SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROSLYN EVENTS CORP., Plaintiff, -against- BER DUR REALTY CORP., Defendant.	**INDEX NO.**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE FOR A *YELLOWSTONE* INJUNCTION, PRELIMINARY INJUNCTION, AND TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

Plaintiff, Roslyn Events Corp. ("**Plaintiff**" or "**Tenant**"), by its attorneys, Bronster LLP, submits this memorandum of law in support of its emergency application for a *Yellowstone* injunction, a preliminary injunction, and a temporary restraining order enjoining defendant, Ber Dur Realty Corp. ("**Defendant**" or "**Landlord**") from holding Plaintiff in default of and terminating Plaintiff's valuable, long-term commercial lease. Plaintiff is a well-known and successful event space that is the current tenant of the premises described as 1 Railroad Avenue, Roslyn, New York (the "**Premises**").

The instant dispute concerns whether Plaintiff is required to pay rent to the Landlord according to the terms of the Five Day Demand (the "**Notice**") dated July 29, 2020 and whether Plaintiff is in default of the lease dated May 19, 2017 between Plaintiff and Defendant (the "**Lease**") regarding the Premises.

Plaintiff is not in default of the Lease and has no obligation to pay rent during the COVID-19 pandemic. The novel coronavirus and the New York State and New York City regulations issued in response thereto have clearly triggered the Lease's force majeure clause, excusing Plaintiff's obligations under the Lease. Moreover, the regulations have frustrated the purpose of Plaintiff's Lease, in that, they prohibit Plaintiff from utilizing the Premises as required by the Lease. Through no fault of its own, Plaintiff has been unable to operate its business at the Premises from the period of March 16, 2020 throughout the present date. As a result, not only is Plaintiff unable to obtain any of the bargained-for consideration to which it is entitled under the Lease but also is hamstrung by the law from performing its obligations under the Lease.

As will be established herein, Plaintiff has satisfied all the elements for the issuance of *Yellowstone* relief, namely that: (i) Plaintiff has a commercial leasehold interest; (ii) Defendant sent Plaintiff a notice to cure that includes all of Defendant's rights under the Lease, including termination thereof; (iii) this application is being made prior to the expiration of the cure period (i.e. before the end of August 5, 2020); and (iv) though Plaintiff disputes the existence of any default, it has the desire and ability to cure the alleged default by any means short of vacating the Premises.

Alternatively, Plaintiff has satisfied all the elements for the issuance of a preliminary injunction, namely that: (i) Plaintiff will likely succeed on the merits because (a) the Lease's force majeure clause excuses nonperformance throughout the existence of the force majeure event and (b) the government regulations issued in response to the pandemic frustrated the purpose of Plaintiff's Lease; (ii) Plaintiff will suffer an irreparable injury absent an injunction, as Defendant will, *inter alia*, unjustly terminate Plaintiff's Lease; and (iii) the equities balance in Plaintiff's favor, as Plaintiff should not be penalized for acting according to the provisions of the Lease and for being legally precluded from operating its business as contemplated under the Lease while the Landlord continued to reap an unjust and un-bargained for reward. Injunctive relief and temporary restraining order should be issued tolling Plaintiff's time to cure the default alleged and Defendant's ability to terminate the Lease, pending the determination of this action for declaratory and other relief.

FACTUAL BACKGROUND

The facts upon which this motion is based are set forth in the accompanying Affidavit of Plaintiff's owner, Matthew Prince (the "**Prince Affidavit**"), and the exhibits annexed thereto, the Affirmation of Alexandra C. Mink, Esq. and the exhibits annexed thereto, and the Summons and Complaint. For the convenience of the Court, a summary of the most pertinent facts is set forth herein.

Roslyn Events Corp. Business

On or about May 19, 2017, Plaintiff and Defendant entered into a ten (10) year Lease agreement, under which Plaintiff agreed to rent the Premises for the permitted use of operating an event space focused on large scale parties and events, with a portion of the business operating as a small tavern and a lounge. (the "**Permitted Use**"). See a copy of the Plaintiff's Lease annexed hereto as **Exhibit A**. Plaintiff's business did not retain a permanent wait staff, as it was not a traditional restaurant, but maintained an event staff for the events held on the weekends.

