SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

A.J. RICHARD & SONS, INC.,

Plaintiff,

-against-

FOREST CITY RATNER COMPANIES, LLC,

Defendant.

Index No. 514736/2015

Motion Sequence No. __

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S ORDER TO SHOW CAUSE FOR A STAY PENDING APPEAL AND A TEMPORARY RESTRAINING ORDER

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Defendant Forest City Ratner Companies, LLC ("FCRC") submits this memorandum of law pursuant to CPLR 5519(c) in support of its order to show cause to stay enforcement of the Order of this Court of January 29, 2019 (the "January 2019 Order") (Ex. 9 (Dkt. 271)), pending resolution of FCRC's appeal of that order. FCRC also seeks a temporary restraining order ("TRO") pending adjudication of the stay application.

INTRODUCTION

The January 2019 Order (Ash, J.) addressed a dispute between FCRC and A.J. Richard & Sons, Inc. ("A.J. Richard") over A.J. Richard's rights under a Letter of Intent the parties executed in 2006 (the "Letter of Intent"). The Letter of Intent concerns FCRC's possible purchase of land from A.J. Richard, where it owns and operates a P.C. Richard & Son retail store (the "Property"), in exchange for FCRC providing A.J. Richard a replacement property to continue operating at the same location ("Replacement Property"), after redevelopment of the site as part of the "Atlantic Yards" project in downtown Brooklyn (the "Project").

The Letter of Intent expressly contemplates further negotiations before the parties would enter into an agreement. Nevertheless, this Court declared in the January 2019 Order that the Letter of Intent is a "valid and binding contract between [FCRC] and A.J. Richard," and found that FCRC had breached by failing to convey the Replacement Property and negotiate in good faith. The Court directed FCRC to "specifically perform its contractual obligations under the [Letter of Intent]," and "negotiate and finalize" a purchase and sale agreement (the "Implementing Documents"), "in order to complete the transaction." FCRC timely appealed, arguing that the Court erred by deeming the Letter of Intent a binding contract and directing specific performance.

For nearly a year after the January 2019 Order was issued and with FCRC's appeal pending, A.J. Richard never once claimed FCRC was in violation of its obligations. In December 2019,

A.J. Richard changed course, claiming for the first time that FCRC has failed to comply with the January 2019 Order, demanding that FCRC immediately convey a Replacement Property, and threatening FCRC with a contempt claim. A.J. Richard pivoted to this new position, not because of anything FCRC had done, but in response to an independent decision by the New York State Urban Development Corporation d/b/a Empire State Development ("ESD") late last year to proceed with condemnation of the Property. One week ago, after ESD refused to agree to adjourn the condemnation proceedings, A.J. Richard renewed its threat against FCRC, announcing its plan to file for contempt "this month."

A.J. Richard's threatened contempt claim is entirely without merit. Among other reasons, it would be impossible for FCRC to provide A.J. Richard with the Replacement Property it is demanding. This is because FCRC is a minority holder in a joint venture that controls the Project, and therefore cannot unilaterally convey a Replacement Property to A.J. Richard, which A.J. Richard has long known to be true. Thus, A.J. Richard is threatening to institute contempt proceedings against FCRC unless it immediately conveys a Replacement Property that FCRC does not control; A.J. Richard is taking this position after months during which it expressed no urgency whatsoever; and A.J. Richard is threatening action now, not because of anything FCRC has done, but because ESD has decided to proceed with condemnation.

FCRC makes this application to stay enforcement of the January 2019 Order, and thereby preclude A.J. Richard from seeking to hold FCRC in contempt of that Order, in order to preserve the same status quo that, for nearly a year, was acceptable to A.J. Richard. FCRC should not be made to defend a claim by A.J. Richard that FCRC is in contempt of an order that is impossible to satisfy and subject to a meritorious, pending appeal. Moreover, there is nothing about ESD's decision to pursue condemnation proceedings that threatens A.J. Richard with imminent or

irreversible harm. The condemnation court has already adjourned those proceedings for several weeks and may do so again, as A.J. Richard has requested, and A.J. Richard has admitted that, even without a further adjournment, it will take a year or longer for the condemnation to be completed. And in the unlikely event A.J. Richard is directed to vacate its space before FCRC's appeal is resolved, A.J. Richard will be fully compensated by the State as part of the condemnation process.

FCRC's request for a stay meets all the requirements of CPLR 5519(c):

First, FCRC is likely to prevail on appeal. The Letter of Intent by its plain terms was not a binding agreement between FCRC and A.J. Richard, and failed to include essential terms. And even if the Letter of Intent were binding, the Court erred by awarding A.J. Richard specific performance, which is not available as a remedy for a supposed failure to negotiate in good faith.

Second, the balance of hardships favors a stay. FCRC faces the threat of having to defend contempt proceedings initiated by A.J. Richard should FCRC fail to comply with an order that is impossible to comply with, as well as the prospect of litigation with its joint venture partner, Greenland Atlantic Yards LLC ("Greenland Member"), which is the entity that actually controls the Project. Even if FCRC could satisfy the January 2019 Order by securing a Replacement Property for A.J. Richard, FCRC would face irreparable harm if it is later determined on appeal that it had no such obligation.

