

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WILLIAMSBURG CLIMBING GYM COMPANY LLC and FIFTH CONCERTO HOLDCO, INC.,	: : : Case No.: 20-cv-02073-FB-RML : :
Plaintiffs and Counterclaim-Defendants,	: : ANSWER, AFFIRMATIVE : DEFENSES AND : <u>COUNTERCLAIMS</u> : :
v.	: : :
RONIT REALTY LLC,	: : :
Defendant and Counterclaim-Plaintiff.	: : :
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Defendant/Counterclaim-Plaintiff Ronit Realty LLC (“Ronit”), by and through its attorneys, Stein Adler Dabah & Zelkowitz LLP, as and for its Answer and Affirmative Defenses to the Complaint (the “Complaint”), states as follows:

SUMMARY OF CLAIMS

Ronit states that the unnumbered Paragraph under the heading “Summary of Claims” contains legal conclusions as to which no response is required, except admits that Plaintiffs’ Complaint seeks a declaratory judgment and, in the alternative, the rescission of its lease with Ronit.

THE PARTIES

1. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint.
2. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Complaint.

3. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint.

4. Ronit admits the allegations contained in Paragraph 4 of the Complaint.

5. Ronit denies the allegations contained in Paragraph 5 of the Complaint.

JURISDICTION AND VENUE

6. Ronit states that Paragraph 6 contains legal conclusions as to which no response in required.

7. Ronit states that Paragraph 7 contains legal conclusions as to which no response in required.

COMMERCIAL LEASE

8. Ronit denies the allegations contained in Paragraph 8 of the Complaint, except admits that the lease is dated as of November 1, 2018, and refers the Court to the commercial lease, including the amendment and addendum thereto (collectively, the “Lease”), and for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 8 of the Complaint are inconsistent with the Lease, those allegations are denied.

9. Ronit admits the allegations contained in Paragraph 9 of the Complaint and refers the Court to the Guaranty for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 9 of the Complaint are inconsistent with the Guaranty, those allegations are denied.

10. Ronit refers the Court to the Lease for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 10 of the Complaint are inconsistent with the Lease, those allegations are denied.

11. Ronit denies the allegations contained in Paragraph 11 of the Complaint.

12. Ronit denies the allegations contained in Paragraph 12 of the Complaint.

13. Ronit admits that it tendered delivery of the Leased Premises on or about June 20, 2019 and denies the remainder of allegations contained in Paragraph 13 of the Complaint.

14. Ronit denies the allegations contained in Paragraph 14 of the Complaint.

15. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint.

16. Ronit denies the allegations contained in Paragraph 16 of the Complaint.

17. Ronit denies the allegations contained in Paragraph 17 of the Complaint.

18. Ronit refers the Court to the Lease for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 18 of the Complaint are inconsistent with the Lease, those allegations are denied.

19. Ronit denies the allegations contained in Paragraph 19 of the Complaint.

20. Ronit refers the Court to the Lease for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 20 of the Complaint are inconsistent with the Lease, those allegations are denied.

FRUSTRATION OF PURPOSE AND IMPOSSIBILITY

21. Ronit denies the allegations contained in Paragraph 21 of the Complaint, except admits that Governor Cuomo issued Executive Order No. 202, and refers the Court to that Order for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 21 of the Complaint are inconsistent with that Order, those allegations are denied.

22. Ronit denies that construction continued into the third week of March 2020 and admits the remainder of allegations contained in Paragraph 22 of the Complaint.

23. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint.

24. Ronit denies the allegations contained in Paragraph 24 of the Complaint, except admits that Governor Cuomo issued a number of Executive Orders in connection with the COVID-19 pandemic.

25. Ronit states that Paragraph 25 of the Complaint contains legal conclusions as to which no response is required and refers the Court to Executive Order 202.3 for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 25 of the Complaint are inconsistent with Executive Order 202.3, those allegations are denied.

26. Ronit states that Paragraph 26 of the Complaint contains legal conclusions as to which no response is required and refers the Court to Executive Order 202.13 for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 26 of the Complaint are inconsistent with Executive Order 202.13, those allegations are denied.

27. Ronit denies the allegations contained in Paragraph 27 of the Complaint, except admits that Plaintiff purported to inform Ronit on May 1, 2020 that it intended to terminate the Lease.

28. Ronit admits that, on May 5, 2020, Williamsburg sent a “written notice” to Ronit and refers the Court to the “written notice” for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 28 of the Complaint are inconsistent with the written notice, those allegations are denied.

SUPPLEMENTAL BASIS FOR FRUSTRATION OF PURPOSE AND IMPOSSIBILITY

29. Ronit denies the allegations contained in Paragraph 29 of the Complaint.

30. Ronit denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint.

31. Ronit denies the allegations contained in Paragraph 31 of the Complaint and refers the Court to the Pro-Forma for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 31 of the Complaint are inconsistent with the Pro-Forma, those allegations are denied.

