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

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GRAPHNET, INC., Index No. 151622/ 21

Plaintiff,

- against -

30 BROAD STREET VENTURE LLC,

Defendant.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION AND IN OPPOSITION TO CROSS-MOTION

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PRELIMINARY STATEMENT

Plaintiff tenant, Graphnet, Inc. ("Plaintiff"), respectfully submits this reply memorandum of law in further support of its application for a Yellowstone preliminary injunction to toll the running of the cure period in the notice to cure (the "Notice to Cure") issued by defendant- landlord, 30 Broad Street Venture LLC ("Defendant"), to preserve the commercial lease (the "Lease") between Plaintiff and Defendant, *pendente lite*. Plaintiff also submits this memorandum of law in opposition to Defendant's cross-motion, made pursuant to CPLR 3211(a)(1) and/or (a)(7).

Defendant cannot prevail on its cross-motion because the Notice to Cure is defective. As discussed herein below, in issuing its Notice to Cure Defendant misinterpreted a critical provision of the Lease. Specifically, the Lease defines the Commencement Date as the later of the date that: (i) Landlord's Work was Substantially Completed (as those terms are defined in the Lease) or (ii) the date on which Tenant occupies any portion of the Premises and begins conducting business therein. Defendant Substantially Completed Landlord's Work on October 26, 2020. The Lease also provides a three month free rent period. In the Notice to Cure, Defendant seeks rent starting as of February 1, 2021, which is three months after Landlord's Work was Substantially Completed.

Plaintiff respectfully submits that the Notice to Cure is invalid because it misinterprets the the Commencement Date of the Lease as occurring on the "earlier of", and not the "later of", the date date that: (i) Landlord's Work was Substantially Completed or (ii) the date on which Tenant occupies any portion of the Premises and begins conducting business therein. The Notice to Cure is Cure is the based upon the Landlord's Work being Substantially Completed on October 26, 2020 and

and the first rent being due three months later (starting in February 2021), which is the earlier of, and and not the later of, items "i" and "ii" as required by the Lease. Thus, the Notice to Cure is invalid invalid because it does not accurately interpret the definition of the Commencement Date in the Lease.

With respect to Plaintiff's Yellowstone motion, the accompanying affidavit and the case law cited herein shows that Plaintiff meets all four elements necessary for the granting of such relief.

STATEMENT OF FACTS

The Court is respectfully referred to the accompanying affidavit of Guy Conte for a recitation of the relevant facts.

POINT I

DEFENDANT IS NOT ENTITLED TO A DISMISSAL PURSUANT TO EITHER CPLR 3211(a)(1) OR CPLR 3211(a)(1) OF ANY OF THE FIVE CAUSES OF ACTION IN THE COMPLAINT.

A. *The First and Second Causes of Action Are Not Dismissible.*

Defendant's notice of cross-motion seeks to dismiss Plaintiff's first two causes of action pursuant to CPLR 3211(a)(1) (documentary evidence) and/or CPLR 3211(a)(7) (failure to state a cause of action). Significantly however, nowhere in its cross-moving papers does Defendant even even attempt to apply the standard for a dismissal under either CPLR 3211(a)(1) or (a)(7) to the pleadings or facts alleged in Plaintiff's complaint. Plaintiff respectfully submits that Defendant omits such an analysis because the juxtaposition between the very stringent standard for granting relief under CPLR 3211(a) and the core argument that Defendant make in support of this branch of of its dismissal cross-motion – that the only "reasonable" interpretation of the Commencement Date

Date clause is that the Commencement Date occurred upon Landlord's Substantial Completion of of Landlord's Work (as those terms are defined in the Lease) – is too jarring for Defendant to plausibly advance. As discussed below, the issue of the "reasonableness" of the interpretation of the the Lease is just not susceptible to a CPLR 3211(a) determination but is, instead, the proper subject subject of discovery as to the intent and meaning that the parties possibly ascribe to the term "Commencement Date".

The first cause of action seeks a declaration that Plaintiff is not in default under the Lease as alleged in the Notice to Cure because the "Commencement Date", as that term is defined under the Lease, has not yet occurred and, therefore, Plaintiff is not currently required to take occupancy of the Premises and pay rent therefor. The second cause of action seeks a permanent injunction enjoining Defendant from terminating the Lease based upon the allegations set forth in the Notice to Cure.

