SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

VICTORIA'S SECRET STORES, LLC, successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC., Plaintiffs, v. HERALD SQUARE OWNER LLC, successor in interest to 1328 BROADWAY, LLC, Defendant.	Index No. 651833/2020 Justice Andrew Borrok **Motion Sequence No. 001**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT

MEISTER SEELIG & FEIN LLP
Stephen B. Meister, Esq.
Howard S. Koh, Esq.
125 Park Avenue, 7th Floor
New York, New York 10017
Phone: (212) 655-3500

Attorneys for Defendant
Herald Square Owner LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

Treatises

PRELIMINARY STATEMENT

This dispute turns on a simple, central *legal* issue.

According to Plaintiffs, what matters — for *both* their "frustration" and "impossibility" claims — is (what they call) the "foreseeability of the [specific] *event* [a pandemic]," and *not* "the foreseeability of the *harm* [store closure]" that the specific event, and other events of a similar sort, might cause. *See* Plaintiffs' Memorandum of Law, NYSCEF #31 ("VSMem."), at 13; italics by VS).[1]

But that is not the relevant test. As Judge Batts stated in *A & E Television Networks, LLC v. Wish Factory Inc.*, 2016 WL 8136110, at *13-*14 (S.D.N.Y. Mar. 11, 2016) (*see* SLGMem. 9), in granting a motion to strike defendant's affirmative defense of frustration:[2]

> Wish Factory asserts that "Robertson's offensive outbursts and the extent and severity of the damage they caused ... hardly could have been foreseen by The Wish Factory at the time it entered into the License Agreement with (AETN)." ... However, the Court rejects this argument as well.
>
> First, *Wish Factory frames the question of foreseeability too narrowly*. The question is *not* whether *this specific* event, the publication of Mr. Robertson's offensive comments, nor this specific result, Wish Factory's alleged multi-million dollar losses, were foreseeable. [Judge Batts' n.16, citing cases, omitted.] Instead, it is sufficient to ask whether the parties contemplated a potential decline of the popularity of Duck Dynasty or profitability of the Products, and if so, whether and how they allocated that risk. *No discovery is necessary* to establish that parties to a merchandising agreement related to a television show, particularly a reality television show, could reasonably foresee a lapse in the popularity of the show might occur that would harm merchandising opportunities.

---

[1] See likewise VSMem. 15 (boldface and italics by VS): "the inquiry is ***not*** simply whether the risk could have been guarded against, but also whether the ***event*** was foreseeable."

[2] All emphasis in material quoted herein is added unless otherwise noted. Defendant ("Owner") refers to its moving memorandum, NYSCEF #26 ("SLGMem.") for definitions of terms and general background.

Nor does VS address Justice Sherwood's clear statement, following First Department precedent, in the *Urban Archaeology* case,[3] quoted in SLGMem. 9:

> The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, *even if the precise cause or extent* of such financial disadvantage was not foreseen at the time the contract was executed [citing to *General Elec. Co. v. Metals Resources Grp. Ltd.*, 293 A.D.2d 417 (1st Dep't 2002)].

Accordingly, the relevant legal question is not whether the Lease specifically addresses a forced store closure *as a result of a COVID-19 (or any other) pandemic*, but rather (a) whether the Lease contemplates the risk of forced store closure for *any* reason, including, but not limited to, *by governmental order, and, if so,* (b) *how the Lease allocates that risk*. Here, the Lease explicitly contemplates the risk of a forced store closure from, *inter alia*, "governmental preemption" arising from "a national emergency" and allocates that risk to Tenant — unless the closure was the result of Landlord's failure to provide required services. *See* Lease § 26. That risk allocation sufficiently addresses the generalized risk — a store closure from a governmental order in response to a national emergency — and should be respected, not re-written, by the Court. That should be the beginning and end of the Court's analysis.

VS, as a sophisticated tenant, could have refused to enter into its lease unless it contained provisions protecting VS against even "unanticipated" events that might force VS to close its store. And, again (*see* SLGMem. 4-6), there are *three* Lease provisions that pointed out to VS that general risk — but allocated the risk of loss to VS.

First, in Lease § 1(A), as the starting point, Tenant agreed that it was liable to pay its rent "without set-off, offset, abatement or deduction whatsoever." And as stated in *In re M&M Transp.*

[3] Full citation at page 6 below.

