To Be Argued By:
JOSHUA H. EPSTEIN
Time Requested: 15 Minutes

New York County Clerk's Index No. 652732/20

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

THE GAP, INC.,

Plaintiff-Respondent,

—against—

170 BROADWAY RETAIL OWNER, LLC,

Defendant-Appellant.

CASE NO. 2020-04770

BRIEF FOR PLAINTIFF-RESPONDENT

JOSHUA H. EPSTEIN
JESSE B. SCHNEIDER
DAVID S. GREENBERG
DAVIS+GILBERT LLP
1675 Broadway
New York, New York 10019
(212) 468-4800
jepstein@dglaw.com
jschneider@dglaw.com
dgreenberg@dglaw.com

Attorneys for Plaintiff-Respondent

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the trial court properly deny Appellant's motion to dismiss Respondent's breach of contract claim, when construing the Complaint's allegations liberally, accepting as true the facts alleged, and viewing the pleading in the light most favorable to Respondent in concluding that Respondent had adequately alleged a breach of an express but ambiguous provision of the parties' lease (the "Lease")?

Yes. In its October 30, 2020 Decision and Order (the "Order"), the Supreme Court, New York County (James, J.S.C.) correctly held that Respondent stated a cause of action for breach of contract by alleging that the Lease provided for rent abatements or reductions in the event of a "casualty" event, that pandemic-related closures could constitute such a casualty event, and that Appellant had failed to provide those abatements.

2. Did the trial court properly refuse to dismiss Respondent's causes of action based on the doctrines of frustration of purpose and impossibility of performance where the Complaint alleged that the unprecedented effects of the pandemic were unforeseeable, and led to the complete destruction of the sole and central purpose of the Lease—the operation of a "brick-and-mortar" retail store?

Yes. The Supreme Court correctly held that the Complaint adequately alleged the existence of unforeseen circumstances that destroyed the means

of performance and purpose of the Lease—use of the premises as a retail store—issues that were not properly decided on a motion to dismiss.

3. Did the trial court properly grant a *Yellowstone* injunction where Respondent demonstrated that its commercial Lease remained in effect at the time Respondent requested relief; that Appellant had sent a notice of default for nonpayment of rent, but not any notice of termination of the Lease; and that Respondent maintained the ability to cure the alleged default by paying the disputed rent in the event the court ultimately holds that the pandemic did not excuse such payment?

Yes. In the Order, the Supreme Court correctly issued a *Yellowstone* injunction in order to maintain the *status quo*—the continued existence of the Lease—while the parties litigate issues concerning whether the effects of the coronavirus and the pandemic-related restrictions imposed by state and local governments resulted in the complete, unforeseen frustration of the purpose of the Lease, at least temporarily if not permanently, and rendered performance impossible thereunder.

4. Did the trial court properly exercise its discretion by conditioning *Yellowstone* relief on Respondent's submission of use and occupancy in the form of an undertaking deposited with the court, rather than payment directly to

Appellant, where the central issue in the case is whether Respondent's rent is payable at all?

Yes. The Order's fixing of an undertaking was a valid exercise of the court's broad discretion, and correctly conditioned *Yellowstone* injunction on Respondent's' submission of use and occupancy in the form of an undertaking, where the record does not reflect that Respondent was using or occupying the premises as a retail business during the period covered by the undertaking.

PRELIMINARY STATEMENT

This appeal arises primarily out of the trial court's denial of a pre-discovery motion to dismiss. Confronted with mandatory store closures and regulations that took away its customer base, Plaintiff-Respondent The Gap, Inc. ("Tenant") brought an action (the "Action") seeking relief under its lease (the "Lease") for certain premises located in Lower Manhattan. After unsuccessfully opposing Tenant's application for a *Yellowstone* injunction, Defendant-Appellant 170 Broadway Retail Owner, LLC ("Landlord") answered Tenant's complaint and then, less than an hour later, filed a motion to dismiss the case under CPLR 3211. Given the liberal construction applied to pleadings at the outset of a case, the trial court rightfully denied most of that application. Disregarding the exacting standard applied to such motions, Landlord now asks *this* Court to allow it to skip discovery, skip trial, and reward it with a dismissal. Particularly in a case like this one, involving the unforeseen and dire consequences of an unprecedented global health crisis and the government's response thereto, dismissal would be contrary to the law and the facts.

Tenant operated a retail apparel store at the subject premises for approximately five years after entering into its Lease. Then, COVID-19 hit New York City, devastating the City's economy. Governmental regulations closed all nonessential businesses. The City was rendered a ghost town overnight. The virus

changed the landscape of retail around the country, nowhere more than here, and it created a disastrous situation that no one could have foreseen, or did foresee, when the parties negotiated the Lease. The parties' bargain in that Lease—large amounts of rent in exchange for the ability to operate premier retail space in a 24/7 consumer destination—was destroyed. The Lease's express purpose was frustrated, and its performance was rendered impossible. Tenant notified Landlord that the Lease had terminated as a matter of law, and that Tenant's obligations thereunder, including payment of over $4.9 million in annual rent, had ended. Landlord sent a notice of default for nonpayment.

Before Landlord terminated the Lease and sought to impose penalties, Tenant brought this Action and asked for a *Yellowstone* injunction to preserve the *status quo* until the merits could be litigated. After unsuccessfully opposing that application, Landlord filed its motion dismiss. Consistent with the outcome in most disputes of this type, the trial court granted the *Yellowstone* injunction, ordered Tenant to post a bond securing, *inter alia*, millions of dollars for use and occupancy while the case remains pending, and largely denied Landlord's motion.

This case is about one Gap store located in one specific location. It is about the factual allegations concerning that one store, contained in a complaint filed in July 2020. It is about the circumstances as they existed at that time, and the record

that existed at the time the parties filed their competing applications and the trial court decided them. These issues, and only these, are what this case is about.

Landlord wishes to reframe this case by tying it to other litigations involving Tenant, having the Court examine this case in the context of what happened later, and cajoling the Court into considering extraneous facts that were not part of the pleadings. Landlord seeks to have the Court assess the merits of a case that has not reached the summary judgment phase, and dismiss it based on extraneous evidence, not Tenant's well-pled allegations. The trial court rightfully declined to do so. This Court should do likewise.

As discussed below, the trial court properly took a liberal view of Tenant's Complaint, accepting Tenant's factual allegations as true, and affording Tenant the benefit of all reasonable inferences. Having done this as required by black-letter New York law, the court could not have held anything other than what it held: that the Complaint stated a cause of action for breach of contract based on Landlord's failure to grant rent abatements provided by the Lease, and that Tenant adequately alleged causes of action for rescission and declaratory judgment based on frustration of purpose (whether complete or temporary) and impossibility—two issues of fact ill-suited for resolution on a motion to dismiss.

The trial court likewise correctly granted a *Yellowstone* injunction under the standard articulated by the Court of Appeals where, despite the running of the cure

period, the Landlord had not served notice terminating the lease. The court also did not abuse its discretion by ordering use and occupancy in the form of an undertaking, rather than as payments directly to Landlord. In a dispute concerning the effects of a *sui generis* public health and economic crisis where Tenant's rent obligation itself is the basis of the dispute, the court properly fashioned relief that preserved the *status quo* and protected the rights of the parties without affording either of them the ultimate relief sought.

For the reasons set forth below, the Court should affirm Justice James' Order in its entirety.

COUNTERSTATEMENT OF THE CASE

The Lease

On or about February 5, 2014, Landlord and Tenant entered into a lease (the "Lease") for the basement, ground floor, and second floor (the "Premises") of the Building located at 170 Broadway, New York, New York (the "Building"). (R. 49, 236, 240.) The Lease was for a term of 15 years to commence on February 1, 2014, and end on February 28, 2030. (R. 53, 240.) In exchange for the ability to operate a retail store at the Premises, Tenant agreed to pay rent that, as of the filing of the case below, was in the amount of $4.9 million annually. (R. 50, 237.) Over the life of the Lease, rent would have increased to more than $6.4 million per year. (R. 50, 237.) The sole purpose of the Lease, and the intent of the parties that

negotiated it, was to provide Tenant with commercial retail space suitable for the operation of a retail store selling apparel. (R. 54, 240.) For example, Article 4 of the Lease state in relevant part that the Premises shall only be used by Tenant "for any lawful retail purpose operated by The Gap." (R. 53, 240.)

