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

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EAST 16TH STREET OWNER LLC,

Plaintiff,

-against-

UNION 16 PARKING LLC and TMO PARENT LLC,

Defendants.

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Index No. 653839/20
Date Filed: 7/17/20

IAS Part 14
Hon. Arlene P. Bluth

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DIRECT DEFENDANTS TO PAY RENT PENDENTE LITE

Respectfully Submitted by:

Mavrides, Moyal, Packman & Sadkin, LLP
Attorneys for Defendants
276 Fifth Avenue, Suite 404
New York, NY 10001
(212) 396-4288

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Defendants Union 16 Parking LLC ("Union 16") and TMO Parent LLC ("TMO Parent" and, collectively with Union 16, "Defendants"), in opposition to Plaintiff East 16th Street Owner LLC's ("Plaintiff"") motion for an order directing Defendants to pay rent pendente lite.

Union 16 has operated a parking garage since March 2015 less than a block from Union Square. Since March 2020, the COVID-19 pandemic has wreaked havoc on the parking garage industry in Manhattan, causing a significant drop-off in the number of customers and garage revenue. As a recent *Wall Street Journal* article noted, due to the pandemic, many New Yorkers fled the city with their cars and canceled their monthly garage leases, which has resulted in the monthly garage business – usually down about five percent in August – to be down 60 percent this past August, with signs of matters worsening as winter approaches. See Berger, Paul, Parking Garages Idle as Car Owners Pull Out of New York City, The Wall Street Journal, August 31, 2020.[1] Union 16's parking garage is no different. Contrary to Plaintiffs assertions, this is a standard case of a landlord seeking unpaid rent from a tenant whose business has been devastated by COVID-19.

While asserting four of five causes of action for money damages related to unpaid rent, and a fifth that seeks merely a declaration that Defendants are liable for rent, Plaintiff now seeks an affirmative injunction mandating payment of all future, not-yet-due rent under the subject

[1] Available at https://www.wsj.com/articles/parking-garages-idle-as-car-owners-pull-out-of-new-york-city-11598874770.

lease, which has not been terminated, regardless of the circumstances and notwithstanding that Plaintiff has remedies available at law. In seeking such extraordinary relief, Plaintiff improperly invokes the equitable doctrine of use and occupancy that is generally reserved for holdover tenancies, which is not the case here.

In reality, Plaintiff's motion is nothing more than an attempt to constructively evict Union 16 and circumvent New York State's moratorium on commercial evictions. Setting aside any of Defendants' defenses to the claims for unpaid rent, if Plaintiff were to obtain an order (which would be subject to contempt proceedings) to pay all future rent (not yet due and regardless of any defenses related to future non-payments), it would undermine the very policy considerations and purposes of the eviction moratorium, which was expressly intended to protect businesses from closing, jobs from being lost, and the economy from sinking into further despair.

Such protections are very real to Union 16. Since the onset of the pandemic, Union 16, which is an essential business providing key infrastructure, has worked to remain open for its employees and customers, which include essential healthcare workers. During this challenging period, however, Union 16's revenue has dropped substantially (contrary to Plaintiff's speculative assertions), its occupancy has been significantly reduced, and it has incurred additional costs related to undertaking COVID-19 health and safety measures.

If Plaintiff's motion is granted, Union 16 will not be able to pay its employees or its other operating expenses, and will be forced to shut down. As a result, there is little doubt that the

relief Plaintiff seeks is not intended to maintain the status quo, but to constructively evict Union 16 in circumvention of the Governor's moratorium on commercial evictions.

Because Union 16 is not a holdover tenant, Plaintiff's claims are solely for money damages, and due to the Governor's executive order prohibiting commercial evictions, Plaintiff is seeking relief for which it is simply not entitled, whether as a matter of law or public policy.