On the other hand, A.J. Richard will not suffer undue hardship if the January 2019 Order is stayed. The condemnation proceedings will not go forward if either of A.J. Richard's pending applications to stay those proceedings is granted, in which case A.J. Richard will remain at its present location and, by its own admission, suffer no harm. And if the condemnation proceeds,

A.J. Richard would face no imminent threat of being forced from the Property, and, as required by the law of eminent domain, would be justly compensated by the State.

Third, FCRC has been diligent. It filed its notice of appeal within days of the January 2019 Order and promptly filed its appellate brief. FCRC also (albeit unsuccessfully) moved the appellate court for preference in calendaring. And after A.J. Richard claimed for the first time last December that FCRC is in violation of the January 2019 Order, FCRC promptly declared it would file this stay application. It held off doing so only because the parties agreed to a standstill in consideration of the limits on Court operations caused by the COVID-19 pandemic. FCRC is bringing this application on the day that standstill is expiring, and within a week of A.J. Richard's threat to move for contempt this month.

In sum, a stay will preserve the status quo while ensuring that all parties' rights are preserved, and FCRC therefore respectfully requests that its application be granted.

BACKGROUND

A. FCRC And The Atlantic Yards Project

FCRC is a commercial real estate developer responsible for many well-known projects in New York, including MetroTech Center in downtown Brooklyn. Ex. 1 (Mitnick Aff.) ¶2. One of its projects, originally known as Atlantic Yards (now Pacific Park) is a real estate development in Brooklyn, which FCRC launched in 2006. *Id.* ¶¶2–5. The Project spans twenty-two acres, and encompasses the development of the Barclays Center arena, an improved commuter train yard and subway facility, sixteen buildings for residential and commercial uses (including 2,250 apartments affordable to low- and middle-income households), and eight acres of publicly accessible space. *Id.*

B. The P.C. Richard Letter Of Intent

One of the commercial lots within the Project is at the intersection of Flatbush and Atlantic Avenues, known as "Site 5." *Id.* ¶¶6–8. A.J. Richard, which operates a regional big-box appliance and mattress retailer under the "P.C. Richard & Son" brand, owns and operates an approximately 30,000 square-foot P.C. Richard store on Site 5, at 590 Atlantic Avenue. *Id.*

In or around 2006, FCRC and A.J. Richard started discussing A.J. Richard's possible sale of its parcel on Site 5 to FCRC in exchange for space in the mixed-use building to be constructed on the same location. *Id.* The parties memorialized these discussions in the Letter of Intent, signed on December 2, 2006, which set a framework for continued negotiations. *Id.* ¶¶8–10.

From the outset of the discussions with A.J. Richard, FCRC made clear there would be no binding agreement except upon execution of final deal documents. In an email accompanying the first draft of the Letter of Intent, FCRC lead negotiator, Andrew Zlotnick, advised A.J. Richard that "except for the provisions contained in the LOI which expressly survive, ... the parties will only be bound when they sign definitive written agreements described in the LOI." Ex. 2 (Sept. 20, 2006 Zlotnick Email), at FC_0000850. When FCRC and A.J. Richard later signed the Letter of Intent, it had no language stating it was a binding agreement, but instead set forth an "outline for the proposed redevelopment of the Property" with certain "proposed terms of [] understanding." Ex. 3, at FC_AF_00483. The Letter of Intent provides that the parties "will negotiate specific terms and conditions of the sale of the Property to FC[RC] to be set forth in a purchase and sale agreement to be executed by the Parties…." *Id.*

FCRC and A.J. Richard spent years negotiating a possible purchase and sale agreement, but never agreed on final terms. Ex. 1 ¶¶11–18. Throughout this time, it remained FCRC's understanding, as it expressed to A.J. Richard, that the Letter of Intent was not binding. Ex. 4

(Apr. 17, 2008 Weinberger Letter), at FC_0000024 (advising "there is nothing in the Letter of Intent that indicates that the parties intended to be bound unless and until" agreements are executed). In mid-2009, negotiations between A.J. Richard and FCRC were suspended with no agreement finalized. Ex. 1 ¶18.

C. Greenland Acquired Control Of The Project

Starting in mid-2013, FCRC affiliates, Atlantic Yards Development Company LLC and FC Atlantic Yards LLC ("FC Member"), entered into negotiations with the Greenland Group ("Greenland"), a real estate developer based in China, over a sale of a portion of FCRC's interest in the Project. These negotiations culminated in a joint venture, pursuant to which an affiliate of Greenland, Greenland Member, obtained a 70% interest in the joint venture, Atlantic Yards Venture, LLC (the "Joint Venture"), with FC Member owning the remaining 30%. *See* Ex. 5 (July 1, 2014 MarketWatch Article).

The terms of the Joint Venture were documented in an amended LLC Agreement of Atlantic Yards Venture, LLC, dated June 30, 2014 (the "2014 Joint Venture Agreement"). Ex. 6. As a minority member of the Joint Venture, FC Member (and its affiliate FCRC) did not have the ability to unilaterally make decisions concerning Site 5 or the development of the Property. *See id.*; Ex. 7 (Jan. 23, 2020 Weinberger Letter).