The Building's Location Was the Key Consideration in the Agreement as to Rent

Tenant's decision to pay these enormous sums of rent was based on the Building's location. (R. 50, 237.) The Premises' location is in one of Lower Manhattan's most visited and highly trafficked locations. (R. 53, 240.) Located right on Broadway and Maiden Lane, the Building is easily accessed via the Fulton Street subway station, PATH station, and bus lines which service the neighborhood regularly at all hours. The Building is in the heart of New York's once-vibrant Financial District, near some of New York City's most visited tourist attractions, including the Freedom Tower and the 9/11 Memorial and Museum. (R. 50, 237.)

Lower Manhattan was home to retail giants like Century 21 and shopping hubs like Brookfield Place. (R. 50, 237.) Upscale boutiques dotted the streets both east and west of the Premises. (R. 50, 237.) As a result, Tenant's store was located in what was one of Lower Manhattan's premier retail shopping hubs. (R. 50, 237.) Before the COVID-19 pandemic, Lower Manhattan was in the midst of a transformation into a 24/7 destination for office workers, neighborhood residents and tourists alike. (R. 50, 237.) Tenant would never have agreed to pay nearly $5

million a year in rent (scheduled to increase to $6.4 million per year by the end of the Lease term) without Lower Manhattan's teeming sidewalks and hordes of eager shoppers. Landlord's ability to demand such high levels of rent was also based almost entirely on the Building's highly visible and unique location in the heart of Lower Manhattan.

The COVID-19 Pandemic Decimates Commerce in New York City and Throughout the Country

In March 2020, the unforeseeable occurred. New York City became a ghost town, and overnight retail in New York City came to an abrupt halt. The COVID-19 pandemic, unmatched in scope and unprecedented in duration, resulted in government mandates that changed the landscape of New York City if not forever then for the foreseeable future. (R. 51, 238.) Because thousands of lives were at stake, Governor Cuomo and Mayor DeBlasio's response to the COVID-19 pandemic was drastic. (R. 51, 238.) Beginning in mid-March 2020, emergency orders mandated the closure of Tenant's store at the Premises; to this day, orders and regulations continue to require retail establishments to operate in a manner drastically different from what was contemplated when the Lease was negotiated. (R. 51, 238.) Indeed, as of today, only about 15% of New York City's workforce has returned to their offices and tourists remain either prohibited or highly restricted in their ability to come to the United States.

Retail at the time this Action was commenced looked nothing like it did prior to the onset of the pandemic. Nobody could predict if or when Lower Manhattan's millions of workers as well as its annual visitors would return, or how social distancing and other governmental restrictions or even a second wave of the virus would impact retail. (R. 51, 52, 239.) COVID-19 cases continued to rise in many States. (R 52, 239.) Businesses were advised of extensive and mandatory guidelines they would need to follow to afford customers protection. Such restrictions were certain to negatively impact the behavior and comfort levels of customers willing to return to crowded retail shops and shopping areas. (R. 52, 239.) It is likely to be years before retail has even a chance to return to its pre-COVID form, which served as the bases for what retail tenants and landlords relied on when agreeing to such enormous rents. (R. 52, 239.)

As a result of the severe restrictions, and denied the benefits they had bargained for, Tenant exercised its right to cease rental payments for April and May 2020. (R. 54.)

Landlord Sends Notice of Default, and Tenant Files the Action

On May 5, 2020 Landlord improperly sent Tenant a Notice of Default, alleging that Tenant was in default under the Lease for failing to timely pay rent and additional rent for April and May 2020, and indicating Landlord's intent to terminate the Lease without first bringing summary proceedings if the alleged

default was not cured. (R. 54, 240.) Attempts by the parties to come to some reasonable compromise about how to handle this unprecedented situation were unfruitful. Landlord did not terminate the Lease, however, which is a requirement both under the Lease and as a matter of law for Tenant's leasehold interest to be severed. (R. 54.)

With its leasehold interest enforceable and fully intact, Tenant commenced this Action on July 2, 2020, filing a summons and complaint along with an order to show cause requesting a *Yellowstone* injunction. (R. 48, 49, 231.) Tenant's Complaint alleges that, when Tenant was forced to shut down all retail operations, the purpose of the Lease was frustrated and rendered impossible to effectuate due to no fault of Tenant's, the Lease's object and purpose became impossible, impracticable, and illegal, and Tenant was deprived of the consideration it received in exchange for entering into the Lease. (R. 50, 51, 52, 54, 57, 58, 61, 64.) Tenant seeks a declaratory judgment that the Lease terminated as of March 19, 2020 pursuant to the Lease and applicable law, or *alternatively*, that rent and expenses abated under the Lease from and after March 19, 2020, amongst other relief. (R. 60-62). The Supreme Court held oral argument on Tenant's *Yellowstone* application on August 17, 2020.

Landlord Moves to Dismiss

Landlord moved to dismiss the Action on August 24, 2020, based on documentary evidence pursuant to CPLR 3211(a)(1) and failure to state a claim pursuant to 3211(a)(7). Landlord's motion was fully submitted on October 8, 2020. (R. 504–39.)

The Supreme Court Grants Tenant Yellowstone Relief, Orders an Undertaking of Use and Occupancy, and Denies Landlord's Motion to Dismiss

On October 30, 2020 Justice James issued her Order, largely denying Landlord's motion to dismiss and granting Tenant's application for a *Yellowstone* injunction.

As relevant to this appeal, Justice James first held, correctly, that Tenant's Complaint had identified a specific portion of the Lease that Landlord violated by failing to provide an abatement or reduction in rent, finding that that the undefined term "Casualty" in that portion of the Lease could encompass closures due to COVID-19. (R. 9-10.) Justice James therefore held that Tenant had stated a valid cause of action for breach of contract.

Justice James further held correctly that the Complaint adequately alleged "frustration of purpose" and "impossibility of performance." (R. 11–12.) The court found that the Complaint alleged "in some factual detail" that the unforeseeable pandemic and resulting governmental restrictions on operations

which "shut[] down 'brick and mortar' retail stores," rendered performance under the Lease objectively impossible and frustrated the Lease's purpose. (R. 11-12.) On these bases, the court properly refused to dismiss Tenant's declaratory judgment, injunctive relief, and rescission causes of action, to the extent based on these doctrines.

On Tenant's application for a *Yellowstone* injunction to preserve the status quo, the court correctly held that Tenant had demonstrated all of the required elements for such relief. The court specifically found that the Lease was still in existence, and that while the ten-day cure period stated in Landlord's Default Notice had expired, Tenant had nonetheless requested relief "prior to the termination of the lease," as required by the standard articulated by the Court of Appeals. (R. 14.) Moreover, the court found that statements by this Court appearing to require commercial tenants to request relief before expiration of the cure period were *dicta*, as those statements came in scenarios in which the subject lease had already in fact been terminated. (*Id.*)

The court conditioned the *Yellowstone* injunction

> upon plaintiff filing with the Clerk of the County an undertaking in the form of a bond in the total amount of $5,500,000.00, comprised of the sum of $2,500,000.00 to secure payment of future use and occupancy, pendent lite, for the period November 1, 2020 until a final determination of this action plus $3,000,000.00 to secure the payment of rent arrears allegedly owed by plaintiff to defendant for the monthly fixed rent due under the Lease dated February 5, 2020, from April 1, 2020 to date… .

(R. 7.) In ordering this undertaking, the court found that this form of security was more appropriate in this case than direct payment to Landlord, because the alleged default itself involved a monetary provision in the Lease. (R. 15.)

STANDARDS OF REVIEW

Motion to Dismiss

As the Court knows well, on a motion to dismiss, the Court's only task is to determine whether the pleading states a cause of action. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151-52 (2002). Moreover, the court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." *Id.* at 152 (internal citations omitted); *see also* 1 Weinstein, Korn & Miller CPLR Manual § 21.03 (2020) ("The test applied on this motion is whether, assuming the accuracy of the allegations of fact in the pleading, there is some basis to award legal redress. Put another way, *has the pleader alleged facts which show a wrong for which there is a remedy in the substantive law*?") (emphasis added). Thus, the Court must determine whether Tenant's Complaint states a cause of action by viewing the pleading in the light most favorable to Tenant, determining "whether a cognizable cause of action can be discerned therein, not whether one has been properly stated." *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011), citing *Hirschhorn v. Hirschhorn*, 194 A.D.2d 768 (1st

Dep't 1993). Unlike a motion for summary judgment, on a motion to dismiss for failure to state a cause of action, the court does not search the record and assess the sufficiency of the parties' evidence. *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014). Such an assessment is properly deferred until later in the case. *See Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 52, 54 (2001) (reversing Appellate Division's dismissal of complaint because the "Trial Court will have a clearer basis on which to assess claims that defendants may raise in connection with particular causes of action" once the case proceeds further).