The Court is respectfully referred to the Affirmation of Heath Olnowich, Esq. ("Olnowich"), dated December 9, 2020 (the "Olnowich Aff'm"), the Affidavit of Spencer Stiefel ("Stiefel"), general counsel to non-party Icon Parking Holdings, LLC ("Icon Parking"), the indirect parent and manager of Defendants, sworn to December 9, 2020 (the "Stiefel Aff't"), and the Exhibits submitted therewith, which set forth the factual bases that make the relief sought by Plaintiff unwarranted. For the reasons set forth herein, Plaintiff's motion should be denied in all respects.

STATEMENT OF FACTS

On March 2, 2020, in response to the initial reported cases of COVID-19 in New York, the state legislature passed legislation that afforded Governor Cuomo the power to suspend statutes or regulations, and issue necessary accompanying directives. See Senate Bill ("SB") S7919; N.Y. Exec. Law Art. 2B § 29-a. By March 6, 2020, with New York State rapidly becoming the epicenter of the pandemic, Governor Cuomo declared a statewide emergency. See Executive Order ("EO") 202. Then, on March 20, 2020, Governor Cuomo took the unprecedented step of ordering all non-essential businesses either to close or to require their employees to work from home in order to reduce the spread of COVID-19 and so that medical

professionals and other first responders could stem the wave of infections that reached devastating levels from March through May (which levels are reaching even more devastating levels now). See EO 202.8.

In response to the emergency, EO 202.8 was also the first of several executive orders prohibiting the eviction or foreclosure of residential or commercial tenants for non-payment of rent. See EO 202.28 (issued May 7, 2020, extending moratorium to August 20, 2020); EO 202.55 (issued August 5, 2020, extending moratorium until September 4, 2020); EO 202.57 (issued August 20, 2020, extending moratorium until September 20, 2020); EO 202.60 (issued September 4, 2020, extending moratorium until October 4, 2020); EO 202.64 (issued September 18, 2020, extending moratorium until October 20, 2020); and EO 202.67 (issued October 5, 2020, extending moratorium until November 3, 2020).[2] After issuing a succession of EOs from August through October extending the moratorium for 30 days and recognizing the ongoing effects of the pandemic, especially as winter approached, Governor Cuomo issued EO 202.70 on October 20, 2020, which extended the moratorium until January 1, 2021.

On August 20, 2020, Governor Cuomo emphasized the policy goals underlying the eviction moratorium, stating: "I am extending the State's moratorium on commercial evictions to ensure business owners across New York will not be forced to close as a result of the pandemic."[3] When Governor Cuomo extended the moratorium to January 1, 2021, he

[2] By Administrative Order 157/20 dated May 28, 2020, the Office of Court Administration also suspended all eviction proceedings.

[3] Available at https://www.governor.ny.gov/news/governor-cuomo-signs-executive-orderextending-moratorium-covid-related-commercial-evictions.

reiterated that the extension "extends protections already in place for commercial tenants and mortgagors in recognition of the financial toll the pandemic has taken on business owners, including retail establishments and restaurants."[4] Indeed, given the economic impact of the pandemic, Governor Cuomo recognized that "commercial tenants and mortgagors [need] additional time to get back on their feet and catch up on rent or their mortgage, or to renegotiate their lease terms to avoid foreclosure moving forward."[5] While Governor Cuomo began a phased reopening plan in June 2020, the economic damage to New York City, its citizens and its businesses had been done.

As is well-known in the parking garage industry and by the public in general, COVID-19 has resulted in people no longer driving their cars into Manhattan and, as has been widely reported, residents have moved out of Manhattan in droves and continue to do so to this day. Many non-New York City residents now work from home to avoid their Manhattan offices and/or to avoid traveling to Manhattan altogether, even for recreation. A recent October 26, 2020 article in *Crain's New York Business* concludes that automobile traffic in New York City remains 30 percent below pre-pandemic levels. (See Defs.' Ex. "1").[6]

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[4] Available at https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-extendingmoratorium-covid-related-commercial-evictions-0.

[5] Id.