Since Plaintiff commenced its business operations in 2017, it has been a reliable and cooperative tenant. Plaintiff has operated its business in strict compliance with the terms of the Lease since 2017. It has engaged in timely and transparent communications with the Landlord, with which it enjoyed an amicable relationship, at all times during its tenancy. Additionally, it has added significant financial value to the Premises; Plaintiff invested over $500,000.00 into its buildout of the Premises, at no cost to the Landlord. Currently, the Lease expires in 2027 with a renewal option for a five (5) year term at the Plaintiff's option.

The COVID-19 Crisis

In March 2020, New York State catalogued its first known cases of the novel coronavirus known as COVID-19, an event which has since risen to the level of a global pandemic. As of the

date of this filing, more than thirty thousand (30,000) people have died from COVID-19 in New York State alone, and the global death toll numbers over half a million souls. On March 7, 2020, Governor Cuomo issued Executive Order Number 202 (the "**EO**" or the "**Order**"), which Order declared a state disaster emergency for the entire state of New York. Not long after, Governor Cuomo supplemented and amended the EO with additional orders, both expanding and explaining the restrictions of the emergency declarations on the state:

- Executive Order Number 202.3, *inter alia*, directed that "any restaurant or bar in the state of New York shall cease serving patrons food or beverage on-premises effective at 8 pm on March 16, 2020."
- Executive Order Number 202.8 (the "**PAUSE**" program), signed on March 20, 2020, amended and supplemented the EO by initiating the "New York State on PAUSE" directive. The "PAUSE" program mandated all non-essential businesses statewide to close in-office personnel functions and temporarily banned all non-essential gatherings of individuals of any size for any reason until April 19, 2020.
- Executive Order Number 202.10, *inter alia*, directed that "non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time."
- Executive Order Number 202.11 explicitly declared that: "during the period when an Executive Order limiting operation of a type of facility or limiting the number of persons who may occupy any space is in effect, any operation of such a facility or occupancy of any such space by more than the number of persons allowed by said Executive Order shall be deemed to be a violation of law and in particular, but not by way of limitation, shall be deemed to be a violation of the Uniform

Code or other local building code in effect in the jurisdiction in which the facility or space is located."

- A series of additional Executive Orders, including Numbers 202.3, 202.4, 202.5. 202.6, 202.7, 202.8, 202.10, 202.11, 202.13, 202.14, 202.28, and 202.31, thereafter extended the PAUSE program to the end of May 2020.
- Executive Order Number 202.31, issued on May 14, 2020, articulated the beginning of the phased reopening plan for New York State: "only those businesses or entities in a region that meets the prescribed public health and safety metrics, as determined by the Department of Health, will be eligible for reopening." Copies of the relevant executive orders are annexed collectively hereto as **Exhibit B**.

Pursuant to the EO and the PAUSE Program, Nassau County began Phase 4 on July 8, 2020, at which time restaurants were permitted to resume in-door dining at 50% capacity and small events with restricted numbers were sanctioned if social distancing was possible. To date, these regulations are still in place in Nassau County; restaurants and similar businesses still cannot operate at full capacity within their full premises nor can events be held at normal sizes and venues.

In compliance with the above-referenced executive orders and the PAUSE program, Plaintiff, like other similar establishments in New York, shuttered its doors on March 16, 2020. Plaintiff initiated conversations with the Landlord in March, April, and May to discuss the impact of COVID-19 on Plaintiff's business obligations under the Lease as well as the steps Plaintiff was taking to mitigate that impact (such as applying for federal aid under the Paycheck

Protection Program and investigating ways to pivot Plaintiff's business by developing a food takeout and delivery operation).