The 2014 Joint Venture was announced in a press release, including Greenland Member's acquisition of a 70% interest in the Project. Ex. 5, at 2. The 2014 Joint Venture Agreement was also produced in discovery in this Action to A.J. Richard in May 2017.[1] Ex. 7, at 1.

[1] In June 2018, FC Member and Greenland Member executed a second amended LLC Agreement of Atlantic Yards Venture, LLC, which increased Greenland Member's interest in the Joint Venture to 95%, and was also publicly announced. *See* Ex. 8 (Jan. 15, 2018 PR Newswire Article).

D. After Greenland And FC Member Entered The Joint Venture, A.J. Richard Commenced This Action, Seeking To Enforce The Letter Of Intent

In late 2015, ESD took initial steps for the condemnation of Site 5—a prerequisite for its development. Ex. 1 ¶¶19–20. In response, on December 7, 2015, A.J. Richard initiated this Action. (Dkt 22.) In its Complaint, A.J. Richard asserted claims for (i) a declaratory judgment that the Letter of Intent is a binding contract for the purchase and sale of the Property; (ii) breach of contract, based on FCRC's failure to convey a Replacement Property to A.J. Richard as the Letter of Intent supposedly required; (iii) breach of contract, based on FCRC's alleged failure to negotiate in good faith as the Letter of Intent supposedly required; and (iv) promissory estoppel. (*Id.*) Aside from unspecified "incidental damages," the sole remedy A.J. Richard sought was specific performance. (*Id.* ¶63.)

With its Complaint, A.J. Richard filed an order to show cause for a preliminary injunction with a TRO. (Dkt. 8.) The Court granted a TRO the same day, (Dkt. 25), and on February 18, 2016, granted A.J. Richard's application for a preliminary injunction. (Dkt. 36.) After fact discovery, the parties each moved for summary judgment, and, on January 29, 2019, this Court entered an Order denying FCRC's motion except as to the fourth cause of action (promissory estoppel), and granting A.J. Richard's cross-motion with respect to all but the fourth cause of action. Ex. 9, at 24. The Court granted specific performance directing FCRC "to negotiate and finalize the [Implementing Documents] in good faith in order to complete the transaction[.]" (*Id.*)

On February 4, 2019, FCRC filed a notice of appeal. (Dkt. 273); *see* Ex. 10 (Memorandum in Support of Appeal). On March 12, 2019, FCRC moved for a preference in calendaring the appeal, Ex. 11, which was denied, Ex. 12. The appeal remains pending.

E. <u>ESD Initiated Condemnation Proceedings For Site 5</u>

A.J. Richard knows FCRC does not have the ability (without Greenland's consent) to "finalize" the Implementing Documents or convey the Replacement Property, based, among other things, on the 2014 public announcement of the Joint Venture, and the 2014 Joint Venture Agreement produced in discovery in this action. Exs. 5, 7. Accordingly, for months after the January 2019 Order, the parties and Greenland negotiated the possibility of an alternative transaction that would involve terms different than those contemplated in the Letter of Intent (the "Alternative Transaction"). Exs. 13 (Feb. 14, 2020 Baron Letter), at 2; 14 (Jan. 9, 2020 Weinberger Letter), at 2. A.J. Richard did not demand that FCRC execute Implementing Documents, let alone deliver the Replacement Property, because it knew FCRC could not do so. *See id*.

In the midst of these discussions, on November 20, 2019, ESD filed a Petition in this Court for the condemnation of Site 5 and its acquisition through eminent domain (the "Condemnation Petition"). Ex. 15. On January 27, 2020, A.J. Richard served its Answer, seeking a stay of the condemnation proceedings pending resolution of the appeal from the January 2019 Order. Ex. 16. ESD opposed that request on March 5, 2020. Ex. 17. A.J. Richard and ESD subsequently stipulated to adjourning the return date of ESD's petition, and the condemnation hearing is now scheduled on July 9, 2020. Ex. 18. On June 5, 2020, A.J. Richard filed an order to show cause repeating its earlier request in its Answer for a stay of the condemnation proceeding until a decision on FCRC's appeal from the January 2019 Order. Exs. 19 (MOL); 20 (OSC). A.J. Richard announced in that filing that, if a stay is denied, it will move "this month" for contempt against ESD, Greenland, and FCRC. Ex. 19, at 16 n.3.

F. A.J. Richard Demands The Implementing Documents And Threatens Contempt

On December 30, 2019, A.J. Richard wrote FCRC requesting assurances that FCRC was in compliance with the January 2019 Order. Ex. 21. A.J. Richard also demanded that FCRC "either (i) deliver to A.J. Richard final, executable transaction documents consistent with the terms of the LOI, or (ii) confirm that all proceedings on the Condemnation Petition will be stayed unless and until the Judgment and the Preliminary and Permanent Injunctions are vacated and reversed by a court of competent jurisdiction." *Id.* at 3. A.J. Richard reserved rights to "seek discovery into whether FCR[C] and those acting in concert with it, including Greenland, Brookfield[2] and ESD, have complied with the Preliminary and Permanent Injunctions, and the right to pursue contempt proceedings against FCR[C], Greenland, Brookfield and/or ESD with respect to any violations of those Injunctions." *Id.*

