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

SCHULTE ROTH & ZABEL LLP,

Plaintiff,

- against -

METROPOLITAN 919 3rd AVENUE LLC, in its individual capacity and as successor in interest to 919 THIRD AVENUE ASSOCIATES L.P.,

Defendant.

Mot. Seq. 001

Index No. 655632/2020

Assigned to
Justice Andrea Masley
Part 48

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION DISMISSING PLAINTIFF'S COMPLAINT

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Defendant Metropolitan 919 3rd Avenue LLC, in its individual capacity and as successor in interest to 919 Third Avenue Associates L.P. ("Landlord" or "SL Green"), respectfully submits this memorandum of law, together with the Affirmation of Janice Mac Avoy dated January 8, 2021 (the "Mac Avoy Aff."), and the Affidavit of Thomas Munafo sworn to on January 7, 2021 (the "Munafo Aff.") in support of its motion dismissing the Complaint (NYSCEF Doc. No. 2) (the "Complaint") by Plaintiff, Schulte Roth & Zabel LLP ("Tenant" or "Schulte").[1]

PRELIMINARY STATEMENT

This action is an attempt by a sophisticated commercial law firm to capitalize on the devastating COVID-19 pandemic by grossly misconstruing the terms of its lease in order to falsely claim that it is entitled to a rent abatement. Despite the fact that SL Green has kept Schulte's New York office open by maintaining the building's services and systems thus enabling Schulte to work at full capacity throughout the pandemic, Schulte now seeks a windfall at a time when the pandemic continues to pose an existential threat to New York City and its economy. It seeks to do so through a tortured reading of the lease terms, cherry-picking phrases in a way that contradicts not only common sense but basic rules of syntax. But the clear words of the lease must control and this action should be summarily dismissed.

Schulte is a full-service commercial law firm with offices in New York, Washington, DC, and London. Schulte's New York office is located at 919 Third Avenue, New York, NY (the

[1] Unless noted otherwise, all references to "Ex." are to the exhibits attached to the Mac Avoy Aff., and all internal quotation marks and citations are omitted. A true and correct copy of the Complaint is attached as Ex. 1 to the Mac Avoy Aff., but for the Court's convenience, this memorandum cites to the "Complaint" and is hyperlinked to the e-filed complaint at NYSCEF Doc. No. 2. All emphasis in quoted material is added, unless otherwise noted.

"Building"). Schulte occupies 282,102 sq. ft. of space on the 19th to 27th floors of the Building (the "Premises"), pursuant to an Agreement of Lease between Schulte (as tenant) and Metropolitan 919 3rd Avenue LLC as successor in interest to 919 Third Avenue Associates L.P. (as landlord) dated as of May 13, 1998 (the "Original Lease," and as amended, the "Lease").

Like almost all professional service organizations in New York City, Schulte adopted a "work-from-home" policy at the outset of the COVID-19 pandemic in March 2020. But Schulte is not claiming that the pandemic has hurt its business—unlike the thousands of shuttered small restaurants and retail businesses, Schulte has been able to institute telecommuting procedures that allow its lawyers to continue to work. Plus the firm has kept certain of its administrative staff in attendance at the office—in so-called "rotating skeleton crews"—and it has permitted its attorneys to attend the office when required. Nor does Schulte even dispute that it is today free to re-occupy its premises—albeit with appropriate health precautions common to all businesses. For its part, since the onset of the pandemic, SL Green has kept Schulte's offices at the Premises available, and supplied the Premises with all required services (*e.g.*, electricity, ventilation, heating, elevator, etc.). Schulte may be satisfied with the revenues and cost savings that it is generating by allowing certain of its staff to continue to work remotely. But this business choice *cannot* be a basis for a rent abatement under the Lease.

Despite being able to work remotely at full capacity, Schulte wrongly claims that the COVID-19 pandemic and the associated workforce reduction orders entitle it to a rent abatement pursuant to a Lease provision addressing the landlord's obligation to repair and maintain services in the Building. Schulte argues that the COVID-19 pandemic and the associated workforce reduction orders constitute "Unavoidable Delays" (as defined in Article 24 of the Lease), and that under Lease Section 5.4 it is entitled to a rent abatement when it is unable to use the Premises for

the "ordinary conduct of [its] business" due to an Unavoidable Delay that continues for more than 15 consecutive business days. But Schulte's argument fails: Section 5.4 provides that there must be a predicate breach by Landlord of an obligation to deliver services. No such breach is alleged by Schulte; because none occurred. In its effort to ignore this plain requirement, Schulte asks this Court to cherry-pick certain other phrases within the operative section, which is clearly an improper request.