Co., 13 B.R. 861, 871 (Bankr. S.D.N.Y. 1981), in rejecting a "frustration" defense on summary judgment:[4]

> A person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended.

The VSMem. does not address this predicate obligation.[5]

Second, looking at Lease § 26(i), the Lease clearly contemplated the possibility of:

> governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency (herein sometimes referred to as **"unavoidable delay"**).

And Tenant was certainly sophisticated enough to ask that not only Landlord, but also Tenant, be excused from performance generally, and from payment of rent in particular, in such circumstances:[6] but, in the following section, § 26(ii), Tenant obtained a rent abatement only if (a) Landlord failed to provide some required services, and (b) Landlord's failure was not excused by "unavoidable delay." In short, the parties allocated the risk of a store closure arising from "governmental preemption in connection with a national emergency" to Tenant — and the Court should not re-write the parties' own agreement.

---

[4] VSMem. 11 misstates the procedural posture of this case; see *infra*.

[5] Such an absolute-payment clause *is* enforceable, even in the real property context — except if the tenant has alleged a "constructive eviction," *i.e.*, due to some breach by the landlord. But there is no such allegation here. *See ReliaStar Life Ins. Co. of N.Y. v. Home Depot USA, Inc.*, 570 F.3d 513, 519-20 (2d Cir. 2009).

[6] VSMem. 16 cites *Hitz*, but in that case, there *was* a force majeure clause in favor of tenant. If even that restaurant was capable of insisting on such a clause, surely VS could have done so (or walked away from the lease if Landlord refused to grant one). *See* SLGMem. 7-8.

Third, Tenant specifically recognized that the *mortgageability* of the Landlord's ownership interest depended on VS's *absolute* promise to pay rent — except in circumstances subject to Landlord's (and hence mortgagee's) control, per § 26 (as just discussed). Thus, § 2(c)(vi) begins by explaining:

> (vi) *Because of the difficulty or impossibility of determining Landlord's damages due to diminished saleability or mortgageability* or adverse publicity or appearance by Tenant's actions, should Tenant … cease operating or conducting its business therein as required by this Lease (except during any period the Premises are rendered untenantable by reason of fire or casualty or as expressly permitted by Subsection C(i) of this Article 2), ... for a period of five (5) days following written notice from Landlord, then and in any of such events (hereinafter collectively referred to as **"failure to do business"**), Landlord shall have the right in addition to all other remedies provided in this Lease, at its option, to treat such failure to do business as an Event of Default ….

Consistent with this contractual risk allocation to Tenant, in Lease § 10(A), Tenant agreed to continue to pay its rent even in the event of a casualty.[7]

As reviewed in Point I herein, VSMem. 6 simply misses the point that an essential element of the common law concepts of frustration and impossibility is whether there is a contractual allocation of risk — because the existence of a contractual allocation supplants and therefore precludes application of the "common law" doctrines.

Accordingly, the specific circumstances of a given forced store closure due to extraordinary events may well have been unanticipated — but that is very different from saying that it was (under the relevant legal understanding) unforeseeable, such that VS could not have either insisted on a lease provision guarding against it, or declined to sign the lease. Conversely, VS plainly could

---

[7] Lease § 10(A) explains that even in such event, Tenant agreed to pay its rent:

> Tenant's obligations to pay all Minimum Rent and all other items of Rent shall continue in force and effect and shall not abate during the period the Premises are affected by any such fire or casualty or during the period of repair of the Premises after any such other casualty.

have — by appropriate language inserted in any of these three paragraphs, if Landlord was prepared to agree thereto — protected itself from the business harm that it would suffer if it had to continue paying rent (and/or post-termination damages as specified in the Lease) notwithstanding a government action forcing a store closure: VS just did not obtain any such agreement because, instead, it willingly entered into an absolute promise to pay rent (except in the event of Landlord's own fault).

