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

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

MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT MOTION

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of plaintiff East 16th Street LLC ("Landlord") in support of Landlord's motion to dismiss the affirmative defenses of defendants Union 16 Parking LLC ("Tenant") and TMO Parent LLC ("Guarantor") (jointly, "Defendants"), and for summary judgment on Landlord's claims.

This is a simple breach of contract action by Landlord to enforce the provisions of a commercial lease in which Tenant, the operator of a parking garage under the umbrella of Icon Parking (which touts itself as the largest parking garage operator in New York City), promised to pay rent "***without notice, demand, abatement, counterclaim, deduction or set-off.***" Tenant has unconscionably taken advantage of the ongoing Covid-19 pandemic to avoid its obligations under the lease despite Tenant's continued use of the parking garage. This cynical strategy appears to be the modus operandi of Plaintiff's parent company. 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, pronounced in Crain's Business that the parking garage business will be better than ever as commuters have opted to drive to work rather than using public transportation. [2]

Given the positive outlook for the future of the business, it should not surprise the reader that Tenant (like Icon Parking's subsidiaries appear to be doing all over New York City) continues to operate its parking garage in Landlord' buildings. Yet Tenant continues to withhold rent from

[1] See, e.g., https://therealdeal.com/2020/09/09/icon-parking-sued-for-rent-at-midtown-headquarters/; https://therealdeal.com/2020/09/03/landlords-claim-parking-garages-owe-6m/

[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,* 36, CRAIN'S NEW YORK BUSINESS, 3, 17, (2020) (Exhibit "C" to the Kastner Affirmation) "Demand for parking is going to increase Consumer behavior is going to change."

Landlord despite its clear and unambiguous obligation in its lease to pay rent without setoff or deduction regardless of how well Tenant's business is doing at any given time.

In a transparent attempt to extend their lucrative free ride, Defendants have offered nine (9) rote and conclusory affirmative defenses none of which provide a valid defense for Tenant's outstanding arrears. New York law demands that such bald and conclusory defenses be dismissed as improperly plead. Even if none were to ignore the technical deficiencies in Defendants' pleading, such defenses are without legal or factual merit and likewise warrant dismissal.

As the First Affirmative Defense, Defendants claim that Landlord has failed to state a cause of action. Beyond being defective on its face, it is clear that a viable cause of action for, *inter alia*, breach of contract flowing from Defendants' failure to pay the rent agreed to in the Lease conveys a viable claim for relief. The First Affirmative Defense should be dismissed.

Defendants next claim as the Second Affirmative Defense that the Complaint is insufficiently particular pursuant to CPLR 3013. Even a cursory review of the Complaint, its detailed recitations of the pertinent provisions of the Lease and Guaranties on which Landlord relies and the annexation of those documents, in their entirety, reveals this affirmative defense is utterly frivolous and without merit. The Second Affirmative Defense should be dismissed.

For the Third, Fourth and Fifth Affirmative Defenses, Defendants conclusively assert, respectively: "Plaintiff's claims are barred by the doctrine of payment;" "Plaintiff's claims are barred by the doctrine of accord and satisfaction;" and "Plaintiff's claims are barred by the doctrine of performance." Defendants' calculated decision to offer not a single fact to support the Third, Fourth and Fifth Affirmative Defenses is particularly crucial, providing no information whatsoever as to, for example, how Tenant has feasibly "performed" its obligations under the Lease, or when and how much payment was tendered. This dearth of factual allegations is fatal to these defenses.

The simple truth is that Defendants have not made any payments, much less payments that would make Landlord whole on the hundreds of thousands of dollars in rent and additional rent outstanding. Defendants have capitalized on the Covid-19 pandemic by withholding rent, all the while continuing to earn money from their use of the Parking Garage and evidently anticipating that their business will ultimately be better than ever as a result of that very same pandemic. The Third, Fourth and Fifth Affirmative Defenses are thus legally and factually meritless and should be dismissed.

Defendants simply claim that the Complaint is barred by the doctrine of estoppel as the Sixth Affirmative Defense. Again, it is hard to know where to begin as Defendants include no facts whatsoever as to how Landlord could feasibly be estopped from seeking payment of the rent Defendants are contractually obligated to tender. The Sixth Affirmative Defense should be dismissed.

Defendants' Seventh Affirmative Defense is similarly nonsensical, asserting Landlord's claims are barred by documentary evidence. The most pertinent documentary evidence, however – the Lease – unequivocally directs that Tenant shall pay rent and additional rent "***without notice, demand, abatement, counterclaim, deduction or set-off***." The Seventh Affirmative Defense should be dismissed.