32. Ronit denies the allegations contained in Paragraph 32 of the Complaint.

33. Ronit denies the allegations contained in Paragraph 33 of the Complaint.

34. Ronit denies the allegations contained in Paragraph 34 of the Complaint.

35. Ronit denies the allegations contained in Paragraph 35 of the Complaint.

36. Ronit denies the allegations contained in Paragraph 36 of the Complaint.

37. Ronit denies the allegations contained in Paragraph 37 of the Complaint.

COUNT I
(Declaratory Judgment of Frustration of Purpose)

38. Ronit repeats and reiterates each and every one of the foregoing responses made in response to Paragraphs “1” through “37” of the Complaint with the same force and effect as if set forth herein at length.

39. Ronit states that Paragraph 39 of the Complaint contains legal conclusions as to which no response is required.

40. Ronit denies the allegations contained in Paragraph 40 of the Complaint, including that Williamsburg is entitled to lawfully terminate the Lease and that Williamsburg and Fifth Concerto are relieved of the Lease and Guaranty obligations pursuant to the doctrine of frustration of purpose, except admits that the parties disagree.

41. Ronit states that Paragraph 41 of the Complaint contains legal conclusions as to which no response is required.

42. Ronit denies the allegations contained in Paragraph 42 of the Complaint.

43. Ronit denies the allegations contained in Paragraph 43 of the Complaint.

44. Ronit states that Paragraph 44 of the Complaint contains legal conclusions as to which no response is required, except admits that, to date, Williamsburg has paid Landlord only \$1,256,178.32 in rent, along with a security deposit of \$400,000.00.

45. Ronit refers the Court to the claims and documents filed in this action for their full content, meaning and legal import, if any. To the extent the allegations in Paragraph 45 of the Complaint are inconsistent with those claims and documents, those allegations are denied.

46. Ronit refers the Court to the claims and documents filed in this action for their full content, meaning and legal import, if any. To the extent the allegations in Paragraph 46 of the Complaint are inconsistent with those claims and documents, those allegations are denied.

47. Ronit denies the allegations contained in Paragraph 47 of the Complaint.

48. Ronit refers the Court to the claims and documents filed in this action for their full content, meaning and legal import, if any. To the extent the allegations in Paragraph 48 of the Complaint are inconsistent with those claims and documents, those allegations are denied.

49. Ronit refers the Court to the claims and documents filed in this action for their full content, meaning and legal import, if any. To the extent the allegations in Paragraph 49 of the Complaint are inconsistent with those claims and documents, those allegations are denied.

50. Ronit states that Paragraph 50 of the Complaint contains legal conclusions as to which no response is required.

51. Ronit states that Paragraph 51 of the Complaint contains legal conclusions as to which no response is required.

COUNT II
(Rescission Based on Impossibility of Performance)

52. Ronit repeats and reiterates each and every one of the foregoing responses made in response to Paragraphs “1” through “51” of the Complaint with the same force and effect as if set forth herein at length.

53. Ronit refers the Court to the Lease for its full content, meaning and legal import, if any. To the extent the allegations in Paragraph 53 of the Complaint are inconsistent with the Lease, those allegations are denied.

54. Ronit states that Paragraph 54 of the Complaint contains legal conclusions as to which no response is required.

55. Ronit denies the allegations contained in Paragraph 55 of the Complaint.

56. Ronit denies the allegations contained in Paragraph 56 of the Complaint.

57. Ronit denies the allegations contained in Paragraph 57 of the Complaint.

AFFIRMATIVE DEFENSES

In addition to the defenses set forth below, Ronit expressly reserves the right to amend its Answer to assert additional defenses, counterclaims, cross-claims and/or by instituting third-party actions as additional facts are obtained in discovery and its investigation, which is ongoing. Ronit does not intend to concede or imply that any of the defenses set forth below are affirmative defenses for which Defendant bears the burden of proof.

First Affirmative Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

The Complaint is barred due to Plaintiffs' anticipatory breaches and breaches of the Lease and Guaranty.

Third Affirmative Defense

The Complaint does not set forth a claim for relief since the Lease contains various provisions conclusively negating the claims set forth therein, including, but not limited to, a Force Majeure clause, which provides that Williamsburg, as Tenant, would be required to pay rent to Defendant notwithstanding an "injunction or other court or administrative order, governmental law or regulations which prevent or substantially interfere with the required performance . . . or other casualty, acts of God, other causes not within the control of such party."

Fourth Affirmative Defense

The Complaint is barred under the doctrines of laches, acquiescence, equitable estoppel, waiver, and unclean hands.

Fifth Affirmative Defense

The Complaint is barred under the doctrine of ratification.

Sixth Affirmative Defense

The Complaint is barred based upon documentary evidence.

Seventh Affirmative Defense

To the extent that Plaintiffs have suffered damages, if any, such damage was caused by the acts and/or omissions of Plaintiffs and/or their respective directors, officers, agents and/or employees.