When considering a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must "accept "accept the facts as alleged in the complaint as true, accord the benefit of every possible favorable favorable inference and determine only whether the facts alleged fit into any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994).

Moreover, a CPLR Rule 3211(a)(7) motion to dismiss only addresses the sufficiency of the the pleadings contained in the Complaint. The Court on a 3211(a)(7) motion does not engage in "fact finding or framing of factual issues for trial." Four Seasons Hotels Limited v. Vinnik, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dept. 1987), citing, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976); Board of Managers of Alfred Condominium Condominium v. Carol Management, Inc., 214 A.D.2d 380, 624 N.Y.S.2d 598 (1st Dept. 1995); Butler v. Helmsley-Spear Inc., 198 AD 2d 131, 604 N.Y.S.2d 51 (1st Dept. 1993). Instead, on a

motion dismiss pursuant to CPLR 3211(a)(7), a court must determine "whether the proponent of the the pleading has as cause of action, not whether he has stated one." Leon v. Martinez, 84 N.Y.2d 83, N.Y.2d 83, 614 N.Y.S.2d 972 (1994) (quoting Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977); Rovello v. Orofino, supra, 40 N.Y.2d at 636).

On a motion to dismiss in a declaratory judgment action, such as the instant case, the issue to issue to be decided is whether a cause of action has been pled, not whether the plaintiff is entitled to to a favorable declaration. See Palm v. Tuckahoe Union Free School District, 95 A.D.3d 1087, 944 944 NYS 2d 291 (2nd Dept. 2012). A motion to dismiss for failure to state a cause of action should should only be granted where the defendant demonstrates that the plaintiff is not entitled to a declaration. Garcia v. Motor Vehicle Accident Indemnification Corp., 18A.D.2d 62, 238 N.Y.S.2d N.Y.S.2d 195 (1st Dept. 1963).

With respect to a CPLR 3211(a)(1) motion, Defendant can prevail only where the document document in question "conclusively establishes" a defense as a matter of law to the asserted claim. claim. Leibowitz v. Impressive Homes, Inc., 43 A.D.3d 1008, 843 N.Y.S.2d 120 (2d Dept. 2007) (See also Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972 (1994))

Defendant's cross-motion fails to meet the above standard necessary to dismiss either of the first two causes of action under either CPLR 3211(a)(1) and/or (a)(7).

i The First Cause of Action

Significantly, in seeking dismissal of the first cause of action, Defendant does not attack the the sufficiency of Plaintiff's pleading of this cause of action, which is the purpose of a CPLR 3211(a)(7) motion. As such, based upon well-established case set forth above, Defendant cannot cannot prevail on a CPLR 3211(a)(7) motion with respect to the first cause of action on the ground ground that it fails to allege a cause of action.

Instead of challenging the sufficiency of the pleading for the first cause of action, Defendant seeks to dismiss the first cause of action by arguing that Plaintiff misinterprets the term "Commencement Date" under the Lease.

The Commencement Date is defined in the Lease as:

> the later of (a) the date on which Landlord's Work (as defined below and in Exhibit "B" hereto) in the Premises is Substantially Completed (as defined in Exhibit "B" hereto), (b) the date on which Landlord's Work in the Premises would have been Substantially Completed but for the occurrence of any Tenant Delay Days (as defined in Exhibit "B" hereto), or (c) the date on which Tenant occupies any portion of the Premises and begins conducting business therein."

(Emphasis Added)

Defendant maintains that the Commencement Date means that Plaintiff must pay rent, take occupancy of the Premises and start conducting business within a "reasonable time" after Landlord's Work is Substantially Complete (as those terms are defined in the Lease). (Claman, Aff. ¶¶9-10) Similarly, Defendant argues in its memorandum of law that the Commencement Date provision of the Lease is subject to a "reasonable time of performance". (Defendant, Memo of Law, p.8)

