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MEMO ENDORSED

September 11, 2020

Via Email and ECF

Steven M. Cowley
Duane Morris LLP
100 High Street, Suite 2400
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Re: *Hunter Communications, Inc., et al.* v. *Panasonic Avionics Corporation*, No. 7:20-cv-03434

Dear Counsel:

As you know, this firm represents Panasonic Avionics Corporation ("PAC") in connection with the above-referenced litigation. We write in response to your September 4, 2020 letter (the "Letter Motion") setting forth the purported bases for Hunter Communications, Inc.'s ("Hunter's") "anticipated and interrelated motions" to dismiss PAC's counterclaims under Rule 12(b)(6) and to strike PAC's second, third, seventh, eighth, ninth, tenth and eleventh affirmative defenses under Rule 12(f).

Hunter's Letter Motion amounts to no more than a nine-page retread of the same arguments Hunter made in its July 17, 2020 letter regarding PAC's original Answer, despite the fact that PAC amended its Answer to address each and every one of the purported pleading

deficiencies Hunter raised. As we previously stated in our correspondence to you, PAC's original filing was more than sufficient, and its amendments served only to address your concerns and eliminate any doubt. Nevertheless, despite the inclusion of additional facts responsive to your last letter, we see that it has had no effect on Hunter's position. Accordingly, there appears to be no benefit in continuing to provide additional facts in the form of yet another amended pleading. As set forth herein, the affirmative defenses and counterclaims in both PAC's Original and Amended Answer are sufficient as a matter of law. There is no basis to strike or dismiss PAC's Amended Answer, affirmative defenses, and counterclaims, in whole or in part.

I. Legal Standard

Under the *Twombly* pleading standard, a claim should be dismissed only if it lacks allegations of fact sufficient to state a claim for relief that is "plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). This standard does not create a "probability requirement." Rather, it only asks for "beyond [ ] mere possibility." *Id.* at 557. "Specific facts are not necessary; the statement need only give the [opposing party] fair notice of the what the . . . claim is and the grounds upon which it rests." *Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007).[1]

Each of the affirmative defenses and counterclaims PAC pleads in its Amended Answer easily meets this standard and should proceed to discovery.

II. PAC's Second Affirmative Defense for Frustration of Purpose Is Sufficient as a Matter of Law

Frustration of purpose excuses performance under a contract when an unforeseeable and substantial change in circumstances makes one party's performance virtually worthless. *See PPF Safeguard, LLC* v. *BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011) (purpose is frustrated "when a change in circumstances makes one party's performance virtually worthless to the other[.]"); *see also Profile Publ'g and Mgmt. Corp.* v. *Musicmaker.com, Inc.*, 242 F. Supp. 2d 363, 365 (S.D.N.Y. 2003) (purpose is frustrated when "both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place."). This occurs when the frustrated purpose is "so completely the basis of the contract that without it, the transaction would have made little sense." *See Arons* v. *Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007).

Courts have found a contract's purpose to be frustrated when a government order renders a contract, while technically performable, effectively valueless or unfair. For example, in *Ask Mr. Foster Travel Service, Inc.* v. *Tauck Tours, Inc.*, 181 Misc. 91, 92 (Sup. Ct. N.Y. Co. 1943), the purpose of an advertising services agreement entered into by a sightseeing bus tour

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[1] The plausibility standard of *Bell Atl. Corp.* v. *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense. *See State St. Glob. Advisors Trust Co.* v. *Visbal*, 2020 WL 2750112, at *2 (S.D.N.Y. 2020) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

company with a travel agency to display its printed advertisements in the travel agency's office was frustrated—and payment under the contract thus excused—when the U.S. government prohibited sightseeing tours by bus and therefore, the "expected value of [the advertiser's] performance was destroyed."

