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

EAST 16TH STREET OWNER LLC,	:	
	:	Index No. 653839/2020
Plaintiff,	:	
	:	
- against -	:	
	:	
UNION 16 PARKING LLC and TMO PARENT LLC,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW
IN SUPPORT OF LANDLORD'S MOTION FOR AN ORDER
DIRECTING DEFENDANTS TO PAY RENT *PENDENTE LITE*

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Plaintiff EAST 16TH STREET OWNER LLC ("**Landlord**") respectfully submits this memorandum of law in support of Landlord's motion for an order directing Defendant UNION 16 PARKING LLC ("**Tenant**") and defendant TMO Parking LLC ("**Guarantor**") (jointly, "**Defendants"**) to pay directly to Landlord *pendente lite* rent and additional rent of $127,316.67 each month during the pendency of this action.

PRELIMINARY STATEMENT

The COVID-19 pandemic has impacted businesses across New York City. Fortunately for Defendants, garages – such as the parking garage central to this action – were deemed essential by New York State Empire State Development ("ESD"), and were never subject to closure or work force restrictions. Accordingly, Tenant operated – and continues – to operate from the leased premises throughout the pandemic. Despite its continued operations, Tenant ceased paying real estate taxes due under the relevant lease to Landlord in January 2020 (before COVID-19 struck New York City), and ceased paying rent altogether beginning April 2020. To date, and while fully utilizing the parking garage it has leased, Tenant owes Landlord $1,028,104.36 through November 1, 2020 in rent and additional rent, and with each passing month, another $127,316.67 becomes due.

Refusing to pay rent, while operating its garages, appears to be the *modus operandi* of Plaintiff's parent company, Icon Parking. Since the pandemic began, at least eleven (11) actions have been commenced against Guarantor or other Icon Parking related entities in New York County Supreme Court alone, earning Icon Parking several features in the Real Deal.[1] Meanwhile, Icon Parking's own Chief Executive, John Smith, has proudly pronounced that the parking garage

[1] See, e.g., https://therealdeal.com/2020/09/09/icon-parking-sued-for-rent-at-midtown-headquarters/

business will be better than ever, and was quoted: "Demand for parking is going to increase. Consumer behavior is going to change."[2]

Despite this positive outlook for the future of the business, and as Icon Parking's subsidiaries appear to be doing all over New York City, Tenant continues to operate its parking garage while withholding rent from Landlord and from its other landlords as well. The simple fact is that the clear and unambiguous obligation in the commercial lease at issue that Tenant will pay rent "***without notice, demand, abatement, counterclaim, deduction or set-off***" is not contingent on how well Tenant's business is doing at any given time. It is manifestly unjust for Tenant to be permitted to continue to operate from the leased premises during the pendency of the litigation without paying any of the monthly rent and additional rent it is contractually obligated to pay. Accordingly, it is respectfully submitted that Landlord's motion should be granted in its entirety and Defendants should be directed to pay rent *pendente lite* beginning November 2020, directly to Landlord.

STATEMENT OF FACTS

Landlord respectfully refers the Court to the accompanying affidavit of Haley Jenkins, sworn to on __ November, 2020 (the "**Jenkins Affidavit**"), which sets forth the relevant facts in full.

A. The Lease and the Parking Garage

Landlord is the owner of the parcel of land and the improvements on said land located at 110 East 16th Street, New York, New York (the "**Building**"). The Building contains, in its entirety, a multilevel parking garage (the "**Parking Garage**"). Tenant is, upon information and belief, a

[2] Aaron Elstein, *Parking lot to look forward to - Covid-19 could be a lifeline for garages if commuters ditch mass transit in favor of driving to work,* CRAIN'S NEW YORK BUSINESS, May 11, 2020, at 3. (Exhibit "C" to the Kastner Affirmation)

franchisee of Icon Parking, and occupies the entire Parking Garage and operates its business therefrom.

Pursuant to a written lease, dated March 24, 2015 between Landlord, as landlord, and Tenant, as tenant, Tenant leased the Parking Garage from Landlord for a twenty (20) year term. The annual base rent for the Parking Garage is currently $1,667,422.40 and the fixed monthly rent is currently $123,666.67 per month. (A copy of the Lease is annexed to the Jenkins Affidavit as **Exhibit "A"**).