[6] By way of comparison, the May 11, 2020 *Crain's* article submitted as Plaintiff's Exhibit "C" to the Affirmation of Menachem J. Kastner ("Kastner"), dated November 9, 2020 (the "Kastner Aff'm"), while hopeful, was written seven months ago when the extent of losses and damage from COVID-19 was unknown.

As it relates to this case, Union 16 is a commercial tenant operating a parking garage located at 110 East 16th Street, New York, New York (the "Garage"), pursuant to a lease agreement with Plaintiff dated on or about March 24, 2015 (the "Lease"). The Lease has a term of 20 years and is not due to expire until March 31, 2035. (See Stiefel Aff't, at ¶ 4).

Union 16 generally services monthly residential and daily transient customers. Prior to the COVID-19 pandemic, Union 16 was current on its monthly rent and additional rent (collectively, "Rent") obligations even if it did not generate a profit after expenses. (See Stiefel Aff't, at ¶ 5).

As one of New York City's many business victims of the pandemic, Union 16's business has been significantly impacted since March 2020. This has resulted in numerous Union 16 customers canceling their monthly contracts at the Garage and a significant reduction in daily transient Garage customers. (See Stiefel Aff't, at ¶ 6).

Since April 2020, Union 16's monthly revenues have been insufficient to pay Rent when taking into account operating expenses such as payroll, insurance, personal protective equipment (PPE) and sanitization. Had Union 16 been paying its Rent, it would not have been able to pay its employees or provide the resources to keep employees and customers of the Garage safe. (See Stiefel Aff't, at ¶ 7). At the same time, Union 16's costs, including enhanced cleaning and costs associated with COVID-19 related prevention measures, increased since it has continued to operate as an essential business providing key infrastructure during the pandemic. (See Stiefel Aff't, at ¶ 8). Thus, despite its ongoing struggles, Union 16 has strived

to remain operational, continue to pay its employees and provide services to customers, which include essential healthcare workers. (See Stiefel Aff't, at ¶ 9).

Notwithstanding these efforts, given the significant decrease in customer demand and increased costs, Union 16 cannot afford to pay the current Rent. (See Stiefel Aff't, at ¶ 10). Union 16 stopped paying Rent beginning in April 2020, after the Governor's shutdown, because the impact of the pandemic rendered it unable to afford to do so. Like tens of thousands of other businesses in New York City, Defendants have suffered severe financial losses as a result of COVID-19, and do not have the means to pay current Rent. (See Stiefel Aff't, at ¶ 11).

If Plaintiff's motion is granted, Union 16's revenue shortfall would make it impossible to continue operating and would result in Defendants' inability to pay many other necessary expenses, including employee wages and benefits, utilities, PPE supplies and other everyday business expenses. Union 16 would then have to decide between closing or not paying employee salaries and other operational expenses. (See Stiefel Aff't, at ¶ 12). Given such inequitable consequences, which are contrary to the policy goals underlying the Governor's eviction moratorium, Plaintiff's motion should be denied.

ARGUMENT

I. PLAINTIFF HAS FAILED TO ESTABLISH ANY RIGHT TO USE AND OCCUPANCY PENDENTE LITE RELIEF.

Plaintiff's motion for payment of future rent under a use and occupancy theory is nothing more than an attempt to circumvent the eviction moratorium by constructively evicting Union 16 and regaining possession of the Garage. Plaintiff's motion is likewise an improper attempt

to obtain by way of preliminary injunction the ultimate relief it seeks in the action, by essentially asking this Court to reach the final merits of the action without having to litigate its claims.

In its motion, Plaintiff does not provide a sufficient legal basis to obtain the interlocutory payment of Rent on the extant Lease. To be sure, virtually all of the Supreme Court or Appellate Division cases cited by Plaintiff in support of its motion are cases where (1) the lease had already expired or was the subject of a termination notice or (2) the court granted the requested relief as a condition of relief granted to the tenant. Other than one recent decision by this Court (discussed infra), where the facts differ from those at bar, Plaintiff does not cite any controlling cases where the relief sought herein was granted under similar circumstances. Notwithstanding that the subject Lease has not been terminated and Union 16 is not a holdover tenant, nor is it seeking affirmative injunctive relief from this Court, Plaintiff's argument is that pendente lite relief is nonetheless warranted for the simple reason that Union 16 is occupying the Garage under the Lease. Plaintiff's simplistic argument is legally and factually without merit and should be rejected.