In June 2020, Plaintiff and Landlord engaged in discussions to potentially revise the rental obligations under the Lease, given the effect of the pandemic on possible performance thereof. Thereafter, Defendant offered to sell and Plaintiff offered to buy the building on which the Premises were located (in accordance with Plaintiff's right of first refusal as discussed in Paragraph 53 of the Lease), an offer for which the Plaintiff is currently seeking financing. Despite these good faith efforts, on July 31, 2020, Landlord served the Plaintiff with the instant Five Day Demand (the "Notice"), declaring Plaintiff in default of the Lease for failure to pay rent for the months of April 2020, May 2020, June 2020, and July 2020. The Notice stated that, if Plaintiff failed to cure the default at the end of the expiration period (August 5, 2020), Landlord would terminate the Lease. See a copy of the Notice annexed hereto as **Exhibit C**. In response to this lamentable and unjust development, Plaintiff now moves this Court for relief from the prospect of immediate and irreparable harm from this Defendant.

ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO A *YELLOWSTONE* INJUNCTION AND TEMPORARY RESTRAINING ORDER

A. Plaintiff Meets All of the *Yellowstone* Criteria

Not only is this Defendant incorrect in its declaration of Plaintiff's default and pursuit of rental obligations that are not owed, it is also exploiting a global pandemic to the detriment of this Plaintiff. Based on the facts as recited herein and in the Prince Affidavit, this Plaintiff is entitled to a *Yellowstone* injunction and temporary restraining order.

In *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968) ("*Yellowstone*"), the landlord issued a notice to its tenant demanding that the tenant install a sprinkler system in the leased premises within ten (10) days. After the expiration of ten (10) days, the notice stated that the lease would terminate. The tenant failed to act within the requisite cure period, and after receiving a termination notice from the landlord, sought a declaratory judgment to determine the rights of the parties. The Court held against the tenant, finding that the lease had been duly terminated upon the expiration of the notice to cure. Had the tenant sought declaratory relief and moved for a temporary restraining order *before* the expiration of the cure period, the Court would have stayed the running of the cure period and preserved the lease during the pendency of the litigation.

The enduring legacy of *Yellowstone* is a mechanism to maintain the status quo so that a tenant can challenge a landlord's assessment of its rights without forfeiting its lease during the pendency of the action. See, *2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 A.D.3d 573 (1st Dept 2012). New York courts have routinely granted *Yellowstone* injunctions "to avoid forfeiture of the tenant's interest and in doing so they accepted far less than

the normal showing required for preliminary injunctive relief. An applicant rarely has been required to demonstrate a likelihood of success, irreparable injury, and that the equities favored preliminary relief as those terms are traditionally understood" *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19 (1984); see also, *Ameurasia Int. Corp. v. Finch Realty Co.*, 90 A.D.2d 760 (1st Dept 1982); *Finley v. Park Ten Assoc.*, 83 A.D.2d 537(1st Dept 1981); *Podolsky v. Hoffman*, 82 A.D.2d 763 (1st Dept 1981).

To obtain a Yellowstone injunction, a tenant must show that: (1) it holds a commercial lease; (2) the landlord served upon the tenant a notice to cure or notice of defect or that it faces threat of lease termination; (3) it sought injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means other than vacating the subject premises. See, *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 A.D.2d 421 (1st Dept 1994); see also, *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420 (1st Dept 1995); *Soho Elec., Inc. Petbar Rlty. Co. Inc.*, 2008 WL 345199 (2008); *Aegis Holding Lipstick LLC v. Metro. 885 Third Ave. Leasehold LLC*, 95 A.D.3d 708 (1st Dept 2012) ("[p]laintiff established its entitlement to a *Yellowstone* injunction. Tenant demonstrated that it held a commercial lease, had received a notice to cure from defendant landlord, and had requested injunctive relief prior to the expiration of the cure period. Tenant also showed that it was prepared and maintained the ability to cure the alleged defaults").