For their Eighth Affirmative Defense, Defendants assert that Landlord has failed to mitigate its damages. First, there is no legal duty for a commercial landlord to mitigate, rendering this defense meritless outright. Second, it is patently evident that there is no way for Landlord to mitigate its damages while Tenant is fully in possession of and operating from the parking garage. The Eighth Affirmative Defense should be dismissed.

Lastly, Defendants opportunistically offer a defense of frustration of purpose as the Ninth Affirmative Defense, alleging that they should be relieved of their obligation to pay rent due to Covid-19. It is glaringly obvious that Defendants - - who are operating their business and making money, while depriving Landlord of the rent - - are simply relying on this defense and the global pandemic to place themselves in a more advantageous financial position. However, simple economic hardship (or, more accurately, the opportunity to exploit a global pandemic for financial gain) is not sufficient to absolve a party of its contractual obligations – whether under the guise of a defense of frustration of purpose, or otherwise. The Ninth Affirmative Defense should be dismissed accordingly.

At the end of the day, it is clear that Defendants do not have a valid defense to this action. Consequently, dismissal of the affirmative defenses is appropriate and, upon such dismissal, it is respectfully submitted that summary judgment should be granted in Landlord's favor, and this matter set down for an attorneys' fees hearing to determine the fees due to Landlord, together with such other and further relief as this Court shall deem just and proper.

STATEMENT OF FACTS

The facts are more fully set forth in the accompanying affirmation of Menachem J. Kastner, dated November 11, 2020 (the "**Kastner Affirmation**") and the affidavit of Haley Jenkins, sworn to on November 6, 2020 (the "**Jenkins Affidavit**") and are reiterated herein.

A. The Parties

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 9-story, multilevel parking garage (the "**Parking Garage**"). Tenant is, upon information and belief, a franchisee of Icon Parking, and occupies the entire Parking Garage and operates its

business therefrom. Guarantor is a corporate entity which, as discussed below, guaranteed Tenant's performance of its obligations under the lease for the Parking Garage.

B. The Lease

Pursuant to a written lease, dated March 24, 2015 (the "**Lease**"), between Landlord, as landlord, and Tenant, as tenant, Tenant leased the Parking Garage. (A copy of the Lease is annexed to the Jenkins Affidavit as **Exhibit "B"**).

Pursuant to Article 3 of the Lease (titled "Rent; Guaranty"), Tenant agreed, *inter alia*, to pay a set amount of annual rental (defined as "Basic Rent")[3] as set forth in Schedule 1 to the Lease "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. […]." (Jenkins Affidavit, **Exhibit "B"**, pg. 6-7, and at Schedule 1, pg. 53). (emphasis added)

Article 16 which provides the only mechanism permitting nonpayment of rent, states, in pertinent part:

> 16.01. If Tenant shall be unable to use all or part of the Demised Premises as the result of any act of Landlord (other than a change, repair or replacement which is Tenant's responsibility, if any, under this Lease) and such inability to use the Demised Premises is other than due to a force majeure event and shall involve more than one hundred fifty (150) Space Days (hereinafter defined) in the aggregate in any calendar year; then, and in any such event, Tenant shall be entitled to an abatement of Basic Rent pursuant to a formula (the "Abatement Formula") set forth below.

Per Schedule 1 to the Lease, the monthly rent to be paid by Tenant for the Fourth through Sixth Lease Years (to wit, 2019 through 2021) is $123,666.67. There is no provision in the Lease permitting Tenant to not pay rent as a result of any force majeure event.

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[3] "Fixed Rent" is utilized in lieu of "Basic Rent" on Landlord's ledgers.

In addition to Basic Rent, Tenant agreed, in Section 3.04 of the Lease, to pay additional rent including, but not limited to, tax payments (See Exhibit "B" to the Jenkins Affidavit, Articles 3 and 4, pgs. 6-10) Again, the Lease provides, at Section 3.04 "All additional rent shall be payable by Tenant to Landlord without notice or demand, except as may be expressly required in this Lease, and ***without abatement, counterclaim, deduction or set-off***, except as otherwise specifically provided in Article 16 of this Lease." (emphasis added) (Jenkins Affidavit, **Exhibit "B"**, Section 3.04, pg. 7). Tenant further agreed to the imposition of interest on any late payments of Basic Rent and Additional Rent:

> 3.06 Interest shall accrue and be payable as additional rent on any amount not paid by Tenant under this Lease within five (5) days after same is due from and after the due date thereof at the per annum rate which is the lesser of (the "**Lease Interest Rate**"): (a) the then prime rate of interest charged by JP Morgan Chase, New York (or the successor thereto) plus five percent (5%), or (b) the highest rate permitted by law. Additionally, in the event Landlord makes any expenditure due to a default by Tenant hereunder, which continues beyond all applicable grace and cure periods after notice, if required hereunder, in addition to such amounts, Tenant shall pay interest on the amounts expended at the Lease Interest Rate. In default of payment of any such interest, Landlord shall have (in addition to all other remedies) the same rights as provided in this Lease for nonpayment of Basic Rent. Nothing in this Section contained and no acceptance of interest by Landlord shall be deemed to extend or change the time for payment of Basic Rent or additional rent. […].

