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.	Index No. 655632/2020 Part 48, Masley, J. Motion Sequence No. 001

MEMORANDUM OF LAW OF PLAINTIFF SCHULTE ROTH & ZABEL LLP IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff Schulte Roth & Zabel LLP ("SRZ") submits this brief in opposition to the motion of defendant Metropolitan 919 3rd Avenue LLC, in its individual capacity and as successor in interest to 919 Third Avenue Associates L.P. ("Landlord"), to dismiss the complaint (NYSCEF Doc. No. ("NYSCEF") 2; the "Complaint").

PRELIMINARY STATEMENT

This straightforward breach of contract case revolves around a single, specially negotiated, paragraph in a lease. That paragraph definitively provides rent abatement relief to SRZ, the tenant, on the ground that, since mid-March 2020, it has been unable to use the premises for the ordinary conduct of its business due to factors (relating to the pandemic) entirely beyond either party's control. Landlord, finding itself obliged to excuse rent payments but unwilling to forgo rental income, is struggling to wriggle out of this provision, notwithstanding that the provision was custom-crafted and agreed upon by these parties for invocation in just such a situation. Flailing around to find footing, Landlord introduces its attack on the rent abatement provision by taking SRZ to task for having adapted to this crisis. The resort to this utterly beside-the-point argument as a starting-off point argument heralds the weakness of the remaining assertions proffered to support this motion, which constitutes Landlord's misguided effort at dismissal.

More specifically, SRZ, a law firm, is headquartered at 919 Third Avenue in New York City. SRZ leases its offices (the "Premises") pursuant to an Agreement of Lease with Landlord, a huge realty company with billions in assets (NYSCEF 12; with amendments, the "Lease"). The Lease entitles SRZ to rent abatement "in the event that ... [SRZ] is unable to use the Premises, or any portion thereof ..., for the ordinary conduct of [SRZ]'s business ... if [SRZ]'s inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays," provided that SRZ notifies Landlord of this condition (an "Abatement Notice"), and the

condition continues for 15 business days after that Notice (Lease § 5.4; the "Rent Abatement Provision"). The Lease (Article 24) defines "Unavoidable Delays" as including "any cause whatsoever reasonably beyond [a] party's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any Legal Requirements [*i.e.*, laws, rules, requirements, executive orders, and the like]." The devastating pandemic that has swept our nation – and the entire world – fits the clause's parameters perfectly.

In mid-March, SRZ was forced from its offices by the COVID-19 public health emergency, and it since has been unable to use the Premises for the ordinary conduct of its business due to the continued raging of the pandemic and related government executive orders, rules, and requirements. Accordingly, SRZ – having given the requisite Abatement Notice and allowed 15 days to elapse – is entitled to rent abatement.

Landlord, however, argues that it is entitled to collect the full rental amount, notwithstanding the clear, and clearly applicable, Lease provisions. It therefore refuses to recognize SRZ's entitlement to rent abatement, compelling SRZ to turn to litigation for enforcement of its contractual right. In its motion to dismiss, Landlord asks this Court to terminate this action now, ignoring the rule that a plaintiff is entitled to all favorable inferences, and desperately attempting to avoid the clear, unambiguous, and agreed-upon Rent Abatement Provision by shamelessly portraying its invocation by SRZ as opportunistic, rewriting it, turning plain meaning and rules of grammar on their heads, burying the actual wording of the critical Provision deep within its brief (NYSCEF 9; "LLBr.") – incredibly, it is not *until page 14* of its brief that Landlord quotes the Rent Abatement Provision in full – and obfuscating the record

with questionable documents that, at most, raise factual issues to be explored. Landlord's plan of deflection cannot succeed – and its motion should be denied in all respects.

BACKGROUND

On May 13, 1998, after over four months of negotiations (including negotiations of the Rent Abatement Provision), SRZ and Landlord entered into the Lease, pursuant to which Landlord leased to SRZ, and SRZ established its New York offices at, the Premises. Complaint ¶¶ 17-18, 20. The Rent Abatement Provision of the Lease prescribes that if, for at least 15 business days after SRZ has given an Abatement Notice, SRZ is unable to use the Premises for the ordinary conduct of its business due to events beyond the parties' control – including a critical public health emergency, New York State executive orders, or other governmental mandates – then SRZ is entitled to rent abatement until it is once again able to utilize the Premises as usual.