A motion to dismiss must be denied if, from the four corners of the complaint, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). A claimant is accorded "the benefit of every possible favorable inference." *511 W. 232nd Owners Corp.* at 152. Further, it is well settled that the "[t]he scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed." *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 375 (1st Dep't 2003). Ambiguous allegations must be resolved in the claimant's favor (*see JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015)), and the courts recognize a party's right to seek redress and will "not have the courthouse doors closed at the very inception of an action,

where the pleading meets a minimal standard necessary to resist dismissal of a complaint." *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 379 (1995).

In opposing a motion to dismiss, a party only needs show that "facts unavailable to the plaintiff may exist that will justify denial of the motion," and further, that party "need not demonstrate [the] actual existence of these facts." *Cerchia v. V.A. Mesa, Inc.*, 191 A.D.2d 377, 378 (1st Dep't 1993), citing *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463 (1974). "Whether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *see also* 97 NY Jur Summary Judgment and Pretrial Motions to Dismiss § 147 (2) ("The plaintiff's ultimate ability to prove the allegations is not relevant on the motion").

Lastly, while CPLR 3211(a)(1) allows a motion to dismiss based on a "defense… founded upon documentary evidence," to qualify as "documentary" it must be "*unambiguous*, authentic, and *undeniable*." *First Choice Plumbing Corp. v. Miller Law Offs., PLLC*, 164 A.D.3d 756, 757 (2d Dep't 2018) (emphasis added). A defense grounded on documentary evidence "must be a complete one, leaving no genuine triable issues of fact." *Expocorp v. Hyatt Mgmt. Corp. of N.Y.*, 134 A.D.2d 234, 234 (2d Dep't 1987) (internal citations omitted); *see also* 1 Weinstein, Korn & Miller CPLR Manual § 21.03 (2020) ("Dismissal of the claim is appropriate *only when the documents relied upon definitively dispose of*

plaintiff's claim, leaving no triable issue of fact with respect to its lack of merit, and thus conclusively establish a defense as a matter of law") (emphasis added).

Yellowstone Injunction

In reviewing the trial court's ruling on provisional relief, the Appellate Division applies an "abuse of discretion" standard. *See 456 Johnson, LLC v Maki Realty Corp.*, 177 A.D.3d 829, 830 (2d Dep't 2019) (affirming trial court's conditional grant of motion to vacate injunction, which "is addressed to the sound discretion of the court," because plaintiff had not shown that trial court had abused that discretion); *Bennigan's of New York v. Great Neck Plaza, L.P.*, 223 A.D.2d 615, 616-17 (2d Dep't 1996) ("In granting Yellowstone relief the court may impose reasonable conditions… Those conditions will not be disturbed absent a showing that the court acted improvidently in exercising its discretion.")

As the Court of Appeals has stated,

> The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused…

Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005). This Court has held that while the Appellate Division may have the power to substitute its own discretion for that of the motion court, this is "a power we rarely and

reluctantly invoke." *Estate of Yaron Ungar v. Palestinian Auth.*, 44 A.D.3d 176, 179 (1st Dep't 2007).

ARGUMENT

POINT I
THE TRIAL COURT PROPERLY DENIED LANDLORD'S MOTION TO DISMISS TENANT'S CAUSE OF ACTION FOR BREACH OF CONTRACT

To state a cause of action for breach of contract, a plaintiff must allege the existence of a contract, the plaintiff's performance, the defendant's breach, and resulting damages. *Belle Lighting LLC v. Artisan Constr. Partners LLC*, 178 A.D.3d 605, 606 (1st Dep't 2019). Count One of the Complaint properly alleges all of these elements. (R. 59-60.) The Lease was a valid contract; Tenant performed its obligations under the Lease except for those that were waived, excused or rendered impossible and/or impracticable; Landlord breached by, among other things, demanding rent and other expenses not owed and failing to reimburse excess charges; and Tenant has suffered damages as a result of the breach. (R. 59-60).

A. The Term "Casualty" Lacks the Uniform Construction Landlord Claims, Especially in the COVID-19 Context

Landlord argues that the trial court improperly held that Tenant alleged a breach because it "misread Article 15 of the Lease," in light of recent decisions by courts that "have definitely held, as a matter of law, that the COVID-19 pandemic does not amount to a 'casualty' under similar commercial leases." (App. Br. at 16-

17.) Yet Landlord cites no decision of this court—or any appellate court—so holding. Moreover, the non-precedential *trial court* decisions Landlord cites are both distinguishable and procedurally inapposite to Landlord's motion to dismiss.

For example, the *111 Fulton Street* and *Ponte Gadea* cases each concerned a wholly different procedural posture. Both the Supreme Court in *Fulton* and the Southern District of New York in *Ponte Gadea* were considering motions for summary judgment, which, unlike a motion under CPLR 3211, involve the consideration of evidence in the record. *See 111 Fulton St. Invs., LLC v. Fulton Quality Foods LLC*, 2021 N.Y. Slip Op. 30348(U) (Sup. Ct. N.Y. Co. Feb. 5, 2021); *1140 Broadway LLC v. Bold Food, LLC,* 2020 N.Y. Slip Op. 34017(U) (Sup. Ct. N.Y. Co. Dec. 3, 2020); *Gap Inc. v. Ponte Gadea N.Y. LLC*, No. 20-4541, 2021 U.S. Dist. LEXIS 42964 (S.D.N.Y. Mar. 8, 2021). Landlord here has appealed a §3211 motion, not a motion for summary judgment. Thus, the trial court was not required or even permitted to search the record and assesses the sufficiency of the parties' evidence, but rather merely had to examine the adequacy of Tenant's Complaint.

Similarly, the *Dr. Smood* case concerned an application for a preliminary injunction. The trial court did not opine on whether the tenant had adequately stated a claim for a breach of contract. *Dr. Smood N.Y. LLC v. Orchard Houston, LLC*, 2020 N.Y. Slip Op. 33707(U) (Sup. Ct. N.Y. Co. Nov. 2, 2020). Rather, the

court applied a typical, three-pronged preliminary injunction standard to the tenant's claims asserted therein. Considerations such as imminent harm or a likelihood of success on the merits require a rigorous analysis of evidence, not a mere determination of the adequacy of a pleading.

Landlord self-servingly asserts that "Article 15 could not be more clear" in its application (App. Br. at 18), and argues that "[p]rior to COVID-19, it appears that no one had ever attempted to argue that a virus—or anything other than actual physical damage—could amount to a 'casualty' under a commercial lease." (*Id.* at 18). If true, these arguments would demonstrate only the need for further discovery regarding the intent of the parties in drafting the Lease. Regardless, other relevant case law belies Landlord's assertion. Courts have reached differing conclusions about ambiguous definitions of physical harm or damage, and whether they constitute "casualty" under a commercial lease.

In *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, the Appellate Division of the Superior Court of New Jersey held that the term "physical damage" was ambiguous and that "well-established precedent teaches that such an ambiguous provision must be construed favorably to the insured." *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 541 (App. Div. 2009). Further, the court noted that "'physical' can mean more than material alteration or

damage," and found in favor of the insured that suffered a loss as a result of an electric blackout. *Id*. at 541-42.

In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, the United States District Court for the District of New Jersey held that an ammonia discharge inflicted direct physical loss or damage to the facility "because the ammonia physically rendered the facility unusable for a period of time." *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12-04418, 2014 U.S. Dist. LEXIS 165232 at *17 (D.N.J. Nov. 25, 2014). The court additionally relied on *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.* 311 F.3d 226, 235 (3d Cir. 2002) in determining that "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." (*Id*. at *15).

Further, the Common Pleas Court of Allegheny County, Pennsylvania recently held that a plaintiff's loss of its property resulting from COVID-19 did, in fact, constitute "direct," "physical" loss or damage to property under an insurance policy:

> Here, *Plaintiff's loss of use of its property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space*…Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, *to physically limit the use of property and the number of people that could [] inhabit physical*

> *buildings at any given time.* Thus, [the] spread of COVID-19 did not, as Defendant's contend, merely impose economic limitations. *Any economic losses were secondary to the businesses' physical losses.*

Ungarean v. CNA, No. GD-20-006544, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *17-18 (Allegheny Cty, Civ. Div., March 22, 2021) (emphasis added). A North Carolina Superior Court has likewise held that government-mandated closures in response to COVID-19 gave rise to a "direct physical loss" under an ambiguous business interruption insurance policy. *See N. State Deli v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 N.C. Super. LEXIS 38, *7 (Super. Ct. Durham Cty. Oct. 7, 2020).

