SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

850 THIRD AVENUE OWNER, LLC, *Plaintiff*, *-against-* DISCOVERY COMMUNICATIONS, LLC, *Defendant.*	Index No.: 654148/2020 Hon. Barry R. Ostrager **Mot. Seq. No. 1** ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIMS AND TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT DISMISSING, DEFENDANT'S COUNTERCLAIMS

SCHLAM STONE & DOLAN LLP

Jeffrey M. Eilender
Joshua Wurtzel
Alexandra Douglas
Angela Li
26 Broadway
New York, NY 10004
Tel.: (212) 344-5400
Fax: (212) 344-7677
E-Mail: jeilender@schlamstone.com
E-Mail: jwurtzel@schlamstone.com
E-Mail: adouglas@schlamstone.com
E-Mail: ali@schlamstone.com

Attorneys for Plaintiff 850 Third Avenue Owner, LLC

December 14, 2020

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Plaintiff 850 Third Avenue Owner, LLC (the "Landlord") submits this memorandum of law, along with the Affirmation of Jeffrey M. Eilender and the Affidavits of Vitaly Filipchenko and Daniel Sven Wechsler in support of its motion for summary judgment on its claims and to dismiss, or alternatively, for summary judgment dismissing, Defendant Discovery Communications, LLC's counterclaims.

PRELIMINARY STATEMENT

This is a straightforward suit for unpaid commercial rent against Discovery, the company that owns or operates the Discovery Channel television network. Discovery—which decided not to renew its lease after it ended on May 31, 2020—decided at the last minute that it wanted to stay in its space for several additional months, because construction at its new headquarters was delayed since before the COVID-19 pandemic. And while Discovery initially engaged with the Landlord to work out a short-term extension agreement, Discovery then abruptly switched course, refused to negotiate further, and held over for two additional months after the end of its lease term ***without paying even the full base rent due, and claiming that it was entitled to free rent for this whole period.***

In trying to take advantage of the Landlord, Discovery used the COVID-19 pandemic as a convenient cover—falsely claiming that Governor Cuomo's executive orders prevented it from moving out and that the lease's force-majeure clause allowed it to stay in the space for two extra months without paying a dime. Thus, at a time when many companies were really suffering, Discovery was using the pandemic as an excuse to chisel money from its Landlord. In this way, Discovery is the worst type of nonpaying commercial tenant—making it all the more difficult for other commercial tenants that are truly struggling to get the relief they need.

In an effort to mitigate its damages, the Landlord drew down on a letter of credit supplied by Discovery as its security deposit. But Discovery still owes the Landlord most of the June and

July 2020 rent. Indeed, because Discovery was a holdover, under its lease, it was required to pay 150% of the Base Rent and Additional Rent for June and July 2020. So after crediting Discovery for the amounts it paid in June 2020 and that the Landlord drew down from the letter of credit, Discovery still owes $843,971.81.

Discovery argues that not only was it not a holdover, but that it owes no back rent, and particularly, that it should receive back the money it already paid for June rent (which it claims to have paid "in error") and the money the Landlord drew from the letter of credit. But Discovery is wrong as a matter of law.

First, the force-majeure clause in the lease does not apply to governmental restrictions. Indeed, under New York law, force-majeure clauses are interpreted narrowly, and "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 902–03 (1987). There is no dispute that the force-majeure clause here does not specifically include Governor Cuomo's stay-at-home orders, or any executive orders or governmental restrictions at all for that matter, but refers only to acts of God or other events not within the Government's control. Thus, the clause here means the opposite of what Discovery says.

Second, even if the force-majeure clause applies (it does not), Governor Cuomo's executive orders did not prevent Discovery from moving out by May 31. To the contrary, commercial movers were "essential," and commercial movers were regularly working, for months before May 31. Discovery simply chose not to use them. And in any event, Discovery concedes that commercial movers became essential at least as of May 18, so it could have moved out between then and May 31.

Third, even if the force-majeure clause applies (it does not) and extended Discovery's time to move out (it did not), Discovery erroneously argues that it was permitted to continue to occupy its space for months without paying ***any*** rent. This is wrong, because the force-majeure clause expressly carves out from its coverage Discovery's obligation to pay rent.

. . .

There is no triable issue of fact that Discovery retained possession of its space for two months beyond the end of its lease term. There is also no triable issue of fact that Discovery failed to pay holdover rent for that time. Thus, because Discovery's defenses are erroneous, the Landlord is entitled to summary judgment on its claims. And for the same reasons, Discovery's counterclaims, which are mirror images of the Landlord's claims, should be dismissed.

STATEMENT OF THE CASE

A. The Landlord and Discovery Enter Into the Lease

Landlord and Discovery were the landlord and tenant, respectively, under a commercial-lease agreement, dated June 18, 2004 (the "Original Lease," and with its seven amendments, the "Lease"). SUMF ¶ 1. Under the Lease, Discovery rented several floors at the building located at 850 Third Avenue, New York, New York 10022. *Id.* ¶ 3. Discovery's lease term ended on May 31, 2020. *Id.* ¶ 4. And any lease renewal or extension required a formal, executed renewal agreement. *Id.* ¶ 5.