Specifically, the Rent Abatement Provision (Lease § 5.4; NYSCEF 12 at 248) reads as follows:

> Notwithstanding anything to the contrary contained in any other provision of this Lease, in the event that (a) **Tenant is unable to use the Premises,** or any portion thereof consisting of 750 Rentable Square Feet or more, **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 or any Tenant Party, **then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated as to the Premises or affected portion** 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, and ending on the earlier of (i) the date Tenant reoccupies the Premises or such portion thereof for the ordinary conduct of its business, or (ii) the date on which such condition is substantially remedied and Landlord has notified Tenant thereof.[1]

The definition of "Unavoidable Delays" is found in Article 24 of the Lease (NYSCEF 12 at 313-14):

> strikes or labor troubles or ... accident, or … **any cause whatsoever reasonably beyond such party's control**, **including but not limited to, laws, governmental preemption in connection with a national emergency or** ... **any Legal Requirements** or ... the conditions of supply and demand which have been or are affected by war or other emergency ...

The term "Legal Requirements" as used in that definition "means all present and future **laws, rules, orders, ordinances, regulations, statutes, requirements, codes, executive orders, and any judicial interpretations thereof**, extraordinary as well as ordinary, of all Governmental Authorities [which, in turn, is defined to include all federal, state and city and other governmental authorities]." Lease at 3; NYSCEF 12 at 227.

That other, unspecified, factors beyond the parties' control equally qualify as Unavoidable Delays is underscored by the "including **but not limited to**" language in Article 24 – and by the Lease's caution (§ 32.3(a); NYSCEF 12 at 327) that "Whenever the words 'include', 'includes', or 'including' are used in this Lease, they shall be deemed to be followed by the words 'without limitation.'"[2]

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[1] In quoted material herein, all emphases are added, and all internal quotation marks and citations are omitted.

[2] As here relevant, § 32.3(a) of the Lease also bars changes and modifications to Lease terms "except by a writing, executed by the party against whom enforcement of the change [or] modification ... is to be sought"; and states that "[t]he captions hereof ... in no way define, limit or describe the scope of this Lease nor the intent of any provision thereof."

The parties have extended the Lease and amended it eight times, without making any change to the Rent Abatement Provision or the definition of Unavoidable Delays. Complaint ¶¶ 17, 21.

There is no disputing that COVID-19 presents a global public health disaster. Complaint ¶¶ 26-30, 33-35. By mid-March 2020, executives at all levels of government had declared a state of emergency, and the highly contagious and extremely dangerous virus effectively had paralyzed New York City. *Id.* ¶¶ 4, 31-32, 35. SRZ, like many other New York businesses, was forced to vacate its offices as of March 13. *Id.* ¶¶ 4, 39.

Governor Cuomo took swift action, issuing a wave of executive orders to mitigate the spread of the virus, including Executive Orders 202.6 through 202.8, requiring businesses to implement telecommuting and work-from-home procedures "to the maximum extent possible." Complaint ¶¶ 36-38; NYSCEF 14, 15, 16, 17 at 11 (lawyers must work remotely and any related essential services "should be conducted as remotely as possible"). Executive Order 202.8, further, mandated that businesses "reduce the[ir] in-person workforce ... **by 100%**" by March 22. NYSCEF 16.

On March 31, 2020, still subject to these extraordinary impediments to normal working conditions (and the 15-day waiting period for notice having elapsed), SRZ provided Landlord with an Abatement Notice, advising that SRZ was prevented from conducting business as usual from the Premises as a result of Unavoidable Delays relating to the COVID-19 pandemic emergency. Complaint ¶ 45; NYSCEF 18. On April 3, Landlord rejected the Abatement Notice, based solely on a tortured rewrite of the Rent Abatement Provision – under which no abatement would be available for Unavoidable Delays unless the Premises were rendered unusable *due to a*

breach of the Lease by Landlord. Complaint ¶ 46; NYSCEF 19. Landlord did not dispute that the prevailing conditions constitute Unavoidable Delays.

Nor has Landlord disputed that SRZ was unable to use the Premises for the ordinary conduct of its business from March 13, 2020 until June 22, 2020. On that date, Governor Cuomo permitted office-based businesses to reopen partially, at *no more than* 50% capacity, but that permission was conditioned on compliance with substantial safety and health requirements, including rigorous social distancing restrictions – which requirements continue to apply. Complaint ¶ 41. Indeed, it has been the Governor's clear and unwavering message that following all health protocols is of paramount concern, trumping all other considerations: his reopening plan makes clear that "Even as we reopen, we must **continue our aggressive mitigation efforts**, **until the threat of COVID-19 is completely eradicated**," and emphasizes that "all citizens" must live up to their "important role" in "combating this crisis – an individual responsibility to uphold their end of the social contract, show respect for their fellow New Yorkers, and help keep those around them safe. That means **continuing to social distance,** continuing to wear a mask, continuing practicing good hand hygiene or wearing gloves, and **continuing to stay inside as much as possible**"; "**Staying inside and avoiding others**"; and "**telecommuting or working from home** – policies that will inevitably **need to continue** and expand." *New York Forward, A Guide to Reopening New York & Building Back Better*, May 2020, at 41, 76, 78, 93.[3] As for "the ordinary conduct of business," the Governor's message