In fact, Landlord itself acknowledges that the definition of "casualty" in the COVID-19 context is not settled, even among New York trial courts. Landlord begrudgingly acknowledges the *Lucky Jab Realty* case, in which the plaintiffs sought a *Yellowstone* injunction based in part on the allegation that the premises were rendered partially unusable due to a "casualty"—namely, the pandemic. *See 188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.,* 2020 N.Y. Slip Op. 34311(U) at * 3 (Sup. Ct. N.Y. Co. Dec. 21, 2020). The lease in that case stated:

> *If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty*, then the rent . . . shall be proportionately paid up to the time of the casualty and then shall cease until the date that the demised premises shall be . . . restored by Owner.

Id. at *9 (emphasis added). Ultimately, the court held that

> [t]he plaintiffs have established that they are likely to succeed on their claim that the COVID-19 epidemic, *and the consequent state-mandated suspension of* indoor *dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances and, hence, a "casualty" within the meaning of the lease that rendered the premises unusable for a period of time.*

Id. (emphasis added).

Here, the language of Tenant's Lease, specifically, Art. 15, is nearly identical to the language of the lease in *Lucky Jab Realty*. Given the varied conclusions courts have reached on this issue, and the evolving legal discussion concerning the proper interpretation of a commercial lease in relation to COVID-19, the intent of the parties in using the undefined term "casualty" in the Lease cannot be determined as a matter of law based solely on the pleadings.[1] This case requires discovery to determine that intent. Any determination by the trial court based solely on the pleadings that there was no breach, particularly based on Landlord's interpretation of Article 15, would have been premature.

B. The Trial Court Properly Held That Tenant has Alleged Breach of a Specific Provision of the Lease

Landlord argues that the trial court improperly considered the Complaint together with Tenant's brief, and cites a single decision, *Seltzer v. Fields*, 20 A.D.2d 60, 64 (1st Dep't 1963), for the contention that "even if the statements in

[1] *See 188 Ave. A Take Out Food Corp.*, 2020 N.Y. Slip Op. 34311(U) at *9 ("[t]he term 'casualty,' as employed in a lease, is generally defined as an 'accident' or an 'unfortunate occurrence,' that is, something other than a 'common occurrence' constituting a 'sudden or unexpected' event or series of events").

the brief were more detailed, they may not be used to remedy inadequate complaint allegations." This argument is misleading and insufficient.

First, *Seltzer* was not a breach of contract case. Rather, Seltzer involved a libel claim. Allegations of slander and libel are subject to heightened pleading standards under CPLR 3016, and a libel complaint must allege with specificity "the particular words complained of." CPLR 3016(a). Breach of contract claims are subject to no such heightened standard. The three cases Landlord cites in support of its assertion that the Complaint must "identify the specific contractual provision breached" certainly do not amount to any requirement that a plaintiff plead breach of contract with particularity. Indeed, the most recent of those cases demonstrates that the real issue is whether the plaintiff has alleged a contract that *contains* a provision subject to the alleged breach, not whether the plaintiff has failed to identify that provision in the pleading. *D'Artagnan v. Sprinklr Inc.*, No. 2019-04312, 2021 N.Y. App. Div. LEXIS 1532, *5 (1st Dep't Mar. 11, 2021) (breach of contract claim alleging "defendant's failure to provide plaintiff with the ability to target specific customers and to direct advertisements" to them failed because "nowhere in the contract does it require[] defendant to give plaintiff this ability").

Second, *Seltzer* does not preclude the court from considering Tenant's Complaint in light of Tenant's papers in opposition to the subject motion. That case forbade using a brief to "*remedy* inadequate complaint allegations." Here,

however, the trial court did not determine that Tenant's brief had remedied some alleged "defect" in the Complaint. The Complaint itself incorporated the Lease by reference, and the Lease further became a part of the record when Landlord filed a copy with its Answer and then moved to dismiss minutes later upon "all prior papers and proceedings had herein… ." (R. 433.) In viewing the whole Complaint in the light most favorable to Tenant, as the trial court was required to do, the court merely considered the Complaint in light of Tenant's opposition papers and determined that Tenant had in fact sufficiently alleged:

> that defendant breached paragraph Article 2, paragraph C. of the Lease when landlord did not provide an 'abatement or reduction in Fixed Rent due to loss or use of all or a portion of the Demised Premises due to Casualty' attributable to the period after March 19, 2020, when, due to the governmental shut-down of non-essential businesses, plaintiff could not lawfully use the premises in the manner set forth in the Lease.

(R. 9.) The Complaint solidly supports this finding, discussing Tenant's entitlement to rent abatements in light of the loss of use of the Premises in several places, referencing Landlord's breach in demanding and collecting rent not owed under the Lease due to that loss of use, and attaching a Lease that provides for such abatements in the event of a casualty. (*See* R. 58, 60, 62, 98.)

In light of the foregoing, the trial court properly denied Landlord's motion to dismiss the breach of contract cause of action.

POINT II
THE TRIAL COURT PROPERLY HELD THAT TENANT ADEQUATELY ALLEGED FRUSTRATION OF PURPOSE AND IMPOSSIBILITY

The trial court correctly held that Tenant adequately pled frustration of purpose and impossibility of performance. (Counts Two (d) and (e)). Landlord moved to dismiss the Complaint on the grounds that Tenant failed to *allege* frustration of purpose and impossibility of performance based on the unprecedented COVID-19 pandemic. In support of this appeal, however, Landlord relies on recent *summary judgment* decisions, none of which have precedential effect on this Court, and all of which were decided based on facts outside the four corners of the complaints in those cases, not the Complaint in this case. This case is not at the summary judgment stage. Thus, this Court must consider *only* the factual allegations of the Complaint and affirm the trial court's finding that Tenant adequately pled these claims.

A. The Trial Court Correctly Held that Tenant Adequately Pled Frustration of Purpose

Landlord argues that the Court should reverse the Order because (1) financial hardship is not a basis for frustration of purpose; (2) COVID-19 did not render the Lease virtually worthless, and (3) the government closures were not completely unforeseeable. Each of these arguments requires the Court go beyond the "narrowly circumscribed" scope of inquiry here, however. At this stage, the

Court may consider only the four corners of the Complaint and the appropriate documentary evidence – the language of the Lease.

A party is entitled to relief pursuant to the frustration of purpose doctrine where, as here, the purpose frustrated was "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs. v. Koval-Olsen,* 11 A.D.3d 263, 265 (1st Dep't 2004). The doctrine applies where "as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." *U.S. v. Gen. Douglas MacArthur Senior Vill., Inc*., 508 F.2d 377, 381 (2d Cir. 1974).

A frustration of purpose *need not be permanent* to have legal effect. Courts both in New York and elsewhere have recognized temporary frustration of purpose as a ground for relief from a contract. For example, a Massachusetts Superior Court denied a landlord summary judgment, and *sua sponte* granted the tenant summary judgment, under the same conditions the case at bar presents. That court held that due to mandatory COVID-19 closures, "under the doctrine of frustration of purpose [tenant's] obligation to pay rent was discharged while it was barred" from using its premises for its intended purposes. *UMNV 205-207 Newbury, LLC v. Caffe Nero Americas Inc.*, 2084CV01493-BLS2 (Mass. Sup. Ct. Feb. 8, 2021). Similarly, the Eastern District of Michigan recently granted summary judgment in

favor of tenant, finding that the tenant was not required to pay rent during the period of Michigan's COVID-19 shutdown because "[t]he purpose of Plaintiff and Defendant's lease was frustrated by an unforeseeable event not caused by Defendant: the COVID-19 pandemic and [the state's] Shutdown Order", which "were not reasonably foreseeable at the time the contract was signed." *Bay City Realty LLC v. Mattress Firm, Inc.*, 20-cv-11498, 2021 WL 1295261, at *8-9 (E.D. Mich. Apr. 7, 2021).