B. The Relevant Lease Provisions

Under paragraph 22 of the Lease, the holdover clause, if the Tenant "fails to surrender all or any part of the Premises at the termination of this Lease," the tenancy becomes a tenancy at sufferance. *Id.* ¶ 6. And for the first 90 days of the holdover period, Discovery was required to "pay an amount (on a per month basis without reduction for partial months during the holdover)

equal to 150% of the sum of the Base Rent and Additional Rent due for the period immediately proceeding the holdover." *Id.* ¶ 7.

Under paragraph 26.03 of the Lease, the force-majeure clause, "[w]henever a period of time is prescribed for the taking of an action by Landlord or Tenant ***(other than the payment of the Security Deposit or Rent)*** the period of time for the performance of such action shall be extended by the number of days that the performance is actually delayed due to ***strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party."*** *Id.* ¶ 8 (emphasis added).

Under paragraph 26.02 of the Lease, the fee-shifting clause, "[i]f either party institutes a suit against the other for violation of or to force any covenant, term or condition of this Lease, the prevailing party shall be entitled to all of its cost and expenses, including without limitation, reasonable attorneys' fees." *Id.* ¶ 9.

C. Discovery Pretends to Negotiate With the Landlord to Extend the Lease

Before the COVID-19 pandemic, Discovery engaged the Landlord in protracted negotiations for a long-term extension of the Lease. Dkt. No. 2 ¶ 15 But then, after deciding to relocate its New York headquarters to a new building, Discovery abruptly changed its mind, and instead requested a two-month extension of the Lease—so the lease term would end on July 31, 2020, instead of May 31, 2020. *Id.* Trying to accommodate its long-term tenant, the Landlord agreed to this two-month extension, subject to the execution of a formal, written extension agreement. *Id.*

But Discovery continued to flip flop, and during the course of negotiations for the short-term extension, Discovery demanded the unilateral option to further extend the term of the lease for up to an additional month—through August 31, 2020. *Id.* ¶ 16. Again, in good faith, the Landlord agreed—subject, however, to the execution of a formal, written extension. *Id.*

As part of the negotiations for this short-term extension, the Landlord proposed charging Discovery an aggregate monthly rent that was roughly equal to the sum of the Base Rent and Additional Rent due for the last month of the term of the Lease. *Id.* ¶ 17. Discovery initially agreed to this—which was much better for Discovery than the holdover rate under the Lease of 150%. *Id.* ¶ 17.

D. Discovery Holds Over For Two Months After Its Lease Term Ends, and Fails to Pay the Full Rent For These Two Months

Counsel for the Landlord and Discovery engaged in lengthy negotiations over the language of the proposed extension agreement, and were down to a few minor issues—none of which involved the rent payable during the extension term. *Id.* ¶ 18. But without any meaningful notice, Discovery abruptly changed course and withdrew from any further negotiations. *Id.* ¶ 19.

Sensing what it likely perceived as an opportunity created by the COVID-19 pandemic and executive orders temporarily limiting landlords' ability to evict tenants, Discovery unilaterally refused to surrender the Premises on May 31, 2020—the last day of the lease term under the Lease—and continued to occupy the Premises until at least July 27, 2020. SUMF ¶ 11.

This had nothing to do with the COVID-19 pandemic, and was instead because construction at Discovery's new headquarters had been delayed since before the pandemic even began and would not be ready by May 31. Dkt. No. 2 ¶ 22. Indeed, Discovery wanted to keep its property in the Premises for a few extra months, rather than incur the expense of moving it to storage and then moving it again to its new headquarters. *Id.* And Discovery saw an opportunity to do this for what it believed would be for free. *Id.* Thus, Discovery was a holdover tenant from June 1, 2020 through July 31, 2020. *Id.* ¶ 23.

Even worse, however, and consistently with its efforts to try to beat the Landlord out of contractually required rent, Discovery indisputably ***did not pay the Landlord any rent***—either

under the 150% holdover rate or the base rate—for July 2020. SUMF ¶ 15. And though it made a payment of base rent in June 2020, it later claimed that this payment was "made in error," and demanded it back. *Id.* ¶ 16.

E. Discovery Claims That the Lease Entitled It To Hold Over Without Paying Rent, and Demands Return of June Rent Paid "In Error" and Its Security Deposit

On May 15, 2020, Discovery's general counsel wrote to the Landlord, claiming that "because of the COVID-19 Regulations (meaning the executive orders issued by Governor Cuomo), Tenant is currently legally prevented from removing Tenant's property from the Premises and has been unable to do so since at least March 20, 2020." *Id.* ¶ 17.

