

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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223 AVENUE B, LLC,

Plaintiff,

- against -

SUBWAY REAL ESTATE LLC D/BA SUBWAY,
GEETA FAST FOOD ENTERPRISE, INC.,
AND ABHIMANUE MANCHANDA,

Defendants.
-----X

Index No. 613065/2020

**VERIFIED ANSWER,
COUNTERCLAIMS AND
CROSSCLAIMS**

Defendant Subway Real Estate LLC d/b/a Subway (“defendant” or “Subway”), by and
through its attorneys, Kaufman & Kahn, LLP, as and for its Answer to the Complaint,

Counterclaims and Crossclaims, sets forth the following:

1. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the Complaint.
2. Admits the allegations contained in paragraph 2 of the Complaint.
3. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Complaint.
4. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 4 of the Complaint.
5. Admits that Doctor’s Associates Inc. is a former Florida corporation and that it previously owned the rights to award franchises for SUBWAY® sandwich shops, and denies the remaining allegations contained in paragraph 5 of the Complaint.
6. Denies the allegations contained in paragraph 6 of the Complaint.
7. Admits the allegations contained in paragraph 7 of the Complaint.

8. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 8 of the Complaint.

9. Admits entering into a lease with plaintiff dated April 1, 2011 (the "Lease") and respectfully refer this Court to the Lease to ascertain its meaning.

10. Denies the allegations contained in paragraph 10 of the Complaint and respectfully refers this Court to the Lease to ascertain its meaning.

11. Denies the allegations contained in paragraph 11 of the Complaint and respectfully refers this Court to the Lease to ascertain its meaning.

12. Admits the allegations contained in paragraph 12 of the Complaint and respectfully refers this Court to the Lease to ascertain its meaning.

13. Admits the allegations contained in paragraph 13 of the Complaint and respectfully refers this Court to the Lease to ascertain its meaning.

14. Admits the allegations contained in paragraph 14 of the Complaint and respectfully refers this Court to the Lease to ascertain its meaning.

15. Admits that Abhi held a franchisee/license for a SUBWAY® sandwich shop from DAI, and denies the remaining allegations contained in paragraph 15 the Complaint.

16. Admits subletting the Premises to Abhi in or about 2011, and denies the remaining allegations contained in paragraph 16 of the Complaint.

17. Admits that for approximately eight years Abhi operated a SUBWAY® sandwich shop known as Store #50977, and denies the remaining allegations contained in paragraph 17 of the Complaint.

18. Denies the allegations contained in paragraph 18 of the Complaint and in the tenant ledger annexed to the Complaint as Exhibit B.

19. Admits the allegations contained in paragraph 19 of the Complaint and respectfully refer this Court to the Lease to ascertain its meaning.

20. Admits the allegations contained in paragraph 20 of the Complaint subject to the Affirmative Defenses set forth herein and respectfully refer this Court to the Lease to ascertain its meaning.

21. Admits the allegations contained in paragraph 21 of the Complaint subject to the Affirmative Defenses set forth herein and respectfully refer this Court to the Lease to ascertain its meaning.

22. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 22 of the Complaint.

23. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 23 of the Complaint.

24. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 24 of the Complaint.

25. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 25 of the Complaint.

26. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 26 of the Complaint.

27. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 27 of the Complaint.

28. Admits the Premises were vacant in or about August 2020, and denies the remaining allegations contained in paragraph 28 of the Complaint, and denies having knowledge or information sufficient to form a belief as to the truth or falsity photographs annexed to the

Complaint as Exhibit C.

29. Admits sending a letter to plaintiff on or about August 26, 2020, advising plaintiff that the Lease would not be renewed, and denies the remaining allegations in paragraph 29 of the Complaint.

30. Admits that Abhi has ceased operations at the Premises as of the date of Complaint, and denies the remaining allegations contained in paragraph 30 of the Complaint.

31. Denies the allegations contained in paragraph 31 of the Complaint and in the tenant ledger annexed to the Complaint as Exhibit B.

32. Denies the allegations contained in paragraph 32.

33. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 33 of the Complaint.

34. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 34 of the Complaint.