This Court has held that frustration of purpose presents an issue of fact. *See Jack Kelly Partners LLC v. Zegelstein,* 140 A.D.3d 79, 85 (1st Dep't 2016); *see also 119 Fifth Avenue, Inc. v. Taiyo Trading Co. Inc.*, 190 Misc. 123 (Sup. Ct. N.Y. Cty. 1947). Yet Landlord's argument is almost entirely reliant on purported "facts" outside of the Complaint. For example, Landlord argues that Gap "elect[ed] not to open simply because it anticipated less customer traffic" (App. Br. at 30) and therefore the Lease has not been frustrated. But whether and why Tenant "elected" not to open its store at the Premises are questions of fact not to be considered, let alone determined, on a motion to dismiss.

The Complaint alleges that: (i) the COVID-19 pandemic was so unforeseeable that neither party did, nor could have, contemplated such a scenario at the time the parties entered into the Lease, and (ii) the pandemic has so frustrated the purpose of the Lease that Tenant cannot use the Premises as intended

by either party. (R. 50-54, 57, 58, 61, 64-66, 67.) As alleged, due to the government shutdowns at the beginning of the pandemic, and the regulations and restrictions that followed, the Lease makes "little sense," indeed, no sense, without the ability to operate as contemplated when the Lease was executed. Tenant was "deprived of its use of the Premises for the full term that Tenant was promised under the Lease" and Tenant is not "in a position to operate the Premises in the way in which it was contemplated when it entered into the Lease." (R. 57-58, ¶¶ 34-35). "[B]ut for Tenant's right to operate in a location like that of Lower Manhattan, Tenant would not have entered into the Lease and/or would not have agreed to pay rent in excess of $5 million per year for the Lease. . . . without Tenant's ability to use the Premises in the manner originally contemplated . . . the transaction between the parties that resulted in the Lease would have made no sense." (R. 61, ¶ 55).

Accordingly, based on the allegations in the Complaint, Tenant has adequately alleged frustration of purpose. Each of Landlord's arguments to dispute this are ultimately questions of fact improper for determination on a motion to dismiss.

1. Foreseeability is an Issue of Fact Not to be Decided on a Motion to Dismiss

Frustration of the Lease's purpose involves questions of fact regarding the central issue in this case: the foreseeability of the COVID-19 Pandemic. Dismissal

under CPLR 3211(1) or (7) is improper because Landlord cannot point to a single provision in the Lease that shows the Parties anticipated a government shutdown in response to a pandemic, or the ensuing restrictions on operating the contemplated store.

Never in the lifetime of anyone involved in this case has the government completely shut down retail operations as a result of a disease or pandemic. It simply cannot be said as a matter of law that such an occurrence was foreseeable as a matter of law. In fact, courts in New York and around the country have found, quite logically, either that the pandemic was *not* foreseeable, or that its foreseeability is a question of fact. *See, e.g., International Plaza Assoc. L.P. v. Amorepacific US, Inc.,* No. 155158/2020, 2020 WL 7416598, at *2 (Sup. Ct., NY Cty. Dec. 14, 2020) (finding that foreseeability of the COVID-19 pandemic "must be determined by findings of fact, especially in this crisis that has never occurred in most of our lifetimes."); *B & JCM Doral Development LLC v. Tutto Foods Doral Corp.,* Case No. 2020-014953-CA-01, ¶¶ 10-15 (Fla. Cir. Ct. Oct. 12, 2020) (finding that pandemic shutdowns were "unprecedented" and reducing tenant's rent obligations based on reduction in tenant's ability to use premises).

Landlord apparently confuses the standard for a motion to dismiss with that of summary judgment. Indeed, Landlord supports its appeal with recent summary judgement decisions, and asks this Court to make a decision on the merits of the

case rather than on the Complaint's well-pled allegations. Because Landlord cannot dispute that Tenant has adequately alleged that the pandemic was unforeseeable, it directs this Court to Lease provisions that are entirely irrelevant – including that Tenant has to maintain terrorism insurance and business interruption insurance, and a definition of "Unavoidable Delays" that relates solely to construction at the Premises. (App. Br. at 31.) Notably, the business interruption provision Landlord cites requires insurance for damage "by fire or other insurable casualty." (R. 133.) Yet Landlord expressly argues that COVID-19 was not a "casualty" under the Lease. (Br. at 16-21.) It is puzzling, then, how Landlord can argue that this provision somehow demonstrates the foreseeability of the pandemic. Landlord also cites to the *force majeure* clause in the lease in the *Ponte Gadea* case to suggest that the parties here anticipated the possibility of "government preemption of priorities or other controls in connection with national or other public emergency …." Landlord does not point the Court to a similar clause in this case, however, because no such clause exists.

2. Tenant Does Not Rely on Mere Financial Hardship In Pleading Frustration of Purpose

Landlord also argues that financial hardship alone is not the basis for frustration of purpose. But Tenant does not allege that the Lease was frustrated because of mere financial hardship. Instead, Tenant alleges that the Lease was frustrated because it is no longer possible to operate the store for the explicit or

contemplated purpose set forth in the Lease. The Premises ceased to be a viable outlet for that explicit purpose, the operation of a first class retail store conducting in-person sales of apparel to consumers.

Moreover, once again every case that Landlord cites to in support of its economic hardship argument was decided on summary judgment. *See 35 E. 75th St. Corp. v. Christian Louboutin L.L.C.*, 2020 N.Y. Slip Op. 34063(U) at *1 (Sup. Ct. N.Y. Co. Dec. 9, 2020) (granting landlord's motion for summary judgment); *RPH Hotels 51st St. Owner, LLC v. HJ Parking LLC*, 2021 N.Y. Slip Op. 30286(U) at *4 (Sup. Ct. N.Y. Co. Jan. 28, 2021) (same); *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) (Sup. Ct. N.Y. Co. Dec. 3, 2020) (same); *see generally Dr. Smood N.Y. LLC* (same). These cases have little relevance to the disposition of Landlord's motion to dismiss.

The allegations in the Complaint reflect that Tenant is unable to operate a retail store as contemplated by the Lease. They do not "boil down to financial consequences," as Landlord argues. At worst, this is a question of fact to be resolved after discovery has been completed.

B. Tenant Has Adequately Alleged Impossibility of Performance

Landlord next argues that the trial court should have dismissed Tenant's impossibility of performance claim because "the interfering cause was not so

complete as to make performance impossible; and the effect (business closure) was not unforeseeable." (App. Br. at 36.)

Related to frustration of purpose, the doctrine of impossibility applies where performance is "objectively" impossible due to the "destruction of the means of performance" by a force majeure event or the enactment of law rendering performance illegal. *See 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968) ("Generally… the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, *vis major,* or by law"). As the Court of Appeals has explained,

> Impossibility excuses a party's performance only when the destruction of the subject matter of the contract makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 902 (1987).

Like frustration of purpose, courts have recognized temporary impossibility of performance as an excuse for performance. "Temporary impossibility usually suspends the obligation to perform during the time it exists." *Maudlin v. Pac. Decision Scis. Corp.*, 137 Cal. App. 4th 1001, 1017 (2006) (emphasis omitted); *see also Bush v. Protravel Int'l, Inc.,* 192 Misc. 2d 743, 752 (Civ. Ct. Richmond Cty. 2002); "[W]here a supervening act creates a temporary impossibility… the impossibility may be viewed as merely excusing performance

until it subsequently becomes possible to perform."); Restatement (Second) of Contracts, § 269 (1981) ("Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists.").

While courts have been reluctant to apply the impossibility doctrine, this case presents the extreme and unique circumstance warranting its application. Unlike the tenant in *Savoy*, for example, and as discussed above, Tenant's impossibility defense is *not* derived from financial hardship. Rather, Tenant's performance under the Lease was impossible because "New York City was in the state of virtual lockdown with travel either forbidden altogether or severely restricted." *Bush,* 192 Misc. 2d at 750. Simply put, COVID-19 made the object of the Leases impossible to fulfill. For months, Tenant was barred from operating at all. Even if Tenant reopened at the Premises, Tenant still could not operate the retail business contemplated in the Lease due to government restrictions and health and safety requirements.

Likewise, unlike in *Kel Kim*, the pandemic simply could not be "foreseen" or "guarded against" by contractually allocating risk. In fact, this Court has applied the impossibility doctrine under arguably less unforeseeable circumstances than those at bar. *See Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dep't 2014) (holding that impossibility excused plaintiff's performance of recording and

management contracts where romantic relationship between plaintiff singer and executive of defendant talent management company soured, ending in stipulation that parties would have no further contact with each other).