[3] https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf. *See also* NYSCEF 22 at 1, 2, 6, 7, 11 ("the best way to reduce the spread of COVID-19 and protect employees is to continue work from home as much as possible"; consider reopening standards only "[i]f you must require employees to leave home to work"; "Should my employees continue to work remotely if possible? Yes."; "Allow employees to telecommute if the job allows"); NYSCEF 24 at 3-5 (areas that do not allow for social distancing

could not be clearer: "As businesses reopen, **they will not be returning to business as usual**." *Id.* 57.[4]

Accordingly, because of the continued raging of the virus and the restrictions and conditions on reopening, compounded by the overarching, government-dictated, public health rules, requirements and practices that lawyers, staff, and clients must follow to keep themselves and others safe during the pandemic, SRZ remained – and remains to this day – unable to use its offices for the ordinary conduct of its business. Complaint ¶¶ 41-43. The Complaint alleges as much, and there can be no serious question about it by anyone living or working in New York City.

On October 23, 2020, after fruitlessly trying to engage Landlord in discussion, SRZ (which has continued making its rent payments to Landlord, under protest (Complaint ¶ 48))[5] was compelled to commence this action to remedy Landlord's steadfast refusal to honor the agreed-upon Rent Abatement Provision. In its Complaint, SRZ asserts two causes of action: for breach of the Lease's Rent Abatement Provision, and for a declaration that SRZ is entitled to enforcement of that Provision pursuant to its Abatement Notice. Complaint ¶¶ 55-58, 66.

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must be closed; employers "should create policies which encourage employees to work from home when feasible").

[4] *See also* NYSCEF 21 at 2 (Cuomo: "we can't just re-open and go back to where we were and what we were doing before"); Around The ABA, July 2020, *After COVID-19, returning to the office won't be business as usual*, https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-july-2020/office-after-pandemic/ ("don't expect law firms to return to business as usual anytime soon").

[5] Landlord's harping on SRZ's ability to pay rent (*e.g.*, LLBr. 2) is simply a distraction. SRZ seeks to enforce a contractual right based on a negotiated agreement. SRZ's ability to pay notwithstanding that right – and speculation by Landlord about SRZ's ability to pay – does not enter the calculus, just as Landlord's size and economic strength do not.

Doubling down on its convoluted reimagining of the Rent Abatement Provision, Landlord has moved to dismiss.

STANDARD OF REVIEW

In considering this motion to dismiss – as Landlord agrees (LLBr. 9) – 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). Further, because SRZ's allegations must be accepted as true, SRZ has no obligation at this juncture to shore them up with "demonstrations," "showings," or "explanations," and the Court must disregard Landlord's insistence otherwise. LLBr. 12, 13, 19, 21.

ARGUMENT

I. LANDLORD'S MOTION MUST BE DENIED BECAUSE THE LEASE CLEARLY AND UNAMBIGUOUSLY ENTITLES SRZ TO THE RENT ABATEMENT IT SEEKS

A. Under A Straightforward Reading Of The Rent Abatement Provision, There Is No Question That SRZ Is Entitled To Rent Abatement

The Rent Abatement Provision (*supra* 3-4) describes the circumstances in which SRZ is entitled to rent abatement. The parties' dispute revolves primarily around the first branch of this test, at Lease subsection 5.4(a):

> ... in the event that (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 ...

This subsection recognizes two separate and independent triggers for the availability of rent abatement relief: if SRZ is unable to use all or part of the Premises for the ordinary conduct of its business either "**due to Landlord's breach** of an obligation under this Lease," "**or** ... **result[ing],** in whole or in part, from Unavoidable Delays." In the latter situation – that is, when the inability to use the Premises ordinarily has resulted from Unavoidable Delays – the Lease provides that SRZ is entitled to rent abatement after the passage of 15 days and an Abatement Notice.