FCRC responded on January 9, 2020. Ex. 14. In addition to assuring A.J. Richard that FCRC had no role in ESD's decision to initiate condemnation proceedings, and had not violated the January 2019 Order, FCRC addressed A.J. Richard's demand for "final, executable transaction documents consistent with the terms of the LOI." *Id.* FCRC's counsel explained,

> [I]t is Greenland, and not my clients, who controls Site 5 and my clients are thus not in a position unilaterally to deliver 'final, executable transaction documents' to A.J. Richard. Moreover, there are numerous issues not addressed by the LOI that will require agreement by the parties. Recognizing that, the January 2019 Order requires that FCRC *'negotiate* and finalize the Implementing Documents in good faith in order to complete the transaction....' (emphasis added). Before the negotiations stalled in mid-November 2019, the parties, including Greenland, were working diligently and in good faith to negotiate a development transaction consistent with the letter and spirit of the LOI, and my clients remain willing to continue to participate in those negotiations. As for a stay of the condemnation proceeding, that is entirely within the control of ESD and the condemnation judge.

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[2] A Brookfield Asset Management controlled fund acquired FCRC's parent company in December 2018.

Id. at 2.

In a letter on February 14, 2020, A.J. Richard cut off negotiations, and again threatened FCRC with contempt unless final transaction documents were delivered. Ex. 13, at 2. A.J. Richard also proposed that FCRC seek a stay of the January 2019 Order. *Id*. at 3. FCRC responded on February 24, 2020, reiterating its inability to unilaterally provide the Implementing Documents or convey the Replacement Property, and refuting any claim that FCRC has engaged in any act of contempt. Ex. 22, at 2. FCRC also recited that it had spent months engaging in good faith negotiations, and that A.J. Richard had rejected FCRC's offer to continue those discussions. *Id.* at 1–2. FCRC advised that it was nevertheless prepared, as A.J. Richard had proposed, to seek a stay of the January 2019 Order, although FCRC did not believe it was in violation of any obligation under the order. *Id.*[3]

On March 2, 2020, FCRC notified A.J. Richard that FCRC would imminently file its motion to stay the January 2019 Order. Ex. 25 (Mar. 3, 2020 Carlinsky Email). FCRC agreed to put off that filing briefly, at the request to A.J. Richard's counsel. *Id.* Then, when it became clear that the COVID-19 crisis was impacting Court operations, the parties entered into a standstill agreement, pursuant to which FCRC agreed not to file its stay motion, and A.J. Richard agreed not to file for contempt. Ex. 26. The parties resumed their negotiations during the standstill period, and, on June 9, 2020, participated in a mediation ordered in connection with FCRC's pending appeal of the January 2019 Order. Ex. 27. Notwithstanding the parties' ongoing negotiations, A.J.

[3] A.J. Richard subsequently wrote to FCRC and Greenland, on March 4, 2020, requesting that FCRC (through an affiliate) stipulate to a stay of the condemnation proceedings, demanding that Greenland not "interfere" with the request, and advising that A.J. Richard would not object to a stay of the January 2019 Order if a stipulation were entered. Ex. 23. Greenland responded, on March 9, 2020, that it "opposes any attempt to stay the condemnation proceeding…." Ex. 24, at 2.

Richard declined to extend the standstill agreement past June 12, 2020, Ex. 28, and, as noted above (Background § E, *supra*), has announced its plan to file for contempt this month, Ex. 19, at 16 n.3.

ARGUMENT

The Court has broad discretion to stay enforcement of an order pending appeal.[4] *See* CPLR 5519(c) (The court "may stay all proceedings to enforce the judgment or order appealed from pending an appeal…."); Siegel, N.Y. Prac. § 535 (6th ed.) ("[CPLR 5519(c)'s] stay []lies entirely in the court's discretion…."). In considering a motion under CPLR 5519(c), courts look to several factors, including "the merits of the appeal" (*Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990)), "the relative hardships that would result from granting (or denying) a stay" (*id.*), and whether the appeal is "solely to effect delay" (*In re Mott*, 123 N.Y.S.2d 603, 609 (N.Y. Sup. Ct. 1953)).

All these factors weigh in favor of FCRC's application for a stay.

I. THE MERITS OF FCRC'S APPEAL WEIGH IN FAVOR OF A STAY

There are multiple grounds upon which the Appellate Division should reverse the January 2019 Order. As FCRC has argued on appeal, the Court erred in (a) declaring the Letter of Intent a binding contract and finding that FCRC breached by failing to convey the Replacement Property; (b) deciding as a matter of law that FCRC breached an obligation to negotiate in good faith; and (c) granting specific performance directing FCRC to resume negotiations and finalize transaction documents.

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[4] FCRC is seeking a discretionary stay under CPLR 5519(c) because its inability to unilaterally finalize and execute the Implementing Documents and convey the Replacement Property to A.J. Richard precludes it from seeking an automatic stay under CPLR 5519(a). *See* CPLR 5519(a)(5) (requiring execution of the instrument and depositing with the court); *id.* 5519(a)(6) (requiring that the party being ordered have control of the property such that it can transfer it).

