UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

ARCHIV FRANZ WEST, *Plaintiff*, -against- GAGOSIAN GALLERY, INC., *Defendant*.	No. 15 CV 7008 (LLS)

DEFENDANT GAGOSIAN GALLERY, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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SUPPORTING DECLARATIONS AND EXHIBITS

DECLARATIONS

DECLARANT	ROLE
Dr. Markus Boesch	Attorney for the Foundation in the Vienna Litigation
Melissa Lazarov	Director of Gagosian Gallery, Inc.
Tracy Appleton	Attorney for Gagosian Gallery, Inc.
Ines Turian	President of the Board of the Foundation

EXHIBITS

EXHIBIT NO.	DESCRIPTION
1	July 20, 2012 Foundation Deed
2	July 20, 2012 Declaration of Dedication
3	The Foundation's May 26, 2012 Notice of Appeal in the Vienna Litigation
4	The Archive's September 4, 2015 Motion for Injunctive Relief in the Vienna Litigation
5	Gagosian Gallery, Inc.'s August 14, 2015 Press Release Announcing the Exhibition
6	The Archive's August 27, 2015 Motion for Injunctive Relief in the Commercial Court in Zurich
7	The Commercial Court of Zurich's August 28, 2015 Order Denying the Archive's Motion
8	May 15, 2015 ARTnews Article

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Defendant Gagosian Gallery, Inc. ("Gagosian Gallery") respectfully submits this memorandum of law in opposition to Plaintiff Archiv Franz West's (the "Archive") motion for a temporary restraining order ("TRO") and preliminary injunction (the "Motion" or "Mot.").

PRELIMINARY STATEMENT

This lawsuit is an improper attempt by the Archive to get here what it failed to obtain, and may never obtain, in Austria: injunctive relief enforcing its purported rights under written agreements it entered into with the artist Franz West in July 2011 (the "Furniture Agreement" and the "Photograph Agreement," and collectively the "2011 Agreements"), agreements which West himself subsequently nullified in a pair of written and signed deeds just a year later (the "Deeds"), transferring those same rights to the Franz West Privatstiftung (the "Foundation"). Over four months ago, in the Archive's declaratory judgment action against the Foundation (the "Vienna Action"), the Commercial Court of Vienna declared that, under Austrian law, the Deeds are insufficient to nullify the 2011 Agreements (the "Vienna Decision"). But, as the Archive concedes in a footnote, "[t]he decision is ***not yet enforceable under Austrian law*** because it is still on appeal." Mot. at 11 n.6.[1] To date, apart from the present Motion, the Archive has made two attempts to obtain temporary restraining orders enforcing the Vienna Decision, and both have been *denied*.

First, on August 27, 2015, the Archive attempted to enforce the Vienna Decision in a lawsuit that it filed in Zurich against Galerie Eva Presenhuber AG (the "Zurich Action")—another gallery that, like Gagosian Gallery here, was hired by the Foundation to exhibit and sell West's work, including furniture that allegedly falls within the scope of the Furniture Agreement (the "Furniture"). In its brief, the Archive alludes to the Zurich Action, but it fails to mention that the

[1] Unless otherwise noted, all emphasis in quotations was added by Gagosian Gallery. In the Vienna Action, the Archive similarly has acknowledged that the Vienna Decision does not yet have "the legal force of [a] final judgment." Ex. 4 at 10.

Swiss court *denied its application for an ex parte temporary restraining order* to enjoin Galerie Eva Presenhuber AG ("Galerie Eva Presenhuber") from exhibiting and selling the Furniture (the "Zurich Decision").[2] Among other things, the Swiss court noted that (i) the Archive's dispute with the Foundation first arose in July 2012, when West signed the Deeds; (ii) since that time, Galerie Eva Presenhuber publicly has "carried out for several years, exhibitions with works by Franz West or had his works in their sales program"; and (iii) the Archive's delay in bringing suit and its decision to do so on an emergency basis were "incomprehensible." Ex. 7 at 5-6.[3]

Second, on September 4, 2015 (*i.e.*, the same day it filed the present lawsuit), the Archive filed a motion for injunctive relief with the Vienna Court. *See* Boesch Decl. ¶ 11; Ex. 4. In addition to an injunction, that motion asked the Vienna Court to issue an *ex parte* TRO enjoining the Foundation from proceeding with any sales of the Furniture through Gagosian Gallery at the upcoming September 11, 2015 exhibition (the "Gagosian Exhibition")—the same relief that the Archive presently is seeking from this Court. *Id*. On September 8, 2015, the Vienna Court *denied* the Archive's request for an *ex parte* TRO and set a briefing schedule pursuant to which the Foundation's papers opposing the Archive's request for an injunction are not due until September 17, 2015—six days *after* the Gagosian Exhibition begins. Boesch Decl. ¶ 11.

The Archive's present, third attempt to obtain emergency injunctive relief enforcing the Vienna Decision should be denied on comity grounds because the Vienna Decision is no more enforceable here than it is in Austria. Because Austrian law admittedly governs the scope of the Archive's rights under the 2011 Agreements and the Vienna Court admittedly is the proper forum for determining those rights, this Court should defer to the Vienna Court and deny the present

[2] In its brief, the Archive says only that its dispute with the Galerie Eva Presenhuber "is the subject of injunctive proceedings that remain pending in Switzerland." Mot. at 8.

[3] References to "Ex.__" refer to the exhibits appended to the Declarations in Opposition to Plaintiff's Motion submitted concurrently with this Memorandum.

Motion—which asks for relief the Vienna Court already has held the Archive is not entitled to—on the basis of comity. To the extent the Vienna Court decides to award the Archive any injunctive relief, the Foundation will abide by that decision and Gagosian Gallery—as the Foundation's consignee (*i.e.*, its selling agent)—likewise will abide by it.

Even if this Court were to entertain the notion of granting extraordinary relief that both the Zurich Court and the Vienna Court have concluded is unwarranted, the Archive has not met and cannot meet its burden of showing that it is entitled to such relief. The conduct that the Archive asks this Court to enjoin consists of Gagosian Gallery's (i) selling any of the Furniture and (ii) displaying any photographs of West's works (the "Photographs"). The Archive cannot show that such conduct will cause it irreparable harm—much less make the clear showing required here—for four reasons.