A claim for use and occupancy pendente lite relief is principally reserved for holdover proceedings. See, e.g., 501 E. 87th St. Realty Co., LLC v. Ole Pa Enters., 304 A.D.2d 310, 311 (1st Dep't 2003) (use and occupancy awarded from the expiration of the last lease through the time the apartment was finally vacated); Rose Assocs. v. Lenox Hill Hosp., 262 A.D.2d 68 (1st Dep't 1999) (use and occupancy applied to holdover period); Immerblum v. Grefe, 248 A.D.2d 281 (1st Dep't 1998) (same); 1133 Bldg. Corp. v. Ketchum Commc'ns Inc., 224 A.D.2d 336 (1st Dep't 1996) (same); 540 Madison Partners, LLC v. Global Tech. Invs. LLC, No. 653174/12,

2014 WL 3870615 (Sup. Ct. N.Y. Cty. July 30, 2014) (plaintiff not entitled to use and occupancy, the amount a landlord can attribute to a holdover tenant until the tenant vacates the premises). The rationale for this general rule lies in the nature of a holdover tenancy, where the tenant remains in possession after the lease has expired or terminated. In such circumstances, the landlord no longer has a lease to sue under, is deprived of re-letting its premises, and must therefore resort to a claim in equity.

Here, Plaintiff's Complaint does not allege a cause of action for use and occupancy, or any equitable claims for that matter. Rather, four of Plaintiff's five causes of action are for money damages related to unpaid Rent, and the fifth seeks merely a declaration that Defendants are liable for Rent under the Lease. Similarly with respect to the motion before this Court, Plaintiff is seeking the payment of Rent under the in-force Lease, not the reasonable value for use and occupancy of the Garage following expiration or termination of the Lease. See 40 Rector Owner LLC v. City of New York, 137 A.D.3d 700, 702-03 (1st Dep't 2016) (where plaintiff asserted a use and occupancy claim for period where tenant was not a holdover, court deemed it to be a cause of action for unpaid rent).

Plaintiff has available relief against Union 16 for unpaid Rent under the Lease (i.e., the causes of action in the Complaint), by which Plaintiff can be made whole. To be sure, as courts have repeatedly held, since Plaintiff can seek money damages available at law, it has no right to equitable relief. See, e.g., Eastview Mall, LLC v. Grace Holmes, Inc., 182 A.D.3d 1057, 1058-59 (4th Dep't 2020) (denying injunctive relief where lease provided remedy at law); Harris v. Patients Med., P.C., 169 A.D.3d 433, 434 (1st Dep't 2019) (finding right to equitable

relief not established where monetary damages are an adequate remedy); Gama Aviation Inc. v. Sandton Capital Partners, L.P., 93 A.D.3d 570 (1st Dep't 2012) (denying motion for injunction seeking payments on note pending lawsuit, since plaintiff can recover the money at law); DiFabio v. Omnipoint Commc'ns, Inc., 66 A.D.3d 635, 636-637 (2d Dep't 2009) (irreparable injury, for purposes of equity, means any injury for which money damages are insufficient). As alleged in the Complaint, Plaintiff's claims under the Lease are legal and not equitable in nature. Thus, Plaintiff should be relegated to litigating this plenary action regarding Defendants' alleged failure to pay Rent and should not be allowed to shortcut the process by improperly obtaining equitable relief for its legal claims.

The cases cited by Plaintiff are distinguishable and expose the flaw in its argument. As stated above, Plaintiff's Supreme Court and Appellate Division cases fall generally into two categories: (1) cases where the lease had already expired or was the subject of a termination notice; or (2) cases where the court granted the requested relief as a condition of relief also granted to the tenant.