Specifically, Discovery's general counsel claimed that "COVID-19 Regulations" precluded access to the Premises by Discovery, its employees, and its moving company, and so under the force-majeure clause, "any term in the Lease requiring action to be taken by Tenant to vacate or surrender the Premises (including by removing Tenant's Property) by a date certain has been expressly extended" by the "number of days during which such action has been delayed due to causes beyond Tenant's reasonable control." *Id.* ¶ 18. Thus, according to Discovery, "any provisions in the Lease relating to holdover rent, or other actions by the Landlord in connection therewith, do not apply." *Id.* ¶ 19.

Critically, Discovery did not claim that any financial hardship prevented it from paying rent during these two months. *Id.* ¶ 20. To the contrary, Discovery boasted that, despite the COVID-19 pandemic and its purported inability to use its office space at the Premises, it "continued to timely pay all rent due under the Lease, including, without limitation, all rent due for May 2020—the last month in the term for the Lease." *Id.* ¶ 21.

On May 20, 2020, the Landlord's representative, Michael Chetrit, responded, explaining that even if Discovery were not a holdover (it was), the force-majeure clause did not permit it to

both occupy the Premises and not pay even the Base Rent and Additional Rent, since the force-majeure clause expressly carved out the "payment of rent" from the tenant obligations that could be excused by a purported force majeure. *Id.* ¶ 22. Mr. Chetrit also proposed that the parties resume negotiations on a short-term extension of the lease. *Id.* ¶ 23.

But on May 27, 2020, Discovery's general counsel responded to the Landlord, rejecting Mr. Chetrit's offer to negotiate further. *Id.* ¶ 24. Discovery then doubled down on its claim that it could continue to occupy the Premises without paying rent—claiming that its time to move out of the Premises was extended, even though it was not required to pay any rent during this time. *Id.* ¶ 25.

Despite its posturing, and in contradiction to its stated position, however, in June 2020, Discovery paid almost all of its base (but not holdover) rent for June 2020. *Id.* ¶ 27. And when it made this payment, Discovery did not state that it was without prejudice to its previously stated position or its right to later seek return of this payment. *Id.* ¶ 28.

In July 2020, however, Discovery failed to pay even its base rent for that month. *Id.* ¶ 29. So on July 7, 2020, Mr. Chetrit e-mailed Discovery to state that its July rent payment was late, and needed to be processed right away. *Id.* ¶ 30. But later in the day, Discovery's general counsel again wrote to Mr. Chetrit, repeating his position that the force-majeure clause excused it from paying rent after May 31 because Discovery was "legally prevented from removing [its] Property from the Premises by May 31, 2020." *Id.* ¶ 31. He further stated that Discovery's June rent payment was "made in error," and refused to pay any further rent. *Id.* ¶ 31. Critically, Discovery's general counsel acknowledged that it did not "commence[] the removal process" until June 8, 2020, since it believed it was not permitted to do so until then. *Id.* ¶ 32.

Consistently with this position, Discovery held over for two months—June and July 2020. *Id.* ¶ 33. And while Discovery fully moved out of the Premises on July 31, 2020, it refused to pay July base rent or June or July holdover rent—which was an additional 50% per month under paragraph 22 of the Lease. *Id.* ¶ 34.

To mitigate its damages, the Landlord drew down on the letter of credit, issued in its favor by Discovery as a security deposit, for a total of $829,581.42. *Id.* ¶ 36. And on August 20, 2020, in accordance with section 18.01 of the Lease, the Landlord sent Discovery a Five-Day Notice of Failure to Pay Rent Due Under Lease. *Id.* ¶ 37.

On August 21, 2020, Discovery paid the Landlord $60,334.95, purportedly toward the "Extra Charges" listed in the notice. *Id.* ¶ 41. But Discovery did not pay any additional amounts demanded by the notice. *Id.* ¶ 42. Instead, on August 24, 2020, Discovery's outside counsel at Proskauer Rose LLP wrote to the Landlord's counsel doubling down on its position that it had no obligation to pay any rent, holdover or base, after May 31. *Id.* ¶ 43. Specifically, Discovery claimed that Executive Order 202.8, dated March 20, 2020, required all nonessential businesses to reduce their in-person workforces by 100% by March 22, 2020 at 8:00 p.m. *Id.* ¶ 44. Critically, however, and contrary to the positions it took in its May 15 and 27 letters, Discovery conceded that commercial movers were deemed essential workers as early as ***May 18, 2020***—almost two weeks before Discovery was obligated to move out of the Premises. *Id.* ¶ 45.

Despite conceding that it was legally permitted to move on the date it was required to move out, and was permitted to do so for the preceding two weeks, Discovery claimed that it could not "begin the process of hiring a commercial moving company" until May 18, and could not "allow its employees to enter the Premises and make preparations to move" until June 8—when New York City entered Phase One of reopening. *Id.* ¶ 61. Discovery further claimed that

the force-majeure clause extended its obligation to move out, and reiterated its prior claim that its June payment was "made in error." *Id.* ¶ 65. And so, according to Discovery, "no Rent was due for the months of June and July," so it was not in Default for nonpayment for those months. *Id.* ¶ 66.