First, the conduct the Archive seeks to enjoin has been ongoing for the past *three years*. The Archive's dispute here is not with Gagosian Gallery, but with the Foundation: Gagosian Gallery does not manufacture any Furniture, and it is selling the Furniture only in its capacity as the Foundation's consignee. Accordingly, as the Archive puts it, "any rights that Gagosian may have to sell the Furniture or to use and exploit Photographs are necessarily derivative of, and conditioned upon, any licensing rights the Foundation may have." Mot. at 11-12. But the Archive's licensing dispute with the Foundation admittedly and pointedly arose in July 2012, when West signed the Deeds revoking the Archive's rights under the 2011 Agreements. *See* Exs. 1, 2. Since that time, the Foundation and its agents have manufactured, promoted, and sold West's furniture. *See* Turian Decl. ¶¶ 3, 5, 7, 8; Lazarov Decl. ¶ 3. For reasons the Archive could not and did not explain in its papers, it delayed nearly *two years* before it sued the Foundation, waiting until March 2014 to file suit, and it never bothered to seek injunctive relief against the Foundation until last Friday, the same

day it filed this lawsuit. *See* Polak Decl. ¶ 6. This lengthy delay alone thwarts any clear showing of irreparable harm.

Second, the Archive cannot establish irreparable harm because, even if this Court enjoins Gagosian Gallery from selling the Furniture on the Foundation's behalf, *both the Foundation itself and the other galleries the Foundation uses will remain free to continue selling the Furniture*.

Third, the Archive's papers misleadingly suggest that Gagosian Gallery seeks to sell "imitations." Mot. at 2. But the record contradicts this assertion. The Furniture that Gagosian Gallery is selling is manufactured by the Foundation, *just like the Furniture that is sold by the Archive*. *See* Turian Decl. ¶ 7. This is not a case where an established copyright holder seeks to enjoin the production and sale of knockoffs. To the contrary, the artist himself signed Deeds revoking the Archive's rights; any rights the Archive has are the subject of ongoing litigation in Austria and admittedly remain unenforceable under Austrian law; and, as the Archive failed to tell this Court, the Archive itself lacks the technical expertise required to make the Furniture, and for that reason, it has continued *to ask the Foundation to manufacture that Furniture*. *Id*. ¶ 8; Boesch Decl. ¶¶ 4-9. The fact that the Foundation also seeks to continue selling the Furniture on its own account—through Gagosian Gallery and other galleries—is hardly cause for injunctive relief. To the contrary, the Foundation's continuing to sell the Furniture is admittedly permissible under the foreign law that the Archive concedes controls this dispute.

Finally, the record demonstrates that, should a TRO be granted by this Court, the Archive's lengthy delays unfairly and substantially will prejudice Gagosian Gallery. Not only did the Archive allow this dispute to drag on for *years* without ever seeking injunctive relief, it also failed to seek any injunctive relief for *four months* after the Vienna Decision was issued—despite the fact that, as the Archive has told the Vienna Court, "*since the judgment*" the Foundation "has been *going strong*…[it] produces and sells furniture…as if the judgment had never been issued." Ex. 4.

During those intervening months of delay by the Archive, Gagosian Gallery expended substantial time and resources preparing to sell the Furniture at its upcoming exhibition, including by arranging for international shipments of the Furniture, outfitting its display space for the Furniture (including by installing special carpeting), spending substantial sums of money on advertising, and inviting a large number of potential customers from around the United States and abroad—all of whom expect to be able to buy the Furniture at the Gagosian Exhibition. Lazarov Decl. ¶¶ 4-7. The record here, including the recent decisions by the Zurich and Vienna Courts, overwhelmingly establishes that the Archive's eleventh-hour request for an order barring any sales at the Gagosian Exhibition should be denied.

FACTUAL BACKGROUND

I. WEST'S WORK IS WIDELY PUBLICIZED AND SOLD PRIOR TO JULY 2011

Franz West, who died on July 25, 2012, was one of the most important contemporary visual artists of Austria with an international appeal. He is known primarily for his sculptural works, including furniture, and his works have been displayed in museums worldwide, including the Museum of Modern Art and the Solomon R. Guggenheim Museum.

For many years, West operated a large studio, or "atelier," with several assistants. In this atelier, known as "Atelier Franz West," West or his assistants created various artworks according to his specifications and designs. Turian Decl. ¶ 4. Atelier Franz West sold hundreds of West's works, including furniture, throughout the world. Since 2000, Atelier Franz West has been led by Ines Turian, who acted as the studio manager. As explained below, after West died on July 25, 2012, Ms. Turian became the President of the Board of the Foundation, and she and West's assistants continued their work manufacturing West's furniture for the Foundation. *Id.* ¶¶ 1, 4.

II. WEST AND THE ARCHIVE ENTER INTO THE SHORT-LIVED FURNITURE AGREEMENT AND PHOTOGRAPH AGREEMENT IN JULY 2011

In 1999, West founded the Archive, a not-for-profit entity organized as a *Verein*

(association) under the laws of Austria, to promote his works. During his life, West was exclusively responsible for financing the Archive's activities. West appointed Eva Badura, a curator at the Museum of Modern Art in Vienna (MUMOK), the Archive's Secretary in or about 1999.

On May 27, 2011, West signed the Furniture Agreement with the Archive, a license agreement pursuant to which he purported to grant the Archive an exclusive license to "produce and sell" the Furniture, which included certain identified furniture he had designed and all copyrightable furniture he would design in the future. Polak Decl. Ex. A ¶ 2.1. In return for the license, the Archive agreed to pay West's heirs a license fee of 5% of the net sale price of each work sold. *Id.* ¶ 2.3. Critically, the Furniture Agreement expressly stated that it "enters into force on the day of Franz West's death." *Id.* ¶ 4. As a result, under the Furniture Agreement's own terms, it was not in "force," and thus not enforceable, prior to July 25, 2012—the day West died. *See* Complaint ("Compl.") ¶ 15.

Also on May 27, 2011, West separately signed the Photograph Agreement with the Archive, a license agreement pursuant to which he purported to grant the Archive an exclusive license to "use and exploit" any and all photographs of all works of art he created or would thereafter create. Polak Decl. Ex. B ¶ 2.1. In return for the license, the Archive agreed to pay West's heirs 25% of the net income from the exploitation of the photographs. *Id.* ¶ 2.3. Like the Furniture Agreement, the Photograph Agreement provided that it "enters into force on the day of Franz West's death" and thus did not become enforceable until July 25, 2012. *Id.* ¶ 3.