With respect to the first category, in MMB Assocs. v. Dayan, 169 A.D.2d 422, 422 (1st Dep't 1991), the plaintiff was granted use and occupancy pursuant to an agreement to vacate the premises, presuming either no tenancy or a terminated tenancy. Similarly, in Albright v. Shapiro, 92 A.D.2d 452, 453 (1st Dep't 1983), use and occupancy was ordered in a declaratory judgment action where the subject tenancies had already terminated pursuant to certain termination notices. Moreover, in 255 Butler Assocs., LLC v. 255 Butler, LLC, 173 A.D.3d 651 (2d Dep't 2019), where the tenant sued the landlord for a declaratory judgment and injunctive

relief after the landlord served the tenant with a notice of termination, use and occupancy was granted in enforcement of the parties' stipulation allowing the tenant to remain at the premises. Finally, in Esposito v. Larig, 174 A.D.3d 574, 576 (2d Dep't 2019), use and occupancy was ordered in an ejectment action pursuant to an expired lease.

With regard to the second category, in Corris v. 129 Front Co., 85 A.D.2d 176 (1st Dep't 1982), while the court did grant relief to the landlord, it was only as a condition of granting equitable relief to the tenant, stating as follows:

> The order appealed from directs the payment of all rent past due and current. In form this is improper. There is no reason for an injunction to direct the payment of money; there is an adequate remedy at law for the recovery of money either by action to recover rent or by summary dispossess proceedings. That there may be legal defenses to an action at law does not render the legal remedy inadequate for the purpose of the rule.
>
> However, this does not mean that the payment of rent may not be imposed as a condition of granting the extraordinary remedy of a mandatory injunction; such conditions are a traditional means of adjusting the equities between the parties.

Corris, 85 A.D.2d at 178 (emphasis added). Similarly, in Eli Haddad Corp. v. Cal Redmond Studio, 102 A.D.2d 730 (1st Dep't 1984), an equitable action for ejectment and not money damages, the tenant was ordered to pay use and occupancy, but only as a condition of obtaining a stay pending determination of whether the tenancy was protected by the loft law. In 538 Morgan Ave. Props. LLC v. 538 Morgan Realty LLC, No. 507788/15, 20202020 WL 5026659, at *2 (Sup. Ct. N.Y. Cty. Aug. 20, 2020), the court granted use and occupancy to the landlord on its cross-motion, but only as a condition of the tenants' obtaining a preliminary injunction enjoining defendants from interfering with their tenancy.

Likewise falling into the second category of Plaintiff's cited caselaw, in Steve Madden Retail, Inc. v. 720 Lex Acquisition LLC, No. 158822/15, 2016 WL 4245395, at *3 (Sup. Ct. N.Y. Cty. Aug. 5, 2016), while payment of current was imposed, it was only as a condition of granting a Yellowstone injunction. The granting of a Yellowstone injunction was also the basis for directing the payment of current rent in The Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, No. 652549/2020, 2020 WL 4207345, at *1-2 (Sup. Ct. N.Y. Cty. July 21, 2020).

This Court's recent decision in CP Assocs. LLC v. Concourse Plaza Family Dental LLC, No. 654307/2020, 2020 WL 6867924 (Sup. Ct. N.Y. Cty. Nov. 20, 2020), was also cited by Plaintiff, albeit in its opposition to Defendants' application for an adjournment of the instant motion. (NYSCEF Docs. 41-45). In CP Assocs. LLC, the tenant dentist was ordered to pay current rent after using COVID-19 as an excuse even though he had failed to pay rent for six months before the pandemic began. 2020 WL 6867924, at *2. Here, unlike the tenant in CP Assocs. LLC, the cessation of Union 16's payment of Rent in April 2020 coincides precisely with the onset of the pandemic that wreaked havoc on its business.

