115 is mentioned 28 times. All of these references must be stricken.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the FAC be dismissed in all respects as it fails to set forth a cause of action against the Defendants and request such other relief as the Court deems just and proper.

Dated: Roslyn, New York
June 5, 2017

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