III. WEST NULLIFIES THE 2011 AGREEMENTS BEFORE THEY EVER TAKE EFFECT

The Archive signed the Furniture Agreement and Photograph Agreement on July 14, 2011. Thereafter, West had a falling out with Dr. Badura as a result of, among other things, Dr. Badura's claiming to know better than West which of his works were authentic. Turian Decl. ¶ 3. As a result of his disputes with Dr. Badura, West no longer wished to be associated with the Archive and

decided to create a private foundation that would hold the licenses to sell his works and take appropriate steps to safeguard his legacy. *Id.*

To this end, West signed the following two Deeds on July 20, 2012. Under a Deed of Foundation, West established the Foundation, which is registered under FN 383488 d in the commercial register of the Commercial Court of Vienna (the "Vienna Court"). Boesch Decl. ¶ 5; Ex. 1. Article 3.1 of the Deed of Foundation provides that the Foundation's purpose was to, among other things: (1) preserve and supervise the works of Franz West (the "Works"); (2) promote the Works; and (3) maintain and safeguard the copyrights to the Works. *Id.* The President of the Board of the Foundation is Ms. Turian, the head of the former Atelier Franz West. Turian Decl. ¶ 1.

Through the second notarial deed, a Declaration of Dedication, West assigned certain identified works to the Foundation, and the right to photograph such works. Ex. 2. Among the works assigned were the Furniture identified in the Furniture Agreement. *Id.*

West died on July 25, 2012.

IV. THE ARCHIVE DELAYS TWO YEARS BEFORE SUING THE FOUNDATION AND THREE YEARS BEFORE SUING GAGOSIAN GALLERY

A. The Foundation Has Been Selling West's Furniture and Displaying Photographs of His Work Since July 2012

Since July 2012, the Foundation actively has pursued its mission of promoting, manufacturing, and selling West's works, including the Furniture. Turian Decl. ¶ 5. The Foundation principally sells West's works through galleries, including Galerie Eva Presenhuber and Gagosian Gallery. *Id.* In arranging these sales, the Foundation consigns the works to the galleries, which act as the Foundation's agents in selling the works to the public. *Id.* Until August 27, 2015, the Archive never made any attempt to seek injunctive relief against the Foundation's consignees to prevent the sale or display of any West works.

B. Gagosian Gallery Has Been Selling West Furniture and Displaying West Photographs Since October 2012

Gagosian Gallery has been selling West furniture and displaying photographs of his works since at least October 2012. Lazarov Decl. ¶ 2. In fact, as Gagosian Gallery's website currently reflects, in October 2012, Gagosian Gallery presented a widely-publicized exhibition of West's works in London, entitled "Man with a Ball." *Id.* This exhibition lasted from October 9, 2012 to November 10, 2012 and was memorialized in an exhibition catalog that included dozens of photographs of West's works. *Id.* The catalog has been offered for sale on Gagosian Gallery's website since November 2012. *Id.*

C. The Archive Sues the Foundation in March 2014, Obtains a Favorable Ruling from the Trial Court, But Fails to Obtain Either an Enforceable Judgment or an Injunction

On March 21, 2014, the Archive commenced the Vienna Action, seeking a declaration of its rights under the 2011 Agreements. Until then, the Archive had not commenced any legal proceedings in any forum to enforce its purported rights under the 2011 Agreements against the Foundation or any of the Foundation's consignees (such as galleries) or other agents. For reasons not discussed in its papers, the Archive chose not to seek any injunctive relief at the time that it filed the Vienna Action. Boesch Decl. ¶ 12.

On April 28, 2015, the Vienna Court issued the Vienna Decision. Polak Decl. Ex. C. In substance, the Vienna Court decided that, as a matter of Austrian contract law, the Deeds were insufficient to nullify the 2011 Agreements—even though West admittedly had had a falling out with the Archive and admittedly had signed the Deeds. *Id.*

On May 26, 2015, the Foundation appealed the April 28, 2015 Vienna Decision to the Higher Regional Court of Vienna. Ex. 3. Significantly, and as the Archive concedes, as a result of this appeal, under Austrian law, the April 28, 2015 Decision is "not enforceable." *See* Polak Decl. ¶ 6; *see also* Boesch Decl. ¶ 9. The Foundation's appeal remains pending.

D. The Archive Sues Another Gallery in Zurich and the Swiss Court Denies the Archive's Request for a TRO

On August 27, 2015, the Archive filed the Zurich Action in the Court of Commerce of the Canton of Zurich (the "Zurich Court") against Galerie Eva Presenhuber, seeking the Swiss equivalent of an *ex parte* TRO to enjoin an exhibition of West's furniture and sculpture that was scheduled to commence the next day and continue through November 7, 2015. Ex. 6 at 2-3, 5. Like Gagosian Gallery, Galerie Eva Presenhuber planned to exhibit several works that it had received on consignment from the Foundation, including works identified in the Furniture Agreement. *Id.* In fact, as discussed further below, the Foundation had made plans as early as May 2015 for Gagosian Gallery and Galerie Eva Presenhuber to conduct overlapping exhibitions of West's works, and Ms. Turian informed the Archive as early as June 2015 that the Foundation intended to continue selling furniture through these galleries. Turian Decl. ¶ 8. As it has claimed here, the Archive alleged in the Zurich Action that Galerie Eva Presenhuber was violating its rights under the Furniture Agreement and that it would suffer irreparable harm absent an injunction prohibiting the exhibition from going forward. Ex. 6 at 16-22.

On August 28, 2015, the Zurich Court *denied* the Archive's request for an *ex parte* TRO barring the exhibition. Ex. 7. The rationale for the Zurich Court's decision applies here: the Zurich Court held that the Archive was not entitled to an *ex parte* TRO because of its unreasonable delay in seeking such relief. *Id.* In this regard, the Zurich Court noted that the litigation between the Archive and the Foundation had been going on "for some time," and that Galerie Eva Presenhuber had, since 2006, sold and exhibited West's works, and included photographs of those works on its webpage. *Id.* at 3-6. Against this background, the Zurich Court held that, even assuming the Archive first learned of the August 28, 2015 exhibition "only a few days ago," it was "incomprehensible" why it "did not, at least since the judgment of the Commercial Court of Vienna on April 17, 2015," initiate legal action against Galerie Eva Presenhuber. *Id.* at 6.

V. GAGOSIAN GALLERY'S SEPTEMBER 11, 2015 EXHIBITION OF WEST'S WORK

A. The Foundation Continues to Manufacture, Promote and Sell Furniture After the Vienna Decision Is Issued

After the Vienna Decision was issued in April, the Archive chose not to seek any injunctive relief against the Foundation, despite its knowledge of public sales of Furniture and displays of Photographs. Instead, the Archive sat idly by for over four months while, as the Archive recently put it, the Foundation continued "going strong" with its manufacturing and sales, "as if the judgment had never been issued." Ex. 4. This delay was one of the principal reasons that led the Zurich Court to deny the Archive's application for a TRO in Switzerland. Ex. 7 at 5-6.