Pursuant to Article 19 of the Lease (titled "Remedies of Owner and Waiver of Redemption"), Tenant agreed, *inter alia*, "19.03 If Landlord and Tenant are involved in any litigation regarding the performance of any of their obligations under this Lease, the unsuccessful party by final unappealable order, decree, or judgment by a court of competent jurisdiction in such litigation shall reimburse the substantially successful party in connection with obtaining such final unappealable order, decree or judgment. […]." (Jenkins Affidavit, **Exhibit "B"**, Article 19, pgs. 34-36)

The Lease does not provide for any suspension or abatement of rent, other than as set forth above. There is no "force majeure" clause, excusing Tenant from the payment of rent as a result of any governmental restrictions, acts of God, or other extraneous events.

C. The Guaranty

As a condition for entering into the Lease, Landlord required Guarantor to guaranty Tenant's obligations under the Lease. Consequently, Guarantor executed a Good Guy Guaranty, dated March 24, 2015 (the "Good Guy Guaranty") and a Guaranty, dated March 24, 2015 (the "Guaranty") (jointly, the "Guaranties"). (Copies of the Good Guy Guaranty and Guaranty are annexed to the Jenkins Affidavit respectively as **Exhibits "C"** and **"D"**)

As referenced in Article 3 of the Lease, pursuant to paragraph 1 of Exhibit "C" (pg. 2) of the Lease (titled "GOOD GUY GUARANTY"), Guarantor agreed, *inter alia*, as follows:

> [Guarantor] unconditionally guarantees to Landlord (which term shall be deemed to include the named landlord and its successors and assigns) all of the obligations of Tenant under the Lease to pay any and all of the following through the date of surrender of the Premises by Tenant to Landlord (or the date upon which Landlord obtains possession of the Premises) vacant (other than parking customers) (the "Surrender Date"): (i) Basic Rent, (ii) Tax Payments owed pursuant to Article 4 of the Lease, and (iii) interest on the foregoing items (i) and (ii) owed pursuant to Section 3.06 of the Lease; . . . [N]otwithstanding anything to the contrary set forth herein, ***Guarantor shall be, and shall remain, liable for Landlord's costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with the enforcement of this Guaranty***. (emphasis added)

Furthermore, pursuant to paragraph 2 of the Good Guy Guaranty, Guarantor agreed, *inter alia*, "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. . . . ***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 circumstance or condition […]." (See **Exhibit "C"** to Jenkins Affidavit, para. 2, pgs. 2-3)

Guarantor further agreed "Guarantor shall pay for all costs and expenses in the enforcement of this Guaranty including but not limited to Landlord's reasonable attorney fees and expenses."

Pursuant to paragraph 1 of the Guaranty, Guarantor further agreed, *inter alia*, as follows:

> [Guarantor] absolutely and unconditionally guarantees the payment and performance when due by UNION 16 PARKING LLC, as tenant ("Tenant"), of all of the terms, covenants, conditions, agreements and other obligations (collectively, the "Obligations") of Tenant pursuant to that certain Lease […] with the same force and effect as if a signatory thereto and liable thereunder with Tenant, and the full and prompt payment of all damages and expenses that may arise in connection with or as a consequence of the non-payment, non-performance or non-observance of such Obligations, in each and every instance without requiring any notice of non-payment, non-performance or non-observance or proof or notice or demand whereby to charge Guarantor therefor, all of which Guarantor hereby expressly waives. . .

(See **Exhibit "D"** to Jenkins Affidavit, para. 2, pg. 2)

D. Covid-19 and The Executive Orders

In mid-March 2020, Governor Cuomo issued the first of 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. 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 exempt from any in-person workforce reductions and permitted to remain open for the duration of

the pandemic. As such, Tenant never shut down its business and continues to operate from the Parking Garage.