Pursuant to Article 3 of the Lease (titled "Rent; Guaranty"), Tenant agreed, *inter alia*, "to pay to Landlord an annual rental ("**Basic Rent**") as detailed in Schedule 1 [to the Lease]." Tenant agreed that payment of such Basic Rent would be as follows:

> 3.02 Such Basic Rent shall be paid in equal monthly installments in advance on the first (1st) day of each and every month during the Term ***without notice, demand, abatement, counterclaim, deduction or set-off, except as otherwise specifically provided in Article 16 of this Lease***.[3] […].

As referenced in Article 3 of the Lease, pursuant to Schedule 1 of the Lease, Tenant agreed, *inter alia*, to pay Basic Rent for the Parking Garage as follows:

For the Fourth (4th) Lease Year through and including the Sixth (6th) Lease Year:	One Million Four Hundred Eighty Four Thousand and 00/100 Dollars ($1,484,000.00) per annum ($123,666.67 per month).

Under Section 3.04 of the Lease, Tenant further agreed that it would pay all other charges, fees and expenses, including tax payments, as additional rent, payable "without notice or demand…and without abatement, counterclaim, deduction or set-off…"

[3] Article 16 of the Lease is inapplicable. Article 16 establishes an abatement formula for situations where Tenant is unable to use all or part of the Parking Garage ***as a result of any act by Landlord***. Notably, Article 16 expressly excludes any occurrences of force majeure from the provision allowing non-payment of rent. Tenant has been able to use the entire Parking Garage uninterrupted.

Such additional rent includes 100% of the real estate taxes imposed on the Building, increased over the base tax year of July 1, 2015 through June 30, 2016, as set forth in Article 4 of the Lease. Tenant further agreed:

> 4.02 Tax Payment. (a) Subject to the provisions of this Article 4, Tenant shall pay to Landlord, on the first day of the calendar month following the calendar month during which Landlord gives the initial Tax Statement to Tenant, and on the first day of each succeeding calendar month during the Term (until Landlord gives Tenant an additional Tax Statement pursuant to Section 4.02(b) hereof), an amount equal to the quotient obtained by dividing (x) the Tax Payment for the Tax Year covered by such Tax Statement, by (y) twelve (12) (the "**Initial Monthly Tax Amount**"). If Landlord gives the initial Tax Statement to Tenant after the first day of the Tax Year covered thereby, then Tenant, on the first day of the following calendar month, shall also pay to Landlord an amount equal to the product obtained by multiplying (i) the Initial Monthly Tax Amount, by (ii) the number of calendar months which have elapsed since the beginning of such Tax Year.

Currently, for the 2020-2021 Tax Year, Tenant is obligated to pay to Landlord $3,650.00 in additional rent for taxes.

B. The Guaranties

Pursuant to a Good Guy Guaranty, between Landlord and Guarantor, executed March 24, 2015 (the "**Good Guy Guaranty**"), Guarantor guaranteed to Landlord full and timely payment of Tenant's monetary obligations under the Lease, including, *inter alia*, all Basic Rent, tax payments, interest, and other charges due under the Lease or otherwise payable by Tenant. (A copy of the Good Guy Guaranty is annexed to the Jenkins Affidavit as **Exhibit "C"**).

Pursuant to paragraph 2 of the Good Guy Guaranty, Guarantor agreed, *inter alia*, as follows:

> This Guaranty is an ***absolute and unconditional guaranty of payment and not only of collection. Guarantor's liability under this Guaranty is direct and primary, and not secondary, and shall be joint and several with that of Tenant.*** Guarantor hereby covenants and agrees to and with Landlord and its successors and

> assigns, that Guarantor may be joined in any action against Tenant in connection with the Lease, and that recovery may be had against Guarantor in such action or in any independent action against Guarantor without Landlord or its successors or assigns first pursuing or exhausting any remedy or claim against Tenant or its heirs, executors, administrators, successors or assigns or any other remedy or claim under any other security for, or guaranty of, the obligations or liabilities of Tenant under the Lease and without the necessity of any notice….The obligations of Guarantor under this Guaranty are ***unconditional, are not subject to any set-off or defense based upon any claim Guarantor may have against Landlord, and will remain in full force and effect without regard to any circumstances or condition***.[…](emphasis added)

Pursuant to a Guaranty between Landlord and Guarantor, also executed March 24, 2015 (the "**Guaranty**"), Guarantor guaranteed to Landlord full and timely payment of Tenant's monetary obligations under the Lease, including, *inter alia*, all Basic Rent, Additional Rent and other charges due under the Lease or otherwise payable by Tenant. (A copy of the Guaranty is annexed to the Jenkins Affidavit as **Exhibit "D"**) (The Good Guy Guaranty and Guaranty, collectively referred to as the "**Guaranties**").