F. The Landlord's Damages

The Base Rent and Additional Rent for June and July 2020—the two months that Discovery held over—totaled $1,671,613.88. *Id.* ¶ 68. And under paragraph 22 of the Lease, since Discovery was a holdover, this amount increased by 150%, to $2,507,420.82. *Id.* ¶ 69.

As explained above, in June 2020, Discovery paid $833,867.59 in rent. *Id.* ¶ 70. And as also explained above, on July 22, 2020, the Landlord drew $829,581.42 from the letter of credit. *Id.* ¶ 71. So putting aside the $66,605.60 in additional charges for June and July—which Discovery primarily paid on August 21, and for the sake of convenience, the balance of which the Landlord does not seek here—this brought Discovery's outstanding balance due and owing to **$843,971.81**. *Id.* ¶ 71.

But even if Discovery were not treated as a holdover for June and July 2020, it must still pay base rent and additional (non-holdover) rent for these months, which would be $8,164.87. *Id.* ¶ 71.

ARGUMENT

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE LANDLORD ON ITS CLAIMS

A. There Is No Triable Issue of Fact That Discovery Held Over for Two Months After Its Lease Term Expired

There is no dispute, and Discovery concedes, that the lease term under the Lease ended on May 31, 2020. SUMF ¶ 4; Dkt. No. 22 ¶ 61-62. Nor is there a dispute that, at the "termination of this Lease," Discovery was required to remove all of its property from the Premises and "quit

and surrender" the Premises to the Landlord. SUMF ¶ 10; Dkt. No. 3 § 25. Nor is there a dispute that Discovery did not remove its Property from or quit and surrender the Premises until the end of July. SUMF ¶ 11-13.

Thus, between June 1 and when Discovery moved out at the end of July, Discovery was a holdover as a matter of law. *See Yu Yan Zheng v. Fu Jian Hong Guan Am. Unity Ass'n, Inc.*, 168 A.D.3d 511, 514 (1st Dep't 2019) (tenant that "remains in possession on the expiration of a lease granting exclusive possession" is a holdover); Dkt. No. 3 § 22 (Discovery becomes holdover if it "fails to surrender all or ***any part*** of the Premises at the termination of this Lease").

B. There Is No Triable Issue of Fact That Discovery Owes, But Failed to Pay, Holdover Rent Under the Lease

Under the Lease, because Discovery "fail[ed] to surrender all of any part of the Premises at the termination of this Lease," it was required to pay monthly holdover rent equal to 150% of the Base Rent and Additional Rent due for the period immediately preceding the holdover—which was $2,507,420.82 for June and July. *Id.* And the date in July when Discovery vacated does not matter, since section 22 imposes monthly holdover rent "without reduction for partial months during the holdover." *Id.*

Discovery claims that the holdover clause of the Lease applies "only where the Lease has been 'terminated,'" and thus does not apply here because the Lease instead "expired pursuant to its terms" and was not "terminated." Dkt. No. 22 ¶¶ 58–63. But Discovery ignores that May 31, 2020 is defined in the Lease as the ***"Termination Date."*** Dkt. No. 3 § 1.06. Thus, unless the Lease were "terminated early" (*id.*), the Lease "terminated" on the "Terminate Date," which was May 31, 2020.

Indeed, New York courts regularly use the terms "termination" and "expiration" of a lease interchangeably—with both referring to when a lease term comes to its end by its terms.

See Stahl Assocs. Co. v. Mapes, 111 A.D.2d 626, 628 (1st Dep't 1985) (lease "terminated" at end of term); *Parkchester Pres. Co. LP v. Vargas*, 2017 N.Y. Misc. LEXIS 5259, at *4 (Civ. Ct. Bronx Cty. Sept. 28, 2017) ("no dispute that the lease, by its terms, ***terminated*** at the end of June in 2011") (emphasis added).

Further, a contract "should not be interpreted to produce a result" that is "commercially unreasonable." *Keller-Goldman v. Goldman*, 149 A.D.3d 422, 426 (1st Dep't 2017). Discovery's interpretation is just that. According to Discovery, neither the holdover clause nor the clause requiring Discovery to "quit and surrender" the Premises and remove its property apply unless the Lease is "terminated" early—meaning ***before*** May 31, 2020. Dkt. No. 22 ¶¶ 60, 62. But applying Discovery's logic, it could have retained possession of, and kept its property in, the Premises after May 31, 2020 ***indefinitely***, and because neither the holdover clause nor the surrender clause would apply, the Landlord would have minimal recourse.

Thus, Discovery's interpretation is wrong as a matter of law. And since Discovery was a holdover but failed to pay all holdover rent due, it remains liable for the difference—as described above.