This is the case here. SRZ's ability to conduct business in the normal course in its offices surely and definitively has been prevented by Unavoidable Delays, and SRZ has complied with the requisite waiting period and notice provisions. Both sides agree: "the clear words of the [L]ease must control," and "the Court must simply enforce the Lease according to its unambiguous terms." LLBr. 1, 3. The Rent Abatement Provision, therefore, must be enforced.

B. Landlord's Alternate Proposed Rent Abatement Provision Diverges Intolerably From The Agreed-Upon Language Of The Lease

Landlord's motion is anchored on its reconstruction of the Lease to make it say something that it plainly does not; that is, to provide that, Unavoidable Delays or not, there can be no rent abatement unless SRZ's inability to conduct business as usual from the Premises *flows from a Landlord breach*. *E.g.*, LLBr. 13-19. Thus, rather than following the Lease's plain distinction between unusable Premises flowing from a Landlord breach vs. unusable Premises flowing directly from Unavoidable Delays, Landlord has introduced a rewrite that does not address the latter situation at all (and provides no rent abatement whatsoever in the event that SRZ is unable to conduct business as usual in its offices as a direct result of Unavoidable Delays) – and instead, inexplicably, distinguishes between different causes of Landlord breaches. *E.g.*,

id. 5. This stance is irreconcilable with the language and the construct of the Rent Abatement Provision.

Defying grammar and syntax, Landlord argues that Landlord's proffered rent abatement provision and the Rent Abatement Provision in the Lease are one and the same. This ill-fated exercise results primarily from a tortured reading of the parenthetical in subsection (a) of the Rent Abatement Provision:

> (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)

The word "or," the parentheses setting this provision off from the rest of the subsection, and the absence from the parenthetical of any reference to a predicate Landlord breach, make clear that the word "results" directly relates to "Tenant's inability to use the Premises or portion thereof" – not, as Landlord would prefer, to "Landlord's breach." Put another way – and it is almost ridiculously obvious to say so – the key word is "or." In other words, the parenthetical can only naturally be read to address the scenario in which Unavoidable Delays on their own – untethered to any Landlord action or inaction – have impeded SRZ's ability to use its offices. *See U.S. v. Woods*, 571 U.S. 31, 45-46 (2013) ("or" "is almost always disjunctive, that is, the words it connects are to 'be given separate meanings'"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 330 (1979) (clause following "or" given independent significance); *Advanced Alt. Media, Inc. v. Hindlin*, 2020 WL 4754601, *3 (Sup. Ct. N.Y. Cnty. Aug. 14, 2020) (Masley, J.) ("or" must be given effect).

To construct the alternate rent abatement provision for which Landlord strains – in which the parenthetical would relate to SRZ's inability to conduct business from its offices *because Landlord breached* and *if Landlord breached because of Unavoidable Delays* – one would have

to amend the parenthetical to delete the words "if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from." That extreme surgery completed, the parenthetical might be read to modify "Landlord's breach." Alternatively, one might alter the parenthetical to insert a direct reference to "Landlord's breach." Indeed, Landlord does just that in its brief, slipping in additional words, and misrepresenting to the Court that the parenthetical applies "[w]here Tenant's inability to use the Premises is due to **a Landlord default resulting from** an Unavoidable Delay." LLBr. 5; *see also id.* 14, 18.

Either way, Landlord's attempted unilateral modification of the Lease (barred under Lease § 32.3(a); *supra* 4n.2) must fail: the Court "may not, in the guise of interpreting a contract, add or excise terms." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 398 (2009). As this Court has held, that a contract's plain language is disadvantageous toward one party "is not a reason to disregard it." *Advanced Alt. Media*, 2020 WL 4754601 at *3. [6]

Furthermore, Landlord's argument transforms the Abatement Notice clause of the Rent Abatement Provision – conditioning rent abatement on "Tenant giv[ing] a notice to the Landlord ... stating that Tenant's inability to use the Premises or such portion thereof is solely due to such condition" – into a nonsensical requirement. If the parenthetical were meant to propose different reasons *for a Landlord breach*, how would *SRZ* ever be able to notify Landlord about the *sole reason* behind a breach *by Landlord*? On the other hand, the paragraph is sensible as SRZ reads

[6] Nor may the courts rewrite contractual provisions based on the supposed wherewithal of a party. *See W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (a clear and complete writing should be enforced according to its terms); *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Cap., Inc.*, 30 N.Y.3d 572, 581 (2017) (courts must honor "the parties' agreement on the allocation of the risk of economic loss in certain eventualities").

it: SRZ readily should be able to discern whether an impediment to its ordinary use of its offices flows from Landlord breaches or from Unavoidable Delays. As Landlord concedes, "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." LLBr. 10. *See Mionis v. Bank Julius Baer & Co.*, 301 A.D.2d 104, 109 (1st Dep't 2002) (courts must interpret contracts so as to give meaning to all of their terms).