35. Defendant repeats and realleges paragraphs 1 through 34 of this Answer as if set forth more fully herein.

36. The allegations set forth in paragraph 36 of the Complaint state a legal conclusion and therefore no response is required. To the extent any response is necessary, defendant admits entering into the Lease with the plaintiff and respectfully refer this Court to the Lease to ascertain its true meaning, legal effect and all questions of law.

37. The allegations set forth in paragraph 37 of the Complaint state a legal conclusion and therefore no response is required. To the extent any response is necessary, defendant admits entering into the Lease with the plaintiff and respectfully refer this Court to the Lease to ascertain its true meaning, legal effect and all questions of law.

38. Admits the allegations contained in paragraph 38 of the Complaint.

39. The allegations set forth in paragraph 39 of the Complaint state a legal conclusion and therefore no response is required. To the extent any response is necessary, defendant admits entering into the Lease with the plaintiff and respectfully refer this Court to the Lease to ascertain its true meaning, legal effect and all questions of law.

40. Admits the allegations contained in paragraph 40 of the Complaint as to the amount of the base rent set forth in the Lease subject to the Affirmative Defenses and Counterclaims set forth herein as to the defendant's rent obligations under the Lease and respectfully refer this Court to the Lease to ascertain its meaning, legal effect and all questions of law.

41. Admits the allegations contained in paragraph 41 of the Complaint as to the amount of the base rent set forth in the Lease subject to the Affirmative Defenses and Counterclaims set forth herein as to the defendant's rent obligations under the Lease and respectfully refer this Court to the Lease to ascertain its meaning, legal effect and all questions of law.

42. Admits the allegations contained in paragraph 42 of the Complaint as to the amount of the base rent set forth in the Lease subject to the Affirmative Defenses and Counterclaims set forth herein as to the defendant's rent obligations under the Lease and respectfully refer this Court to the Lease to ascertain its meaning, legal effect and all questions of law.

43. Denies the allegations contained in paragraph 43 of the Complaint, except admit that plaintiff sent certain correspondence to defendant, and respectfully refers this Court to the referenced correspondent to ascertain its true meaning, legal effect and all questions of law.

44. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 44 of the Complaint.

45. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 45 of the Complaint.

46. Admits the allegations contained in paragraph 46 of the Complaint subject to the Affirmative Defenses set forth herein as to the defendant's rent obligations under the Lease and respectfully refer this Court to the Lease to ascertain its meaning, legal effect and all questions of law.

47. Denies the allegations contained in paragraph 47 of the Complaint.

48. Denies the allegations contained in paragraph 48 of the Complaint.

49. Denies the allegations contained in paragraph 49 of the Complaint.

50. Denies the allegations contained in paragraph 50 of the Complaint and respectfully refer this Court to the Lease to ascertain its meaning, legal effect and all questions of law.

51. Admits that Abhi subleased the Premises from defendant to operate Subway® sandwich shop #50977, and denies the remaining allegations in paragraph 51 of the Complaint.

52. Denies the allegations contained in paragraph 52 of the Complaint and respectfully refers this Court to the referenced correspondent to ascertain its true meaning, legal effect and all questions of law.

53. Denies the allegations contained in paragraph 53 of the Complaint and respectfully refers this Court to the referenced correspondent to ascertain its true meaning, legal effect and all questions of law.

54. Denies the allegations contained in paragraph 54 of the Complaint.

55. Denies the allegations contained in paragraph 55 of the Complaint.

56. Denies the allegations contained in paragraph 56 of the Complaint.

57. Denies the allegations contained in paragraph 57 of the Complaint.

58. Denies the allegations contained in paragraph 58 of the Complaint.

59. Denies the allegations contained in paragraph 59 of the Complaint.

60. Denies the allegations contained in paragraph 60 of the Complaint.

61. Denies the allegations contained in paragraph 61 of the Complaint.

62. Defendant repeats and realleges paragraphs 1 through 61 of this Answer as if set forth more fully herein.

63. Admits that Beth Koppell sent the email annexed to the Complaint as Exhibit D and denies the remaining allegations contained in paragraph 63 of the Complaint, and respectfully refers this Court to the referenced email to ascertain its true meaning, legal effect and all questions of law.

64. Admits that Beth Koppell sent the email annexed to the Complaint as Exhibit D and denies the remaining allegations contained in paragraph 64 of the Complaint, and respectfully refers this Court to the referenced email to ascertain its true meaning, legal effect and all questions of law.