C. Discovery Erroneously Argues That the Lease's Force-Majeure Clause Excuses It From Paying Holdover Rent for June and July 2020

Discovery argues that because of the COVID-19 Regulations issued by Governor Cuomo that applied between March 22 and June 22, 2020, the Lease's force-majeure clause extended its time to "remove its property from the Premises" by 94 days. Dkt. No. 22 ¶ 176. And so, according to Discovery, because it removed its property within 94 days of May 31, 2020, it "complied with the Lease and was not a holdover," and is not required to pay any rent—holdover or base—for June and July. *Id.* ¶ 179. Discovery is wrong.

1. The Force-Majeure Clause Does Not Excuse Performance Based on Governmental Restrictions

Under New York law, force-majeure clauses are "narrowly construed." *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dep't 2009). Thus, "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp.*, 70 N.Y.2d at 902–03. A force-majeure clause must also "be interpreted as if it included an express requirement of unforeseeability"—even if the clause does not include an unforeseeability requirement. *Goldstein v. Orensanz Events LLC*, 146 A.D.3d 492, 493 (1st Dep't 2017). And the burden of demonstrating force majeure is on the party seeking to have its performance excused. *See J.C. Penney Co. v. McLean Trucking Co.*, 36 N.Y.2d 733, 734 (1975).

As stated above, the Lease's force-majeure clause applies only to "strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party." SUMF ¶ 8; Dkt. No. 3 § 26.03.

There is no dispute that the force-majeure clause here does not specifically include governmental restrictions or executive orders. Instead, Discovery argues that the force-majeure clause's catch-all language—"other causes beyond the reasonable control of the performing party"—covers the COVID-19 Regulations it claims prevented it from moving its Property out of the Premises. Dkt. No. 22 ¶¶ 174, 175. Not so.

"When the event that prevents performance is not enumerated" in a force-majeure clause, but the clause "contains an expansive catchall phrase in addition to specific events," then the "'precept of *ejusdem generis* as a construction guide is appropriate—that is, words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the ***same general kind or class as those specifically mentioned***.'" *Team Mktg.*

USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942–43 (3d Dep't 2007) (emphasis added) (citation omitted); *see also Kel Kim Corp.*, 70 N.Y.2d at 902 ("general words" in force-majeure clause are "not to be given expansive meaning," and are instead "confined to things of the same kind or nature as the particular matters mentioned"); *Forward Indus., Inc. v. Rolm of NY Corp.*, 123 A.D.2d 374, 376 (2d Dep't 1986) ("Applying the rule of *ejusdem generis*, the comprehensive words 'other cause beyond the control' of the defendant are restricted to some extraordinary cause analogous to the specifically named contingencies and not to problems which must naturally be anticipated as to performance."); *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 1984 U.S. Dist. LEXIS 24614, at *11 (S.D.N.Y. Aug. 2, 1984) ("In interpreting the force majeure clause here we must apply the ejusdem generis rule to give it specificity by including in the provision only those things of the same character or class as the specific items mentioned.").

In the force-majeure clause here, the events that give rise to a force majeure under the Lease are acts of ***disorder***—meaning events beyond the control of organized civil society. In contrast, governmental restrictions, like the COVID-19 Regulations, are events or acts of ***law and order***—the opposite of what is covered by the specific events in the force-majeure clause. *See Morgantown Crossing, L.P. v. Mfrs. & Traders Tr. Co.*, 2004 U.S. Dist. LEXIS 22949, at *14–15 (E.D. Pa. Nov. 10, 2004) (under doctrine of *ejusdem generis*, force-majeure clause that excused performance in the event of "strikes, lockouts, inability to obtain labor or materials on the open market, war, riots, unusual weather conditions, acts of God, or ***other similar causes beyond their control***" did not apply to governmental action or delay, because "delay attributed to a governmental entity is not of the same kind or nature as those enumerated in the lease") (emphasis added); *see also Team Mktg. USA Corp.*, 41 A.D.3d at 943 (under doctrine of *ejusdem*

generis, force-majeure clause in staffing contract that excused performance "***for any reason***, including without limitation, strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints of public authority" did not apply to cancellation by nonparty of events to be staffed, despite broad "for any reason" language) (emphasis added); *Madison Hill Corp. v. Cont. Baking Co.*, 21 A.D.2d 538, 541 (1st Dep't 1964) (under doctrine of *ejusdem generis*, clause that required landlord to make repairs in the event of "'fire'" or "'war, or by act of God, or by reason of ***any other cause whatsoever***'" applied only to "casualty repairs" despite broad "any other cause whatsoever" language) (emphasis added).

Nor were governmental restrictions on access to commercial spaces or commercial moving unforeseeable when the parties signed the Lease Indeed, New York City has a plethora of ever-changing regulations—from parking restrictions to zoning regulations to permit requirements. So while the specific COVID-19 Regulations of which Discovery complains may not have been contemplated by the parties when they signed the Lease, that New York City's local or state government may impose restrictions or regulations affecting Discovery's ability to move out was foreseeable. *See Team Mktg. USA Corp.*, 41 A.D.3d at 943 (broad catch-all language in force-majeure clause did not apply to events that were not "unforeseeable").