B. Gagosian Gallery Invests Substantial Resources Preparing for the Gagosian Exhibition

As the Court can imagine, exhibitions such as the upcoming Gagosian Exhibition do not come together overnight. In the more than four months since the Vienna Decision, Gagosian Gallery has spent substantial time and resources working with the Foundation to plan, prepare for, and promote the upcoming exhibition. For example, Gagosian Gallery has spent substantial sums on an announcement card and other advertising, shipping the furniture from Vienna to New York, outfitting its display space for the furniture (including shipping and installing a special carpet designed by West), travel expenses for Gagosian Gallery employees, and entertainment and other incidental expenses, including expenses related to insurance. *See* Lazarov Decl. ¶ 4.

C. Halting the Gagosian Exhibition Now Would Cause Gagosian Gallery to Incur Substantial Monetary Losses and Harm Gagosian Gallery's Reputation

The Gagosian Exhibition is scheduled to open in just two days. If the Gagosian Exhibition were halted at this late date, Gagosian Gallery would suffer significant reputational harm, as such a cancellation inevitably would be reported in the art market causing potential buyers to question Gagosian Gallery's professionalism, and the loss of future business. *Id.* ¶¶ 6, 7. In addition, Gagosian Gallery would incur costs to remove the installation and forego its expected profits. *Id.*

D. The Archive Belatedly Seeks an Injunction and TRO in the Vienna Action—and the Vienna Court Denies the TRO

On September 4, 2015, the same day it filed its lawsuit against Gagosian Gallery, the Archive filed a motion with the Vienna Court seeking injunctive relief against the Foundation. Boesch Decl. ¶ 11; *see* Ex. 4. Critically, the Archive's motion included a request for an ex parte order barring the Foundation from selling any Furniture at the Gagosian Exhibition. *See* Ex. 4 at 10-11. In the motion the Archive specifically mentioned that the Foundation had been "going strong" manufacturing West furniture in the preceding months, and that the Gagosian Exhibition was planned for September 11, 2015. Ex. 4 at 3-4. This motion was the first attempt made by the Archive to obtain injunctive relief in the Vienna Action. Boesch Decl. ¶ 11. On September 8, 2015, the Vienna Court denied the Archive's request for an *ex parte* TRO and set a briefing schedule pursuant to which the Foundation's opposition papers are due on September 17, 2015. *Id.*

ARGUMENT

I. COMITY BARS THE ARCHIVE'S ATTEMPT TO ENFORCE HERE A JUDGMENT THAT IT ADMITS IS "NOT ENFORCEABLE" IN AUSTRIA

The Archive's conduct and its own papers establish that whatever rights it has with respect to the Furniture and the Photographs are determined by the Vienna Decision and Austrian law, including whatever rights it has to currently enforce the Vienna Decision. Because the Vienna Decision admittedly is not yet enforceable under Austrian law, and because the Vienna Court itself has denied the Archive's request for a TRO enjoining sales of Furniture at the Gagosian Exhibition, comity dictates that this Court should not issue an order reaching the opposite conclusion.

A. The Archive's Rights All Derive from the Vienna Decision and Should Be Resolved by the Austrian Courts

The record here establishes that any rights the Archive has with respect to West's works derive solely from the Vienna Decision and the scope of any such rights should be decided, as the Vienna Decision itself was, by the Austrian courts. As a threshold matter, the Archive concedes

that the present dispute is really one between itself and the Foundation, not between itself and Gagosian Gallery or any other gallery. As the Archive puts it, "any rights that Gagosian may have to sell the Furniture or to use and exploit Photographs are necessarily derivative of, and conditioned upon, any licensing rights the Foundation may have." Mot. at 1-12. And both the Foundation's rights and the Archive's rights are determined, according to the Archive, by the Vienna Decision. *Id.*

The Archive also concedes that the proper forum for resolving the present dispute is the Austrian courts, and not this or any other U.S. court. As the Archive puts it:

> An Austrian court has now declared the validity of the Furniture Agreement and Photographs Agreement….[T]hese issues involve the interpretation and application of Austrian law, the impact of those licenses on the rights of Austrian citizens, and the effect on works of art protected by Austrian Copyright Law…

Mot. at 10. In fact, after a prolonged and inexplicable period of delay, the Archive finally has asked the Vienna Court for the same relief it is seeking from this Court: an injunction barring future sales of Furniture by the Foundation and an interim TRO halting the Gagosian Exhibition, the latter of which the Vienna Court already has denied.

Thus, the record here confirms that whether the Foundation—and, derivatively, its agents such as Gagosian Gallery—should be restrained from selling Furniture pending the Appeal is an issue that (1) is governed by Austrian law; (2) should be decided by the Vienna Court; and (3) has now been presented to the Vienna Court and partially decided by that court (*i.e.*, the TRO portion of the Archive's motion there was denied). Far from seeking relief from this Court because relief is unavailable in Austria, the Archive inexplicably seeks relief from this Court that it admittedly already is seeking from, and concedes should be decided by, the Vienna Court.

B. Under Settled Principles of Comity, the Archive Cannot Obtain Injunctive Relief Here That It Is Not Entitled to in Austria

Under settled principles of comity, this Court should not entertain the Archive's request to enforce here an order that is admittedly unenforceable in its home jurisdiction. Whether a foreign declaratory judgment is enforceable here is an issue governed by the "common law doctrine of the comity of nations." *Owoyemi ex rel. PDP-USA Chapter Executive Members v. Wariboko*, No. CV 05 1789 (CPS), 2005 WL 1241133, at *2 n.3 (E.D.N.Y. May 23, 2005) (declining to enforce foreign declaratory judgment). Where, as here, a foreign declaratory judgment is not enforceable in its home jurisdiction, it is not entitled to enforcement by our courts. *Allstate Ins. Co. v. Administratia Asigurarilor de Stat*, 962 F. Supp. 420, 425 (S.D.N.Y. 1997) (declining to enforce a Romanian non-monetary judgment because there were questions of fact as to whether the judgment was enforceable in Romania). For that reason alone, this Court should not issue an order—much less an order awarding extraordinary relief—that treats the Vienna Decision as if it were enforceable. *ContiChem LPG v. Parsons Shipping Co.*, 229 F.3d 426, 433 (2d Cir. 2000) (A party should not be permitted to "accomplish indirectly, by means of [preliminary relief], that which it could not do directly.").