65. Denies the allegations contained in paragraph 65 of the Complaint, except admit that there were certain telephone calls concerning the email annexed to the Complaint as Exhibit D.

66. Denies the allegations contained in paragraph 66 of the Complaint.

67. Denies the allegations contained in paragraph 67 of the Complaint and respectfully refers this Court to the referenced correspondent to ascertain its true meaning, legal

effect and all questions of law.

68. Admits the allegations contained in paragraph 68 of the Complaint and respectfully refers this Court to the referenced email to ascertain its true meaning, legal effect and all questions of law.

69. Denies the allegations contained in paragraph 69 of the Complaint, except admit that there were certain telephone calls concerning the email annexed to the Complaint as Exhibit D.

70. Admits sending a letter advising plaintiff that it would not be exercising its option to renew the Lease, and denies the remaining allegations contained in paragraph 70 of the Complaint.

71. Denies the allegations contained in paragraph 71 of the Complaint.

72. Denies the allegations contained in paragraph 72 of the Complaint.

73. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 73 of the Complaint.

74. Denies having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 74 of the Complaint.

75. Denies the allegations contained in paragraph 75 of the Complaint.

76. Denies the allegations contained in paragraph 76 of the Complaint.

77. Denies the allegations contained in paragraph 77 of the Complaint.

Facts Relevant to the Affirmative Defenses and Counterclaims

78. Plaintiff 223 Avenue B, LLC, as landlord, and defendant Subway Real Estate LLC, as tenant, entered into a written lease agreement dated April 1, 2011 (the "Lease") for commercial retail space known as and located at 223 Avenue B, New York, New York (the

“Premises”).

79. The express purpose of the Lease was to provide Subway with commercial retail space suitable for the operation of a Subway® Sandwich Shop.

80. Article 2 and Sections R6 and R7 and of the Lease makes clear that defendant is to use the Premises solely as a Subway® sandwich shop for the sale of sandwiches, wraps and salads and such other items on features on its national menu.

81. Plaintiff and defendant entered the Lease with the principal and basic expectation that defendant could operate its Subway® Sandwich Shop business alongside other retail stores and restaurants in the East Village neighborhood.

82. Defendant relied on the foot traffic generated from the retail stores and restaurants in the East Village neighborhood, which was a material factor in defendant’s decision to agree to pay the amount of rent sought in the Lease and, indeed, plaintiff’s ability to charge that amount.

83. Without the ability to operate a Subway® Sandwich Shop alongside other retail stores and restaurants in the East Village neighborhood, the transaction between plaintiff and defendant that was embodied by the Lease makes no sense.

84. The unprecedented COVID-19 pandemic resulted in a massive and severe government response that completely shuttered many of the retail stores and restaurants in in the East Village neighborhood. The shutdown utterly and irreversibly frustrated the purpose of the Lease, and indeed rendered both parties’ performance impossible. The same is true when the retail stores and restaurants can open at only a marginal capacity, or when customers are too fearful of profound illness and potential death to venture out to shop and dine.

85. The COVID-19 pandemic was and is an unprecedented and unforeseen health and economic crisis.

86. Upon information and belief, on or about March 7, 2020, Governor Andrew M. Cuomo issued an Executive Order in response to the rapidly escalating COVID-19 public health emergency and declaring a State disaster emergency for the entire State of New York.

87. Upon information and belief, in the ensuing weeks and months, the Governor Cuomo, in a series of executive orders, aimed to “flatten the curve” and slow the spread of COVID-19 by limiting large gatherings of people.

88. Upon information and belief, on or about March 18, 2020, Governor Cuomo issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. By this time, business and commerce in New York State was already at a virtual standstill.

89. Upon information and belief, on or about March 20, 2020, Governor Cuomo issued Executive Order 202.8, which ordered all nonessential businesses to reduce their in-person workforce at any work locations by 100% no later than March 22 at 8 p.m.

90. Upon information and belief, the COVID-19 pandemic has killed more than 400,000 Americans in less than one year and infected millions more.

91. The COVID-19 pandemic and the Executive Orders have completely frustrated the very purpose of the Lease, and made it impossible for the parties to perform.

92. Because of the COVID-19 pandemic, defendant cannot operate its business consistent with the parties’ fundamental understanding, purpose, and expectation at the time the Lease was entered.