Indeed, the Lease expressly contemplated that governmental orders or regulations could impose requirements or restrictions on the parties. *See, e.g.*, Dkt. No. 3 § 5.01 ("Tenant shall comply with all statutes, codes, ordinances, orders, rules and regulations of any municipal or governmental entity, city or borough department, boards, agencies, offices, commissions and subdivisions thereof"); *id.* § 7.01 (Landlord must provide heat and air conditioning "as required by governmental authority"); *id.* Ex. F §§ 2.02, 2.11, 3.01 (for use of generator, connection to portable emergency generator, and installation, operation, maintenance, and removal of satellite

dish, Discovery responsible for "obtaining all necessary governmental and regulatory approvals").

Further, many commercial leases expressly include governmental acts, orders, laws, or regulations in their force-majeure clauses. *See, e.g.*, *Reade*, 63 A.D.3d at 434 (force-majeure clause in commercial lease applied to TRO issued by Supreme Court because it was triggered by "governmental prohibitions"). But the clause here did not, which is fatal to Discovery's argument. *See Kel Kim Corp.*, 70 N.Y.2d 900, 902–03 ("only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused"). And Discovery, a sophisticated commercial tenant, may not renegotiate the force-majeure clause in the Lease—despite having the opportunity to do so at any time when it negotiated its ***seven*** amendments to the Lease—by trying to backdoor this language through the catch-all clause.

2. The COVID-19 Regulations Did Not Prevent Discovery From Moving Out By May 31, 2020

Even if the force-majeure clause in the Lease were triggered by the COVID-19 Regulations (it was not), those regulations did not prevent Discovery from moving out by May 31, 2020.

As a threshold matter, though New York State's initial guidance did not expressly list residential- or commercial-moving companies as essential businesses, many real-estate-law experts believed they fit within the State's general categories of essential businesses from the outset. Indeed, in a detailed presentation published on March 24, 2020 by ***Discovery's own counsel at Proskauer Rose*** (which represented Discovery in lease negotiations with the Landlord), Proskauer advised its clients and businesses about how to safely conduct commercial

moves, and wrote, ***"We have received word that moving companies have been deemed essential under the Executive Order."*** SUMF ¶ 46.

Proskauer's advice was consistent with the advice of other real-estate professionals. *See Id.* ¶ 47 (6sqft, *Can you move in NYC during the coronavirus outbreak?*, dated Mar. 27, 2020) ("moving companies are considered an essential service, according to New York City and State officials").

And Proskauer's advice was also consistent with the fact that commercial-moving companies were working all throughout the pandemic. Indeed, one Manhattan-based moving company advised clients early on that it was considered an essential business under the categories of "logistics" and "storage" in the State's initial guidance. *Id.* ¶ 50. And one Brooklyn-based moving company was quoted in a *New York Times* article stating that its moving business got "insane" in May to the point it "had to hire some more movers." *Id.* ¶ 48. And another Manhattan-based moving company published a detailed account of how, other than a short pause during which it sought and received an "essential business letter" from the State, it completed a warehouse move ***between February 26 and late May*** for international law-firm Simpson, Thatcher & Bartlett so the firm "would not be in violation of their lease." *Id.* ¶ 49. And in this same publication, this moving company also explained how it moved casino-gaming company High 5 Games out of its New York City office and into storage until High 5 Games could get a new lease. *Id.*

Further, with these summary-judgment papers, we submit affidavits from 2 additional commercial-moving companies showing that they too were performing commercial moves in New York City between March 20 and May 17, 2020—the period during which Discovery claims commercial movers were not essential businesses (Dkt. No. 22 ¶¶ 120–25). *See* Wechsler

Aff. ¶ 2 ("Between March 20 and May 17, 2020, we conducted nine commercial moves originating in New York City."); Filipchenko Aff. ¶ 2 ("On May 4, 2020, we conducted a commercial move from Brooklyn to upstate New York.").

Critically, to resolve any doubt (if any existed), on ***May 17, 2020***, New York State updated its guidance to expressly include ***"commercial moving services"*** as essential businesses. SUMF ¶ 59. In its counsel's August 24 letter, Discovery conceded that commercial movers were essential as early as May 18 (Discovery's counsel got the date wrong by one day). SUMF ¶ 60. And it also made the same concession in its Verified Answer. Dkt. No. 22 ¶ 122 (conceding that commercial movers were deemed essential as early as May 18, 2020). These are judicial admissions that are admissible on summary judgment. *See U-Trend N.Y. Inv. L.P. v. US Suite LLC*, 186 A.D.3d 438, 441 (1st Dep't 2020) ("'[f]acts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made'") (citation omitted); *Ayers v. Mohan*, 154 A.D.3d 411, 412 (1st Dep't 2017) ("correspondence" from counsel constitutes an "informal judicial admission"). And so Discovery concedes that, as a matter of law, commercial movers were permitted to move it out of the Premises for two weeks before May 31, 2020.