On a proper and natural reading, Article 24 states that none of the enumerated force majeure events (the "Unavoidable Delays") excuse Tenant's obligation to pay rent unless the Lease expressly provides to the contrary, and Section 5.4 only entitles Tenant to a rent abatement where certain mandatory prerequisites have been satisfied: if Tenant's inability to use the Premises for the "ordinary conduct of [its] business" is *due to* Landlord's default of its obligations to repair or provide services (such as electricity), coupled with Tenant's actual non-use of the Premises for the relevant period. But Schulte has not (and cannot) allege any of these mandatory conditions. Schulte has not alleged Landlord's default—a prerequisite to any rent abatement—because it plainly *cannot* do so, as there has been no such default. But even assuming *arguendo* that Landlord's default is not required by the Lease—which it is—documentary evidence conclusively shows that at all times Schulte *did* use the Premises, and especially since June 22, Schulte *has been permitted* to use, and *in fact has continued to use*, the Premises.

This is a straightforward action where the Court must simply enforce the Lease according to its unambiguous terms. Schulte is unequivocally not entitled to a rent abatement, and this motion should be granted.

STATEMENT OF FACTS

I. THE LEASE AND THE PREMISES

Schulte's New York office is located in the Building, which is beneficially owned by SL Green Realty Corp. Munafo Aff. ¶¶ 2, 4. Schulte occupies 282,102 sq. ft. of office space on nine floors at the Premises, located on levels 19-27 of the Building, pursuant to the terms of the Lease. Munafo Aff. ¶ 5. The Lease provides that Schulte is obligated to pay Fixed Rent (as defined in the Lease) "without any set-off, offset, abatement or deduction whatsoever, except as specifically set forth in this Lease." Ex. 2 § 1.1(d) (pdf p. 231).

By its own admission, Schulte is a sophisticated business party that was represented by counsel during the Lease negotiations. Complaint ¶ 19. Moreover, Schulte boasts an esteemed commercial real estate practice and thus evidently understood the allocation of risk under the Lease. Mac Avoy Aff. ¶ 5.

Article 5 of the Lease (titled "Repairs; Floor Load") outlines Landlord's repair obligations under the Lease. That article stipulates that Landlord is to maintain and repair the structural components of the Building and the "Building Systems" (as defined in the Lease) in conformity with "standards applicable to first-class office buildings in Manhattan of comparable age and quality." Ex. 2 § 5.1 (pdf p. 247).

Section 5.4 of the Lease addresses Tenant's right to a rent abatement where Tenant is unable to occupy the Premises "***due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements***." Ex. 2 § 5.4(a) (pdf p. 248). Section 5.4 provides that Tenant's obligation to pay rent is abated proportionately when three independent conditions are satisfied: *first,* if Tenant is unable to use a portion of the Premises *due to* Landlord's listed defaults (*i.e.*, of Landlord's obligation to "provide services, perform

repairs, or comply with Legal Requirements") pursuant to Subsection 5.4(a); *second,* Tenant does not *actually* use or occupy the Premises during the pendency of Landlord's default pursuant to Subsection 5.4(b); *and third,* Tenant's non-use of that portion of the Premises due to Landlord's default has not resulted from Tenant's negligence or misconduct pursuant to Subsection 5.4(c). *See id.* § 5.4.

Subsection 5.4(a) contains a parenthetical that introduces two alternative timings for Tenant's rent abatement, depending on the *cause* of the predicate Landlord default. Ex. 2 § 5.4(a) (pdf p. 248). Where Tenant's inability to use the Premises is due to a Landlord default resulting from an "Unavoidable Delay", then Tenant's inability to use the Premises due to Landlord's default must continue for a period of fifteen consecutive business days before Tenant is entitled to a rent abatement (once it gives Landlord an Abatement Notice). Ex. 2 § 5.4(a), art. 24 (pdf pp. 313-314). Conversely, where Tenant's inability to use the Premises is due to a Landlord default that is "other than as a result of" an Unavoidable Delay, then Tenant is entitled to an immediate rent abatement once it gives Landlord the Abatement Notice (*i.e.*, Landlord is not entitled to a 15-day grace period to remedy the problem). Ex. 2 § 5.4(a).

Section 5.4 plainly is designed to provide 15 days of protection to Landlord from a claim that it has breached the covenant to provide services and repairs in circumstances where Landlord cannot render those services or repairs (*e.g.*, electricity, heating and ventilation, elevator access, sanitary systems) due to a force majeure event that renders performance impossible. The two timing alternatives contemplated by Subsection 5.4(a) appropriately reflect that Tenant's right to a rent abatement is based on Landlord's culpability. Where Landlord is at fault for its breach, Tenant will be entitled to a rent abatement *immediately*. Conversely, if Landlord has failed to provide services due to an Unavoidable Delay, its failure must continue for 15 days before Tenant

is entitled to an abatement. Clearly the Lease provides that Tenant could not obtain a windfall rent abatement in circumstances where Tenant could not use a portion of the Premises—for say, only three consecutive business days—where Landlord could not provide electricity due to a regional power outage beyond Landlord's control. In any event, those timing alternatives do not negate the predicate requirement that Tenant is only entitled to a rent abatement in the event of Landlord's default.