Similarly—and of particular relevance here—courts have applied this principle to excuse performance where the business in which one of the contracting parties was engaged was shut down by government order due to the outbreak of illness. *Sch. Dist. No. 16 of Sherman Cty.* v. *Howard*, 98 N.W. 666, 666-67 (Neb. 1904). For example, in *Howard*, a school district, despite its capacity to pay, was released from having to pay the wages due under a teacher's contract because the school at which the teacher taught was shut down by the Board of Health due to a smallpox outbreak. *Id.* The teacher argued that, because the teacher was willing to provide teaching services and the school district could still draw its usual share of state funds despite its closure, the contract could, and therefore should, be fulfilled. *Howard,* 98 N.W. at 667. The court rejected this proposition, noting that the school was unable to complete its contract due to the Board of Health's decision to close the school and that the receipt of certain funds that could have been used to pay the teacher's wages did not alter that fundamental frustration of the contract. *Id.*

Determining the purpose of a contract to excuse performance for frustration of purpose is, of course, a fact-specific inquiry. Indeed, it is well established that courts should look to "whether the parties contracted on a basic assumption that a particular contingency would not occur," including by examining extrinsic evidence. *Profile Publ'g & Mgmt. Corp. APS*, 242 F. Supp. 2d at 365. Accordingly, "[a]n analysis of the facts is crucial for the proper application of" the frustration of purpose doctrine. *Id.*

There is no question that PAC's Amended Answer adequately pleads the elements of frustration of purpose to get to this fact-specific inquiry. PAC pleads that:

- the singular purpose of the Contracts is for Hunter to provide PAC with satellite capacity, which PAC in turn uses to provide its airlines with broadband in-flight connectivity for passengers (¶ 52);
- the Contracts provide for satellite capacity that PAC would have needed based on the existence of the travel industry at the time the Contracts were negotiated (¶ 52);
- as a result of the COVID-19 pandemic—and the related collapse of the commercial airline industry due in part to governmental restrictions and travel bans—commercial air traffic has decreased significantly to only a small fraction of what it was a year ago, and it is expected that the commercial airline industry will remain at a substantially depressed level for years in the future (¶¶ 55, 57);
- this substantial change in circumstances was unforeseeable at the time PAC entered into the Contract (¶¶ 67-68);

- this substantial change in circumstances destroyed the underlying reasons PAC entered into its contract with Hunter, as PAC's customer usage is down approximately 85% from last year so that much of the satellite capacity for which PAC contracted—purchased solely for the purpose of providing airline passengers with broadband services—is both unused and unusable (¶¶ 58-59); and

- thus the contract between PAC and Hunter is virtually worthless, as nearly 75% of PAC customers that access Hunter's satellites have been unable to fulfill their payment obligations under their PAC contracts in light of the COVID-19 pandemic such that PAC has not been paid by those customers for the broadband connectivity services PAC provides through utilizing the contracted-for Hunter satellite capacity (¶ 60).

Notwithstanding these factual allegations, Hunter essentially makes three arguments as to why PAC's Amended Answer is so deficient as to require dismissal. Each of Hunter's arguments is without merit.

First, Hunter argues that financial hardship is not sufficient to avoid performance.[2] (*See* Letter Mot. at 6.) But PAC's frustration of purpose defense is not premised on the financial hardship it has suffered as a result of the COVID-19 pandemic.[3] As set forth *supra*, PAC's position is that performance is excused because the fundamental purpose of the Contracts has been frustrated. As in *Howard*, a viral outbreak has resulted in governmental restrictions and the evisceration of the commercial travel industry. Accordingly, there is effectively no market in which PAC can sell its in-flight connectivity services: such a market no longer exists with airlines having grounded so many of their flights. This shift makes the Contracts—through which PAC procures the satellite capacity that passes on to its airline customers—virtually worthless. Accordingly, Hunter's argument is inapposite.[4]

Second, Hunter claims that the purpose of the contract cannot be frustrated or "fail of its essential purpose" because PAC is receiving minimal payments from some of its customers for its bandwidth capacity. (*See* Letter Mot. at 6-7.) Hunter's arguments ignore the facts: as PAC explained in its Amended Answer, it contracted with Hunter for a certain amount of satellite

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[2] Bizarrely, Hunter simultaneously alleges that PAC has not alleged that it lost profits as a result of the COVID-19 pandemic, and thus PAC should be barred from asserting a frustration of purpose defense. (*See* Letter Mot. at 7.) While it is unclear whether Hunter believes PAC's financial condition is relevant or not, PAC's pleading is clear on its face that PAC has experienced financial losses due to the frustration of the Contracts. (¶¶ 60, 71–73 83, 91).

[3] Notably, PAC added facts to the Amended Answer related to its financial hardship in response to Hunter's assertion in its July 17, 2020 letter that PAC's Answer was deficient because it failed to establish financial hardship. (Hunter's July 17, 2020 Letter at 4 ("The Counterclaims simply are devoid of any allegation from which it may plausibly be concluded that the loss of revenue or other financial impacts experienced by the Defendant have been so severe."); *see also id.* ("Defendant does not even allege it has suffered [ ] financial hardship").)