Nor is there any reason Discovery could not have made arrangements for this move out before May 17 or 18 remotely—in the same way it apparently continued to run its broadcast business during this time. Nor did Discovery seek clarification, approval, or an exemption from the State—as it was permitted to do and as thousands of businesses did during this time—to allow it to move out of the Premises by May 31. SUMF ¶ 64. And while doing these things may have been more expensive or difficult, this does not excuse Discovery from performance under the Lease. *See 143-145 Madison Ave. LLC v. Tranel, Inc.*, 74 A.D.3d 473, 474 (1st Dep't 2010)

("difficulties" in performance do not excuse performance under contract); *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002) ("financial disadvantage" does not excuse performance under contract).

Indeed, New York courts have generally rejected claims by parties to a contract that the COVID-19 Regulations excused their performance. *See Dr. Smood N.Y. LLC v. Orchard Hous., LLC*, 2020 N.Y. Misc. LEXIS 10087, at *6 (Sup. Ct. N.Y. Cty. Nov. 2, 2020) (New York shutdown orders did not excuse café's obligation to pay rent under frustration of purpose doctrine, since "'partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law,'" and café "remain[ed] open for both counter service and pickup of orders submitted online") (citation omitted); *In re Condado Plaza Acquisition LLC*, 2020 Bankr. LEXIS 2767, at *40 (Bankr. S.D.N.Y. Oct. 5, 2020) (stating, in dictum, that there is "good reason to be skeptical" of frustration of purpose and impracticability defenses to buyer's obligation under purchase and sale agreement to close on sale of hotel).

Discovery also claims that the COVID-19 Regulations prevented it from "permitting its 'non-essential' employees to access the Premises" for the "purpose of preparing to remove Tenant's property from the Premises" before June 22, 2020, since that is when—according to Discovery—Governor Cuomo's workforce-reduction orders allowed "business offices" to resume in-person operations. Dkt. No. 22 ¶¶ 111, 112.

But undisputed documentary evidence shows that this is false. Indeed, in correspondence before this suit was filed, Discovery claimed that it "commenced the removal process on ***June 8, 2020***"—not June 22. SUMF ¶ 63. So that Discovery did not allow its non-essential employees into the Premises before June 22, yet began the move-out process on June 8, shows that

Discovery could have begun—and did begin—the removal process ***before*** it resumed full-scale in-person operations, and thus could have started well before May 31. That it did not was merely its choice.

Further, Discovery's claim that it could not enter the Premises to oversee or direct a move before June 22 is belied by unrefuted building records showing that Discovery employees or agents entered the Premises ***83 times*** between March 23 and May 17, 2020, and an additional ***902*** times between May 18 and June 22, 2020. SUMF ¶ 62. And while Discovery claims that these were only "'essential' employees and vendors" who entered the Premises to "check mail, provide IT support, and to engage in other permitted essential services" (Dkt. No. 22 ¶ 119), there is no reason why these "essential" employees—who were already at the Premises—could not assist with move-out efforts, especially if the "non-essential" personnel directing these efforts remained remote.

In any event, as explained above, commercial movers were "essential" throughout the duration of the COVID-19 Regulations, and at the very least, as of May 17. And so any Discovery employees whose in-person presence would be required to direct or oversee a move would have necessarily been permitted to enter the Premises as well. Any contrary interpretation of the COVID-19 Regulations defies logic and is commercially unreasonable.

Thus, the only reason Discovery failed to move out by May 31 is because it chose not to. The COVID-19 Regulations had nothing to do with this decision by Discovery, and Discovery's efforts to cloak this decision as mandated by the COVID-19 Regulations is opportunistic and disingenuous.

3. There Was No Labor Shortage That Prevented Discovery From Moving Out

Discovery also claims that there were "labor shortages" that prevented it from moving out before May 31, since "commercial movers were not permitted to operate." Dkt. No. 22 ¶ 120. But this is merely a restatement of Discovery's claim that the COVID-19 Regulations prevented commercial movers from working, which as explained above, is wrong. *See* Wechsler Aff. ¶ 3 ("[w]e were also fully operational and available for other commercial moves between March 20 and May 17, 2020, and we would have been ready, willing, and able to do these moves for customers who requested our services"); Filipchenko Aff. ¶ 3 (same); Wechsler Aff. ¶ 4 ("I also understand that other commercial-moving companies—our peers—were fully operational and available for commercial moves during this time, and that most of them considered themselves to be essential businesses during this time as well."); Filipchenko Aff. ¶ 4 (same).

D. Discovery Erroneously Argues That the Lease's Force-Majeure Clause Excuses It From Paying Base Rent for June and July 2020

Even if the force-majeure clause were triggered by the COVID-19 Regulations (it was not), and even if the COVID-19 Regulations prevented Discovery from moving out by May 31 (they did not), Discovery was still required to pay ***base*** (rather than holdover) rent for June and July.