Significantly however, whatever may be the ultimate definition or determination of what is is reasonable period of time after the Landlord's Work is Substantially Completed – which, in any any event, is not the proper subject of a CPLR 3211(a) motion – Defendant's Notice to Cure does does not constitute such a reasonable period of time. As Plaintiff notes above and elsewhere in its papers, the Lease states that the Commencement Date occurs on the later of the date that: (i) Landlord's Work is Substantially Completed or (ii) Plaintiff takes occupancy of the Premises and begins to do business in the Premises. Yet, in its Notice to Cure, Defendant takes the position that that the Commencement Date actually occurred on the earlier of the date that Landlord's Work is

Substantially Completed or the date that Plaintiff takes occupancy of the Premises and begins to do do business in the Premises. Plaintiff says this because Defendant notified Plaintiff that the Commencement Date occurred on October 26, 2020. (A copy of this notice is annexed as Exhibit 8 Exhibit 8 to the affidavit of William Brodsky.) That same Exhibit 8 also states that the Landlord's Landlord's Work was Substantially Completed on October 26, 2020. Thus, according to Defendant's argument, and in contravention of the express language of the Lease, the Commencement Date occurred on the earlier of date that; (i) Landlord's Work is Substantially Completed or (ii) the date that Plaintiff takes occupancy of the Premises and begins to do business in business in the Premises

And, indeed, the Notice to Cure reflects Defendant's interpretation of the Lease that the Commencement Date occurred on the earlier of the two events set forth in the preceding paragraph. Plaintiff says this because Article 1(C)(ii) of the Lease states that Rent is abated "for each of the first three (3) calendar months following the Commencement Date". (A copy of the Lease is annexed as Exhibit C to the February 18, 2021 affidavit of Guy Conte.) Thus, Defendant has concluded that the Commencement Date occurred upon the Landlord's Work being Substantially Completed because the Notice to Cure claims that the rent first became due in February 2021, which is just three calendar months after the Commencement Date.

Defendant's interpretation of the Commencement Date (with rent first due as of February 2021) can't be right and therefore it cannot be "reasonable" because the Lease states that the Commencement Date occurs on the later of the aforesaid two events.

In reaching its conclusion as to the meaning of the term Commencement Date, Defendant commits a cardinal sin of contract interpretation; it does not give any meaning to the term "later of" of" because, under Defendant's interpretation, the Lease could have said the "earlier of" and still

have the Commencement Date and the Landlord's Work being Substantially Completed on October October 26, 2020 as Defendant maintains. Under well-established New York law, in interpreting the the Lease a party must "avoid an interpretation that would leave contractual clauses meaningless". meaningless". 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 6, 784 N.Y.S.2d 63, 66 (1st (1st Dept. 2004)

A separate and additional argument against granting dismissal of the first cause of action pursuant to CPLR 3211(a)(7) is that Defendant's counsel drafted the Lease. (See Conte Aff. ¶26) ¶26) Therefore, under well accepted principles of contract interpretation any ambiguity as to the meaning of the term "Commencement Date" must be construed against the drafter. Commercial Tenant Servs., Inc. v. Northern Leasing Sys., Inc., 131 A.D.3d 895, 17 N.Y.S.3d 394 (1st Dept. 2015) 2015)

Finally, even assuming *arguendo* for the purpose of Defendant's cross-motion that the meaning of the Commencement Date is subject to a "reasonableness" factor, this would not establish Defendant's right to dismissal of this cause of action under CPLR 3211(a)(7). The question of what is "reasonable" is an inherently factual question that cannot be resolved on a motion to dismiss. Instead, Plaintiff requires discovery from the drafter of the Lease as to why he/ she used the term "later of" instead of the "earlier of", which is the much more commonly used phrase in such leases.