[4] The case Plaintiff cites in support of its argument, *Phibro Energy, Inc.* v. *Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989), is of no moment: it does not analyze either frustration of purpose or impracticability defenses, but instead interprets a force majeure clause. (*See* Letter Mot. at 6.)

capacity based on the airline industry pre-pandemic and the existing in-flight connectivity market for airline customers. Now that the airline industry as a whole has been upended and there is only a tiny fraction of commercial travel that remains in the face of the pandemic, the satellite capacity for which PAC contracted is largely unpaid for and unusable. The fact that some small portion of the contracted-for satellite capacity may be bought does not change the fact that the contract is virtually worthless to PAC at this point.

Moreover, Hunter cites no authority for the proposition that a party must receive *no* payment or have *zero* revenue to establish a frustration of purpose defense.[5] To the contrary, courts have found frustration of purpose in cases in which it was still possible to perform under the contract, or where a party claiming frustration still had an ability to pay under the contract. *See, e.g.*, *Howard*, 98 N.W. at 666-67; *Ask Mr. Foster Travel Serv., Inc.*, 181 Misc. at 92; *see also In re M & M Transp. Co.*, 13 B.R. 861, 869 (Bankr. S.D.N.Y. 1981) (noting that even though "literal performance is still possible" the court "is not blind to the motivations of the contracting parties" in evaluating a frustration of purpose defense).[6]

Finally, Hunter claims that, because it performed under the contract for 92 months before the purpose of the contract was frustrated, PAC's performance may not be excused on the basis of frustration. That argument has no basis in law or fact. Hunter has not cited—and PAC has not identified—any authority for the proposition that a contract cannot be frustrated because the parties have performed under the contract in the past. In making this argument, Hunter makes clear that it fundamentally misunderstands the doctrine—where an unforeseeable event at some point in the life of the contract so alters the landscape that even when "both parties can perform," "performance by party X would no longer give party Y what induced him to make the bargain in the first place," the purpose of the contract is frustrated. *Profile Publ'g and Mgmt. Corp.*, 242 F. Supp. 2d at 365.

Accordingly, it is evident that, at a minimum, whether the purpose of the Contracts has been frustrated is an issue of disputed fact that requires discovery.

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[5] The cases Hunter cites in support of its argument are easily distinguishable from the facts in this case. In *Beardslee* v. *Inflection Energy, LLC*, 904 F. Supp. 2d 213 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015), the court found a government directive banning hydro-fracking permits was foreseeable, because the governing regulation in place when the leases were signed made it clear that drilling using [hydro-fracking] would not be permitted without further environmental studies. *Id.* at 221. Moreover, the court found that the purpose of the contract—to "drill, produce, and otherwise operate for oil and gas and their constituents"—could still be fulfilled by drilling oil and gas using other methods. *Id.* at 220. This case is distinct. First, Hunter does not contest that the pandemic was unforeseeable. And second, the purpose of the contract—to obtain Hunter's satellite capacity and pass it on to commercial airline clients in the form of in-flight connectivity services—cannot be fulfilled because travelers for the most part are not flying and therefore not accessing the in-flight connectivity PAC provides.

[6] Plaintiff cites *Wheelabrator Envtl. Sys., Inc.* v. *Galante*, 136 F. Supp. 2d 21, 34 (D. Conn. 2001), for the proposition that there can be no frustration of purpose where a party can partially perform. *Wheelabrator* does not so hold. The court there rejected a frustration argument not because the defendant was still able to perform, but because the purpose of the contract was not frustrated by a Supreme Court case changing the law—which the court deemed a foreseeable possibility at the time of contracting. *Id.*

III. PAC's Counterclaims and Its Third, Seventh and Eighth Affirmative Defenses for Force Majeure, Breach of Contract, and Unclean Hands Are Sufficient as a Matter of Law

Under the Master Services Agreement ("MSA"), a party's failure to perform under the contract is excused where it results from a force majeure event. (*See* Am. Answer ¶ 66; MSA Schedule 2, § 9.) When a force majeure event is continuous for a period of 30 days or more, the accompanying Service Order Form PAC 003-A2 (the "Service Order") obligates Hunter to meet with PAC to negotiate the modification or termination of the contract. (Am. Answer ¶ 99.)

