THEODORE ROOSEVELT INN OF COURT

"COVID-19 PROGRAM PART I: LITIGATING IN A POST-COVID-19 WORLD, AND CONTRACT OBLIGATIONS IN A POST-COVID-19 WORLD"

TUESDAY, NOVEMBER 17, 2020 AT 6:00 P.M.

VIA ZOOM

PROGRAM CO-CHAIRS: HON. MICHAEL CIAFFA AND KEVIN SCHLOSSER

PRESENTERS: STEPHEN BRODSKY; DANIELLE GATTO; MATTHEW MARCUCCI; JEFFREY MILLER; GAYLE ROSEN; GREG ZUCKER

THEODORE ROOSEVELT INN OF COURT

NOVEMBER 17, 2020

COVID-19 PROGRAM PART I

I. LITIGATING IN A POST-COVID-19 WORLD

A. Introduction: Kevin Schlosser (2 minutes)

B. Using Private Judges Authorized by the CPLR: Kevin Schlosser (10 minutes)

C. Oral Arguments on OSCs and TROs: Jeffrey Miller (10 minutes)

D. Virtual Routine Court Appearances: Matthew Marcucci (10 minutes)

E. Virtual Depositions: Danielle Gatto (10 minutes)

F. Virtual Mediations: Greg Zucker (10 minutes)

II. CONTRACT OBLIGATIONS IN A POST-COVID-19 WORLD

A. Introduction: Michael Ciaffa (5 minutes)

B. Government Regulation of Businesses in the COVID Era, and Constitutional Limits: Michael Ciaffa (15 minutes)

C. COVID-19 as Force Majeure—Court Treatment of Contractual Provisions: Gayle Rosen (15 minutes)

D. Deal Litigation in a Post-COVID World—Material Adverse Changes and Material Adverse Events: Stephen Brodsky (15 minutes)

Covid Program 11/17/20 – outline

Part 2 - Contract Obligations in a Post-Covid World

Michael Ciaffa, Gayle Rosen, and Stephen Brodsky, presenters

*** Introduction (Michael Ciaffa) – 5 minutes (7:00-7:05 pm)**

*** Government regulation of businesses in the Covid era – constitutional limits (Michael Ciaffa) – 15 minutes (7:05-7:20 pm)**

- **U.S. Constitution, Art 1, sec. 10, clause 1 – "No state shall … pass any … Law impairing the Obligation of Contracts …"**
- **"Law" in this context includes state statutes, municipal ordinances, and administrative regulations having the force and operation of law.**
- **Gov. Cuomo's Executive Orders – e.g. the N.Y.S. moratorium on evictions and suspension of foreclosure proceedings (recently extended to January 1, 2021) – may have the effect of substantially impairing contractual obligations by postponing or restricting a private party's rights and remedies.**
- **Local municipal bodies (e.g. NYC) have also enacted regulations that may substantially impair contractual obligations, particularly in real estate and leasing relationships between landlords, tenants, and their guarantors.**
- **Open question – how far can such laws and regulations go?**
- **U.S. Supreme Court decisions provide a good clue: e.g. Home Building Ass'n v Blaisdell, 290 U.S. 398 (5-4 ruling allowing state "to give temporary relief from enforcement of contracts" due to "economic emergency" during the Great Depression).**
- **The majority and dissenting Judges' reasoning in the Blaisdell case echo an ongoing judicial debate in Constitutional law – witness the back and forth discussions at the hearings on Judge Barrett's nomination.**
- **The majority in Blaisdell (per Chief Justice Hughes, joined by Justices Brandeis, Stone, Roberts, and Cardozo) concluded that the Contracts Clause had to be interpreted in light of the "public need" in today's times. "It is no answer to say that this public need was not apprehended**

a century ago …" The "great clauses of the Constitution" should not be "confined to the interpretation which the framers … would have placed on them." "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

- **The dissenting Justices, in contrast, forcefully argued that the Constitution "must be construed now as it was understood at the time of its adoption." The Contracts Clause "forbids state action under any circumstances, if it has the effect of impairing the obligation of contracts." "It does not contemplate that an emergency" makes it "any less a restriction on state action …"**
- **Most judicial decisions in recent months have given government officials the benefit of the doubt, and, following Blaisdell, have rejected Contracts Clause challenges to Covid-pandemic regulations that temporarily restrict a private party's contractual rights and remedies. See, e.g. Elmsford Apartment Associates, LLC v Cuomo, 2020 WL 3498456 (SDNY 6/29/20) ("The eviction moratorium does not eliminate the suite of contractual remedies available to the Plaintiffs; it merely postpones the date on which landlords may commence summary proceedings against their tenants").**
- **But other pending court challenges to Covid-pandemic restrictions remain open for further court consideration. E.g. Melendez v City of New York, 20-CV-05301 (SDNY) (challenging NYC local laws which shift the burden of the Pandemic "from one segment of society" [commercial and residential lessors] to another [property owners], stripping them of "their ability to collect rental income … with tax bills and mortgage payments quickly mounting").**
- **With no end to the pandemic in sight, we can foresee increasing judicial disagreement over whether certain laws and regulations "go too far" in impairing contractual obligations. Particularly when the new rules seem to pick "winners" and "losers" arbitrarily, favoring one class (e.g. commercial tenants) over another (e.g. commercial landlords), difficult constitutional issues will likely be presented. Apart from the Contracts Clause, other provisions in U.S. Constitution may limit a state or local**

government's ability to regulate businesses under its generally broad police powers. Here, again, however, most recent lower court judicial decisions addressing claims attacking Covid-pandemic rules and regulations under the Takings, Due Process, and Equal Protection clauses have deferred to the legislative judgments. See, e.g. Luke's Catering Service, LLC v Cuomo (WDNY 9/10/20); Hapco v City of Philadelphia, 2020 WL 5095496 (ED Pa. 8/27/20).