E. Tenant's Breach of the Lease

As noted above, Tenant is obligated to pay rent and additional rent pursuant to the Lease. To determine Tenant's share of the taxes, Landlord calculates the difference between the real estate taxes assessed against the Building for the 2015/2016 Tax Year, and subtracts that from the real estate taxes assessed for the current tax year, and divides that figure by twelve (12) to obtain the monthly real estate taxes due from Tenant. For the 2019/2020 Tax Year, this resulted in monthly payments being due in the sum of $3,108 through June 2020. For the 2020/2021 Tax Year, this resulted in monthly payments being due in the sum of $3,650, starting July 2020. (Copies of the Tax Statements and related documents supporting the tax calculations are annexed to the Jenkins Affidavit as **Exhibit "E"**). The Taxes due are reflected on each monthly invoice sent to Tenant. Tenant has not objected to the sums due on any of the invoices which it has been sent.

As relevant to this action, Tenant has breached Articles 3 and 4 of the Lease by failing to pay Basic Rent and Additional Rent (as those terms are used and defined in the Lease) (collectively, the "**Payment Breaches**"), totaling $657,514.89, through August 1, 2020, comprised of Basic Rent charges and Taxes that remain outstanding with respect to the Parking Garage, as same continue to accrue. As of the date of this Memorandum of Law, the outstanding rent and additional rent due equals **$1,028,104.36**, (the **$1,028,104.36** and, to the extent permitted by law, any associated fees, as they continue to accrue, shall hereinafter be referred to as the "**Arrears**".). (A copy of the current Ledger for the Parking Garage is annexed to the Jenkins Affidavit as **Exhibit "F"**)

F. The Pleadings

By Summons and Complaint, dated August 14, 2020 (the "**Complaint**"), Landlord commenced this action against Tenant and Guarantor for, *inter alia*, breach of contract and a declaratory judgment, based on Tenant's failure to pay rent and additional rent under the Lease. Landlord further sought recovery of attorneys' fees and costs incurred by Landlord as a result of Tenant's monetary breaches of the Lease. In addition to reciting the pertinent provisions of the Lease, the Good Guy Guaranty and the Guaranty, Landlord also annexed those documents to the Complaint, as well as a ledger delineating the rent and additional rent due from Tenant. (See **Exhibit "1"** to Kastner Affirmation)

Tenant and Guarantor answered by Verified Answer and Affirmative Defenses, dated October 9, 2020, interposing nine (9) affirmative defenses (the "**Answer**"). (A copy of the Answer is annexed as **Exhibit "2"** to the Kastner Affirmation).

ARGUMENT

POINT I

DEFENDANTS' AFFIRMATIVE DEFENSES ARE UNTENABLE AS A MATTER OF LAW, AND SHOULD BE DISMISSED

Under CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." As particularly relevant to the Answer interposed in this action, it is well settled that "defenses which merely plead conclusions of law without supporting facts are insufficient." *Glenesk v. Guidance Realty Corp*., 36 A.D.2d 852, 853, (2d Dep't 1971). Likewise, "[b]are legal conclusions without supporting factual allegations are insufficient to raise affirmative defenses." *Robbins v. Growney*, 229 A.D.2d 356, 357 (1st Dep't 1996). *See also Carlyle, LLC v. Beekman Garage LLC,* 133 A.D.3d 510 (1st Dep't 2015) (Affirming dismissal of parking garage defendant's affirmative defenses "because they consist of

bare legal conclusions."); *Kingman v. ZMoore Ltd*., 2018 NY Slip Op 32029(U), ¶¶ 9-10 (Sup. Ct. N.Y. Co. 2018).

As detailed below, Defendants' affirmative defenses are all bare and conclusory, woefully without merit and/or are defeated by documentary evidence. As such, it is respectfully submitted that they should be dismissed.

A. Defendants' First Affirmative Defense of Failure to State A Cause of Action Should Be Dismissed

Tenant's First Affirmative Defense alleges that Landlord failed to set forth a cause of action, yet fails to provide so much as a hint as to how. The conclusory nature of Tenant's First Affirmative Defense alone – warrants its dismissal. *See Rosenfeld v. Rosenblum*, 176 A.D.2d 645, 646 (1st Dep't 1991) (striking defendant's fifth defense asserting the failure to state a cause of action); *Bank of Am., N.A. v. 414 Midland Ave. Assocs., LLC,* 78 A.D.3d 746 (2d Dep't 2010) (affirming dismissal of defendant's affirmative defense of failure to state a cause of action). *See also Petracca v. Petracca*, 305 A.D.2d 566 (2d Dep't 2003) ("Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken.").