While the admittedly unenforceable status of the Vienna Decision is reason enough to deny injunctive relief here, the fact that the Vienna Court already has refused to issue a TRO and has the Archive's motion for a preliminary injunction pending before it overwhelmingly calls for the Archive's present Motion to be denied. It is settled law that "the doctrine of international comity (the mutual respect of sovereigns) requires the courts of one nation to avoid, where possible, interfering with the courts of another." *In re Rimsat, Ltd.*, 98 F.3d 956, 963 (7th Cir. 1996); *see also Pilkington Bros. P.L.C. v. AFG Indus. Inc.*, 581 F. Supp. 1039, 1045 (D. Del. 1984) (declining to issue a preliminary injunction which would "domesticate an interim foreign order and give it the imprimatur of an American court" because to do so "would offend, rather than promote, principles

of international comity" and create a risk of "inconsistent interpretations and inconsistent enforcement"); *Ensign-Bickford Co. v. ICI Explosives USA Inc.*, 817 F. Supp. 1018, 1031 (D. Conn. 1993) (Cabranes, C.J.) (declining to exercise jurisdiction where the plaintiff instituted a parallel litigation in Canada because international comity "requires that domestic courts take reasonable steps to prevent potential conflicts from ripening into overt confrontations with foreign tribunals"). Comity applies with special force where, as here, the foreign proceeding has gone beyond the initial stages and the foreign court has fully delved into the case. *See, e.g.*, *Tarazi v. Truehope Inc.*, 958 F. Supp. 2d 428, 436-37 (S.D.N.Y. 2013) (deferring under principle of international comity to Canadian case filed two weeks earlier which had begun discovery); *Caspian Investments, Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 885 (S.D.N.Y. 1991) (dismissing action in favor of Irish action that was commenced eight months earlier and had "progressed beyond an initial stage."). The Vienna Court has a much greater interest in and history with this dispute, and it would offend comity for this Court to give the Archive another bite at the apple and grant relief that the Vienna Court already has denied. *Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v. Kvaerner a.s.*, 243 A.D.2d 1, 9 (N.Y. 1st Dep't 1998) ("[S]ound considerations of comity—in particular the possibility of conflicting rulings on identical issues—prohibit duplicative litigation.").

II. THE ARCHIVE FAILED TO MEET ITS BURDEN OF DEMONSTRATING IRREPARABLE HARM

Even if the Archive were somehow entitled to seek enforcement of an admittedly unenforceable foreign judgment (and it plainly is not), the Archive's request for injunctive relief still should be denied because the Archive has not made a showing—much less the "clear showing" required by controlling law—of irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Instead, like its attempt to gloss over the unenforceable status of the Vienna Decision, the Archive baldly claims that "there is little doubt that the Archive stands to suffer irreparable harm if an injunction is not issued," and proceeds to support that claim with nothing

more than conclusory assertions that are both unsupported by any competent evidence and glaringly contrary to admitted facts—including the Archive's own lengthy delay. Mot. at 21.

A. The Archive's Long Delay in Seeking Injunctive Relief Is Reason Enough to Deny a TRO Against Gagosian Gallery Now

As a threshold matter, the Archive's lengthy delay in seeking injunctive relief is, by itself, sufficient reason to deny the Archive's request for any injunctive relief here. The uncontroverted evidence establishes that the Archive could have sought injunctive relief at any time since July 2012, when this dispute pointedly arose with West's signing the Deeds nullifying the 2011 Agreements. Since that time, the Foundation and its agents, including consignees like Gagosian Gallery and Galerie Eva Presenhuber, publicly have displayed the Photographs and sold the Furniture—the very acts that the Archive now baldly claims will cause it "irreparable harm." Mot. at 21. But the fact that the Archive allowed these acts to continue for years without ever previously seeking injunctive relief defeats its hollow claims of irreparable harm now. *Tough Traveler Ltd. v. Outbound Prods.*, 68 F. 3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief."). The fact that the Archive purportedly owns copyrights in the Furniture and the Photographs does not make its lengthy delay any less inexcusable. *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d 441, 457-58 (S.D.N.Y. 2014) (denying preliminary injunction and noting "[i]t is well-established in this Circuit that delays in moving for injunctive relief to protect copyrights . . . from further unauthorized use weigh heavily against the movant.").

Recognizing that the foregoing delay undermines any claim of irreparable harm, the Archive misleadingly suggests that it only had cause to seek injunctive relief as of August 14, 2015, when Gagosian Gallery issued a press release concerning the Gagosian Exhibit. Compl. ¶ 19. That suggestion fails for three reasons. First, as shown above, Gagosian Gallery is only a selling agent of the Foundation: the operative dispute here is the one between the Archive and the Foundation, and

that dispute—along with the Foundation's challenged actions—has been ongoing since July 2012. Second, Gagosian Gallery itself has displayed West's Furniture in catalogs going back to October 2012. Finally, even as to the upcoming show, the Archive was aware as early as ***June 2015*** that the Foundation was planning to sell West's Furniture through Galerie Eva Presenhuber and Gagosian Gallery. Turian Decl. ¶ 8. Delaying in any one of these instances is inexcusable—delaying in all three instances, as the Archive has done, can only be described as, to echo the Zurich Court, "incomprehensible." Ex. 7 at 6. Given its repeated delays, the Archive cannot remotely meet its heavy burden of establishing irreparable harm. *See, e.g.*, *In re AutoHop Litig.*, No. 12 CIV. 4155 LTS KNF, 2013 WL 5477495, at *9-11 (S.D.N.Y. Oct. 1, 2013) (denying application for preliminary injunction, where television network failed to "proffer[] any evidence of actual and imminent injury" and instead "speculate[d] as to the effect of the [challenged product]; even though [it] ha[d] been in the market for many months"); *Clonus Assocs. v. Dreamworks, LLC*, 417 F. Supp. 2d 248, 254 (S.D.N.Y. 2005) (rejecting claim of irreparable harm as "unsupported by concrete evidence" and collecting cases in this Circuit that have "rejected such speculative arguments in deciding whether to issue a preliminary injunction"); *Jumbo Bright Trading Ltd. v. Gap, Inc.*, No. CV 12-08932 DDP MANX, 2012 WL 5289784, at *2 (C.D. Cal. Oct. 25, 2012) (finding movant failed to meet its burden of establishing irreparable harm where it speculated, in a declaration and a distributor's letter, that consumers would be confused and profits diminished if alleged copyright infringement was not enjoined); *EnVerve, Inc. v. Unger Meat Co.*, 779 F. Supp. 2d 840, 845 (N.D. Ill. 2011) (finding movant's speculations about possible reputational damage as a result of copyright infringement too speculative to establish irreparable harm).