The facts of the instant case are more like those in Park Towers South Company, LLC v. Columbus Circle Parking, LLC and TMO Parent LLC, Index No. 653757/20, where the Hon. Louis L. Nock of this Court denied the landlord's motion for, inter alia, the exact same relief sought by Plaintiff herein. In Park Towers South Company, LLC, decided on December 3, 2020, Justice Nock determined that the landlord's motion for what it characterized as "use and occupancy" was, in actuality,

> a request that the court recognize the lease's ongoing obligation on the tenant to pay monthly rent. In other words, this is not in the nature of an interlocutory

> application for pendente lite provisional relief, but rather, a reiteration of plaintiff's first cause of action for breach of contract in which it is alleged that the tenant's 'breach of the lease' is 'continuing each month that [the tenant] fails to pay rent or other charges due under the lease[.]'

(See Defs.' Ex. "2", at 1). In denying the landlord's motion, Justice Nock concluded that "it [would be] improper for the court to grant [the] ultimate relief sought at this early stage of the case under the guise of provisional relief by order to show cause." (See Defs.' Ex. "2", at 2).

Even if Plaintiff properly asserted a claim for use and occupancy relief (which it has not), such relief is not automatic in any respect, but is subject to the Court's equitable discretion. See, e.g., Alphonse Hotel Corp. v. 76 Corp., 273 A.D.2d 124 (1st Dep't 2000). Given the devastating economic toll the pandemic has had on New York City and Defendants' considerably diminished financial state, such relief is not only unwarranted and inequitable, but contrary to the stated purposes of Governor Cuomo's eviction moratorium.[7]

Indeed, Plaintiff's motion clearly operates as an end run around the eviction moratorium. The Governor did not just look to protect residential tenants from being evicted during the pandemic, but extended such protections to commercial tenants, i.e., businesses that rely on their leased space to operate, even if at reduced revenues. Governor Cuomo has made clear that the underlying policy goal of the moratorium was to ensure business owners across New York would not be ousted from their leased space and forced to close as a result of the

[7] Plaintiff has provided no evidence, other than conclusory statements, that it is subject to any equivalent harm that would justify an order for the relief sought. Where a party makes only conclusory allegations and "fails to point to any imminent and non-speculative harm that would befall it in the absence of a preliminary injunction," the injunction must be denied. See, e.g., Family-Friendly Media, Inc. v. Recorder Television Network, 74 A.D.3d 738, 739-40 (2d Dep't 2010).

economic hardship caused by COVID-19.[8] For certain, if landlords were permitted to obtain the type of order Plaintiff is seeking from commercial tenants, it would undermine the stated goals of the moratorium and amount to a constructive eviction – the very result the moratorium is designed to protect against.

From a policy standpoint, extending the moratorium to commercial tenants has allowed them to remain open and operate in a diminished capacity. In turn, by staying open, businesses have been able to continue employing their workforce and providing services to the public. If landlords could sidestep the moratorium, it would not only jeopardize the ability of commercial tenants to continue operating, but if they were evicted and forced to close, then other dominos would fall, starting with employees being laid off. While Plaintiff cries foul under the current circumstances and wrongly speculates that Union 16 is earning a windfall, not only is Plaintiff wrong about Union 16's financial state, but it disregards the policy endorsed by the State, which is to protect tenants and not have them bear the financial burden of the pandemic any more than they already have. To be sure, Governor Cuomo could have limited the moratorium to residential tenants, but he recognized the serious consequences that would result if businesses were evicted and closed during these unprecedented times.

Here, if Plaintiff's motion is granted, the result would unquestionably destroy Union 16's business. Since the pandemic began, Union 16's revenue has declined substantially due to monthly parking customer terminations and daily customer absences, and its operating costs

[8] See https://www.governor.ny.gov/news/governor-cuomo-signs-executiveorder-extending-moratorium-covid-related-commercial-evictions.

during the same period have increased. (See Stiefel Aff't, at ¶¶ 6-11). As a result, it would be impossible for Union 16 to continue operating and would result in Defendants' inability to pay many other necessary expenses, including employee wages and benefits, utilities, PPE supplies and other everyday business expenses. Union 16 would then have to decide between closing or not paying employee salaries and other operational expenses, all while facing the risk of contempt. (See Stiefel Aff't, at ¶ 12). Not content to rely on its legal remedies, it would seem that Plaintiff's goal is to force Union 16 to surrender the Garage, which would be an obvious end-run around the Governor's executive order prohibiting commercial evictions. Simply put, if Plaintiff, through this motion, can inflict even more hardship on Union 16 than it has already suffered, it will result in a constructive eviction. Such consequences are hardly equitable and, as such, justify this Court's considerable discretion in denying Plaintiff's motion.