COUNTERCLAIMS

Defendant/Counterclaim-Plaintiff Ronit Realty LLC, by its attorneys, Stein Adler Dabah & Zelkowitz LLP, as and for its Counterclaims against Plaintiffs/Counterclaim-Defendants Williamsburg Climbing Gym Company LLC (“Williamsburg Climbing”) and Fifth Concerto Holdco Inc. (“Fifth Concerto” and together with Williamsburg Climbing, “Counterclaim-Defendants”), alleges as follows:

INTRODUCTION

1. This action involves a high-end, private equity-backed climbing, co-working, and entertainment facility that has opted to abandon its long-term lease of a Williamsburg property months prior to opening and only after extracting over \$1.2MM in construction contribution payments, hundreds of thousands of dollars in rent deferrals, and other concessions from its family-run landlord.

2. Fifth Concerto is the holding company for Brooklyn Boulders. In November 2018, Brooklyn Boulders – through a single-purpose entity, Williamsburg Climbing – entered into a ten-year lease with Ronit for over 30,000 square feet of space in a building across from the East River State Park and located on Kent Avenue in Williamsburg, Brooklyn. Brooklyn Boulders’ plan was to construct its fifth large “active lifestyles” facility in which its patrons would engage in rock-climbing, various forms of fitness, co-working, and other activities, and which would also serve as a venue for art exhibits, performances, corporate retreats, and other events.

3. In reliance on Brooklyn Boulders’ long-term commitment under the lease, Ronit bent over backwards to accommodate each and every one of Brooklyn Boulders’ requests, for example: (i) deferring Brooklyn Boulders’ rent payments for months while Ronit conducted significant work on the property to accommodate Brooklyn Boulders’ specific construction plans;

(ii) deferring hundreds of thousands of dollars of Brooklyn Boulder's rent for several months *after* the property was delivered to Brooklyn Boulders in recognition of Brooklyn Boulders' self-inflicted delays in construction, and (iii) licensing an additional portion of the premises to Brooklyn Boulders for months, free of charge. Most significantly, Ronit paid over \$1.2MM towards the customized build-out of the Brooklyn Boulders facility, a significant portion of which was paid at the end of March 2020, *after* the onset of the COVID-19 outbreak.

4. Ronit invested millions into a customized facility for Brooklyn Boulders with the intention of recouping such amounts over the life of the long-term lease, under which Brooklyn Boulders' rent would include a percentage of its annual revenue. Unfortunately, now, less than two years into the lease term and just months before it was set to open, Brooklyn Boulders has abandoned the property and its lease obligations, citing COVID-19 and its aftermath as an excuse for performance. It has since defaulted and failed to pay any amounts due under the lease, including, but not limited to, rent, deferred rent, taxes, and other amounts.

5. Brooklyn Boulders' attempt to walk away from its long-term commitment is unlawful. The lease specifically provides that Brooklyn Boulders would be required to continue paying rent even if governmental orders or regulations prevented or substantially interfered with the parties' ability to perform any act under the lease. But, in any event, Brooklyn Boulders' is able to and is currently planning to operate its business at numerous other locations. In fact, Ronit has recently learned that Brooklyn Boulders is now seeking a new lease for new space in Brooklyn, seeking to take advantage of the currently depressed commercial real estate market. To accept Brooklyn Boulders' untenable position would not only contravene the parties' express allocation of risk in their lease, but would also require a sweeping rewrite of New York law that would permit any long-term commercial leaseholder impacted by COVID-19 to evade their obligations.

6. The harm to Ronit is manifest. Ronit is out of pocket millions of dollars and is now left with a property that has been partially-built for Brooklyn Boulders' unique purpose that cannot be easily repurposed. To compound the matter, Brooklyn Boulders' general contractor – which Brooklyn Boulders apparently likewise left high-and-dry – has filed a lien against the property, claiming that Brooklyn Boulders failed to pay it over \$1.6MM for work it performed.

7. Ronit now seeks to recover from Williamsburg Climbing and the guarantor of the lease, Fifth Concerto, for the millions of dollars in damages that Ronit has already sustained due to Brooklyn Boulders' egregious anticipatory repudiation and breaches of the Lease, and for the more than \$15MM in rent that will be due to Ronit for the remainder of the Lease term.

THE PARTIES

8. Ronit is a New York limited liability company whose members reside in the State of New York. Ronit Realty is a family-owned and operated real estate developer and an outgrowth of the family's former apparel company. Ronit is now the sole owner of the real property located at 83-89 Kent Avenue a/k/a 44-60 N. 9th Street in Brooklyn, New York (the "Property").

9. Williamsburg Climbing is a Delaware limited liability company.

10. Fifth Concerto, the sole member of Williamsburg Climbing, is a Delaware corporation with its principal place of business in Denver, Colorado.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, since there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of costs.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions that give rise to the claims herein occurred in this district.

FACTUAL ALLEGATIONS

Brooklyn Boulders' Business Model and Expansion

13. Williamsburg Climbing was formed by the founders of Brooklyn Boulders, a self-described builder and operator of “active lifestyles facilities that foster community through rock climbing, fitness, arts + culture, active co-working, and events.” Brooklyn Boulders’ website and brochures tout the company’s facilities as “innovative + mixed-use spaces” that offer far more than rock climbing and fitness. Indeed, the company utilizes their “multifunctional” spaces to host events with art exhibits, live performances, and other productions, and their facilities include co-working areas which “play host to hack-a-thons, corporate retreats, and special events and serves as a workspace for everyday BKB members and local start-ups to work in between climbing sessions, yoga classes or sauna breaks.”