Since the Lease is against them, Plaintiffs argue that this case will have "sweeping consequences." VSMem. 1. But the result here should turn on the facts and the specific language of this Lease. Of course, Landlord is not advocating that the result sought here should apply to *all* retail leases, across the country, that are affected by COVID-19. VS wants to pretend that we are seeking a uniform rule that would apply both to sophisticated tenants with sophisticated leases, and to, *e.g.*, mom-and-pop saloons that were declared illegal businesses upon the enactment of Prohibition. We are, rather, seeking summary judgment based solely on this Lease.

Likewise, it is irrelevant whether or not *other* stores are also now forced to close: the issue here is solely *this* Tenant, and *this* Lease. In any event, however, VS's suggestion that *every* retail store has been irreversibly forced out of business is belied by the facts. *See* Reply Affidavit of Howard S. Koh in Further Support of Motion for Summary Judgment, sworn to August 13, 2020 ("Koh Aff."), noting that other stores in the Herald Square area are open, and the Victoria's Secret company has in fact an open store elsewhere in Manhattan. Indeed, Tenant does not now proffer *any* evidence to support, *e.g.*, its reformation claim, or to show that an issue of fact exists as to any supposed ambiguity in the key Lease clauses.

Finally, we note that VS does not dispute that this case is now solely about money: for (a) it did not seek a "Yellowstone" stay in response to Landlord's notices to cure/notices of termination

(conceded in its Complaint at p. 21-22, and the Complaint's prayer for relief does not seek an injunction), and (b) it does not dispute (*cf.* SLGMem. 4, n.11) that by asserting rescission (based on frustration/impossibility) it is deemed to have conceded that it has "abandoned" its tenancy interest (although it may still be wrongfully holding-over, insofar as it has not surrendered its keys; and liable for stipulated damages).

ARGUMENT

I. AN ESSENTIAL ELEMENT OF VS'S FRUSTRATION AND IMPOSSIBILITY CLAIMS IS REFUTED BY THE LEASE

A. Summary Judgment Is Warranted

VS does not dispute that, as stated in *Gander Mountain v. Islip U–Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013), *aff'd*, 561 F. App'x 48 (2d Cir. 2014), if a plaintiff (like VS) cannot show "unforeseeability" — as that concept is fully elaborated (*e.g.*, in *A & E*, *supra*) — then its claims/defenses of both "frustration" and "impossibility" should be dismissed. See likewise *Urban Archaeology*; *see also*, *e.g.*, *MidFirst Bank v. 159 West 24th St. LLC*, 2010 WL 2639221 (Sup. Ct. N.Y. Co. June 21, 2010) (rejecting, on summary judgment, a defense of financial impossibility, citing to the First Department's decision in *Urban Archaeology*, *supra*, and noting "the economic meltdown, while perhaps unprecedented, was not completely unforeseeable"), and the classic leading case, *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987) (on summary judgment, holding that "impossibility" did not apply, because the risk "could ... have been ... guarded against in the contract") (discussed further *infra*).[8]

The plain language of the Lease thus can and should warrant immediate rejection of VS's claims. *See, e.g.*, *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 2009 WL 8572326 (Sup. Ct.

[8] We apologize: as correctly noted in VSMem. 15 n.11, the separate discussions of *MidFirst* and *Kel Kim* in our draft were accidentally "merged" in the final document, at 14.

N.Y. Co. Sept. 10, 2009) (Sherwood, J.) (granting landlord's motion to dismiss the "common law" defenses asserted by that retail tenant, operating as "Urban Outfitters"), *aff'd*, 68 A.D.3d 562 (1st Dep't 2009); *see also Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.*, 2009 WL 9087853 (Sup. Ct. N.Y. Co. Dec. 4, 2009) (Schweitzer, J.) (dismissing complaint in context of lease of railroad cars) [see n.1 to the opinion there, noting that typically frustration/impossibility are raised as a defense, and that defense is then stricken on a summary judgment motion; but where the "defense" is raised in a complaint, it can properly be dismissed under CPLR 3211(a)(1)].

Indeed, all four of the cases now cited in VSMem. 8-9 rejected the "frustration" allegations in a summary judgment context. See generally, granting summary judgment motions based on documentary evidence, *LCM Holdings GP, LLC v. Imbert*, 114 A.D.3d 406 (1st Dep't 2014), and *Pavin v. Cohen*, 80 A.D.2d 790 (1st Dep't 1981).