C. COVID-19 and Executive Orders

Beginning in mid-March 2020, Governor Cuomo issued a series of Executive Orders to address the COVID-19 pandemic in New York City. Pursuant to Executive Order 202.6, Governor Cuomo instituted in-person workforce reductions to curb the spread of COVID-19, however businesses considered "essential" were not subject to the in-person restrictions. In conjunction with the Executive Order, the New York State ESD, an umbrella organization for the New York State Urban Development Corporation and the Department of Economic Development, issued guidance for determining whether a business is subject to the workforce reductions under the executive orders. According to the guidance, garages are considered essential infrastructure and are therefore exempt from any in-person workforce reductions and permitted to remain open

for the duration of the pandemic. In accordance with the guidance, Tenant is currently open and operating its business from the Parking Garage.

D. Tenant Defaults on its Lease Obligations

As of January 1, 2020, Tenant is obligated to pay monthly Basic Rent in the sum of $123,666.67 and additional rent of taxes in the sum of $3,108.00. The additional rent of taxes increased to $3,650.00 in July 2020. Tenant failed to pay real estate taxes due in January, February, and March 2020 - - all pre-COVID. Thereafter, on April 1, 2020, Tenant failed to pay Rent and additional rent of taxes due under the Lease. At the present time, Tenant owes $1,028,104.36 to Landlord in past due Rent and additional rent through November 1, 2020, not including interest, attorneys' fees, and other items for which Tenant is responsible pursuant to the Lease. (A copy of a current rent ledger is annexed to the Jenkins Affidavit as **Exhibit "B"**).

E. Procedural History

Landlord commenced this action for breach of contract against Tenant and Guarantor by service of summons and complaint filed with the Court on August 14, 2020 (the "**Complaint**"). (A copy of the Complaint is annexed as **Exhibit "A"** to the Kastner Aff.) In the Complaint, Landlord seeks, *inter alia,* declaratory and injunctive relief related to Tenant's failure to pay rent and additional rent due under the Lease.

Tenant and Guarantor answered by Verified Answer dated October 9, 2020 interposing nine (9) affirmative defenses, including *inter alia*, that Landlord's claims are barred by the doctrine of frustration of purpose resulting from the effects of the COVID-19 pandemic (the "**Answer**") (A copy of the Answer is annexed as **Exhibit "B"** to the Kastner Aff.). In the Answer, Defendants admit that they remain in possession of the Parking Garage and continue to operate their business from the Parking Garage. Beyond the affirmative defenses asserting frustration of purpose,

Defendants do not provide any assertion that they are not responsible for the payment of rent and additional rent pursuant to the Lease.

Landlord now moves by Order to Show Cause seeking an order directing Tenant and/or Guarantor to pay Landlord rent and additional rent directly to Landlord each month *pendente lite* until such time as judgment is entered resolving this matter.

ARGUMENT

I. Defendants Should be Required to Pay Rent *Pendente Lite* Directly to Landlord

Tenant and Guarantor are jointly and severally liable for rent obligations under the Lease, and together should be directed to compensate Landlord for Tenant's occupancy of the Parking Garage pursuant to the terms of the Lease during the pendency of this litigation.

Significantly, the Lease does not allow Tenant to withhold rent under any relevant circumstances. To the contrary, pursuant to the express terms of Section 3.02 of the Lease rent is due "without notice, demand, abatement, counterclaim, deduction, or set-off." There is no *force majeure* provision in the Lease, nor is the obligation to pay rent contingent on how well Tenant's business is faring on any given day. Rather, Rent is simply due "without notice, demand, abatement, counterclaim, deduction, or set-off" without applicable exception.