14. Since 2009, Brooklyn Boulders has steadily gained popularity and embarked on a mission to develop and expand its brand across the nation. It now operates four locations in expansive facilities: 22,000 square feet in Gowanus, Brooklyn; 40,000 square feet in Somerville, Massachusetts; 25,000 square feet in Chicago, Illinois; and 25,000 square feet in Queensbridge, New York.

15. Brooklyn Boulders has capitalized on its success by reportedly securing an investment of over \$48 million from North Castle Partners, the large private equity firm that backs some of the most prominent and high-end fitness clubs and companies in the nation, including Equinox, Crunch Fitness, Barry’s Bootcamp, Curves, and others.

16. More recently, Brooklyn Boulders set its sights on opening additional locations, reportedly entering into a lease in early 2018 to open a 35,000 square foot facility in Washington, D.C.,¹ and entering into negotiations concerning two more locations in Chicago, Illinois.²

Brooklyn Boulders, through Williamsburg Climbing, Enters into a Long-Term Lease with Ronit to Open a 30,000 Square Foot Facility in Williamsburg

17. On November 30, 2018, Ronit and Brooklyn Boulders – through Williamsburg Climbing (*i.e.*, its entity created for the purpose of operating the facility) – entered into a lease, dated as of November 1, 2018, pursuant to which Williamsburg Climbing agreed to lease 30,598 square feet of the Property from Ronit for a period of ten years, with options to twice extend the term for additional ten-year periods (the “Lease”).

18. Pursuant to Section 40 of the Lease, the term of the Lease commenced on January 7, 2019 upon Ronit’s delivery of the fully-executed Lease to Williamsburg Climbing, as Williamsburg Climbing did not tender the required proof of insurance and security deposit until January 2019. Accordingly, the term of the Lease extends up until and including January 6, 2029.

19. Rent was initially set at \$1,957,500.00 for the first year of the Lease term, payable in equal monthly installments of \$163,125.00 on the first day of each month. The parties further agreed that, for each subsequent year of the term, rent would increase by 2.85% *plus* 7.5% of Williamsburg Climbing’s gross annual revenue above \$8MM for the preceding twelve-month period.

¹<https://www.bizjournals.com/washington/news/2018/02/21/eckington-development-to-get-a-massive-climbing.html>

²<https://blockclubchicago.org/2020/01/29/brooklyn-boulders-climbing-gym-coming-to-former-treasure-island-in-lincoln-park-alderman-says/>

20. Like many long-term commercial relationships, the parties' Lease was structured in such a way that the risks and responsibilities inherent in utilizing the Property were to be borne by the tenant, Williamsburg Climbing.

21. For example, the Lease provided, among other things, that Williamsburg Climbing was (i) accepting the premises "as-is," (ii) required to carry various types of insurance to cover the Property and the risks inherent in the activities that would be conducted on the Property, including "'All Risk' business interruption or earnings insurance"; (iii) required, at its sole cost and expense, to comply with all present and future laws and ordinances, regardless of whether they were foreseen or unforeseen, and even if such laws or ordinances required Williamsburg Climbing to alter the manner in which it used the Property.

22. Critically, the Lease also contained a *force majeure* provision, which provided, in pertinent part, that Williamsburg Climbing would be required to pay rent to Ronit even if governmental orders or regulations prevented or substantially interfered with the parties' ability to perform any covenant, agreement, work, service or other act under the Lease. Specifically, Section 59 of the Lease provides that:

In the event that either party shall be delayed or hindered in or prevented from the performance of any covenant, agreement, work, service, or other act required under this Lease to be performed by such party, ***other than the payment of Fixed Rent or Additional Rent by Tenant***, and such delay or hindrance is due to strikes, lockouts, failure of power or other utilities, injunction or other court or administrative order, governmental law or regulations which prevent or substantially interfere with the required performance, condemnations, riots, insurrections, martial law, civil commotion, war, fire, flood, earthquake, or other casualty, acts of God, or other causes not within the control of such party, the performance of any covenant, agreement, work, service, or other act, ***other than the payment of Fixed Rent or Additional Rent by Tenant***, shall be excused for the period of delay and the period for the performance of the same shall be extended by the period.

See Lease § 59 (emphasis added).

23. In exchange, Ronit agreed to deliver to Williamsburg Climbing the Property in a condition that would accommodate Williamsburg Climbing's construction plans, which required (i) performing work to the Properties' electrical panels and plumbing; (ii) installing a glass wall and railings; (iii) providing an ADA-complaint shell of the Property; and (iv) providing a means of egress (collectively, "Landlord's Work"). Ronit further agreed that, aside from paying the first month's rent simultaneously with the Lease's execution, Williamsburg Climbing's obligation to pay monthly rent would commence on July 1, 2019, and that it would be required to pay only 50% of monthly rent for the months of July and August 2019.

24. Moreover, given Williamsburg Climbing's long-term commitment to lease the Property, Ronit agreed to contribute up to \$2.775MM towards Williamsburg Climbing's customized build-out of its facility, which would be disbursed in installments as construction progressed (the "Construction Contributions").