Tenant's conclusory pleading is also contradicted by the Complaint, which does, in fact set forth valid claims premised on Defendants' obligation pay rent and their failure to do so. Tenant expressly agreed, in Article 3 of the Lease, to pay rent as it became due "without notice, demand, abatement, counterclaim, deduction or set-off." (See **Exhibit "B"** to the Jenkins Affidavit, pg. 7) "[I]t is a basic contract principle that when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms. [Courts] have also emphasized this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." *TAG 380, LLC v.*

ComMet 380, Inc., 10 N.Y.3d 507, 512–13 (2008). *See also 159 MP Corp. v. Redbridge Bedford*, LLC, 33 N.Y.3d 353 (2019).

New York Courts have consistently held that – particularly where, as here, there is an obligation to pay rent without deduction or set-off the withholding of rent constitutes a fundamental breach of a commercial lease. *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.").

Accordingly, the First Affirmative Defense is merely a conclusory and meritless "catch-all," and should be dismissed. *See, e.g., Deltoid, LLC v. Ghorcian*, 2014 NY Slip Op 30748(U), ¶ 10 n.2 (Sup. Ct. N.Y. Co. 2014) (Edmead, J.) ("Landlord's pleadings and submissions establish a prima facie case against defendant for liability under the Guaranty, defendant's affirmative defense and motion to dismiss premised on the failure to state a cause of action lacks merit and such affirmative defense is dismissed.").

B. Defendants' Second Affirmative Defense Asserting Insufficient Particularity Should Be Dismissed

As the Second Affirmative Defense, Defendants assert "The Verified Complaint lacks the particularity required by CPLR § 3013." A simple review of the Complaint demonstrates that this affirmative defense is without merit.

To satisfy CPLR 3013, a complaint must be sufficiently particular "to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013. *See also 12 Baker Hill Rd., Inc. v. Miranti*, 130 A.D.3d 1425, 1426 (3d Dep't 2015).

Here, the Complaint lays out the foundation of its claims --- the relationship between the parties as landlord, tenant and guarantor, the pertinent documents in the Lease, the Good Guy Guaranty and the Guaranty, the Tenant's breach of the Lease by failing to pay Basic Rent and Additional Rent. One step further, the Complaint annexes the pertinent documents, providing not only the Lease and Guaranty, but a ledger detailing the specific items which Tenant failed to pay, and how much in arrears accumulated at the time of the Complaint. (See **Exhibit "1"** to Kastner Affirmation, pg. 122).

Thus, it is evident that the Complaint not only satisfies the particularity requirement of CPLR 3013, but details assertions which are "plain enough and [Tenant] should have no difficulty in answering the allegations," rendering the Second Affirmative Defense wholly baseless. *See, e.g., Mich. Mut. Liab. Co. v. S.S. Silberblatt, Inc.*, 15 A.D.2d 649 (1st Dep't 1962). *See also Forty Cent. Park S., Inc. v. Anza*, 117 A.D.3d 523 (1st Dep't 2014).

Indeed, New York Courts have found much less is sufficient to satisfy the CPLR 3013 requirement for asserting breaches of contract. *See, e.g., Kraft v. Sheridan*, 134 A.D.2d 217 (1st Dep't 1987) (Finding despite failure to identify forms of relief sought in the complaint, dismissal was not warranted); *12 Baker Hill Rd., Inc. v. Miranti*, 130 A.D.3d 1425, 1426 (3d Dep't 2015)

("[T]he amended complaint's fourth cause of action identified the parties and the subject property and alleged that defendant agreed to purchase the subject property for $75,000 and that defendant breached the contract, resulting in damages. '[P]laintiff was not required to attach a copy of the contract or plead its terms verbatim.' . . . and we find that the allegations contained in the amended complaint were sufficient to provide defendant with adequate notice of plaintiff's claim."); *Elisa Dreier Reporting Corp. v. Glob. Naps Networks, Inc.,* 84 A.D.3d 122, 127 (2d Dep't 2011) ("Given that the plaintiff sufficiently stated a cause of action to recover damages for breach of contract by alleging all of the essential elements: to wit, the existence of a contract, the plaintiff's performance pursuant to that contract, the defendants' breach of their obligations pursuant to the contract, and damages resulting from that breach . . .it was improper for the Supreme Court to have, in effect, granted that branch of the defendants' motion which was to dismiss the complaint pursuant to CPLR 3211 (a) (7).").

Ironically, it is Defendants' Answer – and not Landlord's Complaint – which is deficient for lack of specificity, relying wholly on conclusory statements with no factual assertions whatsoever. Consequently, it is the affirmative defenses which warrant dismissal, and not the causes of action alleged. As such, it is respectfully submitted that the Second Affirmative Defense, along with the other eight conclusory and general affirmative defenses, should be dismissed.