In VSMem.'s lead citation for a supposed requirement of discovery, *i.e.*, *In re M&M Transp.*, *supra* (VSMem. 11), summary judgment was granted against the "frustration" defense based solely on the documents and affidavits — and in particular based on the language of the contract, which showed that the possibility of a change in the regulatory context was (in the relevant legal sense) "foreseeable." By contrast, in *City of New York* (VSMem. 11) the court found a fact issue only because of an *absence* of any contract language there sufficient to resolve this question. *See also* SLGMem. 11.

VS also misstates the summary judgment standard (*cf.* VSMem. 3): rather, as noted in SLGMem. 2 n.7, if the Lease negates the essential element of "unforeseeability" (as that concept is properly construed), then the existence of other "material issues of fact" in respect of *other* elements of VS's claims are irrelevant. *See, e.g.*, *Orphan v. Pilnik*, 66 A.D.3d 543, 544 (1st Dep't

2009), *aff'd*, 15 N.Y.3d 907 (2010), and *Nunez v. Chase Manhattan Bank*, 155 A.D.3d 641, 643 (2d Dep't 2017).

Plaintiffs contend that summary judgment is "premature" and Owner "seek[s] to deny Plaintiff's [sic] [alleged] right to discovery." VSMem. 1. Plaintiffs argue that discovery is required "as to the parties' reasonable expectations at the time they entered the Lease" and whether Tenant considered "the possibility that its Retail Premises might be forced to close due to various circumstances." VSMem. 2-3. But it is well-settled that the best evidence of a parties' intent when making a contract is the words used in the contract. Indeed, unless there is an ambiguity, extrinsic evidence of the parties' intent is inadmissible. *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Moreover, a plaintiff will not succeed in resisting summary judgment by saying the contract language is ambiguous where, as here, plaintiff failed to *proffer* any *evidence* tending to show why its proposed reading should be adopted. *See* Glen Banks, *N.Y. Contract Law* § 9:38 (citing, *inter alia*, *Estate of Stravinsky*, 4 A.D.3d 75, 83 (1st Dep't 2003)). Although Plaintiffs cite *Ames v. Cnty. of Monroe*, 162 A.D.3d 1724 (4th Dep't 2018) for the proposition that discovery is supposedly necessary to determine what "risks" were contemplated by the Lease (*see* VSMem. 5-6, incorrectly attributing the decision to the First Department), in that case, the contracts at issue were interpreted *as a matter of law* because "resolution of the issue [did] *not* depend on the credibility of the extrinsic evidence," and the plaintiffs failed to "submit evidentiary facts or materials" to raise a triable issue of fact concerning the parties' intent. *Id.* at 1727. Plaintiffs here have not proffered any reason why they have failed to offer such evidence or why they would need discovery to obtain it. Rather, Plaintiffs, and their predecessors in the same corporate structure, negotiated and signed the Lease and each of its ten amendments. *See* Koh Aff.

B. VS Misunderstands the Relevant Legal Test

VS's contention is, in effect, that an agreement cannot allocate the risk of an event that is unexpected. But, that is contrary to the point made in, *e.g.*, *In re Schenck Tours, Inc.*, 69 B.R. 906, 911 (Bankr. E.D.N.Y.), *aff'd*, 75 B.R. 249 (E.D.N.Y. 1987), that an essential element of a defense/claim of frustration is that:

> the risk of the *unexpected* occurrence has not been *allocated* by agreement or otherwise.

Likewise, in the context of impossibility, the Court of Appeals wrote, in *Kel Kim Corp.*, 70 N.Y.2d at 902:

> Moreover, the impossibility must be produced by an *unanticipated* event that could not have been *foreseen or guarded against* in the contract [citations omitted].

This point, *viz.*, that an "unanticipated" specific event can nevertheless be *deemed* something that the contracting party *should* have protected itself against, as a matter of "foreseeability," so as to defeat an "impossibility" defense, is nicely made in *World of Boxing LLC v. King*, 56 F. Supp. 3d 507 (S.D.N.Y. 2014).[9] *See also*, *e.g.*, *Ahlstrom Machinery Inc. v. Associated Airfreight Inc.*, 251 A.D.2d 852, 854 (3d Dep't 1998) ("Although unanticipated, the January 1996 snowstorm that struck the northeast was not an unforeseeable event ....").