25. Although the Lease provided that Ronit was not making any representation that the purposes for which Williamsburg Climbing was leasing the Property was lawful or permissible under the certificate of occupancy for the building, Williamsburg Climbing was granted broad rights to use the Property as it saw fit. Specifically, Williamsburg was permitted to utilize the Property "primarily as an indoor climbing facility," as well as

for other uses incidental to the primary use, such as for a fitness center or studios, a juice bar, a cafe, lounge, restaurant or bar (including the sale of alcohol and food), lounges, general office space in connection with the conduct of [Williamsburg Climbing's] business or for coworking, event space (e.g., birthday parties), for the retail sale of merchandise related to Tenant's primary use and for collaborative office space

Fifth Concerto Executes a Guaranty of Lease

26. Simultaneously with Williamsburg Climbing's execution of the Lease on November 30, 2018, Fifth Concerto executed and delivered to Ronit a Guaranty of Lease (dated as of November 1, 2018) as further security for Williamsburg Climbing's performance of its obligations under the Lease (the "Guaranty").

27. Pursuant to the Guaranty, Fifth Concerto agreed to "absolutely, irrevocably and unconditionally guarantee[] to Landlord the punctual payment, performance and fulfillment of all of the Obligations" of Williamsburg Climbing under the Lease.

28. Fifth Concerto also waived, among other things, "notice of nonpayment, nonperformance or nonobservance . . . and any other notice to or demand upon Guarantor" and agreed that the Guaranty "may be enforced without prior resort by Landlord to any right of dispossession or other remedies it may have under the Lease or against Tenant or any other person or against any security or collateral and without the necessity of any suit or proceedings by Landlord of any nature whatsoever against Tenant."

29. Fifth Concerto also agreed to pay to Ronit "[a]ll losses, damages, and other costs and reasonable expenses of whatsoever nature which Landlord incurs in connection with or incidental to the enforcement of the performance of any of the Guarantor's obligations under this Guaranty, including reasonable attorney's fees. . . ."

Ronit Delivers the Property to Williamsburg Climbing and Amends the Lease to Include Additional Space and to Defer Certain Rent Payments

30. In the months following the execution of the Lease, Ronit completed the Landlord's Work as required under the Lease.

31. By letter, dated June 20, 2019, and emailed to Williamsburg Climbing's representatives the next day, Ronit provided formal notice to Williamsburg Climbing that the Property was thereby delivered in a condition ready for it to commence its build-out.

32. Approximately two months later, Ronit and Williamsburg Climbing entered into a First Amendment to Lease, dated August 14, 2019, pursuant to which Ronit leased to Williamsburg Climbing an additional mezzanine space of approximately 260 square feet (the "First Amendment"). The rent for the for the first year of the Lease term was accordingly adjusted to \$1,967,500.00, payable in equal monthly installments of \$163,958.00.

33. Moreover, although Williamsburg Climbing had not yet commenced paying full monthly rent – which was to commence in September of 2019 – it requested that Ronit grant a partial deferral of rent. Brooklyn Boulders, which is rapidly expanding elsewhere at the same time, explained that Williamsburg Climbing would be in a difficult financial position if it were required to pay rent before its projected opening date and generating revenue. It assured Ronit that, in exchange, Williamsburg Climbing would increase its future monthly rent to make up the amount deferred.

34. Although Ronit was reluctant to accommodate the request – and despite pushback from its lender – in reliance on Williamsburg Climbing's long-term commitment, Ronit agreed to defer 50% of the remainder of monthly payments for 2019.

35. Specifically, by an Addendum to Lease Agreement, dated September 1, 2019 (the "Addendum to Lease"), Ronit and Williamsburg Climbing agreed that, for the months of September 2019 through December 2019, Williamsburg Climbing would be required to pay only 50% of the monthly rent due, and that commencing on January 2020 through December 2020, Williamsburg Climbing would be required to make additional rent payments (*i.e.*, payments in

addition to the rent that would otherwise be due) in the amount of \$27,326.33 (the “Deferred Rent”).

36. In addition, in or around November of 2019, as an additional accommodation to Brooklyn Boulders, Ronit and Williamsburg Climbing entered into a License Agreement pursuant to which Ronit agreed to license to Williamsburg Climbing, free of charge, approximately 200 additional square feet of a portion of the Property.

Brooklyn Boulders Commences Its Massive Build-Out and Ronit Pays Over \$1.2MM in Construction Contributions to Brooklyn Boulders

37. Notwithstanding Brooklyn Boulders’ representations that it would commence construction of its facility shortly after Landlord’s Work was completed and the Property was delivered and initially estimated that its grand opening would take place in the fall of 2019, Brooklyn Boulders did not hire a general contractor and begin its work until November 2019.

38. The general contractor for the project was Resolute NY LLC (“Resolute”).

39. As Brooklyn Boulders progressed in its customized build-out over the next several months, it made two requests for Ronit’s payment of Construction Contributions.