Again, in arguing that the trial court should have granted its motion to dismiss, Landlord cites to cases decided on summary judgment, including the *Ponte Gadea* case. There, the court's analysis of the lease cobbled together provisions to conclude that the conditions claimed to have rendered performance impossible were foreseeable. *Gap Inc. v. Ponte Gadea N.Y. LLC*, No. 20-4541, 2021 U.S. Dist. LEXIS 42964, at *26 (S.D.N.Y. Mar. 8, 2021). The portions of the Lease that Landlord cites here, however, are completely irrelevant to show what the parties foresaw. Sections 13.A(e) and (f) require that Tenant have business interruption and terrorism insurance. Section 15(A) also requires Tenant to carry business interruption insurance to cover fire or other insurable casualty (and as discussed, Landlord expressly argues that COVID-19 is not a casualty under the terms of the Lease).

The lease at issue in *Ponte Gadea* also defined a *force majeure* event to include "governmental preemption of priorities or other controls in connection with a national or other public emergency." *Ponte Gadea N.Y. LLC*, 2021 U.S. Dist. LEXIS 42964, at *20. Relying on the specific language of that lease, the court found that the parties had foreseen the possibility of a government order

shutting down the store for a temporary period of time. But *no such language exists in the Lease at issue here*.

The Lease in this case leaves for discovery and trial an issue of fact with respect to whether the parties foresaw an unprecedented global pandemic and subsequent government orders shutting down retail stores throughout New York and nationally. This cannot be determined on a motion to dismiss. The trial court, therefore, properly declined to dismiss Tenant's claims based on the doctrine of impossibility.

C. The Trial Court Properly Declined to Dismiss Additional Remaining Counts of Tenant's Complaint

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy." *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99 (1st Dep't 2009); *see also* CPLR 3001; 43 NY Jur 2d, Declaratory Judgments §§4, 22). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931). "While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action…the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact." *Thome,* 70 A.D.3d at 100.

Landlord argues that the trial court should have dismissed various subsections of Count Two of Tenant's Complaint, including "subsections (b), (c), (g), (i), (j) & (k)." (App. Br. at 40.) as "duplicative, incomprehensible, or otherwise dismissible," ignoring the high bar required to dismiss claims on a motion to dismiss. Landlord's arguments to dismiss these subsections represent a misreading of Count Two, which sufficiently alleges a cause of action for a declaratory judgment.

First, despite Landlord's contentions, Landlord's Motion to Dismiss did not seek to specifically dismiss subsection (g) ("[t]he effects of the foregoing on the Lease's Term and expiration") of Count Two. *See* R. 433, 505. As Landlord did not seek this relief before the trial court, it is inappropriate for Landlord to seek it on appeal for the first time before this Court.

Regardless, to the extent that this Court considers Landlord's arguments regarding subsection (g), that section is not "incomprehensible." Subsection (g) plainly requests a judgment from the trial court to determine the effects of the COVID-19 pandemic on the Lease's term and expiration. This represents a clear request to have the trial court declare the legal rights of the parties to a justiciable controversy, and Landlord's token argument on this point is insufficient to dismiss the same on a motion to dismiss.

Regarding the remaining subsections of Count Two, Landlord first alleges that Tenant failed to specifically oppose its request to dismiss and that Tenant has abandoned those claims. Landlord's reliance on *Cassell v. City of New York*, 159 A.D.3d 603, 603 (1st Dep't 2018) is misplaced, however. In *Cassell,* this Court dismissed the plaintiff's claim of municipal liability because the plaintiff did not make *any* argument opposing the City's argument. *Id*. Here, however, Tenant clearly requested in its opposition that "'Landlord's Motion to Dismiss Tenant's *Declaratory Judgment*, Recession and Reformation Causes of Action Should be Denied" (R. 554) (emphasis added), and otherwise asserted that *all* of Count Two should stand ("*Landlord's contention that the Lease somehow bars Tenant's claims for declaratory relief (Count II)*, rescission (Counts II (a) and IV) and reformation (Counts II (h) and V) based on the language in the Lease is baseless") (emphasis added).) As Tenant plainly opposed Landlord's request to dismiss Count Two, this is a frivolous basis to allege abandonment.

Landlord argues regarding Count Two (a) that "there is no… applicable law" pursuant to which the Lease terminated, the Lease did not terminate on its own terms, and neither 'frustration' nor 'impossibility' or any other concept 'terminates' the Lease. (App. Br. at 40.) Tenant adequately stated a request to establish the respective legal rights of the parties to a justiciable controversy, however (*i.e.* that frustration or impossibility can terminate the subject Lease), and

as discussed above, frustration of purpose and impossibility function to terminate Tenant's obligations under the Lease. (*See* Point II(A)-(B), *supra*).

Landlord further argues that the trial court should have dismissed Count Two (b), seeking a judgment "that the rent and expenses under the Lease abated from and after March 19, 2020," and Count Two (c), seeking a judgment that "the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020." (R. 62.) As previously discussed under Point I, *supra*, Tenant has sufficiently alleged that the contract provides for an abatement pursuant to Article 2(C) of the Lease, and that COVID-19 constitutes a casualty or "Damage Event."

Landlord also asserts that Count Two (h) should be dismissed, on the basis that the Trial Court dismissed Tenant's Count Five for reformation. A declaratory judgment that the Lease should be reformed is separate and apart from a standalone claim to reform the lease. In seeking a declaratory judgment for reformation, Tenant seeks the guidance of the trial court to declare a practical end in quieting or stabilizing uncertain relations between the parties herein, which can be accomplished through reformation of the Lease. The trial court, in its discretion and after a more fulsome review of the relevant facts, may declare that the respective legal rights of the parties under the Lease should be reformed based on equity, and Tenant has the right to explore the same in discovery.

Finally, Landlord argues that Count Three should be dismissed because Tenant failed to demonstrate entitlement to *Yellowstone* relief. As discussed in Point III, *infra*, this is incorrect. Similarly, Landlord argues that Count Four should have been dismissed because Tenant has not adequately alleged 'frustration' or 'impossibility. As discussed in Points II(A) and (B), *supra*, this is likewise incorrect.

POINT III
THE SUPREME COURT PROPERLY HELD THAT TENANT DEMONSTRATED ITS ENTITLEMENT TO A *YELLOWSTONE* INJUNCTION

A party requesting *Yellowstone* relief "must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs*., 93 N.Y.2d 508, 514 (1999) (emphasis added).

Landlord acknowledges that *Graubard* reflects the standard as articulated by the Court of Appeals. Landlord further implicitly recognizes that the Court of Appeals has never held that *Yellowstone* relief is untimely if sought after the expiration of the cure period but before a lease is terminated. Landlord nonetheless argues that this Court's decisions foreclose the issuance of a

Yellowstone injunction once the cure period ends, even where the lease has not been terminated. If this Court's decisions can be characterized as reading the *Graubard* standard that way, however, they do so overwhelmingly as *dicta*, as the trial court recognized. This is because in case after case that Landlord cites, the limited recitation of the underlying facts makes clear that the tenant had not sought *Yellowstone* relief until *after the Landlord had* ***also*** *served a notice of termination or the lease had otherwise actually terminated*.[2]

For example, *KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 A.D.3d 909, 909 (1st Dep't 2010), stated that the tenant "did not make its application until after the applicable cure period had expired *and the notice of termination had been served.*" *Id.* (emphasis added). Similarly, in *JH Parking Corp. v. E. 112th Realty Corp*., 298 A.D.2d 258, 258 (1st Dep't. 2002), the Court explained that the plaintiff had not timely sought relief because the order to show cause that effected a temporary restraining order was signed by the motion court "after the cure period had ended *and* after service of the notice of termination." *Id.* (emphasis added). Likewise, in *Daashur Assocs. v. December Artists Apartment Corp*., 226 A.D.2d 114 (1st Dep't 1996), the cure period had expired and the landlord had sent a three-day notice of termination of the lease. It was only then that the plaintiff had sought

[2] Moreover, this Court has also recognized that the expiration of an arbitrary cure period would not necessarily bar relief under all circumstances, such as where the alleged default is not capable of cure within the time period imposed by the default notice. *See Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 A.D.3d 219, 223-224 (1st Dep't 2012).