Numerous decisions following *Yellowstone* have emphasized the precariousness of a tenant's situation without the protection afford by the *Yellowstone* injunction:

> "under the procedure promulgated in [*Yellowstone*], a tenant may obtain a restraining order which tolls the running of the notice to cure until a declaration of the parties' rights may be had. In [*Yellowstone*], the tenant's failure to obtain a restraining order until after the cure period had run was fatal since there is no judicial power to revive a cure period that has expired. Absent a toll of the

> cure period, a judicial determination that the lease has been violated leaves the tenant without the ability to cure if the time to cure has elapsed by the time of the decision. Therefore, a tenant who fails to seek a restraining order tolling the time to cure must either cure during the time limited or litigate under the peril that a negative determination of the substantive issues will destroy the leasehold without a further opportunity to cure" *Mann Theatres Corp. v. Mid Island Shopping Plaza*, 94 A.D.2d 466 (2d Dept 1983), *aff'd*, 62 N.Y.2d 930 (1984).

As demonstrated in the accompanying Prince Affidavit, Plaintiff satisfies all the necessary criteria for the issuance of a *Yellowstone* injunction:

(i) Plaintiff holds a commercial leasehold interest in the Premises as a tenant (see Exhibit A);

(ii) Plaintiff has received a purported notice to cure declaring it in default of the Lease (see Exhibit C);

(iii) The time to cure any alleged default, pursuant to the Notice, has not yet expired, in that the cure period does not expire until the end of August 5, 2020 at the earliest; and

(iv) Plaintiff believes that it is not in default under the Lease as alleged in the Notice. Plaintiff, however, is ready, willing, and able to cure any default which this Court may find to exist after a trial on the merits.

Thus, because Plaintiff has established all of the requisite criteria to obtain *Yellowstone* relief, this Court should grant Plaintiff's application for a *Yellowstone* injunction and temporary restraining order.

B. Plaintiff is Not in Default under the Lease

a. Force Majeure Excuses Plaintiff's Performance

First and foremost, this Plaintiff is not in default of the Lease because the COVID-19 pandemic and the regulations issued in response to it triggered the Lease's force majeure clause, excusing Plaintiff's performance of its obligations thereunder.

Force majeure clauses are generally narrowly construed, such that the clause must specify the same reason for non-performance that the party is actually invoking. See *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dept. 2009). New York courts have held that force majeure "is most frequently applied to Acts of God or events in nature, which are neither anticipated not controllable, but it may well apply to 'governmental prohibitions.' *Trump on Ocean, LLC v. Ash*, 24 Misc. 3d 1241(A), 899 N.Y.S.2d 63 (Sup. Ct. 2009), *aff'd as modified sub nom. Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 916 N.Y.S.2d 177 (2011).

Paragraph 27 of the Lease at issue defines force majeure as inclusive of several causes or events that justify the delay of performance:

> "The period of time during which Landlord or Tenant are prevented or delayed in the performance of the making of any improvements or repairs ***or fulfilling any obligation required under this Lease*** due to delays caused by fire, terrorism, catastrophe, strikes or labor trouble, civil commotion, acts of God or the public enemy, governmental prohibitions or regulations, or inability or difficulty to obtain materials, or other causes beyond Landlord's or Tenant's control, shall be added to Landlord's or Tenant's time for performance thereof, and neither Landlord nor Tenant shall have any liability by reason thereof." (emphasis added)

The COVID-19 pandemic and the rules instituted in response fall into not one, but three, of these enumerated bases for force majeure: (i) acts of God, (ii) governmental prohibitions or regulations, and (iii) other causes beyond Landlord or Tenant's control.

As held by the Appellate Division, First Department in *Reade v. Stoneybrook Realty, LLC*, government action can provide the sort of unforeseeable obstacle that establishes force

majeure. *Reade*, 63 A.D.3d at 434 (holding that, where force majeure clauses expressly included "governmental prohibitions," a court-issued temporary restraining order qualified as force majeure). In the context of the COVID-19 pandemic, sister courts have recognized that executive orders imposing capacity restrictions and "shelter in place" directives constitute the type of governmental regulations contemplated under force majeure provisions. The recent ruling in to In re Hitz Rest. Grp., No. BR 20 B 05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020) upheld a restaurant's argument that the executive orders imposed by Illinois Governor J. B. Pritzker in response to the pandemic constituted the type of governmental regulation contemplated within its lease's force majeure provision, therefore excusing rental payments during the months in which the executive orders were active.