The term "Unavoidable Delays" is defined in Lease, Article 24 (titled "Inability to Perform"). *See* Mac Avoy Aff. ¶ 7; Ex. 2, art. 24. Article 24 provides that nothing in that provision, including the existence of an Unavoidable Delay, excuses "Tenant's obligation to pay Fixed Rent and Additional Rent," which obligation "will not be affected, impaired or excused" due to Unavoidable Delay, unless otherwise provided for in the Lease. *Id.* With respect to rent, Article 24 thereby operates as a reverse force majeure clause, which excuses Tenant's obligations under the Lease where there has been an "Unavoidable Delay," *only* if the Lease explicitly provides so elsewhere. The existence of an "Unavoidable Delay," in and of itself, does not excuse any of Tenant's rent obligations under the Lease.

II. SL GREEN AND SCHULTE RESPOND TO THE COVID-19 PANDEMIC

Following the onset of the COVID-19 pandemic in early 2020, the New York State and City governments implemented various restrictions (including stay-at-home orders) in order to mitigate the spread of the virus. On March 20, New York Governor Andrew M. Cuomo issued Executive Order No. 202.8, which mandated that employers in non-essential businesses

throughout the state were to reduce their in-person workforces by 100% no later than March 22 at 8 p.m. Mac Avoy Aff., ¶ 15; Ex. 6.[2]

During this period, Schulte directed all of its attorneys and staff to work remotely, to the extent possible, by March 13, 2020. However, by Schulte's own admission, it maintained "rotating skeleton crews" of workers at the Premises at all times, including information technology, secretarial, duplicating and mailroom and delivery staff, who have access to the entire Premises. Complaint ¶ 4. Schulte employees continued to enter the Premises in the period leading up to Phase II (described below) between March to June, and since Phase II an average of up to approx. 35 Schulte employees have entered the Premises every business day. Munafo Aff. ¶ 21; Ex. 1. Client documents and personnel files have remained at the Premises since March, and the various fixtures, equipment, and hardware provided for employees to perform their jobs likewise remain in place at the Premises. Munafo Aff. ¶ 24. No alterations have been made to the Premises, and far from being vacated, the Premises is still fit out as a law firm. *Id.*

Shortly after Schulte directed certain of its employees to work remotely, Schulte claimed that it was entitled to a rent abatement under the terms of the Lease. On March 31, Schulte sent Landlord a letter which purported to serve as an "Abatement Notice pursuant to the terms of Section 5.4 of the Lease". Mac Avoy Aff. ¶ 20; Ex. 8. That letter stated that "events or circumstances constituting Unavoidable Delays … have occurred and/or exist," and wrongly claimed that the COVID-19 pandemic and associated Workforce Reduction Orders "have caused

[2] For convenience, Executive Order No. 202.8 and the affiliated stay-at-home orders are collectively referred to herein as the "Workforce Reduction Orders".

an inability of Tenant to use its Premises for the ordinary conduct of Tenant's business." *Id.*, ¶ 21; Ex. 8 at 1-2.

By response letter dated April 3, 2020, Landlord rejected the assertions contained in Schulte's March 31 letter, and denied that Schulte was entitled to any rent abatement under the terms of the Lease. Landlord's response stated that, under Section 5.4 of the Lease, "rent abatement is only available in the event 'Tenant is unable to use the premises . . . due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements,'" but that condition was not satisfied because "the Building remains open, staffed, with services and available for Tenant's use." Mac Avoy Aff. ¶¶ 22-23; Ex. 9.

III. NEW YORK COMMENCES ITS PHASED REOPENING

On April 26, 2020, Governor Cuomo announced a phased reopening of businesses in New York. Mac Avoy Aff. ¶ 25. At this time, guidelines issued by NYC Health stated that "[o]nce [NYC] has met the public health milestones that allow Phase Two Reopening, ***offices can restart***." Mac Avoy Aff. ¶ 27; Ex. 12 (emphasis in original). New York County entered "Phase II" on June 22, 2020. Mac Avoy Aff. ¶ 28; Ex. 13.

Guidance issued by the New York State Department of Health titled "Interim Guidance For Office-Based Work During The COVID-19 Public Health Emergency" (the "Interim Office Guidance") provided directives to businesses that operate in office spaces. Specifically, the Interim Office Guidance provided that "[w]here office-based work is located in a region that is in Phases II, III, or IV, the total number of occupants is limited to ***no more than 50% of the maximum occupancy at any given time for a particular area as set by the certificate of occupancy."*** Ex. 14 at pdf p. 4; Mac Avoy Aff. ¶ 30. The Certificate of Occupancy for the Building currently permits Schulte to have a maximum of 240 persons per floor. Munafo Aff. ¶ 11; Munafo Aff. Ex.

3. Over the nine floors that Schulte occupies at the Premises, Schulte is thus permitted to have 2,160 persons in total at the Premises (across the space that it currently occupies). *Id.* Accordingly, Schulte has been permitted to operate its business at the Premises up to 50% of the permitted occupancy from June 22, 2020 (Phase II) to the present date. Mac Avoy Aff. ¶ 31. Schulte's daily occupancy average *before* the pandemic was just under 500 persons per day. Munafo Aff. ¶ 12. As a matter of simple arithmetic, if Schulte were to resume that same amount of usage (*i.e.*, 500 persons per day), and were to distribute this occupancy evenly over its nine floors, it would be able to place 55 people per floor, which is **dramatically below the 120 persons per floor** that it is permitted under the 50% cap currently in effect for New York County.