93. Defendant’s inability to operate its business has completely frustrated the purpose of the Lease and rendered performance impossible.

94. As a result of the governmental restrictions resulting from the COVID-19

pandemic, defendant was forced to close its operations at the Premises to comply with applicable governmental orders and guidelines and to protect the health and safety of its employees, customers, and the surrounding community.

95. Accordingly, as a result of the COVID-19 pandemic and Executive Orders, and the legal doctrines of frustration of purpose and impossibility of performance, the Lease is rescinded.

96. The COVID-19 crisis and the executive orders affecting defendant's ability to operate its Subway® Sandwich Shop at the Premises constitute a casualty that rendered the Premises unusable, such that defendant is entitled to a complete abatement of rent from March 7, 2020, the date the Governor of New York issued Executive Order 202 declaring a disaster in the State of New York.

97. Even after restrictions limiting operations at the Premises are lifted, the conditions under which restaurants and retailers are expected to operate, and the environment in which they will have to operate, is nothing like what was contemplated and promised at the time the Lease was entered.

98. As a result of the inability to operate, the Subway® Sandwich Shop was closed for business and possession of the Premises was surrendered to plaintiff, as performance under the Lease having been excused by, *inter alia*, the doctrines of frustration of purpose and impossibility of performance.

99. Section R13 of the Lease states "For good and valuable consideration, Landlord agrees to the following provision: In the event of a default by the Tenant, Landlord acknowledges an affirmative duty to mitigate damages and shall in no event accelerate rent due to the remainder of the term. Further, Landlord and Tenant agree that Tenant's liability upon

default shall not exceed twelve (12) months or \$40,000 or the remainder due pursuant to this Lease, whichever is less. Upon termination of this Lease, whether in accordance with this section or otherwise, Tenant shall be permitted access to the Premises to remove any and all logo or trademark items. Such items shall include, but shall not be limited to, signage and murals”.

First Affirmative Defense

100. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

101. The complaint as against the defendant fails to state any causes of action upon which relief may be granted.

Second Affirmative Defense

102. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

103. Plaintiff’s causes of action are barred, in whole or in part, pursuant to Section R13 of the Lease which limits defendant’s liability in the event of default to an amount not exceed twelve (12) months or \$40,000 or the remainder due pursuant to this Lease, whichever is less.

Third Affirmative Defense

104. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

105. Plaintiff’s claims are barred, in whole or in part, because the defendant’s performance under the Lease is excused when superseding, intervening and unforeseeable government action makes performance objectively impossible.

Fourth Affirmative Defense

106. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set

forth more fully herein.

107. Plaintiff's claims against the defendant are barred, in whole or in part, by the doctrine of temporary commercial impracticability

Fifth Affirmative Defense

108. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

109. Plaintiff's claims against the defendants are barred, in whole or in part, by the doctrine of frustration of purpose.

Sixth Affirmative Defense

110. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

111. Plaintiff's claims against the defendant are barred, in whole or in part, because COVID-19 pandemic and the government action in response thereto constitutes a casualty under the Lease and suspends the defendant's rent obligations under the Lease until such time as the casualty is remedied.

Seventh Affirmative Defense

112. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

113. Plaintiff's claims against the defendant are barred, in whole or in part, because the COVID-19 pandemic and the government action in response thereto constitute a taking under the lease and suspends the defendant's obligations under the Lease.

Eighth Affirmative Defense

114. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set

forth more fully herein.

115. Plaintiff's claims are barred, in whole or in part, because the COVID-19 pandemic and the government action in response thereto constitutes a force majeure and suspends the defendants' obligations under the Lease.

Ninth Affirmative Defense

116. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

117. The express purpose of the Lease was to allow defendant to use the Premises as a Subway® Sandwich Shop. Due to superseding, intervening and unforeseeable events related to the COVID-19 pandemic and the government's response, all of which were outside of defendant's control, defendant was deprived of the intended use of the Premises. The purpose of the Lease was frustrated, impossible, illegal and commercially impracticable, and the consideration defendant received in exchange for entering the Lease failed. Accordingly, defendant is entitled to judicial rescission of the Lease.