Similarly without merit is Defendant's argument that this Court must dismiss the first cause cause of action on the ground that documentary evidence (i.e. the Lease) requires it. The foregoing foregoing dispute in interpretation of the Lease is simply not something that is susceptible to dismissal on the CPLR 3211(a)(1) motion. Thus, in Muccioli v. Gobrial, 2020 N.Y. Misc. LEXIS LEXIS 12026, 2020 NY Slip Op 34451(U) (Sup. Ct. Queens Co.) the court denied a motion to

dismiss under CPLR 3211(a)(1) where there was a dispute as to the commencement date of the lease lease and the documentary evidence could not "conclusively establish" such date. Similarly, the Appellate Division First Department denied a CPLR 3211(a)(1) motion because there existed "questions of fact with respect to the intent and meaning of the guaranty sued on herein...." Khayyam v. Doyle, 231 A.D.2d 475, 647 N.Y.S.2d 507 (1st Dept. 1996) (See also, DeStasio v. Condon Resnick, LLP, 90 A.D.3d 809, 936 N.Y.S.2d 51 (2nd Dept. 2011) holding that documentary documentary evidence did not conclusive establish that plaintiff's legal malpractice claim must fail fail but instead simply evidenced disputed issues of fact).

In the case at bar, the Lease does not **"conclusively establish"** the meaning of the term "Commencement Date".

For the foregoing reasons this Court must deny Defendant's motion to dismiss Plaintiff's first cause of action.

ii The Second Cause of Action

The second cause of action seeks a permanent injunction against Defendant from terminating the Lease based upon the allegations in the Notice to Cure. Defendant does not explicitly advance any argument in support of dismissing this cause of action.

The second cause of action is inexorably tied to the first cause of action. If Plaintiff obtains a declaration in its favor on its first cause of action then Defendant has no claim to terminate the Lease. Therefore, if the first cause of action survives so must the second cause of action.

B. The Third, Fourth and Fifth Causes of Action Are Not Dismissible.

The third, fourth and fifth causes of Action are also not dismissible under either CPLR 3211(a)(7) or (a)(1).

i. The Third Cause of Action

The third cause of action alleges that the force majeure clause in the Lease cancels or suspends Tenant's obligation to take possession of the Premises.

The force majeure clause, Lease ¶42(B), states in full that:

> Except as otherwise set forth in Articles 10 and 11 above, other than for Tenant's obligations under this Lease that can be performed by the payment of money (e.g. payment of rent and maintenance) whenever a period of time herein prescribed for action to be taken by either party hereto, and such party shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions, or any other causes of any kind whatsoever which are beyond the control of such party.

Defendant seeks to defeat this cause of action by arguing that the force majeure clause does not apply to the facts in the Notice to Cure because it does not excuse anything that can be performed by the payment of money, such as rent. This argument fails because it misconstrues the predicate issue for this court's determination.

Specifically, the Notice to Cure alleges both that Plaintiff has failed to; (i) pay its rent and (ii) take occupancy of the Premises and begin to do business therein. However, the Lease states that the initial rent payment is not due until three months after Plaintiff takes occupancy of the Premises and begins to do business therein (See Lease ¶1(C)(ii)). Therefore, if Plaintiff is justified in not taking occupancy of the Premises and beginning to do business therein because the Commencement Date has not yet occurred, the "payment of rent" carve out does not apply to the facts in this case.

Accordingly, the Court should not dismiss the third cause of action.

ii. The Fourth and Fifth Causes of Action

The fourth cause of action alleges that the doctrine of frustration of purpose relieves Plaintiff of its obligations under the Lease. The fifth cause of action alleges that the doctrine of impossibility of performance relieves Plaintiff of its obligations under the Lease.

Defendant seeks to dismiss the fourth and fifth cause of action on the ground that in three cases, to which Defendant cites in its memorandum of law, those courts held that the twin doctrines of frustration of purpose and impossibility of performance do not constitute defenses to a tenant's obligations under its lease. (Defendant, Memo of Law, pp.12-13)

Significantly, all three of Defendant's cases were decided on a CPLR 3212 summary judgment motion and not, as here, on a CPLR 3211(a) motion to dismiss. CPLR 3211(a)(7) simply does not provide any cognizable basis upon which to dismiss the cause of action as the complaint states a cause of action. Moreover, Defendant does not – indeed cannot – advance the argument that somehow "documentary evidence" under CPLR 3211(a)(1) constitutes a ground for dismissing claims of frustration of purpose and impossibility of performance. Additionally, two of the three cases to which Defendant cites were decided by the same justice (Justice Arlene Bluth).