C. Defendants' Third, Fourth and Fifth Affirmative Defenses, Alleging "the Doctrines of" Payment, Accord and Satisfaction and Performance Should Be Dismissed

In their entirety, Defendant's Third, Fourth and Fifth Affirmative Defenses state, respectively: "Plaintiff's claims are barred by the doctrine of payment;" "Plaintiff's claims are barred by the doctrine of accord and satisfaction;" and "Plaintiff's claims are barred by the doctrine of performance." These defenses, being utterly devoid of any facts, highlight the rationale behind the prohibition against relying on conclusory defenses. At best, Landlord is left to assume that

Defendants are asserting that at least some portion of the Arrears were paid, but there is no assertion whatsoever as to when or how much. The conclusory (and baseless) claims of payment and performance thus make it nearly impossible to discern what, exactly, Defendants propose amounted to a payment of the Arrears, and satisfaction of the rental debts. Thus, as the Third and Fifth Affirmative Defenses do nothing more than assert conclusory statements, they should be dismissed. *See, e.g., Carlyle, LLC v. Beekman Garage LLC*, 133 A.D.3d 510 (1st Dep't 2015); *Kingman v. ZMoore Ltd*., 2018 NY Slip Op 32029(U), ¶ 10 (Sup. Ct. N.Y. Co. 2018) ("The third affirmative defense asserting that 'claims are barred by ZMoore's having paid all obligations under the lease,' is stricken. The proposed defense is plead in one conclusory sentence without any supporting facts."); *S. St. Seaport v. Ry-Allie Candy Corp.*, 14 Misc. 3d 1208(A), 1208A, 836 N.Y.S.2d 490, 490 (Civ. Ct. N.Y. Co. 2006) (J. Jaffe) (Dismissing affirmative defenses of accord and satisfaction, payment, release and statute of frauds as "fatally conclusory.").

As for the Fourth Affirmative Defense of accord and satisfaction, "generally, acceptance of a check in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim. . . Such agreements are enforceable, however, only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim." *Merrill Lynch Realty/Carll Burr, Inc. v. Skinner*, 63 N.Y.2d 590, 596 (1984). As with the other bald, conclusory affirmative defenses, the Fourth Affirmative Defense is unburdened by any actual facts, and notably devoid of any assertion that Defendants made a specific payment, or that such payment was accepted by Landlord in full resolution of the outstanding arrears, much less that Landlord was advised that any such payment would fully satisfy the outstanding Arrears. Thus, again, this affirmative defense is fatally defective on its very face.

Lastly, these defenses are all inapplicable to this matter. As more fully set forth in the Jenkins Affidavit, Defendants have not paid one cent in rent or additional rent for over six (6) months, all the while operating from the Parking Garage and earning profit. Thus, beyond being deficient as a matter of law, the Third, Fourth and Fifth Affirmative Defenses are factually untenable as well.

Accordingly, as the Third, Fourth and Fifth Defenses are wholly devoid of facts or merit, it is respectfully submitted that they should be dismissed. *See, e.g., Coleman v. Norton*, 289 A.D.2d 130 (1st Dep't 2001); *Cohen Fashion Optical, Inc. v. V & M Optical, Inc.*, 51 A.D.3d 619, 619-20 (2d Dep't 2008) ("The defendants' affirmative defenses of payment, accord and satisfaction, and expiration of the applicable statute of limitations period were unsubstantiated by any factual allegations and conclusory in nature. Accordingly, the branch of the plaintiffs' motion which was for summary judgment dismissing them should have been granted.").

D. Defendants' Sixth Affirmative Defense Asserting Estoppel Should Be Dismissed

Defendants' Sixth Affirmative Defense simply alleges that Landlord's claims are "barred by the doctrine of estoppel." Again, no facts or allegations are offered to support this defense, warranting its dismissal outright. *See, e.g., Bd. of Managers of Honto 88 Condo. v. Red Apple Child Dev. Ctr.*, 2012 NY Slip Op 33136(U), ¶ 13 (Sup. Ct. N.Y. Co. 2012) ("That branch of plaintiff's motion seeking to dismiss defendants' eighth affirmative defense of laches and ninth affirmative defense of estoppel is granted. Defendants allegations as to such defenses are conclusory and unsupported by any facts."); *1407 Broadway Real Estate LLC v. Sicari*, 2009 NY Slip Op 30603(U), ¶ 23 (Sup. Ct. N.Y. Co. 2009) ("Defendant's Second Affirmative Defense alleges that plaintiff is barred by the doctrines of waiver, laches, estoppel and unclean hands. Again, defendant fails to fails to assert any facts in support of this defense in either his Answer or

in opposition to the motion. Therefore, plaintiff's request that the Court dismiss the Second Affirmative Defense is granted.").