As explained above, the force-majeure clause excludes the "payment of the Security Deposit or Rent" from the obligations that would be excused if a force majeure occurred. Dkt. No. 3 § 26.03. Thus, even if Discovery did not breach the Lease by failing to move out by May 31, its obligation to pay base rent was not excused by the force-majeure clause.

Discovery claims that it had "no obligation under the Lease to pay rent (in any amount) for the months of June and July 2020" (Dkt. No. 22 ¶ 207), because the lease term still ended on May 31, and it was only Discovery's deadline to remove its property from the Premises that was

extended by the force-majeure clause. Dkt. No. 6. But this contorted interpretation of the Lease would entitle Discovery to retain possession of the Premises for months after its lease term concededly expired, yet pay no rent during this time. This would lead to a windfall to Discovery, and would produce a result that is absurd, commercially, unreasonable, and contrary to the reasonable expectations of the parties. *See Keller-Goldman*, 149 A.D.3d at 426 ("'contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties'").

Further, Discovery concedes that, at least until June 22, it continued to have employees enter the Premises to "check mail, provide IT support, and to engage in other permitted essential services." Dkt. No. 22 ¶119. Thus, Discovery was doing more with the Premises after May 31 than simply storing its property, which refutes it argument that it had no obligation to pay even base rent.

Moreover, by paying its June base rent and $60,334.95 toward June and July additional rent—all without a reservation of rights—Discovery waived any claim that it was not required to pay any rent after May 31.

E. <u>The Landlord is Entitled to Its Attorneys' Fees and Costs</u>

Because the Landlord is entitled to judgment as a matter of law on its claims, it is the "prevailing party." Thus, following a separate submission in which the Landlord will submit its fees and costs, and to which Discovery will have an opportunity to be heard, the Landlord is entitled to "all of its cost and expenses, including without limitation, reasonable attorney's fees" incurred in bringing this suit. SUMF ¶ 9.

II. THIS COURT SHOULD DISMISS, OR ALTERNATIVELY, GRANT SUMMARY JUDGMENT DISMISSING, DISCOVERY'S COUNTERCLAIMS

Discovery's first three counterclaims seek declaratory judgments that Discovery is not a holdover, does not owe June or July rent at all, and that its interpretations of the Lease are correct. Dkt. No. 22 ¶¶ 173–204. And Discovery's fourth through seventh counterclaims—for breach of contract, conversion, money had and received, and unjust enrichment—assert that Discovery is entitled to the amount it paid the Landlord for June rent and the amount the Landlord drew down on the letter of credit because, according to Discovery, it had "no obligation under the Lease to pay rent (in any amount) for the months of June and July 2020." *Id.* ¶¶ 205–233.

But these counterclaims are the mirror image of the Landlord's claims. *See Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 138 (E.D.N.Y. 2013) ("'when a counterclaim is merely the 'mirror image' of an opposing party's claim and the counterclaim serves no independent purpose, the counterclaim may be dismissed'") (internal citations omitted). And so they fail for the same reasons that the Landlord is entitled to judgment as a matter of law on its claims.

Moreover, the conversion, money had and received, and unjust enrichment independently fail, because they are duplicative of the contract claim. *See Sebastian Holdings, Inc. v. Deutsche Bank, AG.*, 108 A.D.3d 433, 433 (1st Dep't 2013) (conversion and quasi-contract claims dismissed as duplicative of contract claim when former claims "covered the same subject matter as the express contract among the parties").

Further, Discovery's eighth counterclaim, which is for costs and expenses (Dkt. No. 22 ¶¶ 234–37), also fails, because Discovery is not the "prevailing party." *See* SUMF ¶ 9.

CONCLUSION

This Court should grant summary judgment to the Landlord on its claims and dismiss, or grant summary judgment dismissing, Discovery's counterclaims.

Dated: December 14, 2020
New York, New York

SCHLAM STONE & DOLAN LLP

By: /s/ Jeffrey M. Eilender
Jeffrey M. Eilender
Joshua Wurtzel
Alexandra Douglas
Angela Li
26 Broadway
New York, New York 10004
Tel.: (212) 344-5400
Fax: (212) 344-7677
E-Mail: jeilender@schlamstone.com
E-Mail: jwurtzel@schlamstone.com
E-Mail: adouglas@schlamstone.com
E-Mail: ali@schlamstone.com

Attorneys for Plaintiff 805 Third Avenue Owner, LLC

WORD-COUNT CERTIFICATION

In accordance with Rule 17 of the Commercial Division Rules

I certify that this document was prepared on a computer using Microsoft Word 2016 in 12-point, Times New Roman font; that the word count of this document, as calculated in accordance with Rule 17 of the Commercial Division Rules by the computer processing system used to prepared this document, is 6,980; and that this document thus complies with the word-count limit in Rule 17 of the Commercial Division Rules.

/s/ Jeffrey M. Eilender
Jeffrey M. Eilender