The force majeure clause in In re Hitz Rest. Grp. essentially mirrors the dispositive clause in Plaintiff's Lease: "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by…laws, governmental action or inaction, orders of government…" *Id*. In response to the restaurant's assertion that the governor's executive orders constituted this type of governmental action, the Hitz court held that:

> "The force majeure clause in this lease was unambiguously triggered by § 1 of Governor Pritzker's executive order. First, his order unquestionably constitutes both "governmental action" and issuance of an "order" as contemplated by the language of the force majeure clause. Second, that order and its extensions unquestionably "hindered" Debtor's ability to perform by prohibiting Debtor from offering "on-premises" consumption of food and beverages. Finally, the order was unquestionably the proximate cause of Debtor's inability to pay rent, at least in part, because it prevented the Debtor from operating normally and restricted its business to take-out, curbside pick-up, and delivery." *Id*.

This holding is instructive to the instant action, as here, Governor Cuomo's executive orders instituted the same types of restrictions on Plaintiff's ability to operate its business as

contemplated under the Lease agreement. Plaintiff was forced to shutter its business on March 16, 2020 in compliance with the state mandates and is still unable to fully operate as an event space and late-night lounge, in accordance with Nassau County's Phase 4 guidelines. It goes without saying that these executive orders restricting the operation of non-essential businesses and precluding the gathering of groups of any size is a government restriction covered by the Lease's force majeure clause. Such regulations clearly excuse this Plaintiff's non-payment of rent during the months in which the executive orders preclude the normal operation of its business.

What is more, it is obvious that the COVID-19 pandemic falls under the umbrella of "acts of God" as described in the Plaintiff's force majeure provision. Longstanding precedent defines the term "act of God" as a natural event not caused by human agency. *Cormack v. N.Y., N.H. & H.R. Co.,* 196 N.Y. 442, 447 (1906). Again, sister courts have illuminated the way in which a disease readily falls under that precedent. *See*, *Ramer v. State ex rel. Ward*, 302 P.2d 139, 141 (Okla. 1956) ("Generally, any illness the result of disease or a condition beyond the prevention or control of human agency is regarded as an act of God"); *see also*, *Rayfield v. Millet Motel*, 185 So.3d 183, 186 (La. Ct. App. 2016). COVID-19 evolved "naturally," as the spread of the contagion is not the creation of human efforts; indeed, the virus spread in spite of extraordinary efforts to contain it. COVID-19 represents a disaster not caused by human agency certainly beyond the control of either Plaintiff or Defendant. As such, the novel coronavirus clearly falls under Plaintiff's force majeure provisions as an act of God, further excusing Plaintiff's performance under the Lease.

Finally, Plaintiff's force majeure clause provides a catch-all for "other causes beyond Landlord's or Tenant's control." The Court of Appeals has held that that a force majeure event

under a catch-all provision must be similar to the specifically enumerated causes of force majeure to apply. *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902-03 (1987). As other enumerated categories of force majeure are appropriate in the instant case, this more general provision is tertiary. For the reasons discussed herein, both the pandemic and the government regulations issued in response fall within this catch-all provision on its face as both constitute events beyond the control of either party that obstruct the operation of Plaintiff's business under the Lease. Moreover, the pandemic and the associated orders are highly similar to the "acts of God" and "governmental restrictions" that the Lease expressly specifies as force majeure events. Consequently, even if the Court finds that COVID-19 is not outright an "act of God" or qualifying "government restriction" within the meaning of the Lease's force majeure clause, the Court should nonetheless hold that it is sufficiently similar to those enumerated conditions to trigger the clause's catch-all provision.

b. <u>The Purpose of the Lease is Frustrated</u>

Notwithstanding the forgoing, this Plaintiff is not in default of the Lease at issue because the government's response to the coronavirus pandemic has frustrated the purpose of the Lease.

The doctrine of frustration of purpose is a defense to nonperformance under a lease when the frustrated purpose is "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dept 2016); see also, *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263 (1st Dept 2004); Restatement [Second] of Contracts §§265 and 269 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made,

his remaining duties are discharged, unless the language or the circumstances indicate the contrary").