Nor can the Court accept Landlord's ancillary, but equally strained, grammatical acrobatics:

(a) Landlord contends that SRZ improperly construes all references in the Rent Abatement Provision to its *use* of the Premises as connoting *use for the ordinary conduct of its business*. LLBr. 18-19. But Landlord is wrong: a plain reading of the Rent Abatement Provision compels the conclusion that the Section 5.4(a) parenthetical's reference to "[SRZ]'s inability to use the Premises" clearly harkens back to the same inability described at the outset of the Rent Abatement Provision; *to wit*, "[inability] to use ... **for the ordinary conduct of [SRZ]'s business**." Equally clearly, Section 5.4(b)'s requirement that SRZ "not actually" use the Premises refers back to, and ensures the *bona fides* of, that same inability. *See also* Rent Abatement Provision at (i), providing that any abatement ends once SRZ "reoccupies the Premises or such portion thereof **for the ordinary conduct of its business**." To read the Rent Abatement Provision otherwise would be to undermine impermissibly the import of the phrase "for the ordinary conduct of [SRZ]'s business," and to warp the Provision (to Landlord's advantage) by ignoring the rules of parallel construction and inserting new, more burdensome (to SRZ) requirements into the Lease. *See Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961) (courts must not construe a provision so as to render a word or phrase inoperative).

(b) Landlord does not dispute that the various executive orders and other rules and requirements governing life under COVID-19 qualify as Unavoidable Delays, as they are "cause[s] beyond [the parties'] control, **including but not limited to**, laws, governmental preemptions in connection with a national emergency, or ... Legal Requirements." Lease Art 24 (*supra* 4). Landlord does, however, dispute that the pandemic itself – although unquestionably "beyond [the parties'] control" – qualifies. LLBr. 13. This quibble is grounded in Landlord's insistence on reading the phrase "including but not limited to" right out of Article 24. Of course, such unilateral erasure of inconvenient contractual language is impermissible. *Corhill*, 9 N.Y.2d at 599 ("It is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect"). Moreover, Landlord's claim that it has a license to ignore this contractual language under *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902-03 (1987), is unfounded. There, the "catchall" provision – *to wit*, "or **similar** causes beyond the control of such party" – is modified by "similar," a modification absent from the Lease. Moreover, to avoid any doubt, the Lease expressly emphasizes that the word "including" always must be read "including **without limitation.**" § 32.3(a) (*supra* 4). No such contractual emphasis on all-inclusiveness was present in *Kel Kim*. *And see Advanced Alt. Media*, 2020 WL 4754601 at *2 ("include" is "generally a term of enlargement").

(c) The phrase "in each case" in the first scenario described in Section 5.4(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 ...

refers back to the three enumerated types of Landlord breaches, *each of which* entitles SRZ to rent abatement *if not caused by Unavoidable Delays or Tenant Delays*. The phrase "in each

case" plainly was inserted to clarify that this condition for triggering rent abatement applies to each of those just-listed types of breaches. It is not, as Landlord proposes, surplusage, nor does it change the meaning of everything that follows. LLBr. 17-18.

(d) Similarly, "such condition," as used throughout Section 5.4 – for example:

> ... in the event that (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**, ...

– per any plain reading of the paragraph, refers to unfitness of the Premises for SRZ's ordinary conduct of its business – regardless of the cause. Landlord's wishful thinking that "such condition" must mean "Tenant's inability to use the Premises **due to Landlord's breach**" (LLBr. 15) utterly lacks textual support.

Landlord's repetitive and head-spinning double talk continues, arguing that "such condition" as used in Section 5.4(c) cannot possibly be read to refer to Unavoidable Delays (LLBr. 15-16) – a *non sequitur*, as SRZ does not claim otherwise.[7]

II. IF, *ARGUENDO*, THE COURT FINDS THAT THE LEASE MAY BE AMBIGUOUS, THEN THE COURT CANNOT CONSTRUE IT AS A MATTER OF LAW – AND MUST DENY LANDLORD'S MOTION

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Phillies Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "A contract is unambiguous if the language it uses has a definite and

[7] Nor can Landlord derive comfort from the captioning of the Article 5 of the Lease. LLBr. 4. The Lease expressly bars that argument at Section 32.3(a) (*supra* 4n.2).

precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Ibid.* In other words, a contract is not ambiguous unless "on its face [it] is **reasonably** susceptible of more than one interpretation." *Telerep, LLC v. U.S. Int'l Media, LLC*, 74 A.D.3d 401, 402 (1st Dep't 2010) (quoting *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986)).