A. The Court Erred In Determining That The Letter Of Intent Is A Binding Contract

The Court erred in at least three respects in finding that the Letter of Intent is a binding contract:

First, the Letter of Intent, by its plain terms, is not binding. It describes itself as an "outline for the proposed redevelopment of the Property" that includes certain "proposed terms of understanding with respect to such redevelopment." Ex. 3, at FC_AF_00483; *see Aksman v. Ju*, 799 N.Y.S.2d 493, 495 (1st Dep't 2005) (dismissing contract claim because letter of intent was only a "proposal to agree"). The Letter of Intent expressly contemplates further negotiations, stating that "[t]he parties will negotiate specific terms and conditions of the sale of the Property to [FCRC] to be set forth in a purchase and sale agreement to be executed by the Parties…." Ex. 3, at FC_AF_00483. This creates a "strong presumption" against an intent to be bound. *Carmon v. Soleh Boneh Ltd.*, 614 N.Y.S.2d 555, 555 (2d Dep't 1994); *Brown v. Cara*, 420 F.3d 148, 153 (2d Cir. 2005) ("Ordinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract."); *Piller v. Marsam Realty 13th Ave., LLC*, 2013 WL 5750089, at *8 (Sup. Ct. Kings Cty. Oct. 22, 2013) (letter of intent stated that the parties "shall execute a Purchase and Sale Agreement" at closing, "indicating the parties' intent to execute a subsequent formal mutually binding contract"), *aff'd*, 25 N.Y.S.3d 273 (2d Dep't 2016).

Second, the Letter of Intent lacks essential terms for a binding contract. *Behrends v. White Acre Acquisitions, LLC*, 865 N.Y.S.2d 227, 228–29 (2d Dep't 2008). The incomplete nature of the Letter of Intent is clear from the hundreds of pages of proposed transaction documents prepared (but never finalized) after the Letter of Intent was executed, which contain dozens of substantive terms not in the Letter of Intent, including provisions for termination rights, representations and warranties, conditions to closing, preparation of plans and specifications, and many more. Exs. 1

¶¶14–16; 10, at 33. The Letter of Intent is missing all these terms and thus cannot be enforced as a final agreement. *See Adjustrite Sys., Inc v. GAB Bus. Servs., Inc*, 145 F.3d 543, 550–51 (2d Cir. 1998) (noting that draft transaction documents contained numerous terms not found in the parties' preliminary agreement); *Argent Acquisitions*, *LLC v. First Church of Religious Sci.*, 990 N.Y.S.2d 1, 5 (1st Dep't 2014) ("[T]here is a direct correlation between the number of terms omitted from a writing and the likelihood that the parties agreed to be bound by it….").

Third, the Court erroneously concluded as a matter of law that the parties intended to be bound despite contrary evidence. *See Stonehill Capital Mgmt., LLC v. Bank of the West*, 28 N.Y.3d 439, 449 (2016) (court evaluates the parties' intent based on "the totality of the parties' actions and communications"); *Argent Acquisitions,* 990 N.Y.S.2d at 4 (parties' correspondence regarding letter of intent "establishes that it was not meant to constitute a final agreement"). The Court did not properly consider, for example, the September 20, 2006 Zlotnick Email, which sent the initial draft of the Letter of Intent to A.J. Richard and stated that "the parties will only be bound when they sign definitive written agreements described in the LOI." Ex. 2, at FC_0000850. Neither did the Court consider when A.J. Richard's negotiator Thomas Pohmer later confirmed his understanding that the Letter of Intent was non-binding, asking, "what kind of language do you normally have in the loi to lock both parties in before the agmts are prepared?" Ex. 29 (Oct. 25, 2006 Zlotnick Email). And the Court ignored FCRC's response declining to insert such language and again confirming that the only obligation was to "negotiate such agreements in good faith to reach final agreement within a commercially reasonable period of time." Exs. 30 (Nov. 6, 2006 Zlotnick Email), at FC_0000806–FC_0000814; 9, at 9.

The Court also failed to consider the parties' inability to reach a final agreement after extensive and lengthy negotiations, which confirms that they did not have an understanding that

an agreement was already reached. *See Spier v. Southgate Owners Corp.*, 833 N.Y.S.2d 459, 460 (1st Dep't 2007) ("further negotiations [following letter of intent]" evidence that parties "did not reach a meeting of the minds"); *Gorodensky v. Mitsubishi Pulp Sales (MC), Inc.*, 92 F. Supp. 2d 249, 256 (S.D.N.Y.) ("[P]laintiffs themselves demonstrated that the [letter of intent's] price term was not sufficiently definite when they continued to negotiate the price through September, 1993."), *aff'd*, 242 F.3d 365 (2d Cir. 2000).

Had the Court enforced the plain terms of the Letter of Intent or considered this evidence, FCRC would have been awarded summary judgment. Even if the record did not permit a finding in FCRC's favor that the Letter of Intent was non-binding, the Court erred by making a factual finding of the parties' intent in A.J. Richard's favor. *See Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012) ("It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.").