Additionally, New York Courts have long held that government action or regulation can legitimately serve to frustrate the purpose of a lease agreement, such that the lease could be terminated at the option of the tenant. "While the purpose of the lease was for the space to be used as an office and plaintiff is in fact prohibited from any other use, the lease also prohibits plaintiff from using the premises in violation of the CO, and the CO itself prohibits commercial use of the space. Therefore, plaintiff properly raises the excuse of impossibility of performance as ***its ability to perform under the lease was destroyed by the law***" *Id* (emphasis added); see also, *Two Catherine Street Management Co., Inc. v. Yam Keung Yeung*, 153 A.D.2d 678 (2d Dept 1989) ("The lease contemplated that certain changes in the premises were necessary so that the premises could be used for the purposes intended, that is, as a restaurant and that such changes must comply with the relevant rules and regulations. It was alleged that it became impossible to make the changes through no fault of either party due to the inactivity of the local building department with respect to the defendant's applications. Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease"); *Elkar Realty Corp. v. Mitsuye T. Kamada*, 6 A.D.2d 155 (1st Dept. 1958) ("[the lease] would fail as a valid contract only if the contemplated correction became impossible and the legal bar to the sole use within the terms of the lease remained in force"); *Bush v. Protravel Int'l, Inc.*, 192 Misc. 2d 743 (Civ. Ct. 2002) ("Precedent is plentiful that contract performance is excused when unforeseeable government action makes such performance objectively impossible").

As previously stated herein, the purpose of the Lease is to operate an event space and lounge. See Exhibit A. The Premises can only be operated according to the terms and intent of the Lease. The numerous executive orders issued by the New York State governor—the contents of which were as unforeseeable and unprecedented as the pandemic—make it abundantly clear that the Plaintiff was legally prohibited from operating the Premises according to those terms from March 16, 2020 through the present time. In accordance with Executive Order Number 202.3, Plaintiff was and is legally required to refrain from serving patrons food or beverage on-premises. Moreover, though Plaintiff's business can resume for limited capacity, it still cannot be fully operational at 100% capacity, which, as an event space for parties and celebrations up to two hundred guests at a time is totally debilitating. By threatening default and termination of the Lease, Landlord implicitly suggests that Plaintiff should break the law to effectuate the business purpose of the Lease, a suggestion that cannot hold sway in any court of equity, let alone the court of public opinion. The law has frustrated and continues to frustrate the purpose of Plaintiff's Lease, rendering the Lease void and terminable at the Plaintiff's option and/or excusing Plaintiff's non-performance of its obligations thereunder.

Accordingly, since the underlying purpose of the Lease has been and continues to be frustrated by unforeseeable events outside this Plaintiff's control, Plaintiff is able to terminate the Lease at its option and/or is relieved from its obligations under the Lease, namely, its rental obligations for the duration of the government orders in play.

c. Rent is Abated under the Casualty Clause of Plaintiff's Lease

The Court should grant Plaintiff's request for relief not only because it has clearly met the requisites for a *Yellowstone* injunction, but also because *no default currently exists* under the

Lease. Plaintiff's Lease, by its terms, clearly indicates that the rent is abated throughout the duration of the COVID-19 pandemic.

Paragraph 18 of the Lease states that "if the Demised Premises or the building containing them should be damaged or destroyed during the term by fire ***or other insurable casualty***…rent payable under this Lease shall be fully abated during such period of time that Tenant is denied the use and enjoyment of the Demised Premises." See Exhibit A (emphasis added).

The casualty triggering Paragraph 18 of the Lease began on or about March 16, 2020, when, pursuant to the Executive Orders previously discussed herein, Plaintiff was legally forced to close its business due to the property and physical damage caused by the COVID-19 virus and the dangerous propensity such virus poses to the public. On March 16, 2020, New York City Mayor Bill de Blasio specifically noted the "property damage and loss" caused by the novel coronavirus. As of May 22, 2020, the Centers for Disease Control and Prevention (the "**CDC**") has maintained that "it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it." See a copy of the CDC Media Statement annexed hereto as **Exhibit D**.