B. The Archive's Claims of Dilution, Confusion, and Reputational Harm Are Unsupported and Contrary to the Record

Though its lengthy delay thwarts any showing of irreparable harm, the specific harms claimed by the Archive fail to warrant any injunctive relief. First, the Archive claims that "[t]he

limitation imposed on the number of items of the Furniture in existence increases the value of the Furniture that the Archive can currently sell and the value of the Furniture that the Archive will sell under the Furniture Agreement in the future," and that the Foundation's creating and selling additional pieces of Furniture will "negatively impact" that value. Mot. at 21. But the only evidence that the Archive provides in support of that bald assertion is the conclusory declaration of Edelbert Köb, the Archive's director. *Id*., citing Köb Decl. ¶ 8. Mr. Köb's declaration fails to address the fact that sales of the Furniture through prominent galleries like Galerie Eva Presenhuber and Gagosian Gallery are just as likely—if not more likely—to *increase* the value of the Archive's potential future sales of the Furniture because of, among other things, their promotional efforts. In fact, the value of the Furniture has *increased* since July 2012, despite the Foundation's and its galleries' sales and other activities. For that reason alone, the Archive's claim of dilution should be rejected as speculative—and, worse, counter-factual.

In any case, the Archive's claim of dilution cannot constitute irreparable harm warranting injunctive relief here because the Vienna Decision admittedly is "not enforceable" and thus, even if Gagosian Gallery were enjoined, the Foundation and its other galleries—like Galerie Eva Presenhuber—remain free to manufacture and sell the Furniture in Austria, Switzerland and other jurisdictions. Given that reality—which the Archive and Mr. Köb glaringly ignore—the Archive's claim that irreparable harm will occur absent a TRO halting sales at the Gagosian Exhibition falls flat. *See Marcy Playground, Inc. v. Capital Records, Inc*., 6 F. Supp. 2d 277, 282 (S.D.N.Y. 1998) ("[A] preliminary injunction here would be very much like locking the barn door after the horse is gone."); *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 153 (D.D.C. 2011) ("It would make little sense for a court to conclude that a plaintiff has shown irreparable harm when the relief sought would not actually remedy that harm. A plaintiff may be irreparably harmed by all sorts of things, but the irreparable harm considered by the court must be caused by the conduct in dispute

and remedied by the relief sought."); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014) ("[T]he inability to obtain redress from an order by this Court[]likewise dooms the plaintiff's ability to show irreparable harm."); *Am. Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923, 937 (C.D. Cal. 1981) (denying preliminary injunction because "issuance of a preliminary injunction would do little to redress" "uncertainty regarding the legal validity" of the disputed municipal Plan, "since the Plan's validity will remain uncertain until judgment has been entered on the merits").

The Archive's remaining claims of consumer confusion and harm to its reputation fail for the same reason: irrespective of any TRO here, the Foundation and its other galleries already have been and will remain able to promote and sell the Furniture, so there is no actual or imminent threat of consumer confusion. This is not a case of some established copyright holder seeking to prevent imitations or pirated copies from entering the market. Quite the contrary, the Archive's dispute with the Foundation has been live since July 2012, when the artist himself nullified the Archive's rights in a written document; has been litigated since March 2014, and remains in litigation; and has been a market reality—with competing sales and promotional activities—throughout that entire time period of over three years. What is more, contrary to the Archive's misleading suggestion that the Foundation is selling "imitations" (Mot. at 2), *the Furniture that the Archive itself sells is manufactured by the Foundation*, and as recently as May 2015, *the Archive has asked the Foundation to continue making the Furniture*—a request which the Archive made because the Foundation has institutional and technical knowledge required to make the Furniture that the Archive lacks.[4]

[4] Given these facts, the Archive's cases are inapposite. While the Archive requests preliminary relief based on speculation, it relies on two cases—*Beastie Boys* and *Simplex*—in which courts issued ***permanent injunctions*** only after plaintiffs ***proved*** at trial that, among other things, they were actually injured by the defendants' conduct. *See Beastie Boys v. Monster Energy Co.*, No. 12 CIV.6065 PAE, 2015 WL 736029, at *4 (S.D.N.Y. Feb. 20, 2015) (Pl. Mem. at 21) (entering permanent injunction after "jury found that the [plaintiff] had proven a likelihood of consumer confusion as to the group's endorsement of [the defendant's] products [and] the evidence supported

The Archive's claims of irreparable harm are worse than speculative—they are contrary to the record. The Archive has not even remotely established irreparable harm warranting injunctive relief, and given the uncontroverted record here it *cannot* do so.

C. The Archive Failed to Establish that Any Alleged Harm Cannot Be Cured by Monetary Damages

Finally, although the Archive attempts to frame its purported injuries as hard-to-quantify injuries to its intellectual property or ability to control West's legacy, the real injury it hopes to stem is the possibility that the Foundation will make a profit that could have accrued to the Archive. But the Archive fails to making any showing, much less the "clear showing" required here, that this harm cannot be remedied by money damages. This is yet another reason the Archive has not and cannot meet its burden with respect to irreparable harm. *See, e.g.*, *In re AutoHop Litig.*, 2013 WL 5477495, at *9-11 (given that the parties know the relevant "numbers," it is "clear that whatever harm may result is calculable and compensable with money damages"); *Williams v. Bridgeport Music, Inc.*, No. LACV1306004JAKAGRX, 2015 WL 4479500, at *40 (C.D. Cal. July 14, 2015) (finding no irreparable harm where musician can seek monetary relief for infringement of his song).

III. THE ARCHIVE FAILED TO ESTABLISH A LIKELIHOOD OF SUCCESS ON ANY OF ITS CLAIMS

A. Count I ("Copyright Violation"): The Archive Admittedly Does Not Have Any Enforceable Copyright in Vienna, and It Has Not Shown that Franz West's Furniture Enjoys Copyright Protection in the United States

Where, as here, "the movant seeks a 'mandatory' injunction—that is, as in this case, an injunction that will alter rather than maintain the status quo—she must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." *Doninger*

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that finding"); *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 167, 202 (S.D.N.Y. 2009) (Pl. Mem. at 22) (entering permanent injunction following bench trial). In the only other case Archive invokes, *CJ Products LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 145 (E.D.N.Y. 2011), the plaintiff proved a likelihood of irreparable harm by evidence, including consumer reviews, demonstrating actual confusion between plaintiff's and defendant's products. There is no such evidence here.

v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008). The Archive cannot and does not meet this standard.