In accordance with these contractual obligations, PAC has asserted as an affirmative defense that it has no obligation to perform under the MSA because a force majeure event rendered it unable to perform. Relatedly—on the basis of Hunter's failure to meet its contractual obligation under the Service Order to negotiate modification or termination of the Contracts after the force majeure event carried on for more than 30 days—PAC additionally pled affirmative defenses of breach of contract and unclean hands and counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Hunter spends single-spaced page after page circuitously addressing these affirmative defenses and counterclaims, but its argument, at its core, is simple: Hunter claims that PAC failed to plead that its failure to perform was the result of a force majeure event, and therefore its third affirmative defense of force majeure, as well as the various affirmative defenses and counterclaims arising from Hunter's contractual obligations premised on the occurrence of a force majeure, must fail. This argument is meritless.

A. PAC's Amended Answer Adequately Pleads That PAC's Performance Was Rendered Impossible as a Result of a Force Majeure Event

Under New York law, a force majeure event is an "event beyond the control of the parties to an agreement that prevents performance under the contract." *Beardslee* 25 N.Y.3d at 154. A party's nonperformance may be excused if the force majeure clause specifically includes the event that actually affects the party's performance. *Kel Kim Corp.* v. *Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987).

In this case, the plain language of the MSA's force majeure clause makes clear that the COVID-19 pandemic is a force majeure event. Under Schedule 2, Section 9 of the MSA:

> Except for the duty to pay for services already received which exceed thirty (30) days, any failure or delay in performance by either Party … shall not be a breach of this Agreement and shall not constitute a failure if such failure results from any act of God, governmental action . . . or any other circumstances reasonably beyond the control of the Company.

As PAC asserted in its Amended Answer, the COVID-19 pandemic has resulted in the occurrence of several force majeure events defined under the contract—all of which were unforeseeable at the time the MSA was executed on February 27, 2015. (¶ 67.)

- *First*, the global pandemic—a naturally occurring, unforeseeable virus that scientists around the world have been unable to contain despite gargantuan efforts—is an "act of God."[7] (¶ 68.)

- *Second*, the acts of the United States government and other governments around the world to restrict international and domestic travel in an effort to halt the spread of the virus are "acts of government exercising appropriate jurisdiction." (¶ 69.)

- *Third*, the uncontrollable spread of COVID-19—and the necessity of social distancing to contain the spread of the virus—constitute "circumstances reasonably beyond" Hunter's control. (¶ 70.)

Hunter does not dispute that these events are included in the MSA's force majeure provision or contend that the COVID-19 pandemic cannot constitute a force majeure event under the plain language of the contract. Hunter instead argues that PAC failed to adequately plead that it is unable to perform under the Contracts as a result of these force majeure events. But that is precisely what PAC pleads. PAC has explicitly asserted that, as a result of the COVID-19 pandemic, it is not being paid by the vast majority of its customers for the broadband connectivity services it provides using the contracted-for Hunter satellite capacity (¶ 71) and that because of this nonpayment due to the pandemic "PAC cannot perform under the Contracts." (¶ 73.) These facts are more than sufficient to meet the pleading standard—which requires only enough facts to make a claim or defense "plausible on its face." *Twombly*, 550 U.S. at 570.

The handful of other arguments in Hunter's letter are similarly unavailing.

First, Hunter argues that none of the "impacts" affecting PAC's performance, including PAC's customers' inabilities to fulfill their payment obligations as a result of the COVID-19 pandemic, occurred "prior to Defendant's assertion of a force majeure event," and therefore no force majeure event prevented performance. (Letter Mot. at 4.) This is nonsensical. The COVID-19 pandemic and related restrictions are precisely the force majeure events that affect and excuse PAC's performance.[8]

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[7] *See* Definition of "Act of God," Black's Law Dictionary (11th ed. 2019) ("An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.").

[8] Hunter also raises a confusing argument that "bankruptcy filings by some airline customers in no way equates with permanent loss of the anticipated revenue from those customers" because the "Bankruptcy Code appears to protect" creditors like PAC and guarantees that they will get their money back eventually. Even assuming this is true—which is far from evident—this argument is irrelevant. PAC does not assert that a force majeure event occurred on the basis of airlines filing for bankruptcy.