The First Department has held that the phrase, "other casualty," as used in lease agreements such as the Plaintiff's Lease is broad and could encompass the type of damage described by Mayor de Blasio, *supra*. See, generally, *45 Broadway Owner LLC v, NYSA-ILA Pension Trust Fund*, 107 A.D.3d 629 (1st Dept 2013). Pursuant to the Plaintiff's Lease, rent is abated in proportion to the amount of time that damage or other casualty renders the Premises inaccessible or unusable. As a result of both the COVID-19 pandemic and the responsive government regulations, Plaintiff has been unable to use or access the entire Premises from March 16, 2020 until the present time. The instant Plaintiff cannot be in default for not paying

rent for the months enumerated by the Defendant as the *rent was contractually abated* during that time under the terms of the Lease.

What is more, considering that Plaintiff paid the entirety of March's rent when it was only able to access and use the Premises for part of the month, the Defendant actually owes the Plaintiff a rent credit for the dates of March 16, 2020 through and including March 31, 2020. Finally and as a point of information, the Notice improperly assesses late fees against the purported rent amounts owed, fees expressly precluded by Executive Order 202.28 (amending "Subdivision 2 of section 238-a of the Real Property Law to provide that no landlord, lessor, sub-lessor or grantor shall demand or be entitled to any payment, fee or charge for late payment of rent occurring during the time period from March 20, 2020, through August 20, 2020.") Even if this Plaintiff did owe rental payments for the months at issue, which it disputes, the amounts claimed by this Defendant violate the existing law.

POINT II

PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Should this Court find that Plaintiff is not entitled to relief under the *Yellowstone* precedent, Plaintiff argues that it is still entitled to injunctive relief under CPLR §6301.

CPLR §6301 provides that:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." See CPLR §6301.

Like a *Yellowstone* injunction, "the purpose of a preliminary injunction is to maintain the status quo" pending a determination on the merits of the litigation. *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 604 (2d Dep't 2004). It is well settled that a party is entitled to preliminary injunctive relief upon a showing of (1) a probability of success on the merits; (2) the danger of irreparable injury absent the issuance of the injunction; and (3) a balancing of the equities in favor of the movant. See *Aetna Insurance Co. & Capasso*, 75 N.Y.2d 860, 862 (1990); *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200 (1st Dep't 1996).

On a motion for preliminary injunctive relief, a plaintiff need only make a *prima facie* showing of a likelihood of success on the merits, and need not demonstrate certainty of success. *Paritmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 553 (1st Dept 1982); *Terell v. Terell*, 279 A.D.2d 301, 303 (1st Dep't 2001); *Demnartini v. Chatam Green, Inc.*, 169 A.D.2d 689 (1st Dept 1991). In reviewing a request for a preliminary injunction, "a court must balance the

equities. [I]t must be shown that the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 174 (2d Dept 1986).

Plaintiff clearly meets the criteria for a preliminary injunction here. First, Plaintiff has established a likelihood of success on the merits as set forth above and in the Prince Affidavit. Plaintiff is clearly not in default of the Lease; not only have the pandemic and the regulations issued in response triggered Plaintiff's force majeure provision, but the law has so frustrated the purpose of the Lease as to render the Lease void and/or excuse Plaintiff's non-performance of its obligations thereunder. Moreover, the rent sought by this Defendant is actually and validly abated by the terms of the Lease itself.

Second, without relief from this Court, Plaintiff faces irreparable harm. Defendant's Notice threatens default and termination of the Plaintiff's Lease. See Exhibit C. Without judicial intervention, Plaintiff faces the loss of its business, its security deposit, and the value of Plaintiff's buildout of the Premises, an amount well in excess of $500,000.00. Moreover, given the fact that the aforementioned executive orders have prohibited the operation of Plaintiff's business at the Premises since the middle of March and thus thwarted the generation of any income since that time, the foregoing would result in a monumental financial harm to this Plaintiff. The Court of Appeals has long held that the attempt to terminate a lease is the exact type of threat that constitutes irreparable harm that a preliminary injunction is meant to alleviate. See *Empire State Bldg. Assocs. V. Trump Empire State Partners*, 245 A.D.2d 225 (1997).