Here, neither party contends that the Lease clauses in question are in any respect ambiguous; while the parties now appear to read the language differently, that, by itself, does not create an ambiguity. That said, even if the issue of ambiguity *were* before the Court, and even if the Court found the language to be ambiguous, "it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate." *Telerep*, 74 A.D.3d at 402.[8] This is because "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent," the best evidence of which "is what they say in their writing." *Greenfield*, 98 N.Y.2d at 569.[9] But if that language is unclear on its face, or susceptible of different interpretations, then the parties must be given an opportunity to clarify it through litigation – including via evidence of intent.

That rule has relevance here. If SRZ were to offer evidence of intent, it would demonstrate that when the Rent Abatement Provision was being negotiated (in 1998 and 1999), all computer-dependent businesses were concerned about the "Y2K bug" – the alarm by computer programmers and engineers that the commencement of the year 2000 would cause

[8] *See also Almah LLC v. AIG Emp. Servs., Inc.*, 157 A.D.3d 416, 416 (1st Dep't 2018) ("If a contract is ambiguous, the complaint should not be dismissed pre-answer before the development of a full factual record as to the parties' intent.").

[9] *See also, e.g.*, *Riverside S. Planning*, 60 A.D.3d at 66 ("the fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing").

widespread technological mayhem and possibly render the Premises unavailable, through no breach by Landlord of any of its obligations. SRZ would show that the Rent Abatement Provision was crafted deliberately so as to cover the possibility that SRZ would become unable to use the Premises due to causes beyond either party's control: in it, the parties agreed, in substance, that SRZ would bear the risk and cost of a 15-day shutdown, but if the anticipated problem exceeded 15 days, SRZ would be entitled to rent abatement. The current pandemic is exactly the kind of crippling Unavoidable Delay contemplated by the Lease.

Landlord's unsupported suggestion (LLBr. 11n.3), that the significance of any such parol evidence somehow was extinguished by amendment of the Lease over the years, is wrong and contrary to the Lease amendments themselves. The relevant Lease provisions never have been deleted or modified in any respect. Indeed, except as amended, "the Lease continues and remains unmodified and in full force and effect, and the Lease as … amended is ratified and confirmed." NYSCEF 12 at 9, 22, 23, 46, 101, 113, 126, 144, 177.

In sum, as explained above, Landlord's new version of the Rent Abatement Provision is at odds with the plain language of that paragraph, stretching it beyond its reasonable limits and undermining its syntax and structure – and equally at odds with the Rent Abatement Provision's history.

III. TO THE EXTENT THAT LANDLORD'S MOTION IS ROOTED IN ITS CONTENTION THAT SRZ IS INVOKING A *FORCE MAJEURE* CLAUSE, IT MUST BE DENIED, AS THE ARGUMENT IS A STRAW MAN

Landlord misrepresents SRZ's claim of breach of the Rent Abatement Provision as a garden-variety *force majeure* claim, arguing that "existence of an 'Unavoidable Delay,' in and of itself, does not excuse" SRZ from paying rent. LLBr. 6. Contrary to Landlord's attempted obfuscation, SRZ is *not* asserting a general *force majeure* claim, arguing that forces beyond its control unconditionally excuse its performance. Put slightly differently, SRZ does not contend

in a vacuum that it need not pay rent due to the COVID-19 pandemic or the related extraordinary government action; rather, SRZ seeks to enforce a negotiated, specific, express contractual right to contractually defined relief.[10] Although Article 24 – the Lease's "reverse" *force majeure* provision (LLBr. 6) – is relevant here to the extent that it defines a term ("Unavoidable Delays") employed in the Rent Abatement Provision, the existence of Article 24 is not a bar to SRZ's claim, which is made under that separate Provision. Complaint ¶ 11. In fact, as Landlord points out (LLBr. 11-12), Article 24 provides that SRZ's obligation to pay rent will be affected by Unavoidable Delays to the extent "expressly provided herein" – and the Rent Abatement Provision is just such an express provision.