To say, therefore, that an event was "unexpected" or "unanticipated" does not answer the relevant question: could the contract or lease at issue have included (if the parties both agreed

[9] Judge Scheindlin explained (at 514):

> [King's] argument misconstrues the term "unanticipated event." King casts the question in terms of probability: an event is "unanticipated," in his view, if it is unlikely to occur. What the case law has in mind, however, are not improbable events, but events that fall outside the sphere of what a reasonable person would plan for.

thereto) a provision that would have guarded even against the "unexpected" or "unanticipated" event?[10]

And the fact that a lease addresses the general problem shows that even an "unexpected" specific event could have been guarded against. Thus, Judge Batts, in *A & E*, *supra*, also noted (at *14):

> Further, the Agreement itself demonstrates that the parties contemplated that Wish Factory would incur costs associated with the Agreement, … and that it would assume the risks of the Agreement, including most significantly, any accounts it was unable to collect. *Where, as here, the parties contemplate and contract for the risk of loss, the occurrence of future events leading to that loss is not unforeseeable.*

See also, *e.g.*, *Bank of Am. Nat'l Trust & Savings Ass'n v. Envases Venezolanos, S.A.*, 740 F. Supp. 260, 266-67 (S.D.N.Y.), *aff'd sub nom.*, *First Nat'l Bank of Maryland v. Envases Venezolanos*, 923 F.2d 843 (2d Cir. 1990) (concluding that because the contract "took into account the possibility of a *change* in the exchange arrangements," defendants could not claim frustration where there was a complete "cancellation of those arrangements").

As for the assertion in VSMem. 12 that no one discussed pandemic risk until 2013, we cited an article from 2003 (SLGMem. 11), and one can find many instances, in the 1980s and 1970s, where *force majeure* clauses included "epidemics." *See*, *e.g.*, *Franzblau v. Trans Global Commc'ns., Inc.*, 1984 WL 145 (S.D.N.Y. Apr. 12, 1984); "Gas and Oil Lease Force Majeure Provisions," 46 ALR 4th 976 (originally published in 1986); Jennifer Bund, "Force Majeure Clauses: Drafting Advice for the CISG [Contracts for International Sale of Goods] Practitioner,"

[10] None of the cases cited in VSMem. presents anything like the sophisticated allocation of risk here. The first case cited by VS in this regard (at 9, *Benderson*) indeed has nothing to do with "frustration," but rather simply enforces an "express warranty" granted by defendant. Here, by contrast, it is clear that Landlord never warranted that Tenant would be able to make use of its store. Nor is this a case where the *nature* of tenant's use is illegal, for purposes of RPL § 231.

17 *Journal of Law and Commerce* 381 (Spring 1998); and Thomas Black, "Sales Contracts and Impracticability in a Changing World," 13 *St. Mary's L.J.* 247 (1981).

Accordingly, VS's claims that it was entitled to have rescinded the Lease by reason of "frustration" or "impossibility" should now be dismissed.

II. VS'S REFORMATION CLAIM FAILS

VS's reformation claim is still self-contradictory on its face. In Complaint ¶¶ 97-98, VS alleges that the supposed inability in 2001 to anticipate being unable to operate a retail store due to COVID-19 requires reformation. But reformation requires a mistake concerning an *existing* fact. SLGMem. 15. VS now asks the Court to ignore Complaint ¶¶ 97-98, and to focus instead on its allegation, in ¶ 100, that the Lease meant to say that as a *general*, absolute matter, Tenant "would have *no* obligation to pay rent once [it] was deprived of the use of the Premises" — *i.e.*, for *any* reason. Given, however, the clear Lease provisions contradicting such a general exception — *e.g.*, § 10(A), quoted *supra* — there is simply "no basis for [a] contention that both parties reached an agreement other than that contained in the writing"; nor has Tenant proffered *any* evidence tending to satisfy the relevant "high level" evidentiary standard. *See, e.g., Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986).