Third, and perhaps most importantly, the balance of the equities weighs in Plaintiff's favor. Plaintiff has been a tenant in good standing since the commencement of the Lease in 2017, when it started its business in compliance and good faith with the Lease provisions. That New

York would face a vicious and mass pandemic was totally unforeseeable by this Plaintiff, as were the necessary government regulations that prohibited the Plaintiff and any non-essential business from running for *months*. Those laws wholly prohibited the operation of Plaintiff's business and frustrated the underlying purpose of Plaintiff's Lease, which was to run a very specific enterprise, as expressly prescribed in the Lease. Additionally, the Plaintiff's Lease provides for the abatement of rent in situations in which damage or other casualty renders the Premises inaccessible or unusable for the Plaintiff. Given all of the above, there is no legitimate reason on which Defendant could possibly base its claim that Plaintiff is in default of the Lease and owes rent as outlined in the Notice.

Defendant's actions, especially demanding rent payments from a business that is prohibited from operating both by the law and because of the grave immediate danger to patrons and its staff, is indefensible. What is worse, Defendant issued this Notice with its consequent claims while good faith discussions were occurring between the parties; such behavior is nothing more than a bald attempt to strongarm this Plaintiff into agreeing to its bad faith demands. The Defendant's reprehensible effort to take advantage of a global health emergency is yet another factor that tips the balance of the equities in Plaintiff's favor. Based on the foregoing, and if this Court should not award relief under the *Yellowstone* precedent, Plaintiff should be granted a preliminary injunction and temporary restraining order.

POINT III

PLAINTIFF IS NOT REQUIRED TO POST AN UNDERTAKING

Should this Court find that Plaintiff is entitled to injunctive relief, it should award such relief without requiring an undertaking.

The First Department has long held that where a tenant has installed building improvements on a leased premises at its own expense, an undertaking is not required. See *Ku Po trading Co., Inc. v. Tsung Tsin Ass'n, Inc.*, 273 A.D.2d 111 (1st Dept 2000); see also, *John A. Reisenbach Charter School v. Wolfson*, 298 A.D.2d 224 (1st Dept 2002).

Since it took occupancy of the Premises, Plaintiff has spent no less than $500,000.00 of its own funds in upgrading and outfitting the space to be a successful events space and lounge. What is more, in the months since Nassau County entered Phase 4, Plaintiff has begun to build out its kitchen to begin operation as a take-out and delivery BBQ establishment. These efforts have been made and these resources expended in good faith to mitigate the financial damage of the pandemic and its consequent government orders. Not only does Defendant know of Plaintiff's efforts, Plaintiff has committed a portion of its profits to the Defendant in good faith until the relevant executive orders are lifted and Plaintiff can resume business as intended under the Lease. As a result of these investments, the Defendant is adequately protected under the law such that a separate undertaking is unnecessary.

CONCLUSION

For the reasons set forth above, the Plaintiff's Order to Show Cause should be granted in its entirety, and a temporary restraining order and preliminary injunction should be issued: (i) staying and tolling the expiration of the cure period set forth in the Notice pending the Court's determination of Plaintiff's rights under the lease relating to the Premises; (ii) enjoining and restraining the Defendant from terminating or attempting to terminate the Lease and/or tenancy of the Plaintiff in the Premises based upon the Notice, to evict or eject Plaintiff from the Premises on the basis of the Notice, to interfere with Plaintiff's occupancy and/or possession of the Premises and enforcing any remedy upon the alleged defaults contained in the Notice; (iii) enjoining and restraining the Defendant from accessing, using, or drawing down upon Plaintiff's security deposit; and (iv) awarding Plaintiff such other and further relief as this Court deems just and proper, including reasonable attorney's fees and costs and expenses of this motion and action.

Dated: New York, New York
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Respectfully submitted,

BRONSTER LLP

By ___/s/ Alexandra Mink _____

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