Landlord's attempt to shoehorn this case into Article 24 continues with its stab at imposing a new condition on the Rent Abatement Provision, to the effect that the Unavoidable Delays at issue must not only have rendered the Premises unusable by SRZ for the ordinary conduct of its business (as required in that Provision), but also must have prevented or delayed SRZ's ability to pay its rent. LLBr. 12. Because this additional, layered on requirement is found nowhere in the Rent Abatement Provision – the breach of which Provision underlies the Complaint – Landlord's efforts in this respect cannot succeed. Thus, SRZ need not allege that a *force majeure* event undermined its ability to pay rent, and it follows that the *force majeure* cases cited by Landlord are inapposite, as none concerns a tenant invoking a contract clause separate and apart from a *force majeure* provision.[11]

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[10] And while Landlord's presentation seems to raise the specter of opening a flood of litigation, this lawsuit, and the critical provision of the parties' Lease, is very specific, and does not implicate other commercial leases (which do not have a similar provision) that apply to other premises throughout this City.

[11] *E.g.*, *Kel Kim*, 70 N.Y.2d at 902 (lessee sought relief under *force majeure* clause); *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 68 A.D.3d 562, 562 (1st Dep't 2009) (tenant sought relief under *force majeure* clause).

IV. LANDLORD'S EVIDENTIARY PROFFER DOES NOT SALVAGE ITS MOTION, AS IT FAILS CONCLUSIVELY TO REFUTE SRZ'S ALLEGATIONS OR TO ESTABLISH A DEFENSE AS A MATTER OF LAW

Although most of Landlord's brief revolves around its attempted redraft of the Rent Abatement Provision, it also has a backup argument. Landlord's Plan B requires this Court's acceptance, on this motion to dismiss, of so-called "documentary evidence" external to the Complaint, and not referenced in its allegations. With that "evidence," Landlord strains to establish that, since June 22, 2020, all of SRZ's employees have been able to occupy the Premises at one time and therefore, purportedly, SRZ has *not* been "unable to use the Premises, or any portion thereof …, for the ordinary conduct of [its] business" (LLBr. 3, 19-21).

On a motion to dismiss under CPLR 3211(a)(1), the movant "bears the burden of demonstrating that the proffered [documentation] **conclusively refutes** plaintiff's factual allegations," and the Court may not dismiss the complaint unless "the documentary evidence **establishes a defense** to the asserted claims **as a matter of law**." *Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d 100, 106 (2018).[12] Landlord's proffer falls far short of the mark.

A. Landlord Has Not Proffered Acceptable "Documentary Evidence" Within The Meaning Of CPLR 3211(a)(1)

Not every document constitutes acceptable "documentary evidence" for purposes of CPLR 3211(a)(1). "'Documentary evidence' actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal." Higgitt, *Practice Commentary*, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:10 (2016). In the First Department, to qualify, a submission must meet each of three criteria: "(1) it is

[12] *See also, e.g.*, *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002) (CPLR 3211(a)(1) dismissal not warranted unless proffer "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law").

unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable." *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019) (quoting *Fontanetta v. Doe 1*, 73 A.D.3d 78, 86-87 (2d Dep't 2010)).[13]

Applying those standards, the courts have concluded that "factual affidavits do not constitute documentary evidence within the meaning of the statute." *Serao v. Bench-Serao*, 149 A.D.3d 645, 646 (1st Dep't 2017).[14] Nor do documents that "can best be characterized as letters, summaries, opinions, and/or conclusions of the defendants" (*Fontanetta*, 73 A.D.3d at 87), or documents such as newspaper articles and printouts of web pages, which are not of "undisputed authenticity" (*Springer v. Almontaser*, 75 A.D.3d 539, 540 (2d Dep't 2010)).

Applying these standards, it is clear that the bulk of the materials on which Landlord relies do not constitute "documentary evidence" in the sense required by the CPLR, and therefore cannot support a dismissal. This Court cannot give credence on this motion to the Mac Avoy Affirmation, Munafo Affidavit, purported summaries of SRZ "swipes" or of SRZ staff, or printouts of an article, of a real estate brokers' publication, and from a database. NYSCEF 10, 25, 28, 29, 30, 32, 33.

Because these materials do not constitute qualifying "documentary evidence," Landlord's argument grounded in them – regarding how many SRZ employees could be packed into the Premises – should be denied. *See Fontanetta*, 73 A.D.3d at 87 (because "defendants' printed materials were not 'documentary evidence' ... their submissions were insufficient as a matter of law to grant their motion").

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[13] *See also* Siegel, *Practice Commentaries*, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:10, at 21–22.

[14] *See also Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 657 (1st Dep't 2016) ("[A]n affidavit – let alone an affirmation – is not documentary evidence").