a *Yellowstone* injunction. *Id.* at 114. This court reversed the trial court's *Yellowstone* injunction because it had been sought "after expiration of the period to cure *and* after service of the notice of termination." *Id.* at 114-15. In *166 Enters. Corp. v. I G Second Generation Partners, L.P.*, 81 A.D.3d 154, 157 (1st Dep't 2011), the Court reversed a *Yellowstone* injunction based on a motion to renew/reargue that had been brought after the trial court had previously denied an injunction, dissolved a TRO, *and* the landlord had terminated lease. *See id.* And in *Gyncor, Inc. v. Ironwood Realty Corp.*, 259 A.D.2d 363 (1st Dep't 1999), the Court's decision makes it clear that the cure period had expired on a Saturday, and the Landlord had served a notice of cancellation the following Monday, the same day the tenant filed an order to show cause seeking its *Yellowstone* relief. *Id.*

Landlord also cites to *Prince Fashions, Inc. v. 542 Holding Corp.*, 15 A.D.3d 214 (1st Dep't 2005). In *Prince Fashions*, this Court indeed rejected the tenant's argument that it had timely sought relief after the cure period had run out because the lease had not "legally" terminated. *Id.* at 215. The foregoing framing of the issue by the Court, however, suggests that in *Prince*, too, notice of termination *had* in fact already been served—and thus the lease had been terminated—even though the effective termination date had not yet arrived. Later decisions in that case support this. *See 542 Holding Corp. v Prince Fashions, Inc.*,

46 A.D.3d 309, 310 (1st Dep't 2007) (referencing dispute over validity of "notice to cure *and*… notice of cancellation") (emphasis added).

Regardless, to the extent any of the cited decisions actually holds that the courts are powerless to grant relief once the cure period has expired, that holding is not compelled by the Court of Appeals' statements on this issue. Moreover, the state of landlord-tenant law today suggests a different conclusion, at least in a case where the alleged default is of the payment of rent only.

In 2019, Governor Cuomo signed the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"). Among other provisions, that Act amended RPAPL § 749, which deals with warrants of eviction following entry of a judgment by the court. Under the revised version of § 749, not only can the court stay or vacate a warrant of eviction for good cause shown *prior* to the warrant's execution, but the court can even restore the tenant to possession *after* the warrant has been executed. *See* RPAPL § 749(3). In fact, where the judgment is for non-payment of rent, the court "*shall* vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to its execution, unless the petitioner establishes that the tenant withheld the rent due in bad faith." *Id.* (emphasis added). In other words, courts have the power to restore a tenant to possession even after they have been evicted, and in a case involving nonpayment of rent, the court *must* stay

eviction if the tenant either offers the landlord payment or deposits the arrears with the clerk.

If Tenant can cure nonpayment of rent even after they have been *evicted* from their premises under RPAPL § 749, the suggestion that *Yellowstone* relief was improper here—where the Landlord had not even terminated the Lease—cannot prevail. Such a result certainly would not effectuate the purposes the *Yellowstone* injunction was designed to accomplish, *i.e.*, the preservation of the *status quo* pending adjudication of the parties' underlying dispute. At a minimum, if the RPAPL gives courts the power to stay an eviction, vacate a warrant, or even restore a tenancy even after eviction, the trial court's ruling preserving the *status quo* here pending further adjudication can scarcely be viewed as an "abuse of discretion."

It is undisputed on the Record that Landlord never sought to terminate Tenant's Lease in this case. The purpose of a *Yellowstone* injunction is to maintain the *status quo* pending adjudication on the merits. The *status quo* before the trial court was that a Lease continued to exist. This Court should affirm the trial court's grant of the *Yellowstone* injunction.

POINT IV
THE SUPREME COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING AN UNDERTAKING

A. The Supreme Court Acted Within Its Discretion Ordering an Undertaking Rather than Payment Directly to Landlord

As this Court has repeatedly held, a motion court has "broad discretion in awarding use and occupancy *pendente lite*." *Alphonse Hotel Corp. v. 76 Corp.*, 273 A.D.2d 124, 124 (1st Dep't 2000). *See, e.g., Kingsley v. 300 W. 106th St. Corp.*, 162 A.D.3d 420, 420-421 (1st Dep't 2018) (finding that motion court had "providently exercised its *broad discretion*" in ordering use and occupancy payments where plaintiff had conceded on record that defendant was entitled to them). This Court should not overturn a motion court's order awarding use and occupancy absent an abuse of that discretion. *See, e.g., Ungar.*, 44 A.D.3d at 179 (Appellate Division only rarely and reluctantly substitutes its own discretion for that of the motion court); *61 W. 62nd Owners Corp. v. Harkness Apt. Owners Corp.*, 202 A.D.2d 345, 346 (1st Dep't 1994) (applying abuse of discretion standard in affirming trial court's conditioning of motion to reargue—effectively an injunction—on plaintiff's payment of use and occupancy); *Sportsplex of Middletown v. Catskill Regional Off-Track Betting Corp.*, 221 A.D.2d 428, 428 (2d Dep't 1995) ("Absent a showing that the court *improvidently exercised its discretion* by imposing conditions in excess of those necessary to protect the nonmoving party's interests, the conditions imposed will not be disturbed.")

(emphasis added); *cf. R & J Bottling Co. v. Rosenthal*, 40 A.D.2d 911, 912 (3d Dep't 1972) ("Preliminary injunctions are within the discretion of the trial court and an appellate court will review only for abuse of that discretion.").

In this case, the trial court ordered Tenant to post an undertaking to secure payment of use and occupancy. This directive of an undertaking in lieu of payment directly to Landlord was consistent with numerous other courts that have ordered tenants to pay use and occupancy as an undertaking or into some other form of an escrow account. Indeed, the payment of use and occupancy into court, rather than directly to the landlord, is commonplace, especially where the dispute concerns rent obligations. *See, e.g., Sibersky v. Winters*, 42 A.D.3d 402, 405 (1st Dep't 2007) (noting the trial court's order "requiring the payment of use and occupancy into escrow."); *Cromwell v. Le Sannom Bldg. Corp.*, 171 A.D.2d 458, 459 (1st Dep't 1991) (same); *255 Butler, LLC v. Boymelgreen*, 179 A.D.3d 876, 876-77 (2d Dep't 2020) (noting that both trial court and Appellate Division had ordered tenant to pay disputed use and occupancy into escrow); *see also Simry Realty Corp. v. Bishop,* 2018 NY Slip Op. 30905(U) ¶ 5 (Sup. Ct. May 7, 2018) (ordering payment of use and occupancy into escrow in dispute over payment of rent); *Mareb 99¢ Plus Enters., Inc. v. 101-09 W. 115th St. Hous. Dev. Fund Corp.*, 2016 N.Y. Slip Op. 32292(U) ¶ 4 (Sup. Ct., N.Y. Cty Oct. 31, 2016) (referencing previous order directing payment of use and occupancy into escrow).

Courts have held that payment of use and occupancy into escrow "is particularly appropriate . . . where the central issue in dispute is [Plaintiff's] failure to pay rent for the premises" and where "payment of rent is the ultimate issue to be decided in this case." *P.J. Clarke's On the Hudson LLC v. WFP Retail Co., L.P.*, 2014 NY Slip Op. 31864(U) ¶ 3 (Sup. Ct., N.Y. Cty July 17, 2014). In fact, under the Real Property Actions and Proceedings Law, payment of use and occupancy *into court* is a standard procedure when trial of a summary proceeding will be delayed with a tenant remaining in possession. *See* RPAPL § 745(2).

Landlord argues that the trial court "ignored" a host of decisions by this Court upholding orders requiring a tenant to pay rent to the landlord during the pendency of litigation. (App. Br. at 53.) Those cases are inapposite, however, because that is not the situation here. The issue before this Court is not whether the trial court, in its discretion, could have properly ordered payment of use and occupancy to Landlord. Rather the issue is whether the trial court abused its discretion by ordering an undertaking instead. The trial court did not abuse its discretion.

In *Graubard*, the motion court had ordered payment of use and occupancy into escrow. There, like here, the tenant contended that its obligation to pay rent had been suspended or terminated, and the motion court had ordered the tenant to make monthly payments into escrow, over the landlord's concerns that it would not

receive any rent during what could be (and indeed proved to be) a long and drawn out litigation. *See Graubard Mollen, Horowitz Pomeranz & Shapiro,* 93 N.Y.2d at 511. Landlord seeks to discount the relevance of *Graubard* by arguing that the Court of Appeals' decision dealt with a party's entitlement to interest on escrowed amounts. This argument fails to address the basic point for which both Tenant and the trial court cited *Graubard,* however: regardless of the issue being decided in *Graubard*, that case reflected an arrangement similar to the one ordered by the trial court here under similar circumstances, namely, a dispute over whether rent was payable.