E. Defendants' Seventh Affirmative Defense Asserting That Landlord's Claims Are Barred by Documentary Evidence Should Be Dismissed

Tenant's Seventh Affirmative Defense alleges that Landlord's claims are barred by documentary evidence, without any discussion of the documentary evidence to which Defendants refer. (**Exhibit "2"** to Kastner Affirmation, paras. 62-63) However, a review of the most crucial documentary evidence in this matter – the Lease – and Tenant's express obligation therein to pay rent and additional rent "without notice, demand, abatement, counterclaim, deduction or set-off," demonstrates that Landlord's entitlement to relief is supported, not barred, by the pertinent documentary evidence. Likewise, the Guaranty and Good Guy Guaranty clearly establish that Guarantor is responsible for the financial obligations of Tenant under the Lease, and that "[t]he obligations of Guarantor under [the] 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 circumstance or condition […]." (See **Exhibit "C"** pg. 2 and **"D"** to the Jenkins Affidavit). Defendants' Seventh Affirmative Defense is blatantly meritless.

Further relevant to this Affirmative Defense is what the pertinent documentary evidence ***does not*** state. Critically, the Lease, Guaranty and Good Guy Guaranty do not state that Defendants may be relieved from any of their financial obligations as a result of force majeure, government restrictions, a downturn in business or any other element beyond Landlord's control. Thus, there is nothing within the relevant documentary evidence which provides a viable defense to the rent and additional rent sought in this action, and the Seventh Affirmative Defense should be dismissed accordingly.

F. Defendants' Eighth Affirmative Defense Alleging Failure to Mitigate Damages Should Be Dismissed

The Eighth Affirmative Defense asserts that Landlord has failed to mitigate its damages. Based on settled law and undisputed facts, this affirmative defense is meritless.

First, it is worth noting that this matter involves a commercial lease agreement and, as such, Landlord has no obligation to mitigate any damages arising from Tenant's default. *See, e.g., 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.,* 24 N.Y.3d 528 (2014)*; Holy Props., L.P. v. Kenneth Cole Prods*., 208 A.D.2d 394, 394 (1st Dep't 1994) *aff'd* 87 N.Y.2d 130 (1995) ("A commercial landlord is under no duty to mitigate damages when a tenant unjustifiably abandons the leased premises prior to the expiration of the lease term."); *Syndicate Bldg. Corp. v. Lorber*, 128 A.D.2d 381 (1st Dep't 1987).

Second, and perhaps more importantly, there is no way here for Landlord to mitigate the damages resulting from Tenant's failure to pay rent. This is not a case where the tenant has vacated, and Landlord has simply allowed the property to languish while arrears accrued (although the Court of Appeals has expressly noted that same would be permissible in *Holy Props.*). Rather, Tenant remains in possession of the Parking Garage and continues to operate its business and, presumably, earn revenue from same. Nonetheless, Tenant failed and refused to pay additional rent due starting in early 2020 (even before the Covid-19 pandemic struck New York City), and Basic Rent due starting in April 2020. There is no potential to mitigate these outstanding arrears, nor those arrears that continue to accrue while Tenant occupies the Parking Garage. Thus, Landlord is left to pursue Tenant and Guarantor for the Arrears, and there is simply no viable defense for failure to mitigate.

As such, the Eighth Affirmative Defense should be dismissed.

G. Defendants' Ninth Affirmative Defense Alleging Frustration of Purpose Should Be Dismissed

In the sole defense which offers some manner of factual allegation, Tenant offers as its Ninth Affirmative Defense that "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." There is

no basis for the extinguishment of the covenant to pay rent under the frustration of purchase doctrine, nor any other theory.

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).

i. Defendants Do Not Satisfy the Substantial Requirements for Asserting a Frustration of Purpose Defense

Tenant bases its frustration of purpose defense on the Covid-19 pandemic. Boiled down to its essence, Defendants are contending that it is not in their economic interest to pay rent for the

months where Tenant has continued to operate its business from the Parking Garage but, due to Covid-19 and the related governmental restrictions, such business has not been as lucrative as Defendants 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 it should be dismissed accordingly.

Additionally, the standard for frustration of purpose requires that the frustration completely invalidate the basis of the contract and last the entire duration contract. Temporary economic hardship is not enough. *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. Defendant 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 "3"** to Kastner Affirmation, pg.

2) 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.

Thus, again, the frustration of purpose doctrine is not applicable to this matter, and the defense should be dismissed.

ii. 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 "B"** to Jenkins Affidavit, Article 16, pg. 32).