B. <u>The Court Erred In Granting Summary Judgment On A.J. Richard's Claim That FCRC Breached A Duty To Negotiate In Good Faith</u>

The Court also erred by holding that FCRC breached an obligation under the Letter of Intent to negotiate in good faith. Ex. 9, at 21. It is settled that "whether defendant breached [a duty to negotiate in good faith] present[s] a question of fact." *Emigrant Bank v. UBS Real Estate Sec., Inc.*, 854 N.Y.S.2d 39 (1st Dep't 2008) (reversing dismissal of claim for breach of the duty to negotiate); *see also Goodstein Constr. Corp. v. City of N.Y.*, 80 N.Y.2d 366, 376 (1992) (affirming denial of motion to dismiss claimed breach of contractual obligation to cooperate in good faith). On this basis alone, Plaintiff's motion for summary judgment should have been denied.

C. <u>The Court Erred In Granting Specific Performance</u>

The January 2019 Order directs FCRC to "negotiate and finalize the transaction documents in good faith in order to complete the transaction." Ex. 9, at 24. In ordering specific performance,

the Court ignored the Court of Appeals' holding in *Goodstein Constr. Corp.* that recovery for breach of an obligation to negotiate in good faith is limited to out of pocket expenses, so as not to "transform[] an agreement to negotiate for a contract into the contract itself" and "give the injured party the 'benefit of the bargain' that was not reached." 80 N.Y.2d at 373–74. The Court also erred by directing specific performance of a supposed obligation, *i.e.*, the transfer of a Replacement Property to A.J. Richard, that would be impossible for FCRC to meet.[5]

In sum, the first factor in the analysis, the strength of FCRC's appeal, weighs heavily in favor of a stay.

II. THE RELATIVE HARDSHIPS WEIGH IN FAVOR OF A STAY

The balance of hardships also weighs in favor of a stay because denying a stay will cause significant harm to FCRC, whereas the grant of a stay will not unduly burden A.J. Richard. Courts recognize that a discretionary stay may be imposed if enforcement of the judgment will "chang[e] the status quo and thereby defeat[] or impair[] the efficacy of the order which will determine the appeal." *Pokoik v. Dep't of Health Serv.*, 641 N.Y.S.2d 881, 881 (2d Dep't 1996). The balance of hardships thus generally tilts in favor of a party who "merely seeks to preserve the status quo." *CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 571 (Sup. Ct. N.Y. Cty. 2005).

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[5] As a minority holder in the Joint Venture, FCRC cannot unilaterally convey the Replacement Property. Thus, it cannot be ordered to do so. *See Xiao Yuan v. Li Dan Zhang*, 871 N.Y.S.2d 720, 720 (2d Dep't 2009) ("[T]he specific performance of a contract for the purchase of real estate may be decreed only where it is possible for the defendant to convey the land."); *Wynyard v. Beiny*, 625 N.Y.S.2d 27, 27 (1st Dep't 1995) (holding that trust beneficiary could not be compelled to execute a stock pledge agreement because the beneficiary did not have the trustee's consent to pledge the shares of stock); *Strategic Value Master Fund, Ltd. v. Cargill Fin. Serv., Corp.*, 421 F. Supp. 2d 741, 760 (S.D.N.Y. 2006) ("[T]his Court cannot issue a decree for specific performance if [it] is either impossible or would violate the rights of a third party whose interest in the equity is superior to the defendant's….").

New York courts have long granted stays of orders directing the transfer of interests in real estate in order to preserve the status quo. *See, e.g.*, *Rifkin v. Lipton*, 14 N.Y.2d 725, 725 (1964) (granting stay pending appeal involving disposition of property of deceased estate); *Frankel v. Tremont Motors*, 8 N.Y.2d 751, 751 (1960) (granting stay of order for specific performance of contract for the sale of automobile agency); *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 48 N.Y.S.3d 251, 251 (2d Dep't 2017) (granting injunction to prevent transfer of rights under a purchase agreement to "maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual"); *Novello v. 215 Rockaway, LLC*, 2009 N.Y. Misc. LEXIS 4860, at *5 (Sup. Ct. Nassau Cty. 2009) ("As the appeal concerns a direction which will result in a transfer [of] real property, and as plaintiffs are protected by a preliminary injunction enjoining defendant from transferring the premises during the pendency of this action, … a limited stay is granted….").

As in these cases, a stay of the January 2019 Order, with its direction that FCRC convey a Replacement Property to A.J. Richard, would avoid a potentially unwarranted property transfer, while ensuring the parties' respective rights can be resolved on appeal.

A. <u>FCRC Will Be Substantially Harmed If A Stay Is Denied</u>

A.J. Richard is demanding that FCRC do something it has no power to do. A.J. Richard knows FCRC cannot unilaterally execute the Implementing Documents, which is undoubtedly why A.J. Richard negotiated an Alternative Transaction, with Greenland's participation, for nearly a year after the January 2019 Order was issued. *See* Ex. 13, at 2. Notwithstanding this understanding, and its own course of conduct, A.J. Richard now insists FCRC do the impossible—execute Implementing Documents conveying a Replacement Property that is not FCRC's to convey. *Id.* at 3.