New York Courts have long enforced such clear and unambiguous requirements that rent be paid without setoff or reduction, especially where, as here, no defense to same is even offered. *See, e.g., Lincoln Plaza Tenants Corp. v. MDS Properties Development Corp*., 169 A.D.2d 509 (1st Dep't 1991) ("Tenant was liable for unpaid rent, notwithstanding parties' ongoing dispute concerning utility services and hookups, given lease provision requiring payment of rent 'without any setoff or deduction whatsoever.'"); *Towers Org., Inc. v. Glockhurst Corp., N.V.*, 160 A.D.2d 597 (1st Dep't 1990) ("The obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord fails to provide essential

services."); *Maiden Lane Props., LLC v. Just Salad Partners LLC*, 2013 N.Y. Misc. LEXIS 2647 (Civ. Ct. N.Y. Co. 2013) (Rejecting tenant's defense to the payment of rent premised on Hurricane Sandy where, *inter alia*, tenant was required to pay the rent due "without offset or defense.").

Since it is undisputed that Tenant—a sophisticated commercial entity—negotiated the Lease without a force majeure provision or any other protections for these current circumstances, it should be held to the terms of the Lease. At a bare minimum, this means that Tenant should be directed to pay the rent and additional rent due under the Lease each month during the pendency of this action.

Guarantor is similarly responsible for the payment of rent and additional rent. To this end, the Guaranty specifically states that "Guarantor's liability under this Guaranty is direct and primary, and not secondary, and shall be joint and several with that of Tenant." Accordingly, Guarantor is independently liable for the payment of rent to Landlord. These contractual obligations for Tenant and Guarantor to pay rent and additional rent for the Parking Garage cannot be ignored.

It is well established that the pendency of litigation does not obviate a commercial tenant's obligation to pay for its use and occupancy of the demised premises. *Corris v. 129 Front Co.*, 85 A.D.2d 176, 447 N.Y.S.2d 480 (1st Dep't 1982); *2865 University Owners Corp. v. High*, N.Y.L.J., June 6, 1988, p. 23, col. 1 (App. T. 1st Dep't); *468-470 9th Avenue Corp. v. Randall*. N.Y.L.J., February 10, 1986, p. 7, col. 2 (App. T. 1st Dep't). Indeed, New York Courts have recognized that "[i]t is manifestly unfair" for a tenant to be permitted to remain in demised premises without paying for their use. *MMB Associates v. Dayan,* 169 A.D.2d 422, 422, 564 N.Y.S.2d 146 (1st Dep't 1991). Compelling a tenant to pay rent or use and occupancy to its landlord pursuant to the lease accommodates the competing interests of the parties by affording fair necessary protection

to both and by preserving the *status quo* until the final judgment is rendered. *Albright v. Shapiro,* 92 A.D.2d 452, 453-54 (1st Dep't 1983). *See also 40 Broad Assoc. No. 3 LLC v. 40 Broad Commer. LLC,* 2018 NYLJ LEXIS 3992, *2 (Civ. Ct. N.Y. Co. 2018) (Granting commercial landlord's motion seeking the payment of rent throughout the course of the litigation, stating "Landlord's motion for pendente lite rent is granted. Tenant is to pay $40,828.66 per month to the Landlord. Tenant shall make a payment, for the month of October 2018, within ten days of the date of this order. Additionally, Tenant shall make such pendente lite rent payments on the first day of each month, beginning November 1, 2018, until final judgment in this proceeding."); *Steve Madden Retail, Inc. v. 720 Lex Acquisition LLC*, 2016 N.Y. Misc. LEXIS 2985 * 2016 NY Slip Op 31522(U), ¶ 6 ("A court has broad discretion in awarding use and occupancy *pendente lite.* Because discovery must be concluded to determine the credibility of the tenant's allegations…the landlord is awarded temporary rent/use and occupancy *pendente lite*, without prejudice, in the amount recited in the lease for rent and additional rent…to the extent plaintiff is ultimately successful at trial, it may be provided with a refund or rent credit.").