II. EVEN IF USE AND OCCUPANCY RELIEF WAS AVAILABLE, PLAINTIFF HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING FAIR MARKET VALUE.

In the unlikely event that this Court finds use and occupancy relief warranted, Plaintiff has failed to establish its burden of determining the reasonable value for such payment. To be sure, it is well settled that the reasonable value for use and occupancy is the fair market value of the subject premises. See, e.g., Mushlam, Inc. v. Nazor, 80 A.D.3d 471, 472 (1st Dep't 2011). In making this determination, "it is the landlord, not the tenant, who has the burden of proving reasonable value of use and occupancy." Id. In this regard, "[l]iability for use and occupancy is not liability for rent under the lease." Beacway Operating Corp. v. Concert Arts Soc'y, Inc., 123 Misc.2d 452 (Civ. Ct. N.Y. Cty. 1984). Moreover, the rent under the lease is probative, but not conclusive. See Mushlam, Inc., 80 A.D.3d at 472; see also 43rd St. Deli, Inc.

v. Paramount Leasehold, L.P., 107 A.D.3d 501 (1st Dep't 2013). In determining fair market value, the Court must appraise the actual value of the property, taking into consideration whatever restrictions apply because of agreements between the parties, governmental decrees or other factors. See, e.g., 438 W. 19th St. Operating Corp. v. Metropolitan Oldsmobile, Inc., 142 Misc.2d 170, 173 (Civ. Ct. N.Y. Cty. 1989).

Here, Plaintiff has failed to submit any evidence of the fair market value of the Garage, i.e., the amount that a prospective commercial tenant would currently be willing to pay to lease the subject premises. See Mushlam, Inc., 80 A.D.3d at 472 (finding record contained insufficient evidence of fair market value). Instead, Plaintiff seeks the fixed monthly Rent under the Lease, erroneous by itself, and fails to take into account the impact of the COVID-19 pandemic on the fair market value of the Garage, including partial government shutdowns, limitations on use of the space and reduced economic activity citywide. Given current circumstances, the fair market value is most certainly not the current fixed Rent under the Lease. See Beacway Operating Corp., 123 Misc.2d at 454-55 (finding decreased value based on the effect a landmark preservation designation had on the Beacon Theater's fair market value); 438 W. 19th St. Operating Corp., 142 Misc.2d at 173 (finding no market value based on caved-in roof and the subsequent governmental order vacating the building for public safety). Thus, even if relief for use and occupancy were to be considered by this Court, which it respectfully should not, Plaintiff has failed to meet its burden of establishing fair market value for such use.

CONCLUSION

For the reasons set forth herein, Defendants Union 16 Parking LLC and TMO Parent LLC respectfully request the entry of an Order:

(A) Denying Plaintiff East 16th Street Owner LLC's motion to direct Defendants to pay rent pendente lite in all respects;

(B) Granting Defendants fees, costs and disbursements; and

(C) Granting Defendants such other, further and different relief as the Court deems just, proper and equitable.

Dated: Lake Success, New York
December 9, 2020

Mavrides, Moyal, Packman & Sadkin, LLP
Attorneys for Defendants

By: /s/ Heath Olnowich
Heath Olnowich, Esq.
276 Fifth Avenue, Suite 404
New York, NY 10001
(212) 396-4288
HBO@mmps.com

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Attorneys for Defendants
276 Fifth Avenue, Suite 404
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(212) 396-4288

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