A.J. Richard's unreasonable demand threatens to disrupt the status quo and inflict substantial injury on FCRC.

First, denying a stay would expose FCRC to A.J. Richard's threatened contempt proceedings. *U.S. v. Fox*, 1983 WL 1586, at *1 (S.D.N.Y. Feb. 14, 1983) ("[R]espondent is faced with irreparable harm in that without a stay his only means of preserving his appeal is through risk of sanctions for contempt."). Just last week, A.J. Richard announced that, should the condemnation court deny its request to adjourn those proceedings, "A.J. Richard will be forced to bring contempt proceedings" against FCRC, Greenland and ESD "this month." Ex. 19, at 16 & 16 n.3. This, despite the fact that a contempt claim against FCRC would be meritless because, among other reasons, it would be impossible for FCRC to perform, given that Greenland controls the Property as the majority member of the Joint Venture.[6] FCRC should not be made to defend such proceedings, which could inflict irreparable reputational harms. *Jacob H. Rottkamp & Son. v. Wulforst Farms*, 844 N.Y.S.2d 600, 600 (Sup. Ct. Suffolk Cty. 2007) ("Damage to business reputation and good will can be difficult or impossible to quantify and [thus] demonstrate[] irreparable harm…."); *CanWest,* 804 N.Y.S.2d at 19 (same); *cf. SerVaas Inc. v. Mills*, 661 Fed. Appx. 7, 9 (2d Cir. 2016) (unpublished) (finding reputational harm arose from a contempt order).

Second, even if FCRC could unilaterally deliver the Replacement Property, requiring FCRC to do so before the appeal is decided would expose FCRC to the risk that success on appeal would be mooted with a conveyance already executed. *See State v. City of New York*, 713 N.Y.S.2d 360, 360 (2d Dep't 2000) (holding "the equities lie in favor of preserving the status quo"

[6] *U.S. v. Rylander*, 460 U.S. 752, 757 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."); *Bemis v. Town of Crown Point*, 995 N.Y.S.2d 794, 799 (3d Dep't 2014) (where the ownership of land remained unresolved, "respondents cannot be held in contempt … until their legal authority … has been established").

where absence of a TRO would result in irreversible sale or physical alteration of community gardens).

Third, requiring FCRC to convey a Replacement Property before the appeal is decided threatens FCRC with the potential harm of facing a legal claim from its joint venture partner, Greenland, contending that such a conveyance would impair its majority stake in the Project. FCRC would also face the threat of litigation if it were to stipulate to a stay of the condemnation proceedings, which A.J. Richard has demanded as a condition for agreeing to a stay of the January 2019 Order. Ex. 23. Greenland has stated it opposes FCRC entering into any such stipulation. Ex. 24. This leaves FCRC in an untenable position, facing a threat of imminent litigation no matter what it does.

B. A.J. Richard Will Not Be Harmed By A Stay

In contrast to the substantial harm FCRC faces if a stay is denied, there is no material risk of hardship to A.J. Richard if a stay is entered. A stay would merely continue the status quo, which A.J. Richard accepted for nearly a year after the January 2019 Order was issued. Ex. 13, at 1–2. Moreover, any purported risk to A.J. Richard arising out of the condemnation proceedings is not imminent, but entirely "remote or speculative." *Family-Friendly Media, Inc. v. Recorder Television Network*, 903 N.Y.S.2d 80, 82 (2d Dep't 2010) ("[I]rreparable harm is imminent, not remote or speculative…. Moreover, [e]conomic loss, which is compensable by money damages, does not constitute irreparable harm.").

That ESD has commenced proceedings does not mean the condemnation will go forward, much less that it will be concluded before the appeal is decided. The condemnation hearing has already been adjourned for weeks, and further extensions are possible. Further, A.J. Richard has entered an Answer in the condemnation proceeding, and an Order to Show Cause, both seeking to

stay those proceedings until resolution of FCRC's appeal from the January 2019 Order, *see* Exs. 20; 16 ¶1. If either request is granted, A.J. Richard will remain at its current location and, by its own admission, face no risk that its "rights will be prejudiced." *See id.* ¶73.

Even if the condemnation proceedings go forward, A.J. Richard will retain possession of the Property, running its business until and unless ESD files for and obtains, after giving A.J. Richard notice and an opportunity to be heard, a writ of assistance or other order to remove A.J. Richard from the Property. *See* N.Y. Em. Dom. Proc. Law 405(A). This process, at its most efficient, will take months or years and is subject to appeals. *See Matter of City of New York*, 92 N.Y.S.3d 598, 602 (Sup. Ct. Kings Cty. 2019) (contemplating 2.5 years of use and occupancy pending resolution on appeal of the City of New York's writ of assistance for possession). A.J. Richard recognizes "ESD will not be able to develop the property for at least another year," and that "no shovel is going into the ground any time soon." *See* Ex. 19, at 18. The possibility that A.J. Richard's business will be disrupted before the appeal is decided is remote.