It follows that *all* of Schulte's employees are now permitted to return to the Premises, and thus since Phase II, Schulte *has been* permitted to use the Premises for the "ordinary conduct of [its] business." But as will be demonstrated, Schulte's business choice to keep its attorneys working from home throughout Phase II *cannot* be a basis for a rent abatement under the Lease.

ARGUMENT

I. SCHULTE'S COMPLAINT SHOULD BE DISMISSED

A. Motion to Dismiss Standard

On a motion to dismiss pursuant to CPLR 3211, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, factual allegations that "consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. *Summit Solomon & Feldesman v.*

Lacher, 212 A.D.2d 487, 487 (1st Dep't 1995); *United Nat. Foods, Inc. v. Goldman Sachs Grp., Inc.*, No. 652185/2019, 2020 N.Y. Misc. LEXIS 1959, at *18 (Sup. Ct. N.Y. Cty. May 5, 2020).

Additionally, where there are no relevant factual disputes, and where a plaintiff's demand is substantively without merit, the Court should resolve a pre-answer motion to dismiss a claim for declaratory relief by issuing a declaration in the defendant's favor. *See GMX Tech., LLC v. Pegasus Cap. Advisors, LP*, No. 654056/2019, 2020 N.Y. Misc. LEXIS 4271, at *7-8 (Sup. Ct. N.Y. Cty. Aug. 10, 2020) (citing *Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150 (2d Dep't 2011)).

B. Schulte's Reading of the Lease is Plainly Wrong as a Matter of Law, Entitling Defendant to Dismissal of Plaintiff's Complaint

Schulte argues that the Workforce Reduction Orders and the COVID-19 pandemic constitute "Unavoidable Delays" (defined in Lease Article 24 of the Lease), and therefore pursuant to Section 5.4 of the Lease it is entitled to a rent abatement because, Schulte claims, it is unable to use the Premises for the "ordinary conduct of its business" due to an Unavoidable Delay that continues for more than 15 consecutive business days. *See* Complaint ¶¶ 24-25, 54-55, 63.

This reading is plainly wrong as a matter of law. Courts must enforce agreements according to their terms so as to give meaning and effect to all terms of the agreement and so that they make sense. *See, e.g.*, *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (Courts "should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless.") Indeed New York law is clear that "when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms, and this rule is applied with special force in the context of real property transactions, where commercial certainty is a paramount concern, and where the

instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 403-04 (2009).

The reverse force majeure provision in Article 24 states that none of the force majeure events (*i.e.*, the "Unavoidable Delays") excuses Tenant's obligation to pay rent unless the Lease elsewhere expressly provides to the contrary, and Section 5.4 is not to the contrary. Rather, Section 5.4 only entitles Tenant to a rent abatement where certain mandatory prerequisites—critically, including Landlord's default of its obligation to provide services—have been satisfied. Schulte's reading of the operative clauses is therefore demonstrably wrong as a matter of law, and its complaint must be dismissed. *Madison Equities, LLC v. Serbian Orthodox Cathedral of St. Sava*, 144 A.D.3d 431, 431 (1st Dep't 2016) (affirming dismissal on documentary evidence because the contract "simply does not say what plaintiff claims it says.")[3]

1. *The Force Majeure Clause Does Not Excuse Schulte's Obligation to Pay Rent*

New York law is clear that force majeure clauses must be read strictly according to their terms. *See Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (1st Dep't 2017) ("[W]hen the parties have themselves defined the contours of force majeure in

[3] Since the requirement of Landlord's default is clear, there is no need to consider any parol evidence. But in any event, the Original Lease was entered into in 1998 between Schulte and Landlord's predecessor-in-interest. Ex. 2 (pdf p. 225). Landlord and Schulte extended the Lease pursuant to that certain "Sixth Lease Modification and Extension Agreement" dated as of September 10, 2014 (the "6th Amendment and Extension"). Ex. 2 (pdf p. 29). When Landlord entered into the 6th Amendment and Extension, it was entitled to rely on the plain language of the Lease as incorporated by that document, without reference to any original intent between the parties to the Original Lease or any parol evidence pertaining thereto. Ex. 2 (pdf pp. 29-30). Since the 6th Amendment and Extension, the Lease has been amended two additional times in April 2015 and January 2016. Ex. 2 (pdf pp. 2, 20).

their agreement, those contours dictate the application, effect, and scope of force majeure"). Pursuant to Article 24, "[e]xcept as expressly provided herein to the contrary," an "Unavoidable Delay" will not affect Tenant's obligation to pay rent or "perform all of the other covenants and agreements hereunder on the part of Tenant to be performed." Ex. 2, art. 24. Although Article 24 identifies certain force majeure events, these events will only excuse Tenant's obligation to pay rent if the Lease explicitly provides so elsewhere. *See Westchester Co. Indus. Dev. Agency v. Morris Indus. Builders,* 278 A.D.2d 232, 233 (2d Dep't 2000).