40. On or about December 19, 2019, Ronit paid to Brooklyn Boulders \$468,949.64 in connection with its first request for Construction Contributions, and on March 27, 2020, Ronit paid an additional \$745,167.12 in connection with Brooklyn Boulders’ second request for Construction Contributions.

41. Thus, in total, Ronit disbursed \$1,214,116.76 in connection with Brooklyn Boulders’ first two requests for Construction Contributions.

Governor Cuomo Declares a Disaster Emergency for the State of New York Due to COVID-19 and Brooklyn Boulders Requests Additional Construction Contributions

42. On March 7, 2020, Governor Cuomo issued Executive Order No. 202, pursuant to which he declared a disaster emergency for the State of New York due to the COVID-19 outbreak.

43. On March 16, 2020, Governor Cuomo issued Executive Order No. 202.3, pursuant to which he, among other things, ordered that “[a]ny gym, fitness centers or classes, and movie theaters” were required to cease operations effective that day at 8pm until further notice (collectively, with Executive Order No. 202, the “Executive Orders”).

44. Throughout March 2020, the CDC as well as various other governmental bodies issued and implemented social distancing guidelines and directives to stem the COVID-19 outbreak and “flatten the curve” of transmission.

45. Despite the onset of the COVID-19 outbreak, Brooklyn Boulders never once indicated to Ronit that the long-term Lease had in any way been “frustrated”.

46. In fact, on March 27, 2020, Brooklyn Boulders issued to Ronit a third request for Construction Contributions, this time in the amount of \$951,836.92.

47. On April 14, 2020, despite having failed to pay over \$100,000 in rent due for April, Brooklyn Boulders issued to Ronit a fourth request for Construction Contributions in the amount of \$609,046.32, which, together with its prior three requests, totaled the maximum amount that Ronit could be required to pay in Construction Contributions under the terms of the Lease (*i.e.*, \$2.775MM) once all of Brooklyn Boulders’ construction was complete.

Brooklyn Boulders Breaches the Lease by Noticing Its Termination Without Cause and Failing to Pay Rent

48. In the weeks that followed Brooklyn Boulders’ April 14, 2020 request for \$609,046.32, Ronit requested certain backup information related thereto.

49. By letter, dated April 24, 2020, Brooklyn Boulders demanded that Ronit pay the third request for Construction Contributions by April 27, 2020. It threatened that “it appears that Ronit Realty is planning to not honor its contractual obligation” and that “[t]his would be completely unacceptable and would constitute a material breach of contract.” A Brooklyn Boulders representative added that “[i]t’s not our problem that you have issues with your financing, you have obligations under the lease.” In retrospect, it is now evident that Brooklyn Builders was the party that was “planning to not honor its contractual obligation” under the lease as of April 27, 2020 and, in reality, was merely trying to grab whatever funds it could before walking away.

50. Brooklyn Boulders was, in any event, not entitled to the contributions it requested in its third and fourth requests because, as Ronit pointed out to Brooklyn Boulders on April 27, 2020, Ronit was not required under the Lease to disburse to Brooklyn Boulders a greater percentage of Ronit’s total required contribution than the percentage of Brooklyn Boulders’ completed work.

51. On May 1, 2020, a mere *four days* after demanding an additional \$951,836.92 in Construction Contributions, Brooklyn Boulders informed Ronit that it was planning on terminating Williamsburg Climbing’s Lease based on the doctrine of “frustration of purpose,” but did not explain the basis for its position. Ronit countered that such an effort would be unlawful and constitute a breach of the Lease.

52. By letter, dated, May 5, 2020, Williamsburg Climbing provided notice that the Lease was terminated effective May 1, 2020. Citing the doctrines of frustration of purpose and impossibility, Brooklyn Boulders’ General Counsel claimed that because the premises was purportedly “designed to be a ‘studio-based’ facility, social distancing destroys the very purpose of the lease.” Williamsburg Climbing’s letter purporting to terminate a Lease worth tens-of-

millions of dollars was bereft of further reasoning and constituted just a half-page, including a threat to commence an action for “judicial confirmation of termination of the lease.”

53. Williamsburg Climbing’s purported termination letter fails to address how it can simply walk away from the Lease and stop paying rent to Ronit when the Lease’s *force majeure* clause expressly contemplates and forecloses Williamsburg Climbing’s ability to rely on the pretextual excuses it has cited (*i.e.*, “governmental law or regulations which prevent or substantially interfere with the required performance”).

54. Nor does it address how social distancing guidelines frustrated or made it impossible for Williamsburg Climbing to utilize the Property for one, many or all of its Permitted Uses, including, “as an indoor climbing facility . . . [and] other uses incidental to the primary use, such as for a fitness center or studios, a juice bar, a cafe, lounge, restaurant or bar (including the sale of alcohol and food), lounges, general office space in connection with the conduct of [Williamsburg Climbing]’s business or for coworking, event space (*e.g.*, birthday parties), [and] for the retail sale of merchandise related to [Williamsburg Climbing]’s primary use and for collaborative office space[.]”