Second, Hunter argues that PAC "fail[s] to allege that it will not be paid the full amounts originally expected, if not more, from its customer contracts." (Letter Mot. at 5.) This is patently false. PAC has plainly alleged that "nearly 75% of PAC customers that access Hunter's satellites have been unable to fulfill their payment obligations under their PAC contracts in light of the COVID-19 pandemic." (¶ 60.)[9]

Accordingly, it is evident that, at a minimum, whether the whether PAC failed to perform under the Contracts as a result of a force majeure event is an issue of disputed fact that requires discovery.

B. PAC's Amended Answer Adequately Pleads Its Counterclaims and Its Seventh and Eighth Affirmative Defenses

Because PAC sufficiently alleges that its failure to perform was the result of a force majeure event, its counterclaims and its seventh and eighth affirmative defenses are also adequately pled. As PAC has stated, under the express terms of paragraph 8 of the Service Order "in the event that [a Force Majeure event] exceeds thirty (30) consecutive days, then following such thirty (30)-day period, the Parties shall meet and negotiate, inter alia, the conditions for the termination or modification of the applicable Service Order." (¶ 81.)

When an event of force majeure occurred, Hunter failed to meet these obligations. As PAC's Amended Answer makes clear, PAC specifically alleges that:

- the Service Order is a valid contract that includes the implied covenant of good faith and fair dealing (¶ 99);
- the force majeure event arising from the COVID-19 pandemic was ongoing for more than 30 consecutive days, triggering Hunter's obligation to meet with PAC to modify or terminate the Service Order (¶¶ 85-86, 103);
- Hunter failed to do so, in breach of its contractual obligation (¶¶ 105-06); and

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[9] Further, the cases Plaintiff cites in its letter undermine its own argument or are wholly inapposite because they involve narrow contractual clauses or foreseeable events. *See, e.g.*, *Phibro Energy, Inc.*, 720 F. Supp. at 320 (denying plaintiff's motion for summary judgment when defendant seller invoked force majeure clause due to an electric mishap damaging its plant and delaying delivery of goods to plaintiff buyer); *Phillips Puerto Rico Core, Inc.* v. *Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985) (construing force majeure clauses in the narrow circumstance of cost and freight contracts); *Great Lakes Gas Transmission Ltd. P'ship.* v. *Essar Steel Minn., LLC*, 871 F. Supp. 2d 843, 855 (D. Minn. 2012) (contract at issue contained a clause specifying that contingencies affecting performance do not relieve obligations to make payments); *Route 6 Outparcels, LLC* v. *Ruby Tuesday, Inc.*, 27 Misc. 3d 1222(A), 910 N.Y.S.2d 408 (Sup. Ct. 2010), *aff'd*, 88 A.D.3d 1224, 931 N.Y.S.2d 436 (2011) (determining that the alleged triggering event, an economic downturn, could not excuse nonperformance because it was not unforeseeable, and defendant failed to identify the steps it took to perform its obligations under the lease, despite its financial difficulties). The unprecedented natural occurrences and governmental actions that prevented PAC's performance are much more analogous to the types of events that New York courts have previously held can constitute force majeure events, especially when the parties' contract expressly includes those events in a force majeure clause.

- PAC was harmed by Hunter's conduct (¶ 107).

On the basis of these facts—and those related to the occurrence of a force majeure discussed *supra*—PAC has sufficiently pled the affirmative defenses of breach of contract[10] and unclean hands[11] and its counterclaims for breach of contract[12] and breach of the implied covenant of good faith and fair dealing.[13]

IV. PAC's Ninth Affirmative Defense of Impracticability Is Sufficient as a Matter of Law

An affirmative defense of impracticability under New York law requires that "performance [is rendered] objectively impossible . . . by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp*, 70 N.Y.2d at 902. PAC's Amended Answer adequately alleges that its performance has been rendered objectively impossible for the same reasons articulated in connection with the force majeure argument described above. PAC is unable to perform because it is "not being paid by the vast majority of the customers that utilize Hunter's satellite capacity." (¶ 91.) Plaintiff does not contest that the COVID-19 pandemic and its effects on the airline industry were unanticipated and unforeseeable events at the time the contract was entered into; therefore, there is no doubt that PAC has adequately pled the elements of this claim, and that they are an issue of disputed fact that should be addressed in discovery.