To bring a claim for copyright infringement, the Archive must necessarily demonstrate ownership of a valid copyright. *See, e.g.*, *Poindexter v. EMI Record Grp. Inc.*, No. 11 CIV. 559 LTS JLC, 2012 WL 1027639, at *3 (S.D.N.Y. Mar. 27, 2012) ("[O]nly '(1) owners of copyrights and (2) persons who have been granted exclusive licenses by owners of copyrights' have standing to sue for copyright infringement."). The Archive asserts that it holds the copyright to the Furniture and the Photographs pursuant to Austrian copyright law, Compl. ¶ 31, and it relies on the Vienna Decision as evidence of the Archive's ownership of these rights, *id.* ¶ 17. As noted above, however, even Austrian courts are not prepared to enforce the Archive's purported rights based on the Vienna Decision. The Archive concedes that "[t]he decision ***is not yet enforceable under Austrian law*** because it is still on appeal." Mot. at 11 n.6. Accordingly, the Archive does not, at this time, have sufficient evidence of ownership to demonstrate a likelihood of success on its copyright claim.

Even if this Court determines that the Archive has demonstrated a likelihood of success with respect to the ownership of West's rights, the Archive has wholly failed to establish that copyright *infringement* has occurred with respect to any rights that it may own. While ownership (and, arguably, assignment[5]) of West's copyrights fall under Austrian law, the question of copyright infringement is governed by *U.S.* law. *See Itar-Tass Russian News Agency v. Russian Kurier, Inc. Eyeglasses*, 153 F.3d 82, 91 (2d Cir. 1998) (ruling that principle of *lex loci delicti* governs the choice-of-law question for copyright infringement); Berne Convention Art. 5(1) (national treatment shall apply to foreign works in signatory states like the United States). Berne Convention, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, Art. 1, 5(1), 828 U.N.T.S. 221, 225, 231–233.

We understand from opposing counsel that your Honor requested further information about whether furniture is copyrightable. The law is clear that furniture is copyrightable where "the

[5] *See Itar-Tass Russian News Agency v. Russian Kurier, Inc. Eyeglasses*, 153 F.3d 82, 90-91 & n.11 (2d Cir. 1998) (expressly leaving open "choice of law issues concerning assignments of rights").

design elements of its furniture are physically or conceptually separable from the furniture's utilitarian elements." *Heptagon Creations, Ltd. v. Core Grp. Mktg. LLC*, No. 11 CIV. 01794 LTS, 2011 WL 6600267, at *3 (S.D.N.Y. Dec. 22, 2011) (finding furniture at issue was not subject to copyright) *aff'd*, 507 F. App'x 74 (2d Cir. 2013); *see also Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993-94 (2d Cir. 1980) (belt buckles were conceptually separable and thus subject to copyright). Gagosian Gallery is not contesting the copyrightability of the Furniture. However, it is plain that the Archive's complaint and its moving papers are devoid of facts demonstrating that West's design is physically or conceptually separable from the utilitarian function of the Furniture. The copyrightability of the Furniture is a necessary element of the Archive's infringement claims under the 2011 Agreements. Thus, the complaint's failure to establish the Furniture's copyrightability provides a separate basis for concluding that the Archive has not demonstrated a likelihood of success on its copyright claim.

B. Counts II & III ("Lanham Act Violation" and "Unfair Competition"): The Archive Failed to Provide Any Evidence of Likelihood of Confusion. Moreover, the Lanham Act and Unfair Competition Claims are Preempted by the Copyright Act

1. The Archive Failed to Provide any Evidence of a Likelihood of Confusion, thus Precluding a Likelihood of Success on its Lanham Act and Unfair Competition Claims

The Archive asserts Lanham Act and unfair competition claims based on the premise that Gagosian Gallery has misled consumers by portraying "imitation" works as genuine West furniture. As discussed above, however, the Foundation's works *are* genuine West works. *See* Part I.B *supra*. The Foundation is the *only* entity that makes West furniture, Turian Decl. ¶ 7, and in fact, the Archive approached the Foundation to produce West furniture for the Archive, *id.* ¶ 8. These facts undermine the Archive's Lanham Act and unfair competition claims.

As the Archive acknowledges, a Lanham Act claim requires it to show, *inter alia*, a likelihood of causing confusion as to the affiliation connection or association of the works. Mot. at

15-16; 15 U.S.C. § 1125(a)(1)(a); *see, e.g.*, *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 886 (9th Cir. 1996) ("The Act prohibits the use of any name which 'is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of' goods."). The Archive attempts to characterize the confusion as being about the attribution of these works, but there is no confusion on that point—these are West works produced by West's furniture manufacturer. Rather, the real "confusion" that the Archive attempts to assert concerns whether these West works are "authorized," Compl. ¶ 38—*i.e.*, whether they are approved by the Archive as the purported exclusive license holder. *Cf. WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 43-46 (1st Cir. 1991) (Channel 5's use of the name "Boston Marathon" to describe broadcast did not leave impression that Boston Athletic Association, its licensing agent, or Channel 4 sponsored Channel 5's broadcast or gave it an official "OK" or imprimatur).

Here, Gagosian Gallery's press release makes clear that the Gagosian Exhibition is done "[i]n collaboration with Franz West Privatstiftung [*i.e.*, the Foundation]," that "[s]ince 2014, [the Foundation] has produced selected furniture works made by West during his lifetime" and that they "continue to be handcrafted by West's staff at his Vienna studio." Köb Decl. Ex. 1. With these statements, there can be no confusion as to where the works were produced or that it was the Foundation and not the Archive that collaborated in their production. Thus, the Archive fails to show confusion as required by the Lanham Act claim. *See Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1047 (2d Cir. 1992) (product labelled "Tylenol PM" not likely to cause confusion with "Excedrin PM" even though Tylenol PM producer used many elements of Excedrin PM trade dress in bad faith).

The Archive's unfair competition claim likewise requires a similar demonstration of a likelihood of confusion. *Id.* at 1048. Even its "'misappropriation' theory still requires some confusion, if not as to source at least as to sponsorship or permission." *Id.* Because the Archive has

failed to demonstrate any confusion as to whether the Archive authorized the Foundation's production of West works, its unfair competition claim likewise must fail.