55. Notably, despite Williamsburg Climbing’s allegations that its business “presumes the ability to convene classes where people are densely packed” and “the energy of a large group was listed as the top driver for participants” in a Nielsen poll of group participants,³ at the time that Williamsburg Climbing illicitly notified its termination of the Lease, an advertisement on the façade of the Property specifically promoted, among other things, the facility’s “Cardio + Strength Training Area” and “Small Group Training.”

³ See Complaint at ¶ 16.

56. By letter, dated May 5, 2020, Ronit notified Williamsburg Climbing that the purported notice of termination was invalid and that Williamsburg Climbing remained obligated to pay all rent due (including, but not limited to rent for the month of May 2020, past due rent, and certain real estate taxes) and to comply with all other obligations under the Lease.

57. On May 14, 2020, Ronit served a Notice of Nonpayment Rent, indicating a total balance due of \$311,742.30 consisting of \$168,630.80 May 2020 base rent, \$27,326.33 in Deferred Rent for May 2020, \$100,940.30 April 2020 rent arrear and a 5% late payment fee of \$14,844.87.

58. Williamsburg Climbing has failed to pay the amounts due under the Lease.

Brooklyn Boulders Abandons the Now Partially-Built Property, Fails to Pay Its General Contractor, and Seeks Space Elsewhere

59. As a result of Williamsburg Climbing walking away from the Lease, Ronit has suffered and will continue to suffer enormous financial losses. Ronit not only invested over \$1.2MM into its tenant and accommodated requests to defer hundreds of thousands of dollars of rent, but it is now left with a partially-built structure that was customized specifically for Brooklyn Boulders' unique business model and cannot be easily repurposed. As a result, Ronit Realty will be unable to re-let the Property to another commercial tenant without first investing millions more to undo the substantial construction project that Brooklyn Builders abruptly abandoned.

60. Adding further insult to injury, on June 2, 2020, Williamsburg Climbing's general contractor, Resolute, filed with the Kings County Clerk's Office a Notice Under Mechanic's Lien against the Property (the "Mechanic's Lien"), claiming that Williamsburg Climbing failed to pay it \$1,621,642.26 for work it performed.

61. Resolute's filing of the Mechanic's Lien represents yet another breach by Williamsburg Climbing under the Lease, as the Lease provides that "Tenant shall not permit any mechanic's or other liens to be filed . . . in connection with or arising from, or otherwise in


connection with . . . work claimed to have been done for, or materials furnished to, [Williamsburg Climbing]....” The Lease also provides, in pertinent part, that Williamsburg Climbing, at its “sole cost and expense, shall defend, indemnify and save Landlord harmless from and against all such liens” and that it “shall satisfy, cancel or discharge all such liens and violations, and remove same from the record, within thirty (30) days after filing or issuance thereof” To date, Williamsburg Climbing has not taken any action to satisfy, cancel or discharge the Mechanic’s Lien.

62. In the end, Ronit, a Brooklyn-based family property owner, has suffered monumental harm as a result of Brooklyn Boulders’ actions, which were unjustified and indefensible.

63. Brooklyn Boulders, on the other hand, knows full well that its development and business plans were neither frustrated nor made impossible due to the Executive Orders or social distancing guidelines. Instead, it is clear that the private-equity backed company, which is rapidly expanding throughout the country, is simply attempting to dodge its obligations and illicitly re-trade on the Lease, seeking to take advantage of the recent declining demand and accompanying lower rents in the commercial real estate market.


64. In fact, on June 10, 2020, the real estate brokerage, TerraCRG, circulated an email advertising Brooklyn Boulders’ was seeking a new location for its facility, including 30,000 to 50,000 square feet with a high ceiling and open floorplan:

From: Peter Schubert
Sent: Wednesday, June 10, 2020 3:30 PM
To:
Subject: Brooklyn Boulders Searching for 30-50K SF Space - All Brooklyn Neighborhoods



BROOKLYN BOULDERS
CLIMBING + COMMUNITY

NATIONAL CLIMBING STUDIO SEEKING
BROOKLYN LOCATION



30,000-50,000 SF TOTAL
HIGH CEILING AND OPEN FLOORPLAN

FIRST COUNTERCLAIM
(Breach of Lease Against Williamsburg Climbing)

65. Ronit repeats and realleges the foregoing Paragraphs 1 through 64, as if fully set forth herein.

66. The Lease is a valid and binding contract that obligates Williamsburg Climbing to pay monthly rent to Ronit. In addition, for each month in the year 2020, Williamsburg was obligated to pay additional Deferred Rent.

67. Ronit has complied with all of its obligations under the Lease.

68. Williamsburg Climbing has failed to pay to Ronit rent (including, but not limited to Deferred Rent, and other additional rent as provided by the Lease) due under the Lease since May 1, 2020, notwithstanding that Ronit provided Williamsburg Climbing with notice of its default and an opportunity to cure the default.

69. Therefore, Williamsburg Climbing has materially breached the Lease.

70. In addition to the damage set forth herein that Ronit has already suffered, Ronit's damages will accrue and continue to accrue for each month that Williamsburg Climbing fails to comply with its obligations during the ten-year term of the Lease, and Williamsburg Climbing is liable for all such damage, including, but not limited to, the payment of past-due rent, future rent, Deferred Rent, all additional rent due (as provided in the Lease), late fees, and attorneys' fees.