Instead, a case with much greater precedential value for the one at bar is Gap, Inc. v. 170 Broadway Retail Owner, LLC, 2020 N.Y. Misc. LEXIS 9794, 2020 NY Slip Op 33623(U) (Sup. Ct. Ct. NY Co.) In that case, like the case now before this Court, the tenant sought a Yellowstone preliminary injunction and the landlord immediately cross-moved to dismiss the action under CPLR CPLR 3211(a). In that case, the tenant asserted a cause of action based upon impossibility of performance and frustration of purpose due to Covid-19. In analyzing the case before her, under a

CPLR 3211(a) analysis, Justice Debra James refused to dismiss the tenant's causes of action based based upon frustration of purpose and impossibility of performance as the complaint stated a cause cause of action for these two claims.

Even more recently, in an unreported decision from the Supreme Court New York County, International Plaza Associates, L.P. v. Amorepacific US, Inc. (Index #155158/2020) (a copy of which is annexed hereto as **Exhibit A**), Justice Feinman denied summary judgment to a landlord that had sued its tenant for the nonpayment of rent. The court denied the landlord's motion for summary judgment on the ground that the Covid-19 pandemic was not foreseeable and thus, depending on the facts developed in discovery, the tenant might establish a defense of frustration of purpose to the landlord's rent claim.

Based upon the above, the justices of the Supreme Court New York County have not staked out a uniform position as to whether or not claims for frustration of purpose and/or impossibility of performance as a result of Covid-19 are, or are not, dismissible, at least within the context of a CPLR 3212 motion. However, Plaintiff is not aware of any binding decision of the Appellate Division on this issue or, any case in which a court dismissed such claims under the auspices of CPLR 3211(a).

Thus, for the foregoing reasons, Defendant cannot prevail on a CPLR 3211(a)(1) and/or (a)(7) motion to dismiss with respect to either the fourth or fifth cause of action.

POINT II –

PLAINTIFF IS ENTITLED TO YELLOWSTONE RELIEF.

To secure Yellowstone relief, Plaintiff must meet the four elements necessary for the granting granting of such relief. Of those four elements, Defendant does not challenge Plaintiff's entitlement entitlement to relief with respect to three of them; these three elements are that Plaintiff (1) holds a

a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the termination of the lease lease and expiration of the cure period set forth in the notice to cure.

Defendant challenges only the fourth element of the test for granting Yellowstone relief; namely, that Plaintiff is ready willing and able to cure any default alleged in the Notice to Cure by any means short of vacating the Premises. In particular, Defendant takes issue as to whether Plaintiff has the financial wherewithal to cure the default of $18,466.63 in unpaid rent and take possession of the Premises if the Court were to rule against Plaintiff. (Defendant, Memo of Law, p.14 and Claman Aff. ¶4) For the reasons that follow, Defendant's argument lacks merit.

In construing this fourth element, the court in LF 420 W. Broadway, LLC v. 420 W. Broadway Corp., 2012 N.Y. Misc. LEXIS 6674; 2012 NY Slip Op 33716(U) (Sup. Ct. N.Y. County), County), citing to Empire State Building Assoc. v. Trump Empire State Partners, 245 A.D.2d 225, 225, 667 N.Y.S.2d 31 (1st Dept. 1997) and Marathon Outdoor, LLC v. Patent Constr. Sys. Div. of Harsco Corp., 306 N.Y.S.2d 254, 760 N.Y.S.2d 528 (2d Dept. 2003), ruled that:

> Although defendant argues that a Yellowstone injunction should be denied in the absence of proof that plaintiffs actually have retained the ability to cure, our courts have held that where, as here, plaintiffs have professed a willingness to do whatever is necessary to cure a default, should one be found, it is sufficient that there exists a potential means to cure the alleged default.

(emphasis added)

(See also, Jemalton of 125th Street, Inc. v. Leon Betesh/ Park Seen Realty Associates, 115 A.D.2d 381, 382 496 N.Y.S.2d 16 (1st Dept. 1985) (holding that "Rather than requiring the tenant to prove, prove, on his application, that he can cure the alleged defects, all he need do to obtain the

Yellowstone injunction is convince the court of his desire and ability to cure the defects by any means short of vacating the premises.")