Tenth Affirmative Defense

118. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

119. The express purpose of the Lease was to allow defendant to use the Premises as a Subway® Sandwich Shop. Due to superseding, intervening and unforeseeable events related to the COVID-19 pandemic, all of which were outside of defendant's control, defendant was deprived of the intended use of the Premises. The purpose of the Lease was frustrated, impossible, illegal and commercially impracticable, and the consideration defendant received in exchange for entering the Lease failed. Accordingly, defendant is entitled to judicial reformation

of the Lease.

Eleventh Affirmative Defense

120. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

121. Plaintiff failed to comply with terms of the Lease and is therefore barred from asserting any cause of action against defendant or its claimed damages must be offset by the amount of damages caused by plaintiff's own failure to comply with the Lease.

Twelfth Affirmative Defense

122. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

123. The Executive Orders were superseding, intervening and unforeseeable act or event that compels the reformation of the defendant's obligations under the Lease, including but not limited to, the requirement to pay rent from March 7, 2020 through the present.

Thirteenth Affirmative Defense

124. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

125. Defendant's obligation to perform any of its alleged obligations under the Lease was excused for a lack of consideration.

Fourteenth Affirmative Defense

126. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

127. Upon information and belief, plaintiff has failed to credit any part of the security deposit under the Lease against its claim for damages. Any judgment awarded to plaintiff must

be offset by the amount of the security deposit under the Lease.

Fifteenth Affirmative Defense

128. Defendant repeats and realleges the proceeding paragraphs of this Answer as if set forth more fully herein.

129. Defendant reserves the right to assert additional affirmative defenses at such time and to such extent as warranted by discovery and the factual developments in this case.

**First Counterclaim
(Rescission For Frustration of Purpose)**

130. Defendants repeats and realleges each and every allegation contained in the proceeding paragraphs of this Answer as if fully set forth herein.

131. The counterclaim seeks rescission of the Leas and a declaration that the Lease is unenforceable as a result of the COVID-19 pandemic and the related government mandated shutdowns. In sum, the cessation of business, commerce, and everyday life in New York State has completely and unforeseeably frustrated the purposes of the Lease, and has rendered performance impossible.

132. The COVID-19 pandemic and Governor Cuomo's Executive Orders have completely frustrated the very purpose of the Lease, and made it impossible for the parties to perform.

133. Because of the COVID-19 pandemic, defendant cannot operate its business at the Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the Lease was entered.

134. An actual controversy of a justiciable nature exists between defendant and plaintiff concerning the rights and obligations of the parties under the Lease.

135. Specifically, plaintiff seeks to enforce the Lease despite the fact that the Lease is rescinded under the doctrine of frustration of purpose.

136. Under New York law, frustration of purpose applies to a situation where an unforeseen event has occurred which, in the context of the entire transaction, destroys the underlying reasons for performing such contract, thus operating to discharge a party's duties of performance.

137. Defendant's inability to operate its business because of a pandemic was completely outside of defendant's control and was not foreseeable at the time the Lease was entered.

138. Defendant has a legally protectable interest in this controversy.

139. Specifically, defendant has a pecuniary interest in a declaration that it has no obligation to pay rent after March 7, 2020, the date Governor Cuomo issued an Executive Order declaring a State of Emergency in New York State as a result of the COVID-19 Pandemic.

140. Therefore, defendant seeks a declaratory judgment of its rights under the doctrine of frustration of purpose.

141. Specifically, defendants seeks a declaration from this Court that the Lease is rescinded as a result of the COVID-19 pandemic and/or the Executive Orders.

142. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

Second Counterclaim
(In the Alternative – Rescission Based on Impossibility of Performance)

143. Defendants repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

144. The Lease requires Defendant to tender the Retail Premises for use as a retail store.

145. The law of impossibility of performance provides that performance of a contract will be excused if such performance is rendered impossible by, inter alia, intervening governmental activities.

146. COVID-19 and/or the Executive Orders have rendered performance by both plaintiff and defendant impossible. Indeed, since early-March, and continuing for months, governmental regulations have rendered defendant's performance under the Lease has been rendered impossible.

147. The impossibility occasioned by COVID-19 and/or the Executive Orders – as well as the “phased” reopening at marginal capacity only – was unforeseen at the time the Lease was entered into and cannot be attributed to the defendants.

148. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

Third Counterclaim
(In the Alternative Reformation of Lease)

149. Defendant repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

150. Defendant's ability to operate Subway® sandwich shop alongside other retail stores and restaurants in the East Village neighborhood was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contracting, and but for its right to operate such business, defendant would not have entered the Lease.

151. As a result of the COVID-19 pandemic and the Executive Orders, defendant's

obligations under the Lease became impossible and impracticable to perform, and defendant was deprived of the consideration it received in exchange for entering the Lease.

152. Defendant's inability to operate its business because of a COVID-19 pandemic and/or the related government shutdown orders was completely outside of defendant's control and was neither foreseen nor foreseeable at the time the Lease was entered.

153. It was the parties' intent that defendant would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable. Had the parties been able to anticipate the events of the COVID-19 crisis at the time of contracting, the parties would have provided language expressly stating their true intent.

154. An actual controversy exists between the parties concerning their respective rights under the Lease, and the defendant has no adequate remedy at law.

155. Based upon the forgoing, the defendant is entitled to judicial reformation of the Lease to reflect the parties' true intent that defendant would have no obligation to pay rent following March 7, 2020, when Governor Andrew M. Cuomo issued an Executive Order in response to the rapidly escalating COVID-19 public health emergency and declaring a State disaster emergency for the entire State of New York, resulting the closure of stores and restaurants in New York's East Village.

Fourth Counterclaim
(Declaratory Judgment that a Casualty Occurred)

156. Defendant repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

157. Article 9 of the Lease provides, in part, that in the event of a casualty, the defendant's obligation to pay rent is abated.

158. Therefore, defendant seeks a declaratory judgment that Article 9 of the Lease entitles defendant to an abatement of rent when a casualty such as the COVID-19 pandemic renders the Premises wholly or partially unusable.

159. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

First Crossclaim

160. Defendant repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

161. Defendant subleases the Premises to Abhimanue Manchanda pursuant to a written Sublease Agreement dated June 1, 2011 (the "Sublease").

162. Pursuant to the Sublease, Abhimanue Manchanda agreed to perform and observe all of the obligations of defendant under its Lease with the petitioner.

163. Upon information and belief, Abhimanue Manchanda owns and/or controls Geeta Fast Food Enterprise, Inc.

164. Upon information and belief, Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc. in the use and occupancy of the Premises and the operation of the Subway® sandwich shop.

165. In the event petitioner recovers a judgment against defendant, such judgment will have been caused, in whole or in part, by reason of the acts or omissions of Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc.

166. Defendant is entitled to a judgment against Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc. for indemnification and contribution for her portion of the judgment.

167. Defendant demands that Abhimanue Manchanda used Geeta Fast Food

Enterprise, Inc. answer this cross-claim.

Second Crossclaim

168. Defendant repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

169. Defendant is entitled to a judgment against Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc. for contribution for his portion of the judgment pursuant to CPLR Article 14.

170. Defendant demands that Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc. answer this cross-claim.

WHEREFORE, defendant Subway Real Estate LLC requests that this Court enter judgment dismissing the complaint with prejudice, and on the first counterclaim, declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of frustration of purpose; alternatively, on the second counterclaim, declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of impossibility of performance; alternatively, on the third counterclaim, reforming the Lease to reflect the parties' true intent that defendant has no obligation to pay rent once it has been deprived of the use of the Premises; alternatively, on the fourth counterclaim, a judgment declaring that a casualty occurred and that the rent must be abated; and a judgment on its first and second cross-claims against Abhimanue Manchanda used Geeta Fast Food Enterprise, Inc. for indemnification and contribution in amounts to be determined at trial; together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 27, 2021

KAUFMAN & KAHN, LLP

By: /s/ Robert L. Kahn

Robert L. Kahn, Esq.

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VERIFICATION

[illegible]

Robert L. Kahn, being one of the attorneys for the defendant Subway Real Estate LLC, hereby affirms under the penalties of perjury and pursuant of CPLR 2106 that I have read the foregoing answer, counterclaims and crossclaims and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true. The basis for my beliefs are conversations with defendant and review of relevant documents. The reason I make this verification rather than defendant is that defendant is a foreign limited liability company and located in a county other than where I have my office.

Dated: New York, New York
January 27, 2021

/s/ Robert L. Kahn

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: New York, New York
January 27, 2021

/s/ Robert L. Kahn
Robert L. Kahn