Since it is undisputed that Tenant is in possession of the Parking Garage, that Tenant continues to operate its business from the Parking Garage, and that the Lease is in full force and effect, the pertinent contract as well as a balancing of the equities is best served by directing Tenant and Guarantor to pay rent *pendente lite* directly to Landlord at the rate set forth in the Lease.[4] It would be manifestly unfair for Tenant to be permitted to continue to withhold rent. *See 255 Butler Assocs., LLC v. 255 Butler, LLC,* 173 AD3d 651, 653-654 (2nd Dep't 2019) ("The award of use

[4] In addition to this contractual right, pursuant to Real Property Law ("RPL") Section 220, a landlord may recover reasonable compensation for the use and occupancy of real property. While the overarching theory that it is patently unjust for a tenant to occupy commercial premises remains the same under a contractual theory or based on RPL Section 220, here we have a clear and distinct Lease obligating Tenant to pay a set amount of rent.

and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both'") (internal citations omitted); *Eli Haddad Corp. v. Cal Redmond Studio*, 102 A.D.2d 730, 731, 476 N.Y.S.2d 864 (1st Dep't 1984); *Albright v. Shapiro*, 92 A.D.2d 452, 453-54, 458 N.Y.S.2d 913 (1st Dep't 1983); *300 E. 34th St. Co. v. Paleias*, N.Y.L.J., June 20, 1997, p. 25, col. 5 (App. Term 1st Dep't).

Tenant and Guarantor should therefore be ordered to pay rent *pendente lite* beginning with rent due for November 2020 and monthly thereafter in the sum of no less than $123,666.67 per month as set forth in Schedule 1 of the Lease and additional rent in the amount of $3,650.00, for a total monthly amount due to Landlord of $127,316.67.

It is well settled that the Court has broad discretion to direct a tenant to pay use and occupancy *pendente lite,* and that the amount of same is often premised on the sums most recently due under the relevant lease. *See, e.g., Alphonse Hotel Corp. v. 76 Corp*., 273 A.D.2d 124 (1st Dep't 2000). Here, however, the matter is even more cut and dry. Defendants (both sophisticated entities) entered into a clear and unambiguous contract obligating them to pay rent and additional rent. Yet, absent Court order, Defendants will continue to shirk this obligation, allowing even more substantial arrears and penalties to accrue. It is respectfully submitted that this Court should not permit Defendants to continue with such a flagrant breach, nor to take advantage of the lengthy nature of plenary actions to continue withholding rent while this matter is litigated. *See, e.g., La Fabrique Owners Corp. v. La Fabrique LLC*, 16 Misc. 3d 130(A), 841 N.Y.S.2d 826 (App. Term 1st Dep't 2007) (Affirming lower Court's order directing tenant to pay rent *pendente lite* in proceeding for nonpayment of rent); *Esposito v. Larig*, 174 A.D.3d 574 (2d Dep't 2019) (Reversing lower Court order which, inter alia, denied landlord's motion for rent pendente lite); *Steve Madden Retail, Inc. v. 720 Lex Acquisition LLC*, , 2016 N.Y. Misc. LEXIS 2985 * 2016 NY

Slip Op 31522(U), ¶ 6 (Sup. Ct. N.Y. Co. 2016) (Granting landlord's cross-motion on a *Yellowstone* request, holding "Because discovery must be concluded to determine the credibility of the tenant's allegations of constructive eviction, the landlord is awarded temporary rent/use and occupancy pendente lite, without prejudice, in the amount recited in the lease for rent and additional rent.").

Recent decisions by this Court involving the COVID-19 pandemic further make clear that Landlord's motion should be granted. In *Gap, Inc., et al. v. 44-45 Broadway Leasing Co. LLC*, this Court, in its Decision and Order dated July 21, 2020, appropriately conditioned *Yellowstone* relief sought by Tenant on the posting of a bond equal to Tenant's arrears, the payment of rent *pendente lite*, and payment of July rent "immediately," albeit at a 10% discount off the rent set forth in the lease. (Sup. Ct. NY Co. Index No. 652549/2020, NYSCEF Doc. No. 32). There, as here, the tenant was withholding rent during the COVID-19 pandemic. The landlord served the tenant with a notice of default regarding the tenant's failure to pay rent and additional rent, and the tenant sought *Yellowstone* relief to prevent the landlord from terminating its lease. There, as here, the issue of rent was the subject of the underlying action and the Court directed the tenant to pay rent pursuant to the lease, only slightly discounted due to the pandemic. Pursuant to the various executive orders issued by Governor Cuomo, non-essential retail stores, like the Gap (and unlike the Tenant in this action), were subject to the reductions of in-person workforce, including the direction to close all together pursuant to Executive Order 202.8. Despite the government mandated closure, the court still ordered the Gap to post a bond equivalent to the rent accrued during such closures, and on-going rent during the pendency of the litigation albeit at a 10% discount due to the fact that – as a retail store – the Gap store was not open. In contrast, here, Tenant was deemed essential and never stopped its operations during the pandemic. Accordingly,