71. Accordingly, Ronit has been damaged in an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys' fees.

SECOND COUNTERCLAIM
(Breach of Guaranty Against Fifth Concerto)

72. Ronit repeats and realleges the foregoing Paragraphs 1 through 71, as if fully set forth herein.

73. The Guaranty constitutes a legally binding and enforceable contract.

74. Pursuant to the Guaranty, Fifth Concerto agreed to “absolutely, irrevocably and unconditionally guarantee[] to Landlord the punctual payment, performance and fulfillment of all of the Obligations” of Williamsburg Climbing under the Lease.

75. Fifth Concerto also agreed to pay to Ronit “[a]ll losses, damages, and other costs and reasonable expenses of whatsoever nature which Landlord incurs in connection with or incidental to the enforcement of the performance of any of the Guarantor’s obligations under this Guaranty, including reasonable attorney’s fees. . . .”

76. As such, Fifth Concerto is liable for all of the damages that Ronit has suffered due to Williamsburg Climbing’s breaches of the Lease, which is an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys’ fees.

THIRD COUNTERCLAIM
(Anticipatory Repudiation Against Williamsburg Climbing)

77. Ronit repeats and realleges the foregoing Paragraphs 1 through 76, as if fully set forth herein.

78. The Lease is a valid and binding contract that obligates Williamsburg Climbing to pay monthly rent (including, but not limited to additional rent and other amounts as provided by the Lease) to Ronit through January 6, 2029. In addition, for each month in the year 2020, Williamsburg was obligated to pay additional Deferred Rent.

79. Ronit has complied with all of its obligations under the Lease.

80. On May 1, 2020 and May 5, 2020, Williamsburg Climbing notified Ronit orally and in writing that it was terminating the Lease, effective May 1, 2020, and that it would no longer comply with its obligations under the Lease, including, but not limited to, its obligation to pay rent for the more than eight years remaining in the Lease term.

81. By declaring that it would not comply with its obligations under the Lease, including, but not limited to, paying rent each and every month through the end of the Lease term, Williamsburg Climbing unequivocally repudiated the Lease and is guilty of anticipatory breach.

82. Thus, in addition to the damage set forth herein that Ronit has already suffered, including, but not limited to, the lost rent and other amounts that have already become due, Ronit's damages will continue to accrue for each month that Williamsburg Climbing fails to pay rent and otherwise comply with its obligations during the remaining term of the Lease.

83. Williamsburg Climbing is therefore liable to Ronit for all such amounts that will become due during the remainder of the lease term, including, but not limited to, future rent, Deferred Rent, all additional rent due (as provided in the Lease), late fees, and attorneys' fees.

84. Ronit remains ready, willing and able to continue to lease the Property to Williamsburg Climbing under the terms set forth in the Lease.

85. As a direct and proximate result of Williamsburg Climbing's anticipatory repudiation, Ronit has been rendered unable to receive the benefits of the Lease.

86. Accordingly, Ronit has been damaged in an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys' fees.

FOURTH COUNTERCLAIM
(Anticipatory Repudiation Against Fifth Concerto)

87. Ronit repeats and realleges the foregoing Paragraphs 1 through 86, as if fully set forth herein.

88. The Guaranty constitutes a legally binding and enforceable contract.

89. Pursuant to the Guaranty, Fifth Concerto agreed to “absolutely, irrevocably and unconditionally guarantee[] to Landlord the punctual payment, performance and fulfillment of all of the Obligations” of Williamsburg Climbing under the Lease.

90. Fifth Concerto also agreed to pay to Ronit “[a]ll losses, damages, and other costs and reasonable expenses of whatsoever nature which Landlord incurs in connection with or incidental to the enforcement of the performance of any of the Guarantor’s obligations under this Guaranty, including reasonable attorney’s fees. . . .”

91. As such, Fifth Concerto is liable for all of the damages that Ronit has suffered due to Williamsburg Climbing’s anticipatory repudiation of the Lease, which is an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys’ fees.

PRAYER FOR RELIEF

WHEREFORE, Defendant/Counterclaim-Plaintiff Ronit Realty LLC respectfully prays for the following relief:

A. On the First Cause of Action against Plaintiff/Counterclaim-Defendant Williamsburg Climbing, for an amount to be determined, together with the costs and disbursements of this action, including reasonable attorneys’ fees;

B. On the Second Cause of Action against Plaintiff/Counterclaim-Defendant Fifth Concerto, for an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys’ fees;

C. On the Third Cause of Action against Plaintiff/Counterclaim-Defendant Williamsburg Climbing, for an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys’ fees;

D. On the Fourth Cause of Action against Plaintiff/Counterclaim-Defendant Fifth Concerto, for an amount to be determined, plus interest thereon, together with the costs and disbursements of this action, including reasonable attorneys' fees;

E. An award of costs and expenses incurred in bringing this action, including reasonable attorneys' fees; and

F. Such other and further relief as the Court deems just and proper.

Dated: New York, NY
June 24, 2020

STEIN ADLER DABAH & ZELKOWITZ LLP

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