Owner met its summary judgment burden by pointing to the fact that there had been multiple amendments since 2001 — yet *no* modification to "correct" this supposed gaping error (SLGMem. 16). *See, e.g., In re Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 207 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 543 (1995). Here, the 6th amendment (2011) specifically revisited the issue of store closure, where it provided (§ 14) that: "Notwithstanding anything to the contrary contained in the Lease, Tenant shall have the right to close for business during the performance of Tenant's Initial Work." Yet Lease Art. 2 was *not* changed. Likewise, the 9th Amendment (2013), in section 9, specifically referred to § 2(c)(vi), in providing that it shall not apply to the new *office*

premises. Yet there was no other modification to that section. These documents thus constitute fact evidence tending to refute, per *Wallace*, any claim of a mistake in respect of the original § 2(c)(vi) and related clauses. *See In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 162 A.D.2d 398, 399 (1st Dep't 1990). This shifted the burden onto VS, for purposes of this summary judgment motion, to proffer specific evidence, meeting the standard of *Chimart*, in support of reformation — especially since VS is a sophisticated tenant. But VS has failed to proffer anything (*e.g.*, any negotiating history, etc.) tending to show a mistake in 2001 on VS's part, let alone a mutual mistake, and let alone one relating to a then-present fact. *See Resort Sports Network Inc. v. PH Ventures III, LLC*, 67 A.D.3d 132, 136 (1st Dep't 2009). Accordingly, summary judgment is warranted, per *Chimart*. *See also*, *e.g.*, *Little Prince Prods., Ltd v. Scoullar*, 246 A.D.2d 306 (1st Dep't 1998).

In any event, this claim is time-barred. First, there is no "discovery exception" for a claim of reformation for mistake (absent fraud).

Thus, in the leading case, *Nat'l Amusements, Inc. v. S. Bronx Dev. Corp.*, 253 A.D.2d 358 (1st Dep't 1998), the First Department clearly explained that a claim of reformation for mistake is "untimely" as of 6 years after the supposedly mistaken document was executed; "notwithstanding our comment in *Davis v. Davis*, 95 A.D.2d 674, 675 [1st Dep't 1983] [a reformation claim is] *not* subject to a discovery accrual (*see*, *First Nat'l Bank v. Volpe*, 217 A.D.2d 967, 968 [4th Dep't 1995])." *See also* Ferstendig, ed., *Weinstein-Korn-Miller, New York Civil Practice* — CPLR ¶ 213.18, noting (text at n.5) that (a) the drafters of the CPLR had proposed a "discovery exception" for claims of reformation for mistake, *but* (b) that draft language was ultimately *not* included in the CPLR. VS's reliance now (VSMem. 19) on the *Davis v. Davis* case, and any progeny, should thus be rejected.

And *second*, in any event, given Tenant's present revised reformation claim — *viz.*, asserting in effect that even clauses like Lease § 10(A) were *already* mistaken (for failure to provide Tenant with a *general* exemption from rent payment in any such circumstances) — Tenant already could and should have "discovered" that the Lease is to the contrary from the very beginning, or, at a minimum, when it signed the 6th (2011) or 9th (2013) amendment.

III. THE REMAINING CLAIMS FAIL

Plaintiffs' remaining claims, for breach of contract, money had and received, and unjust enrichment, add nothing, and should likewise be dismissed. Plaintiffs assert that because their three main claims (for frustration of purpose, impossibility of performance, and reformation) should survive, the remaining causes of action must survive as well. But, as shown herein, because those main claims should be summarily dismissed, Plaintiffs' remaining claims should be dismissed too.

CONCLUSION

Accordingly, the Court should grant Landlord's motion, and dismiss Plaintiffs' claims in their entirety with prejudice.

Dated: New York, New York
August 13, 2020

MEISTER SEELIG & FEIN LLP

By: /s/ Stephen B. Meister
Stephen B. Meister, Esq.
Howard S. Koh, Esq.

125 Park Avenue, 7th Floor
New York, New York 10017
Tel: (212) 655-3500

Attorneys for Defendant
Herald Square Owner LLC

[Certificate of Compliance on next page]

CERTIFICATE OF COMPLIANCE

The total number of words in the foregoing memorandum of law, inclusive of headings and footnotes and exclusive of the caption, table of contends, table of authorities, and signature blocks, is 4,172 and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court, effective October 1, 2018.

Dated: New York, New York
August 13, 2020

/s/ Stephen B. Meister
STEPHEN B. MEISTER