there is no basis to deny the relief sought by Landlord, nor to diminish the rent and additional rent which Tenant is contractually obligated to pay. *See also 538 Morgan Ave. Props. LLC v. 538 Morgan Realty LLC,* 2020 N.Y. Misc. LEXIS 4912 (denied plaintiff's motion to modify use and occupancy payments in light of the COVID-19 related government restrictions prohibiting plaintiffs from operating their business within the subject premises, recognizing that COVID-19 related government restrictions have no bearing on a commercial tenant's obligation to pay rent).

Accordingly, Defendants should not be permitted to continue to shirk the obligation to pay rent and additional rent for Tenant's occupancy of the Parking Garage throughout the course of this litigation, and it is respectfully submitted that Defendants should be directed to pay rent *pendente lite.*

II. The COVID-19 Pandemic Does Not Excuse Tenant's Obligation to Pay Rent

As noted above, the only assertion offered by Defendants to excuse their obligation to pay rent is frustration of purpose. This is Defendants' sole defense which offers some manner of factual allegation, asserting "Plaintiff's claims are barred, in whole or in part, because of the doctrine of frustration of purpose resulting from the effects of the COVID-19 pandemic." However, there is no basis for the extinguishment of the covenant to pay rent under the frustration of purchase doctrine, nor any other theory, where the tenant continues to operate as it did pre-COVID. Accordingly, Defendants cannot be permitted to continue to withhold rent while the merits of this baseless defense is litigated.

Under New York law, frustration of purpose discharges a duty to perform under a contract where "an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (citation and quotation marks omitted). "'For a party to a contract to invoke frustration of purpose as a defense for

nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.'" *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011) "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *Id.* (citation and quotation marks omitted). "Discharge under [the frustration of purpose] doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *A + E TV Networks, LLC v. Wish Factory*, No. 15-CV-1189 (DAB), 2016 U.S. Dist. LEXIS 33361, at *38 (S.D.N.Y. Mar. 11, 2016) (citation and quotation marks omitted). As is relevant to this action, "New York law is clear that financial hardship, even to the point of insolvency, is not a defense to enforcement of a contract." *Id.* at *41 (finding that application of frustration of purpose doctrine in a situation of commercial impracticability means the defense fails as a matter of law).

A. Tenant Does Not Satisfy the Substantial Requirements for Asserting a Frustration of Purpose Defense

Defendants base their frustration of purpose defense on the COVID-19 pandemic. Boiled down to its essence, Defendants' argument is that it is not in their economic interest to pay rent for the months while they have continued to operate their business from the Parking Garage because, due to COVID-19 and the related governmental restrictions, such business has not been as lucrative as Tenant would like. However, it is well settled that financial disadvantage does not create a valid frustration of purpose defense. *See Rockland Dev. Assocs. v. Richlou Auto Body*, 173 A.D.2d 690, 691 (2d Dep't 1991) ("The doctrine of frustration of purpose does not apply unless the frustration is substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss . . . The defendant merely alleges that he has sustained a loss.

Thus, the doctrine of frustration of purpose is inapplicable."). S*ee also Gander Mt.*, 923 F. Supp. 2d at 359 (Discussing frustration of purpose and stating "[i]t is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss."); *Kate Spade & Co. v. G-CNY Grp. LLC,* 114 N.Y.S.3d 184, 63 Misc. 3d 1205(A), at *7 (N.Y. Civ. Ct. 2019) ("[T]here is no basis to rescind the Sublease based on Subtenant's theory that the purpose of the Sublease was frustrated. . . . Subtenant's nonperformance is based not on impossibility, but its own, unsupported determination of economic infeasibility."); *Capital One Equip. v. Deus,* 2018 NY Slip Op 31819(U), ¶ 4 (Sup. Ct. N.Y. Co. 2018) (Rejecting taxi medallion owner's claim of impossibility based on changing financial conditions of the industry, noting "Economic hardship alone cannot excuse performance.").