Landlord also unconvincingly seeks to discount *Lexington Ave. & 42nd St. Corp. v. Lexchamp Operating*, 205 A.D.2d 421, 423-24 (1st Dep't 1994), claiming that case somehow supports *Landlord's* position. It does not. In *Lexington*, the Court ordered that *undisputed* rent be paid directly to Landlord during the pendency of the action, while *disputed* amounts were to be paid into escrow. *Id.* In this case, all rent is in dispute.

Landlord cites only one decision of this Court reversing or modifying the trial court's order that use and occupancy be paid into court rather than directly to the landlord, *Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, 2021 N.Y. Slip Op. 01019 at *550 (1st Dep't Feb. 16, 2021). In *44-45 Broadway Leasing*, however, this Court held that use and occupancy should have been paid directly to the

landlord specifically "because… plaintiff is continuing to use and occupy the premises as a retail business." *Id.* The record in this case, however, does not reflect any finding that Tenant was continuing to use and occupy the Premises as a retail business when the trial court entered its Order. Indeed, the only *evidence* submitted on this issue consisted of:

- The statement of Tenant's Senior Director of Real Estate that Tenant was forced to shut down all retail operations at the Premises in March 2020, and that it had not been able to resume normal operations at the Premises. (R. 242.)
- Landlord's statement in its July 31, 2020 affidavit in opposition that two months earlier, in May 2020, Tenant's store had displayed a sign stating that the Premises was closed, but that "team members inside are hard at work fulfilling online orders." (R. 293, 327.)
- Landlord's statement that its Chief Operating Officer called the Premises on July 27, 2020 and received a pre-recorded message indicating that customers who knew the specific item they wanted could order from Gap.com and would receive an e-mail letting them know that they could pick up their order. (R. 294.)

Even assuming that Landlord's proffered statements were correct, and that this could reasonably be considered "us[ing] and occupy[ing] the premises as a retail

business," it is certainly nothing remotely resembling the business contemplated by the Lease. Moreover, these statements reflected circumstances allegedly present months before the trial court heard the parties on Tenant's application on August 17, 2020, as well as the trial court's October 30, 2020 Order. Yet, this time frame was addressed by that portion of the undertaking directed at rent arrears, not use and occupancy. The record lacks any evidence that Tenant was using or occupying the Premises as the contemplated retail business during the period for which the court ordered use and occupancy, namely, November 1, 2020 and thereafter. (R. 7.)

Most concerning is that payment of use and occupancy directly to Landlord would destroy the *status quo* in this case. The dispute in the underlying Action concerns whether Tenant's obligation to pay rent under the Lease continues or whether government-mandated COVID-19 restrictions have vitiated that Lease by frustration of purpose. Payment of use and occupancy directly to Landlord would effectively have decided the case in Landlord's favor at the outset, and would have provided no security that Tenant could ever recover such payments from Landlord once the case is resolved on its merits. Thus, it would have left Tenant in no better position than if no *Yellowstone* relief had been granted. Payment of use and occupancy as an undertaking deposited with the court protected both sides until the issue can be decided. It protects *Landlord* by ensuring that if the rent is adjudged

to be owed, the money is immediately available. It protects *Tenant* from ultimately succeeding on the merits only to find that Landlord cannot refund the monies paid. This is a substantial and very real concern in this case, where Landlord has admitted it is in tenuous financial circumstances. (R. 299, 305-07, 342-44.)

The Supreme Court did not abuse its discretion in requiring a use and occupancy undertaking rather than payment directly to Landlord.

B. The Supreme Court Did Not Abuse its Discretion in Fixing the Amount of the Use and Occupancy Undertaking

As noted above, fixing of use and occupancy payments is a matter consigned to the motion court's broad discretion. *See 862 Second Ave. LLC v. 2 Dag Hammarskjold Plaza Condominium*, 185 A.D.3d 421 (1st Dep't 2020); *43rd St. Deli, Inc. v. Paramount Leasehold, L.P.*, 107 A.D.3d 501, 501 (1st Dep't 2013). Indeed, the court may fix use and occupancy without a hearing. *Morris Hgts. Health Ctr., Inc. v. DellaPietra*, 38 A.D.3d 261, 261 (1st Dep't 2007). The court may even decline to require the payment of use and occupancy altogether. *Tessler v. Tessler*, 81 A.D.3d 408, 408 (1st Dep't 2011) (affirming trial court's exercise of discretion in declining to award use and occupancy). To the extent a party claims that *pendente lite* use and occupancy payments were fixed at rates too low or too high, the appropriate remedy is a speedy trial. *Mushlam, Inc. v. Nazor*, 104 A.D.3d 483, 483 (1st Dep't 2013); *Morris Hgts. Health Ctr.*, 38 A.D.3d at 261; *500*

Cathedral Parkway LLC v. Gutierrez, 2018 NY Slip Op. 51723(U), *1 (App. Term 1st Dep't Dec. 3, 2018).

Landlord argues that the use and occupancy undertaking the trial court fixed was insufficient because it amounted to only six months of rent at the full rental rate. This is wrong, for two reasons.

First, Landlord argues that an undertaking must be "rationally related to the quantum of damages which plaintiff would sustain in the event that defendant is later determined not to have been entitled to the injunction." *61 W. 62nd Owners Corp. v. Harkness Apt. Owners Corp.,* 173 A.D.2d 372, 373 (1st Dep't 1994). The undertaking in *61 W. 62nd Owners*, however, did not apply to future use and occupancy payments but rather to past arrears. *Id*. *61 W. 62nd Owners* did not announce any rule that use and occupancy must be rationally related to damages sustained if the injunction is later determined to have been improper. Indeed, as the case law cited above demonstrates, trial courts have broad discretion as to the amount of use and occupancy to fix, and/or whether to fix any at all.

Second, implicit in Landlord's argument is the assertion that where a lease sets forth monthly rent, that amount governs the amount of use and occupancy payments. This is simply incorrect. Use and occupancy payments are designed to reflect compensation for the fair market value of the property during the pendency of litigation. But use and occupancy payments are not themselves rent.

Use and occupancy payments are intended to reflect "reasonable compensation" for the tenant's continued use or occupation of the premises. *See* RPAPL § 220. "The reasonable value of use and occupancy is the fair market value of the premises…" *Mushlam, Inc. v. Nazor*, 80 A.D.3d 471, 472 (1st Dep't 2011). While the rent set forth in a lease can be probative of the premises' reasonable value, that figure is by no means conclusive. *Id.*; *see 43rd St. Deli, Inc. v. Paramount Leasehold, L.P.*, 107 A.D.3d 501, 501 (1st Dep't 2013). The party seeking use and occupancy bears the burden of demonstrating the value of the premises. *Mushlam*, 80 A.D.3d at 472. A court does not abuse its discretion by fixing use and occupancy at amounts lower than the rent set forth in a lease. *See Andejo Corp. v. South St. Seaport Ltd. P'ship*, 35 A.D.3d 174, 174 (1st Dep't 2006) (affirming motion court's setting of use and occupancy despite exclusion of certain amounts of additional rent).

Unlike cases involving nonmonetary defaults giving rise to injunctive relief, in this case the rent owed to Landlord, if any, is disputed. Indeed, the dispute focuses on whether the value of the Premises has been so destroyed that Tenant owes either no rent or less than the nominal rent in the Lease from and after March 19, 2020, because the purpose for which Tenant leased the Premises has been entirely frustrated and rendered impossible, illegal and impracticable. In other words, Tenant contends that the present reasonable, fair market value of the

Premises is nowhere near the amount of rent set forth in the Lease. Because the motion court had broad discretion to determine the amount of use and occupancy—which included the discretion to award no such relief at all—Landlord cannot establish that Justice James erred in fixing the amount of use and occupancy in an amount equivalent to six months of rent at 100% of the rate specified in the Lease.

Given the motion court's broad discretion to determine the amount of use and occupancy, Landlord has failed to establish that the amount of use and occupancy ordered here was an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Justice James' October 30, 2020 Order denying Landlord's motion to dismiss, granting Tenant's request for a *Yellowstone* injunction, and ordering a use and occupancy undertaking.

Dated: New York, New York
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Respectfully submitted,

DAVIS & GILBERT LLP

By: _____

Jesse B. Schneider
Joshua Epstein
David S. Greenberg
1675 Broadway
New York, NY 10019
(212) 468-4800

Attorneys for Plaintiff-Respondent

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