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 should be dismissed.

POINT II

LANDLORD SHOULD BE AWARDED SUMMARY JUDGMENT

In order to successfully oppose a motion for summary judgment, "a party must assemble and lay bare sufficient affirmative proof to demonstrate the existence of a genuine triable issue of fact." *Forray v. New York Hosp.*, 101 A.D.2d 740 (1st Dep't 1984). Here, there are no issues of fact to be resolved, all of the proof is in favor of Landlord and, as discussed in Point I, Defendants do not have any viable defense to the failure to pay the rent and additional rent they contractually agreed to pay.

Consequently, summary judgment is appropriate, and Landlord is entitled to a monetary judgment for the outstanding Arrears. *See, e.g., Carlyle, LLC v. Beekman Garage LLC*, 133 A.D.3d 510 (1st Dep't 2015) (Finding landlord was entitled to summary judgment on claim for unpaid rent against parking garage defendant); *US 7, Inc. v. Transamerica Ins. Co*., 173 A.D.2d 311, 312 (1st Dep't 1991) ("Despite including two affirmative defenses in its answer, which it did not thereafter make the least effort to detail or explain, Transamerica has not shown even a suggestion of a viable defense to the action against it. Since it axiomatic that summary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations, plaintiff is entitled to summary judgment in its favor.").

Further, Landlord is entitled to recover the attorneys' fees and costs incurred in this action. To this end, Section 19.03 of the Lease states, in pertinent part, "If Landlord and Tenant are involved in any litigation regarding the performance of any of their obligations under this Lease,

the unsuccessful party by final unappealable order, decree, or judgment by a court of competent jurisdiction in such litigation shall reimburse the substantially successful party in connection with obtaining such final unappealable order, decree or judgment. […]." (See **Exhibit "B"** to the Jenkins Affidavit, Section 19.03, pg. 36)

The Guaranty and Good Guy Guaranty provide for an even more immediate requirement that Guarantor reimburse Landlord for the attorneys' fees incurred in this action without the need for a "final unappealable order," providing: "***Guarantor shall pay for all costs and expenses in the enforcement of this Guaranty including but not limited to Landlord's reasonable attorney fees and expenses***." (See **Exhibit "C"** to Jenkins Affidavit, para. 1, pg. 2) Inasmuch as Landlord has incurred costs and expenses – including attorneys' fees – to enforce the terms of the Guaranty, Guarantor is obligated to reimburse Landlord for those costs and expenses.

The First Department considered a similar scenario in *Allerand, LLC v. 233 E. 18th St. Co., L.L.C.*, 19 A.D.3d 275, 276-77 (1st Dep't 2005), which addressed a tenant's failure to pay rent while maintaining possession of the demised premises. The First Department ultimately found that the landlord/lessor was entitled to recover fees, holding:

> The net lease provided in relevant part that 'Lessee shall indemnify and save Lessor harmless from and against all . . . costs and expenses including attorneys' fees . . . due to or arising out of or from . . . [a]ny breach, violation or non-performance of any covenants, condition, provision or agreement in this Lease,' and that '[i]f Lessor shall incur any expense, including reasonable attorneys' fees, in instituting, prosecuting, or defending any action or proceeding instituted by reason of any default by Lessee, Lessee shall reimburse Lessor for the amount of such expense.' Accordingly, inasmuch as the precipitant of this action was plaintiffs' withholding of rent while in possession of the demised premises -- a violation of a fundamental covenant of the lease, regardless of any breach by defendants -- the costs of the action's defense by the lessor must be borne by plaintiff lessees.

Consequently, it is respectfully submitted that Guarantor is obligated to pay the attorneys' fees incurred by Landlord in this action. Furthermore, should Landlord prevail in this matter, and an unappealable order result, Tenant will likewise be responsible for the payment of attorneys' fees and costs incurred by Landlord. This matter should therefore be set down for a hearing to determine the amount due to Landlord.

CONCLUSION

In light of the above, it is respectfully requested that this Court issue an Order: (i) dismissing Defendants' affirmative defenses; (ii) directing the clerk to enter a monetary judgment in favor of Landlord and against Defendants, jointly and severally, for the outstanding rent and additional rent due from Defendants; (iii) directing the clerk to enter a judgment declaring that Defendants are obligated to pay the rent and additional rent due under the pertinent Lease; (iv) setting this matter down for an attorneys' fee hearing to determine the amount of attorneys' fees and costs which Defendants owe Landlord, and (v) awarding such other and further relief as this Court shall deem just and proper.

Dated: New York, New York
November 11, 2020

COZEN O'CONNOR

By: _____

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