B. Even If, *Arguendo*, Landlord's Proffer Were Qualifying "Documentary Evidence," It Does Not Justify Dismissal

Even assuming, contrary to law, that the Court properly could consider Landlord's documents, those materials would not change the result, for at least two reasons: they neither conclusively refute SRZ's factual allegations, nor establish a defense to SRZ's claims as a matter of law.

First, Landlord's documents are offered in service of what is a grossly oversimplified and wrong-headed analysis. Its materials supposedly show that, notwithstanding New York's 50% maximum occupancy limitation for office-based businesses, SRZ may have all of its employees safely working as usual on the Premises. *E.g.*, LLBr. 8-9, 19-20. Those documents, however, do not begin to demonstrate this theory – especially not *conclusively*, as is required. And Landlord's proffer certainly does not resolve all of the factual issues it attempts to raise, as it must. *Foster v. Kovner*, 44 A.D.3d 23, 28 (1st Dep't 2007) (documentary evidence "must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"). Instead, at most, the proffer leaves unanswered the question of whether the Premises safely can accommodate 50% of the SRZ employees conducting business in the normal course – because it entirely ignores such factors as the nature of the day-to-day conduct of SRZ's business in the pre-pandemic world, including reliance on in-person meetings among lawyers, with staff, and with clients; the physical layout of each of SRZ's office floors at the Premises, including whether there is office sharing and communal areas that do not allow for social distancing; differentiations among floors; the fact that the certificate of occupancy, on its face, presents per floor occupancy limits, and not an overall, aggregate number (NYSCEF 31); and the many COVID-related restrictions binding office-based activities, such as mandatory social distancing. Further, Landlord's callous pronouncement that SRZ should "send all of its attorneys back to the

office" (LLBr. 21n.10) flies in the face of the overarching, government sanctioned, guiding principle for safely enduring the still-raging pandemic: to the extent possible, stay home and avoid others. *Supra* 6. The key issue here is whether SRZ has been able to conduct its business in the normal course – not in some alternate-universe world where everyone could be reconfigured or realigned simply to satisfy an occupancy requirement, working habits could be altered, and everyone has received effective vaccination. *See D2 Mark LLC v. OREI VI Invs. LLC*, 2020 WL 3432950, *5 (Sup. Ct. N.Y. Cnty. June 23, 2020) (Masley, J.) ("the Governor's EOs … are persuasive authority that support [the] contention that what is reasonable during normal business times, may not be reasonable during a pandemic").

Second, Landlord's documents do not support any defense to SRZ's allegations as a matter of law. Instead, the "submissions, at best, raise[] issues of **fact**" – and in such circumstances, a CPLR 3211(a)(1) motion should be denied. *Bernstein v. Oppenheim & Co., P.C.*, 160 A.D.2d 428, 433 (1st Dep't 1990).[15]

In sum, Landlord's purported "documentary evidence" fails woefully to establish, as is required, either a conclusive refutation of SRZ's allegations or a conclusive defense as a matter of law to SRZ's well-pleaded claims.

[15] In light of Landlord's documentary proffer on this motion, and the failure of its submission conclusively to undermine SRZ's allegations, it is hypocritical for Landlord to claim that *it* is entitled to a declaratory judgment because "there are no relevant factual disputes." LLBr. 10. Further, SRZ's allegations decidedly "demonstrate the existence of a bona fide justiciable controversy ... involving substantial legal interests for which a declaration of rights will have some practical effect." *Palm v. Tuckahoe Union Free School Dist.*, 95 A.D.3d 1087, 1089 (2d Dep't 2012). Accordingly, Landlord's motion to dismiss the declaratory judgment cause of action in the Complaint must be denied.

CONCLUSION

The Complaint more than adequately pleads SRZ's breach of contract and declaratory judgment claims relating to its entitlement, under the Rent Abatement Provision, to rent abatement (starting 15 days after it sent the Abatement Notice and continuing until it is able to resume conducting business as usual from the Premises). Accordingly, Landlord's motion should be denied in all respects.[16]

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[16] If *arguendo* this Court, nonetheless, should determine to grant Landlord's motion in full or in part, SRZ respectfully requests that it be without prejudice, and with leave to replead.

CERTIFICATE OF COMPLIANCE WITH COMMERCIAL DIVISION RULE 17

PETER N. WANG certifies that this brief complies with the word count limitation under Rule 17 in that it contains 6,925 words, exclusive of the portions of the brief not subject to counting pursuant to Rule 17.

/s/ Peter N. Wang
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