The Lease does not contain any provision that excuses Schulte's obligation to pay rent on account of an Unavoidable Delay, nor has Schulte even purported to identify any provision. To the contrary, the Lease states that Tenant must pay rent "without any set-off, offset, abatement or deduction whatsoever, except as specifically set forth in this Lease." Ex. 2, § 1.1(d).

Even so, Tenant must show how the Unavoidable Delay "prevent[s] or delay[s]" Tenant's ability to perform the obligation, namely the payment of rent. Ex. 2, art. 24. Article 24 defines an "Unavoidable Delay" to include any "laws, governmental preemption in connection with a national emergency or by any reason of any Legal Requirements . . . or other emergency." *Id*. Whether or not the Workforce Reduction Orders qualify, Schulte still must show those orders prevented it from performing its obligation to pay rent. But Schulte cannot argue this because it is inherently implausible; plainly, the Workforce Reduction Orders have not prevented or delayed Schulte from paying rent. *See Urban Archeology Ltd. v. 207 East 57th St. LLC*, No. 600827/2009, 2009 N.Y. Misc. LEXIS 6670, at *9-11, 13-14 (Sup. Ct. N.Y. Cty. Sept. 10, 2009) (dismissing claim that tenant was excused from performing under the lease because the global economic downturn did not constitute an "unavoidable delay" excusing tenant's performance), *aff'd*, 68 A.D.3d 562 (1st Dep't 2009).

Moreover, Schulte's attempt to cast the COVID-19 pandemic as a generic "Unavoidable Delay" (as a cause "reasonably beyond [the] part[ies'] control," including "other emergenc[ies]") is equally unavailing. *See* Complaint ¶¶ 25, 44. A force majeure clause that includes a "catch-all" phrase that covers events other than those specifically identified is generally limited to events of a similar nature to the identified force majeure events. *See, e.g.*, *Kel Kim Corp. v. Cent. Mkts. Inc.*, 70 N.Y.2d 900, 902-03 (1987) ("The principle of interpretation applicable to [catchall] clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.") The COVID-19 pandemic does not resemble any other specific force majeure event in Article 24, being "strikes," "labor troubles," "accident[s]," "laws," "governmental preemption in connection with a national emergency," "Legal Requirements," or "conditions of supply and demand which have been or are affected by war. . . ." Ex. 2, art. 24. In any event, Schulte's argument fails because it has likewise failed to explain how the pandemic "prevented or delayed" its ability to pay rent.

2. *Schulte's Misreading Of The Repairs Section In The Lease Is Unavailing*

Without a force majeure clause to rely upon, Schulte misconstrues Section 5.4 in a misguided attempt to avoid its obligation to pay rent. Schulte wrongly claims that it is entitled to a rent abatement under Lease, Section 5.4 because it has been unable to use the Premises for the "ordinary conduct of [its] business" due to an Unavoidable Delay that has continued for more than 15 consecutive business days—but Schulte ignores the predicate requirement of Landlord's breach. *See* Complaint ¶¶ 24-25, 54-55, 63.

The Court should not omit key words within Section 5.4, especially in favor of a sophisticated plaintiff. On a proper reading, Section 5.4 sets out three cumulative conditions each of which *must* exist in order for Tenant to be entitled to the rent abatement:

> . . . (a) ***Tenant is unable to use the Premises***, or any portion thereof …, for the ordinary conduct of Tenant's business, ***due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements***, in each case other than as a result of Unavoidable Delays or Tenant Delays (or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of fifteen (15) consecutive Business Days) after Tenant gives a notice to Landlord (the "**Abatement Notice**") stating that Tenant's inability to use the Premises or such portion thereof is solely due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, and (c) such condition has not resulted from the negligence or misconduct of Tenant ….
>
> Ex. 2 § 5.4.

This provision makes clear that each of the three conditions must exist for Tenant to be entitled to a rent abatement. *First,* Subsection 5.4(a) requires that Tenant be "unable to use the Premises" (or any portion thereof) "for the ordinary conduct of Tenant's business, ***due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements***." Ex. 2 § 5.4(a). *Second,* Subsection 5.4(b) requires that Tenant "does not actually use or occupy the Premises or such portion thereof during such period." Ex. 2 § 5.4(b). *Third,* Subsection 5.4(c) requires that "such condition" (*i.e.*, Tenant's inability to use the Premises due to Landlord's breach) "has not resulted from the negligence or misconduct" of Tenant. Ex. 2 § 5.4(c).