These cases stand for the proposition that to meet the fourth element of the test, a tenant only need state, or otherwise convince the court, that it has the desire and ability to cure the claimed default. Guy Conte, in his initial moving affidavit, so stated. (Conte Aff. ¶22)

Supplementing this response, in the reply affidavit submitted herewith, Mr. Conte establishes that Plaintiff maintains, in a bank account that it controls, funds to pay February, March and April 2021 rent. (See Exhibit A to Mr. Conte's accompanying affidavit) With respect to the other prong of the default asserted in the Notice to Cure – that Plaintiff has abandoned, vacated or surrendered the Premises – Mr. Conte states in paragraph 17 of his accompanying affidavit that Plaintiff will take all necessary steps to avoid a forfeiture of the Lease and will, should this Court ultimately rule in Defendant's favor, take possession of the Premises.

Notwithstanding the foregoing, in pages 8 through 11 of his affirmation, Defendant's counsel, Richard Claman, lists a series of cases that he says stands for the proposition that Plaintiff's Plaintiff's moving affidavit allegedly does not show its ability to cure its alleged default. However, However, none of these cases – particularly in light of the contents of Mr. Conte's accompanying affidavit - apply to the case at bar. Here are the cases to which Defendant cites and why they are distinguishable from the case at bar: (York Parking LLC v. York Avenue Commons LLC, 2020 WL WL 6736320 (Sup. Ct. N.Y. Co.) (the tenant did not establish that it would cure its default because it because it could not commit to make a deposit of the disputed arrears); Metropolis Westchester Lanes, Inc. v. Colonial Park Homes, Inc., 187 A.D.2d 492, 589 N.Y.S.2d 570 (2nd Dept. 1992) (tenant had no intention of investing money to timely repair the default); 146 Broadway Assoc. LLC

LLC v. Bridgeview at Broadway, LLC, 164 A.D.3d 1193, 84 N.Y.S.3d 241 (2d Dept. 2018) (tenant (tenant unwilling to cure default where for 17 months prior to the submission of its reply papers, tenant did not make any effort to correct the default); Alsonso v. 401 East 74 Owners Corp., 2019 2019 WL 2009270 (Sup. Ct. N.Y. Co.) ("Here, plaintiffs take issue with the basis for the notice to to cure, without expressing that they are prepared and able to cure the alleged default"); Stella, L.L.C. v. Equity Concepts LLC, 2018 WL 2386357 (Sup. Ct. N.Y. Co.) (plaintiff submits no evidence to support its claim that "it is willing and able to cure or that it has made any effort to do do so"); 330 Hudson Owner LLC v. Rector, Church-Wardens and Vestrymen of Trinity Church in in the City of New York, 2009 WL 1470449 (Sup. Ct. N.Y. Co.) (tenant had no intent to cure the alleged default or pursue a close-up plan unless the landlord agreed to re-negotiate the lease); 73 Empire Development LLC v. MDL Equipment Development LLC, 2018 WL 5456432 (Sup. Ct. N.Y. Co.) ("Plaintiff has basically conceded that it cannot cure the default unless Plaintiff is permitted to assign the lease to another entity, which plaintiff is not permitted to do while it is in default of the lease"); BAS Communications, Inc. v. YTK Corp., 15 Misc.3d 1104(A), 836 N.Y.S.2d N.Y.S.2d 497 (Sup. Ct. Nassau Co. 2007) (tenant could only offer the lease fixtures inventory and and good will of the tenant to pay over $100,000 in rental arrears).

In contrast, Plaintiff has demonstrated that it meets the fourth criterion for the granting of Yellowstone relief.

Defendant further argues in its memorandum of law that Plaintiff is not "entitled to a Yellowstone stay when it is not actually attempting to use the space at issue." (Defendant, Memo of of Law, p.14) (emphasis in original). Defendant cites to York Parking LLC v. York Avenue Commons LLC, 2020 WL 6736320 (Sup. Ct. N.Y. Co.) and Graubard Mollen Horowitz Pomeranz & Pomeranz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508 (1999) to support this proposition.

proposition. However, neither of these cases concern a tenant not in possession of the premises demised to it that is the subject of a default notice, such as the Notice to Cure at bar.