In the unlikely event A.J. Richard is removed from the Property before the appeal is decided, A.J. Richard will be fully compensated. *See Louis Foodservice v. Vouyiouklis*, 2002 WL 31663230, at *4 (Sup. Ct. Kings Cty. 2002) (finding defendants' injury "can be adequately compensated by monetary damages" and thus the "balancing of the equities weighs in plaintiffs' favor"); *EdCia Corp. v. McCormack*, 845 N.Y.S.2d 104, 107 (2d Dep't 2007) ("Economic loss, which is compensable by money damages, does not constitute irreparable harm…."). As part of any condemnation, the State must and will pay "just compensation" to A.J. Richard equal to the fair market value of its Property. *City of New York v. Mobil Oil*, 783 N.Y.S.2d 75, 78 (2d Dep't 2004) ("[J]ust compensation is … the price a willing buyer would have paid a willing seller for … the highest and best use of the property…."); *Minkin v. City of New York*, 198 N.Y.S.2d 744,

744 (Sup. Ct. N.Y. Cty. 1960) (denying motion for injunctive relief against condemnation; "there can be no irreparable harm to plaintiffs which cannot be prevented in the condemnation proceeding itself").

A.J. Richard has itself made clear that any damage it sustains as a result of being removed from the Property could be quantified and remediated monetarily. The Letter of Intent contemplates payment in specified dollar amounts to A.J. Richard during "go dark" periods, in which it is not able to operate at the Property. *See* Exs. 3, at FC_AF_00486–FC_AF_00489; 9, at 4 (holding that the Letter of Intent contemplates that "A.J. Richard would be out of possession of the property during the time that it took to redevelop it," and contains provisions for "compensation for its lost profits during that time period").

At every turn, A.J. Richard would remain protected with a stay in place, which reaffirms that the January 2019 Order should not be enforced until and unless it is affirmed on appeal. *Przybylo v. Bull*, 114 N.Y.S.3d 191 (Sup. Ct. Warren Cty. 2019) (denying injunction to stop condemnation where plaintiff had procedural protections).

III. FCRC IS PROMPTLY PURSUING RELIEF

FCRC's prompt pursuit of its appeal also favors a stay. *See Russell v. N.Y.C. Hous. Auth.*, 608 N.Y.S.2d 592, 592 (Sup. Ct. Bronx Cty. 1992) (stay is available where "the appeal is prosecuted with due diligence"). FCRC filed its notice of appeal on February 4, 2019, days after the Court issued the January 2019 Order. (Dkt. 273.) A month later, on March 5, 2019, FCRC timely filed its appellate brief. Ex. 10. FCRC also moved the Appellate Division to expedite the appeal out of concern that ESD, in light of the January 2019 Order, would not go forward with the condemnation, thus jeopardizing the redevelopment (a concern that did not materialize). Ex. 11.

FCRC also moved expeditiously for this stay. For months after the January 2019 Order, A.J. Richard, understanding FCRC could not unilaterally convey the Replacement Property, was content to explore an Alternative Transaction with FCRC and Greenland, and did not accuse FCRC of violating the January 2019 Order. *See* Ex. 13. FCRC accordingly did not move to stay. Once A.J. Richard changed its position, FCRC promptly advised A.J. Richard it would be filing this motion. Ex. 25. FCRC held off doing so only because the parties entered into a standstill, in consideration of the COVID-19 pandemic, and to facilitate renewed settlement negotiations between the parties. Ex. 26. FCRC was surprised when, notwithstanding those negotiations, A.J. Richard announced last week that it plans imminently to seek contempt. Ex. 19, at 16 n.3. FCRC therefore filed this motion on the first day it is permitted to do so under the parties' standstill agreement. Ex. 28.

In sum, a stay is warranted because FCRC is promptly pursuing a meritorious appeal (and this motion), and denial of the stay would result in greater hardship to FCRC than any inconvenience to A.J. Richard if a stay were granted.

IV. IMMEDIATE AND IRREPARABLE INJURY WARRANTS A TRO

A TRO may be granted pending a hearing for a stay pursuant to CPLR 5519 where immediate and irreparable injury would result without such restraint. *See Norfolk Dev. v. Kee*, 975 N.Y.S.2d 710, at *3 (Civ. Ct. N.Y. Cty. 2013) (granting temporary stay because "prejudice to respondent if she is not afforded an opportunity to return to the status quo and seek a stay pending appeal would be severe"); *Taboola Inc. v. Newsweek Media Grp.*, 2018 N.Y. Slip Op. 88617(U) (1st Dep't. 2018) (granting temporary stay); *see* CPLR 6301 (authorizing a TRO pending hearing on preliminary injunction).

FCRC will suffer immediate irreparable injury without a TRO—exposure to contempt proceedings for failure to perform an impossible act, forced premature conveyance of a property effectively mooting its appeal, and legal claims by its Joint Venture partner. Further, there is no risk of harm to A.J. Richard during the likely duration of a TRO, as it is highly unlikely condemnation will be completed in that time, and, in the unlikely event it is, A.J. Richard will be justly compensated.

CONCLUSION

Defendant respectfully requests an order granting a stay and TRO.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This memorandum complies with the word-count limit of Rule 17 of the Rules of the Commercial Division of the Supreme Court of the State of New York because it contains 6994 words (based on the Microsoft Word word-count function), excluding the parts of the memorandum exempted by Commercial Division Rule 17.

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