Schulte's argument is fundamentally flawed as it misreads the parenthetical contained within the first condition in Subsection 5.4(a) that stipulates *when* Tenant will receive the rent abatement, which itself is dependent on the *cause* of Tenant's inability to use the Premises due to Landlord's default. This subsection explicitly provides that Tenant's inability to use the Premises for the ordinary conduct of Tenant's business due to Landlord's default must, "in each case", be

"other than as a result of Unavoidable Delays or Tenant Delays (or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of fifteen (15) consecutive Business Days) after Tenant gives [an Abatement Notice]" to Landlord. Ex. 2 § 5.4(a). Schulte unnaturally reads the foregoing parenthetical within Subsection 5.4(a) as if it stands alone, untethered to the requirement of Landlord's default, so that the phrase "such condition" in the parenthetical refers *only* to Unavoidable Delays. In other words, Schulte claims that it should enjoy a rent abatement if it is unable to use the Premises due to an Unavoidable Delay and "such condition" (*i.e.,* the Unavoidable Delay) continues for a period in excess of fifteen business days.

But the phrase "such condition" as used throughout Section 5.4 clearly refers to Tenant's inability to use the Premises due to Landlord's breach. *First,* Subsection 5.4(a) enumerates two alternatives that cause Landlord's breach (*i.e.*, due to Unavoidable Delay, or due to a cause "other than" an Unavoidable Delay), and then provides that the Abatement Notice must state that Tenant's inability to use the Premises is "solely due to such condition." Ex. 2 § 5.4(a). Reading the phrase "such condition" to refer *only* to Unavoidable Delays, as Schulte insists, makes no sense because the Lease contemplates that an Abatement Notice can be issued where, counterfactually, Tenant's inability to use the Premises due to Landlord's default *was not due to an Unavoidable Delay*, thus rendering the previous clause (giving Tenant an abatement due to an Unavoidable Delay) meaningless. Ex. 2 § 5.4(a). *Second*, Subsection 5.4(c) states that "such condition" must not result from the negligence or misconduct of Tenant; and by definition an Unavoidable Delay cannot result from the negligence or misconduct of Tenant because "Unavoidable Delays" are matters "reasonably beyond such party's control." *Id.* § 5.4(c), art. 24. *Third*, Subsection 5.4(c) further provides that rent will be abated "immediately (or on the [15th] Business Day, *if such condition*

results, in whole or in part, from Unavoidable Delays)," and it would be a tautology for the phrase "such condition" here to mean an "Unavoidable Delay" because the parenthetical would then read as follows: "(…*if* [an Unavoidable Delay] results, in whole or in part, from Unavoidable Delays)" *Id.* § 5.4(c). *Finally*, Subsection 5.4(c) provides that the abatement may end on the day that "*such condition* is substantially remedied," and again it is clear that "such condition" must refer to Tenant's inability to use the Premises due to Landlord's default because an Unavoidable Delay, as conventionally understood, is not something that can be "remedied."[4] *Id.* Courts strive to give phrases consistent meanings within a contract, but Schulte's reading of Section 5.4 would give the phrase "such condition" two contradictory meanings, and it must therefore fail. *State v. R.J. Reynolds Tobacco Co.,* 304 A.D.2d 379, 379-80 (1st Dep't 2003) (phrase should "presumptively be given the same meaning" when repeated in another section); *see also Cast Iron Co., LLC v. Cast Iron Corp.,* No. 655399/2016, 2018 N.Y. Misc. LEXIS 3370, at *7-9 (Sup. Ct. N.Y. Cty. Aug. 6, 2018), *aff'd*, 177 A.D.3d 492 (1st Dep't 2019).

Upon a proper reading of Section 5.4 that gives effect to the provision as a whole, Subsection 5.4(a) consists of three parts: (i) a list of conjunctive, mandatory conditions (*i.e.*, each of (x) Tenant's inability to use the Premises for the ordinary conduct of Tenant's business; and (y) Landlord's causal breach, referred to herein as the "Predicate Preconditions"); (ii) a grammatical juncture point, introducing two alternatives flowing from the Predicate Preconditions (*i.e.*, the

[4] "Unavoidable Delays" are not circumstances to which the concept of "remed[ying]" even applies. As a matter of ordinary usage, strikes and wars are not matters that can be "remedied." By contrast, the concept of "remed[ying]" makes sense when the phrase "such condition" refers to Landlord's breach of an obligation to provide services.

words "in each case"); and (iii) the two alternative timing scenarios based on the *cause* of these Predicate Preconditions (*i.e.*, Unavoidable Delays or otherwise).