In any event, Plaintiff has not abandoned or surrendered the Premises and has stated that should this Court find that the Commencement Date has occurred it will take possession of the Premises. (Conte Aff. ¶17)

A. Plaintiff Disagrees as to the Conditions Necessary for Granting Yellowstone Relief.

Defendant concludes its opposition to Plaintiff's Yellowstone motion by asserting that if this Court grants Plaintiff's motion it should do so on condition that Plaintiff: (i) post a bond in the sum of $227,116.50 plus (ii) pay on-going use and occupancy, *pendente lite*, in the amount set forth in the Lease. Plaintiff objects to conditioning Yellowstone relief on the payment of use and occupancy, *pendente lite.* Plaintiff also objects to the amount of the bond that Defendant seeks.

With respect to the posting of a bond as a condition for granting Yellowstone relief, Defendant argues that the proper amount of the bond is $227,116.50. Of that amount, Defendant seeks $192,175.50 for claimed arrears on the 43rd floor. (Brodsky, Aff. ¶42 and Memo of Law, p.14) The Court must deny a request for a bond that includes the claimed 43rd floor rent arrears.

Plaintiff recognizes that CPLR 6312(b) requires the posting of a bond as a condition to the the granting of a preliminary injunction. However, the amount of the bond must reflect no more than than the "damages and costs which may be sustained by reason of the injunction…." (CPLR 6312(b)) 6312(b)) Here, the Notice to Cure only asserts a default with respect to the 26th floor Premises; it it does not assert any default regarding the 43rd floor premises. Thus, as a matter of law and logic,

logic, since Plaintiff's request for a Yellowstone preliminary injunction does not pertain to Defendant's claim for the 43rd floor rental arrears (or anything pertaining to the 43rd floor), it cannot cannot constitute damages that fall within the purview of the posting of a bond under CPLR 6312(b). 6312(b).

Moreover, as Guy Conte explained in both of his affidavits, Plaintiff vacated and abandoned the 43rd floor by the end of August 2020 pursuant to the notice to vacate that it sent to Defendant and which is provided for in the License Agreement for the 43rd floor. (For a detailed explanation as to why Plaintiff is not liable for the 43rd floor rent, see paragraphs 18 through 24 of the accompanying affidavit of Guy Conte.)

Defendant also requests that as a condition of this Court granting Plaintiff's motion that Plaintiff "pay in full the ongoing use and occupancy to landlord on a monthly basis…." (Defendant, Memo of Law, p.14) Plaintiff objects to this condition because Plaintiff neither currently uses nor occupies the Premises. Therefore, it would be inequitable to require Plaintiff to pay for space that it is not using. Case law supports Plaintiff's position.

In Global Bus. School, Inc. v. R.E. Broadway Real Estate, II, LLC, 38 A.D.3d 451, 833 N.Y.S.2d 48 (1st Dept. 2005), the tenant obtained a Yellowstone preliminary injunction in the Supreme Court without the court conditioning it on the payment of use and occupancy. In affirming affirming this ruling, the Appellate Division noted that the lease stated that tenant was not required to required to start paying rent until one of two events occurred. The Appellate Division concluded that that since "neither condition had yet occurred when the motion court granted the Yellowstone injunction ... a direction to pay rent would confer on landlord a benefit to which it is not entitled under the lease." Id. at 451, 49. So too here. For the reasons set forth hereinabove and in the accompanying affidavits of Guy Conte, Plaintiff's obligation to pay rent has not yet arrived since the

the Commencement Date has not yet occurred. Therefore, it would be improper to order Plaintiff to Plaintiff to pay on-going use and occupancy at this time.

Finally, neither of the two cases to which Defendant cites in support of requiring Plaintiff to to pay use and occupancy, *pendente lite*, (Rame LLC v. Metropolitan Realty Management, Inc., 2020 2020 WL 6290556 (Sup. Ct. N.Y. Co.) and The Gap Inc. v. 44-45 Broadway Leasing Co. LLC, 2021 2021 WL 651152 (1st Dept. 2021)) involve a situation where the tenant was not in occupancy of the the demised premises and/or the obligation to pay rent had not yet arrived.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion and deny Defendant's cross-motion and grant such other and further relief as may be deemed just and proper.

Dated: New York, New York
March 31, 2021

Respectfully submitted,

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