V. PAC's Tenth and Eleventh Affirmative Defenses for Waiver and Estoppel Are Sufficient as a Matter of Law

"The doctrines of waiver and estoppel are closely akin," *Coggins* v. *Cty. of Nassau*, 615 F. Supp. 2d 11, 30 (E.D.N.Y. 2009), and "preclude[] a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her." 28 Am. Jur. 2d Estoppel and Waiver § 32. Specifically, waiver is "a litigant's intentional relinquishment of a known right." *Hamilton* v. *Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999). Estoppel is a "principle or an affirmative defense that serves to stop another party from denying a material fact."

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[10] To state a claim for breach of contract, a party must allege: (1) the existence of a contract, (2) performance of the contract by that party, (3) breach of the contract by the other party and (4) damages as a result of the breach. *MashreqBank, psc* v. *ING Group N.V.*, 2013 WL 5780824, at *4 (S.D.N.Y. 2013).

[11] *See Radiancy, Inc.* v. *Viatek Consumer Prod. Grp., Inc.*, 138 F. Supp. 3d 303, 319 (S.D.N.Y. 2014) (unclean hands requires a showing that the plaintiff "is engaging in the same conduct of which it is accusing [defendant]," i.e., breach of contract).

[12] *Rozenzweig* v. *ClaimFox, Inc.*, 251 F. Supp. 3d 449, 455 (E.D.N.Y. 2017) ("Under New York law, there are four elements to a breach of contract claim: "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages.").

[13] *Washington* v. *Kellwood Co.*, No. 05 CIV. 10034 (DAB), 2009 WL 855652, at *6 (S.D.N.Y. Mar. 24, 2009) ("The elements of a claim for breach of the duty of good faith and fair dealing are . . . (1) defendant must owe plaintiff a duty to act in good faith and conduct fair dealing; (2) defendant must breach that duty; and (3) the breach of duty must proximately cause plaintiff's damages.").

Cohen v. *Elephant Wireless, Inc.*, No. 03 CIV. 4058 (CBM), 2004 WL 1872421, at *5 (S.D.N.Y. Aug. 19, 2004).

As PAC pleaded in its Amended Answer, on information and belief,[14] Hunter has affirmatively taken the stance in relation to other contracts, or has otherwise acknowledged, that the COVID-19 pandemic excused performance or necessitated modification of contractual obligations, including, but not limited to, because the pandemic constitutes a force majeure event or otherwise frustrated or made difficult or impracticable performance of contractual obligations. (Am. Answer ¶¶ 92–95.) By acknowledging that the COVID-19 pandemic excused performance, constituted a force majeure event, or necessitated modification of contractual obligations, Hunter has waived its right to deny and is estopped from denying the same, especially under the MSA's broad definition of force majeure: "an act of God, governmental action . . . or any other circumstances reasonably beyond the control of the Company." (Am. Answer ¶¶ 66, 98.)[15]

These facts are more than sufficient to meet the pleading standard at this stage: the defenses are not clearly insufficient as a matter of law, and Hunter can claim no prejudice by inclusion of these affirmative defenses, as it is on notice of PAC's defense. *See Cohen*, 2004 WL 1872421, at *4–5 (holding that the affirmative defense of estoppel was sufficiently raised "by its mere assertion"). Accordingly, PAC has adequately pled its waiver and estoppel affirmative defenses.

Sincerely,

s/ Michael E. Gertzman

Michael E. Gertzman

cc: Hon. Kenneth M. Karas, via ECF

The Court will hold a pre motion conference on 10/6/20, at 2:30 telephonically, all counsel will follow the Court's Individual Practices going forward. So Ordered. KMK 9/15/20

[14] It is well established that a party "may plead facts . . . upon information and belief, and find admissible evidence to support those allegations at a later stage." *See, e.g.*, *In re OSG Sec. Litig.*, 12 F. Supp. 3d 619, 622 (S.D.N.Y. 2014).

[15] The cases Hunter cites in support of its position do not suggest otherwise. In *S.E.C.* v. *KPMG LLP*, the SEC was the plaintiff and thus different standards applied to the affirmative defenses. 2003 WL 21976733,*2-*3 (S.D.N.Y. Aug. 20, 2003) ("estoppel is not available against the government except in the most serious of circumstances" and "the doctrine of unclean hands may not be invoked against a government agency which is attempting to enforce a congressional mandate in the public interest"). In *Aspex Eyewear, Inc.* v. *Clariti Eyewear, Inc.*, the defendant "assert[ed] *no* facts" which could put the plaintiff on notice of its affirmative defenses. 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008). That is obviously not the case here, as described *supra*.