The key transition phrase "in each case" acts as a juncture point that separates the two timing alternatives that follow it.[5] But those two timing alternatives that follow the words "in each case" clearly refer back to the Predicate Preconditions. Indeed, Courts have expressly rejected proposed interpretations of similar phrases in contract provisions that, like Schulte's here, would render that language to be a surplusage. *See, e.g.*, *Wolf v. Rawlings Sporting Goods Co.*, No. 10 Civ. 3713, 2010 U.S. Dist. LEXIS 116294, at *6-7 (S.D.N.Y. Oct. 26, 2010) (rejecting interpretation of the phrase "in each case" where such a reading would "render the phrase . . . mere surplusage" because "it is a well-established canon of construction that a court should not construe a provision so as to render a word or phrase inoperative.")[6]

And if the Predicate Preconditions are met, *then* the two timing alternatives are implicated: either (i) if in each case those Predicate Preconditions are "other than as a result of Unavoidable

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[5] *See, e.g.*, *Van Patten v. LaPorta*, 148 A.D.2d 858, 860-61 (3d Dep't 1989) ("The use of 'either' as a function word before two or more coordinate words, phrases or clauses joined by the disjunctive 'or' indicates that what immediately follows is the first or two or more alternatives"); *Cresvale Int'l, Inc. v. Reuters Am., Inc.*, 257 A.D.2d 502, 505-06 (1st Dep't 1999) (the phrase "resulting from fire or other hazard covered by such fire and extended coverage insurance" was held to apply to both branching alternatives being "loss or damage to its property.")

[6] Even the grammatical structure of the parenthetical makes clear it cannot be read alone. The parenthetical begins with the conjunction "or", making it clear that the parenthetical is introducing an alternative to the predicate phrase that is immediately prior to it: "other than as a result of Unavoidable Delays or Tenant Delays." The parenthetical does not modify each of the preceding phrases so as to create a separate right to an abatement in the event of an Unavoidable Delay only. *See Kuhns v. Ledger*, 202 F. Supp. 3d 433, 437-38 (S.D.N.Y. 2016) (a parenthetical commencing with the conjunction "or" identified an alternative person rather than qualifying the person described immediately before the parenthetical).

Delays," then Tenant's right to an abatement would commence immediately upon service of the Abatement Notice; **or** (ii) if in each case those Predicate Preconditions would otherwise be excused because of an Unavoidable Delay and "such condition" (*i.e.*, Tenant's inability to use the Premises due to Landlord's failure "to provide services, perform repairs, or comply with Legal Requirements") continues for more than fifteen business days, then Tenant will receive a rent abatement when it serves the Abatement Notice (provided the other conditions in Section 5.4 were met). Indeed, the operative entitlement in Section 5.4 provides that rent shall be abated on a "per diem basis for the period commencing immediately ***(or on the fifteenth (15th) Business Day, if such condition results, in whole or in part, from Unavoidable Delays)*** after Tenant gives the Abatement Notice." Ex. 2 § 5.4. Thus, the two timing alternatives do not in any way eliminate the mandatory requirement that Tenant's inability to use the Premises for the ordinary conduct of its business results from Landlord's default.

Moreover, Schulte's reading of Section 5.4 is self-contradictory. On the one hand, Schulte reads the parenthetical within Subsection 5.4(a) as if it stands alone (*i.e.*, without reference to the predicate requirement of Landlord's default), but on the other hand Schulte selectively incorporates into the parenthetical the requirement that Tenant is unable to use the Premises for the "ordinary conduct of its business." *See* Complaint ¶¶ 2, 4, 5, 24, 25, 40, 43, 45, 54.

Further, Schulte apparently purports to incorporate the concept of Tenant's inability to use the Premises for the "ordinary conduct of its business" into Subsection 5.4(b)—or worse, ignores the requirement in Subsection 5.4(b) altogether. Schulte's repeated claims that it is entitled to a rent abatement where it is unable to use the Premises for the "ordinary conduct of its business" has *no foundation* in Subsection 5.4(b) itself: that Subsection *only* requires that Tenant "does not actually use or occupy the Premises or such portion thereof" during the period for which the

abatement is claimed, without *any reference* to the concept of the "ordinary conduct" of Tenant's business. Ex. 2 § 5.4(b). Such cherry-picking should not be allowed.

C. Schulte is Not Entitled to a Rent Abatement Because The Conditions In Section 5.4 Have Not Been Satisfied

Even assuming, *arguendo*, that the Workforce Reduction Orders and the COVID-19 pandemic constituted Unavoidable Delays that prevented or delayed Schulte from paying rent, Schulte still must demonstrate that it satisfies the mandatory conditions specified in Section 5.4 in order to be entitled to a rent abatement. Schulte has abjectly failed to do so, and the documentary evidence shows that it *cannot* make these required showings.[7]

First, and critically, Schulte has failed to allege Landlord has breached any of its repair or service obligations in Article 5 of the Lease. And there is good reason for Schulte's failure: as Schulte well knows, since the onset of the pandemic the Premises has at all times remained open, and services have been available for Schulte's use. Munafo Aff. ¶ 22. Indeed, at all times Schulte's employees have been in the Premises. That alone is sufficient to defeat Schulte's claimed entitled to a rent abatement under Section 5.4 of the Lease.

Second, even assuming further that Landlord's default is not required by the Lease—which it is—the documentary evidence conclusively shows that since June 22, 2020, Schulte *has been permitted* to return all of its employees to the Premises. Munafo Aff. ¶¶ 16-19. The Workforce Reduction Orders do not operate as a blanket prohibition on Schulte's employees attending the

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[7] Schulte's failure to allege any of these prerequisites reflect the reality that Schulte cannot allege any such facts. Schulte should not be permitted to re-plead the Complaint because this deficiency cannot be cured. *State of N.Y. ex rel. Light v. Melamed*, 181 A.D.3d 498, 499 (1st Dep't 2020) (denying leave to re-plead where relator did not show that she would be able to "state any viable causes of action upon re-pleading.")