Consequently, Tenant's *sua sponte* determination that it should not pay rent for the Parking Garage because its profits have been impacted does not support a frustration of purpose defense, and, as relevant to this motion, does not provide any excuse for Tenant's failure to pay rent, nor a defense to the instant request for an Order directing Defendants to pay rent *pendente lite.*

Additionally, the standard for frustration of purpose requires that the frustration must be complete for the entire duration of the underlying contract. *See PPF Safeguard, LLC*, 85 A.D.3d at 508 ("For a party to a contract to invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.") (citation omitted); *Robitzek Investing Co. v. Colonial Beacon Oil Co.*, 265 A.D. 749, 753 (1st Dep't 1943) ("Where there is complete frustration of performance of a contract by act of the government, cancellation is permissible. . . . Here there is not complete frustration. Defendants could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its

business might have suffered substantial diminution because of the Federal regulatory measures."). *See also 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp*., 23 N.Y.2d 275, 281 (1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused. . . In short, the applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts."); *Walden Fed. S&L Ass'n v. Slane Co.*, No. 09 Civ. 1042 (DLC), 2011 U.S. Dist. LEXIS 37010, at *3 (S.D.N.Y. Apr. 5, 2011) ("New York courts do not recognize the defense of temporary commercial impracticability.").

Here, there is neither a contention nor an expectation that the COVID-19 pandemic will continue throughout the duration of the Lease – or, significantly, will continue without the introduction of a vaccine -- nor that business will forever be diminished below the levels Tenant deems acceptable. To the contrary, Icon Parking conducted its own investigation, leading its chief executive, John Smith, to opine "When people go back to work, we believe many will prefer to travel in cars by themselves instead of taking the subway . . .Demand for parking is going to increase. Consumer behavior is going to change." (See Exhibit "C" to Kastner Aff.) Clearly, Icon Parking – and presumably its subsidiaries – believes that business will ultimately be better than ever, and the current downswing is nothing but temporary. Thus, again, the frustration of purpose doctrine is not applicable to this matter, and the Defendants should not be excused from their on-going contractual obligations to pay rent and additional rent under the Lease.

B. Defendants' Frustration of Purpose Defense is Insufficient to Override the Clear Language of the Lease

Consistent with the absolute requirement that Tenant pay rent—*no matter what*—the parties did not even include a "force majeure" provision in the Lease. To the contrary, the parties

expressly limited any relief from the obligation to pay rent to incidents caused by Landlord, and expressly excluded force majeure events therefrom. (See Exhibit "A" to Jenkins Affidavit, Article 16)

What the critical language that these sophisticated parties agreed to makes clear is that Tenant must pay the rent "without notice, demand, abatement, counterclaim, deduction or set-off." That language precludes Defendants from invoking any of the common law defenses, such as frustration of purpose, that might otherwise be available. *See, e.g., Axginc Corp. v. Plaza Automall, Ltd*., 759 Fed. App'x 26, 29, 31 (2d Cir. 2018) (sublease language prohibited tenant from later asserting defenses of impossibility of performance and frustration of purpose in the aftermath of Hurricane Sandy); *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 34 Misc. 3d 1222(A), at *4–5, 951 N.Y.S.2d 84 (Sup. Ct. N.Y. Co. 2009) *aff'd* 68 A.D.3d 562 (1st Dep't 2009) (Stating that "[t]he law in New York is well settled that 'once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome' and denying impossibility of performance defense based on lease language.).

As such, Defendants' affirmative defense of frustration of purpose is without merit and provides no basis for Defendants' failure to pay rent and additional rent as it becomes due. Consequently, Defendants should be directed to pay the on-going rent and additional rent that accrues *pendente lite*.

CONCLUSION

Based on the foregoing, Tenant and Guarantor should be directed to pay to Landlord rent *pendente lite* each month beginning November 2020 pursuant to the terms of the Lease, together with such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: New York, New York
November 9, 2020

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