2. The Lanham Act and Unfair Competition Claims are Preempted by the Copyright Act

"[T]he Second Circuit has limited the extent to which a copyright-based claim may support a Lanham Act claim, repeatedly cautioning that 'we reject . . . attempt[s] to convert all copyright claims into Lanham Act violations.'" *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 463 (S.D.N.Y. 1999) (quoting *Lipton v. The Nature Co.*, 71 F.3d 464, 473 (2d Cir. 1995)). Similarly, a state law unfair competition claim is preempted by the Copyright Act where it is derivative of a copyright claim. *See id.* at 462-63. Here, the Archive's unfair competition claim for misappropriation is based purely on the Archive's theory that the Foundation is misappropriating "a property right belonging to another"—*i.e.*, the copyrights the Archive allegedly holds. Mot. at 17. In this case, "[i]t is only through this basic claim that . . . any competition is unfair." *Weber*, 63 F. Supp. 2d at 463. The Archive also claims a violation of the Lanham Act and unfair competition based on a theory that the Foundation made a misrepresentation to the public that would cause confusion as to the affiliation connection or association of the works. However, as explained above, *see* Part III.B.1, there is no misrepresentation as to the authorship of the works—the Foundation is undeniably producing genuine West furniture. The Archive's true theory concerns the public perception of whether the work is authorized by the copyright holder. These purported "confusion" claims under the Lanham Act and unfair competition rubrics are likewise derivative of the Archive's copyright claims and are therefore preempted.

C. Counts IV & V ("Conversion" and "Unjust Enrichment"): The Conversion and Unjust Enrichment Claims Are Not Permitted Because They Are Preempted by the Copyright Act

The Archive's claim for conversion does not contain any element that would make it qualitatively different from its copyright infringement claim. Accordingly, the conversion claim is

preempted by the Copyright Act. *See Miller v. Holtzbrinck Publishers, LLC*, No. 08CIV.3508(HB), 2008 WL 4891212, at *2 (S.D.N.Y. Nov. 11, 2008) (ruling that plaintiff's claim for conversion was preempted because it "seek[s] to redress a legal or equitable right that is equivalent to exclusive rights protected by the Copyright Act"); *Archie Comic Publications, Inc. v. DeCarlo*, 141 F. Supp. 2d 428, 432 (S.D.N.Y. 2001) (concluding that conversion claim was preempted because it concerned a right that was "essentially equivalent to rights protected under the Copyright Act"); *Patrick v. Francis*, 887 F. Supp. 481, 484 (W.D.N.Y. 1995) (ruling that Copyright Act preempted conversion claim because "[w]hat this cause of action actually seeks is to recover for the unauthorized copying of plaintiff's work").

Similarly, "[c]ourts have generally concluded that the theory of unjust enrichment protects rights that are essentially 'equivalent' to rights protected by the Copyright Act; thus, unjust enrichment claims relating to the use of copyrighted material are generally preempted." *Weber*, 63 F. Supp. 2d at 462 (quoting *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1322 (S.D.N.Y. 1997)); *accord Archie Comic Publications, Inc.*, 141 F. Supp. 2d at 432; *Patrick*, 887 F. Supp. at 484. The Archive's unjust enrichment claim turns entirely on its purported ownership of West's copyrights. *See* Compl. ¶¶ 54-61. "It is only through this basic claim that any enrichment is unjust." *Weber*, 63 F. Supp. 2d at 463. Thus, the unjust enrichment claim is also preempted.

IV. THE ARCHIVE FAILED TO ESTABLISH THAT THE BALANCE OF THE EQUITIES TIPS IN ITS FAVOR OR THAT THE PUBLIC INTEREST WILL BE SERVED BY A PRELIMINARY INJUNCTION

As the Archive acknowledges, Mot. at 23-25, to determine whether a TRO should be issued the court must consider whether (1) "the balance of hardships between the plaintiff and defendant . . . tips in the plaintiff's favor," and whether (2) "the public interest would not be disserved by the issuance of a preliminary injunction." *Control Sys., Inc. v. Realized Solutions, Inc.*, No. 3:11CV1423 PCD, 2011 WL 4433750, at *2 (D. Conn. Sept. 22, 2011).

For the reasons stated above, the balance of hardships does not favor the Archive. The

Archive will not suffer any real harm if a TRO is not issued at this time—a fact that is apparent when one considers the Archive's delay in bringing this case. It is simply implausible to believe that the Archive will suffer any hardship by the display of West works produced by the Foundation, which has been the sole manufacturer of high quality West furniture for years. On the other hand, Gagosian Gallery will suffer significant hardship if it is forced to cancel the Gagosian Exhibition at the last minute after expending considerable time and resources planning for it. Such a cancellation would cause Gagosian Gallery to suffer significant money damages from having to uninstall the Gagosian Exhibition, not to mention injury to Gagosian Gallery's reputation, loss of future business, and loss of expected profits. This hardship is particularly unjust when one considers that the Archive was aware of Gagosian Gallery's partnership with the Foundation as early as June 2015, Turian Decl. ¶ 8, and yet it stood back and permitted Gagosian Gallery to spend months planning the Gagosian Exhibition before bringing this action.

Moreover, the public interest would be disserved by the issuance of a TRO. As discussed above, *see* Point I *infra*, principles of comity strongly weigh in favor of declining to issue an injunction here in the United States that the Archive failed to obtain in Austria. Rather than permitting the Archive to perform an end run around the pending Austrian proceedings, the public interest weighs in favor of deferring to the Austrian court's process in adjudicating the Archive's claims.

V. THE COURT SHOULD REQUIRE A SUBSTANTIAL BOND

As amply explained above, this Court should deny the Archive's request for a TRO. If it decides to issue the TRO, however, it should also require the Archive to post a bond to cover Gagosian Gallery's potential damages. Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, this Court "may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages

sustained by any party found to have been wrongfully enjoined or restrained." By requiring a bond to be paid, this Court "assures the enjoined party that it may readily collect damages from the funds posted in the event that it was wrongfully enjoined, and that it may do so without further litigation and without regard to the possible insolvency of the plaintiff." *Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp. 2d 186, 202 (E.D.N.Y. 2013).

Based on the concurrently filed Lazarov Declaration, Gagosian Gallery respectfully requests that the Archive be directed to post a bond of no less than $100,000 if a TRO is issued in this case.

CONCLUSION

For the foregoing reasons, the Archive's motion for a TRO and preliminary injunction should be denied.

Dated: New York, New York
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