Premises.[8] Once New York County entered "Phase II" in June, *all* of Schulte's staff were permitted to return to the Premises. From this time forward, Schulte has been permitted to have up to 50% of the maximum occupancy allowed by the Certificate of Occupancy.[9] Because during ordinary times Schulte utilized less than 50% of the maximum occupancy in the ordinary course of its business before the COVID-19 pandemic, Schulte now is plainly able to do the same and direct *all* of its employees and staff back to the office while still complying with the 50% cap on occupancy. Munafo Aff. ¶ 18. Schulte's business choice to keep its attorneys working from home cannot be a basis for rent abatement under the Lease. *See, e.g., Majestic Hotel Co. v. Eyre*, 53 A.D. 273, 273-74, 275-76 (1st Dep't 1900) (tenant's abandonment of apartment due to fear of scarlet fever was not sufficient to excuse payment of rent where property was not uninhabitable and appropriate health precautions were adopted).

Additionally, Schulte's claim that the Phase II restrictions "placed substantial … social distancing and hygiene restrictions on such access, including relating to physical distancing,

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[8] The Workforce Reduction Orders likewise do not require Schulte to "vacate" the Premises as they wrongly claim in their Complaint. *See* Complaint ¶¶ 4, 24, 39, 44, 45, 54. By their terms, they merely imposed restrictions on the workforce that could attend the Premises.

[9] But even before New York County entered Phase II, Tenant was actually "us[ing] or occupy[ing] the Premises" and thus their claim to a rent abatement fails under Subsection 5.4(b). By Schulte's own admission, they allowed "rotating skeleton crews" to attend the Premises. *See* Complaint ¶ 4. And documentary evidence shows that Schulte personnel were attending the Premises during this time. *See* Munafo Aff. ¶¶ 7-9, 21; Exs. 1 & 2. Indeed, the Workforce Reduction Guidance not only permitted workers in business lines providing "essential services" to attend their office locations (including IT, mailroom, and duplicating staff) during this time, but *expressly* permitted lawyers to attend their office locations if they were doing work "in support of essential businesses or services." Mac Avoy Aff. ¶ 18; Ex. 7 at 3, 6, 11, 12. Clearly, Schulte's attorneys could attend the Premises if required (*e.g.*, viewing or inspecting physical documents, using printing or copying facilities).

movement and commerce…" is utterly irrelevant. *See* Complaint ¶ 41. Schulte has failed to explain how the Premises cannot accommodate these measures. Any inconvenience imposed upon Schulte (like virtually every other commercial tenant) on account of necessary social distancing or similar public health-related restrictions does not render the Premises unusable.

Finally, Schulte has in fact been "actually us[ing] or occupy[ing] the Premises" for the entire duration of the COVID-19 pandemic to date, which makes abundantly clear that this action is merely aimed at seizing a windfall gain. By Schulte's own admission, it has maintained "rotating skeleton crews" of employees consisting of at least mail and delivery personnel.[10] Those personnel have access to the entire Premises, and can make use of all the Premises' facilities if required. Munafo Aff. ¶ 23. Indeed, contrary to Schulte's misleading claim that they "vacated" the Premises, the Premises is still fit out as a law firm. Client documents and personnel files remain stored at the Premises, and the various fixtures, equipment and hardware provided for employees to perform their jobs remain in place at the Premises. *Id.* ¶ 24.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion should be granted in its entirety and the Court should award such other and further relief as it deems just and necessary.

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[10] Schulte's claim that it has continued its telecommuting procedures after Phase II in order to comply with the Workforce Reduction Orders and "protect its personnel" cannot be squared with its admission that it continues to send its support staff to the Premises to "manage SRZ's simplest office functions," when it could have sent all of its attorneys back to the office. *See* Complaint ¶ 4. Schulte acknowledges that COVID-19 poses a threat to "the health and welfare of New York City residents," but apparently has no qualms in directing administrative support staff to attend the Premises. *See id.* ¶ 32. Schulte cannot espouse a double standard where its fee-generating attorneys enjoy the safety and protection of working from home, while the administrative staff do not.

Dated: New York, New York
January 8, 2021

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CERTIFICATION

I hereby certify pursuant to Commercial Division Rule 17, 22 NYCRR § 202.70(g)(17) as follows:

1. I filed via NYSCEF the foregoing memorandum of law.

2. The foregoing document was prepared on a computer using Microsoft Word. The total number of words in the document, exclusive of caption, table of contents, table of authorities, signature block, and this certification is 6974 words.

3. The foregoing document is in compliance with the word count limit set forth in Commercial Division Rule 17, effective October 1, 2018.

Dated: New York, New York
January 8, 2021

Janice Mac Avoy

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