- **But it is likely that higher courts, including perhaps the U.S. Supreme Court, will be asked to weigh in on the broader issue: how far Covid-restrictions may go when constitutional rights are affected. The Supreme Court may be closely divided. Cf. South Bay United Pentecostal Church v Newsome, 590 US ___ (5/20/2020) (5-4 decision denying application for injunctive relief against California Governor's executive order limiting attendance at places of worship in order to limit the spread of Covid-19).**

*** COVID-19 AS FORCE MAJEURE - COURT TREATMENT of CONTRACTUAL PROVISIONS (Gayle Rosen) – 15 minutes (7:20-7:35 pm)**

- Definition

French for "greater" or "superior" force
Force majeure is a defense to contractual obligations
physical impossibility . . . commercial impracticability

- Second Restatement of Contracts

§ 261. Discharge by Supervening Impracticability
Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

- Uniform Commercial Code

2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

- New York Practice Contract Law

Force Majeure 20:13

A force majeure is an event beyond the control of the parties that prevents performance under a contract and may excuse performance.[1] The event must be one that can be neither anticipated nor controlled that may arise from acts of nature (e.g., floods, hurricanes) or of people (e.g., riots, strikes, war).[2] A force majeure clause is a contractual provision which allocates the risk if performance becomes impossible or impractical as a result of an event beyond the control of the parties.[3] The clause excuses non-performance if specified circumstances beyond the parties' control impact performance.[4] The excuse is available only where the parties' reasonable expectations have been frustrated due to circumstances beyond their control.[5] When a specified force majeure event occurs, the effect is that both parties are excused from further performance.[6]

A court order, such as a Temporary Restraining Order, that prevents performance, may trigger a force majeure clause.[7]

The basic purpose of the clause is to relieve a party from its contractual duties when its performance has been prevented by an event beyond its control or when the purpose of the contract has been frustrated.[8] The clause also limits damages where circumstances beyond the parties' control have frustrated their reasonable expectations.[9]

The party claiming a force majeure event excused its performance has the burden to establish force majeure applies.[10] It also must demonstrate its efforts to perform its contractual duties despite the occurrence of the event.[11]
Where the parties' integrated agreement does not contain a force majeure clause, there is no basis for a force majeure defense.[12]

Force Majeure Scope 20:14

Contractual force majeure clauses—clauses excusing non-performance due to circumstances beyond the parties' control—provide a narrow defense excusing a party's obligation to perform.[1] The clause will be narrowly construed.[2] Ordinarily, the clause must contemplate the specific event that is claimed to have prevented performance.[3] Only in such circumstance will a party's performance be excused.[4] Mere impracticability of, or unanticipated difficulty in, performance is not sufficient to excuse performance under a force majeure clause.[5]

Adverse economic conditions do not constitute a force majeure excusing performance of a contract.[6] Force majeure clauses are to be interpreted in accord with their function which is to relieve a party of liability when the parties' expectations are frustrated due to an extreme and event that is beyond the parties' control and occurs without the fault or negligence of the party claiming the benefit of the clause.[7]

A clause addressing a force majeure is not limited to excusing performance upon the occurrence of a contingency, for parties may agree that a force majeure will have a different result.[8] When a force majeure clause contains an expansive catch all phrase in addition to specified events, the precept of *ejusdem generis* as a construction guide is appropriate so that words constituting general language of excuse are not given the most expansive meaning possible but are applied only to events that are the same general kind or class as those specifically mentioned.[9] In construing a force majeure clause, a court applies the rule of *ejusdem generis* by including in the provision only those things as the same character or class as the specific events mentioned.[10] General words are not to be given an expansive meaning but should be confined to things of the same kind and nature as the particular matters mentioned.[11] This point is illustrated by a case involving a failure to deliver a leased aircraft.[12] The contract contained a force majeure clause that covered catastrophes such as a bomb, sabotage, or flood leading to destruction of the aircraft. A dispute between the defendant and the aircraft's owner which prevented timely delivery of the aircraft did not fall within the force majeure provision because it did not constitute a contingency specifically listed in, or similar to those listed in, the force majeure clause.

When the parties define the contours of force majeure in their agreement, those contours define the application, effect and scope of force majeure.[13] The parties may even enter into an agreement that explicitly excludes force majeure events from being used as a defense to full performance.[14]

The parties may draft the force majeure provision so that it broadens or narrows the excuses for non-performance and attaches conditions concerning non-performance.[15] The clause may be broadly written to make a force majeure “any cause whatsoever” beyond the parties' control that prevents a party from performing.[16] The clause may require a party to give prompt notice of the occurrence of a force majeure event and may obligate the claiming party to take steps to minimize the event's impact.[17] Although there is authority that a requirement that a party give notice of a force majeure event will not be deemed a condition precedent to invoking a force majeure excuse unless the language of the agreement clearly creates such a condition,[18] later decisions have viewed giving any required notice as a condition precedent to invoking force majeure.[19]

In determining whether force majeure has been properly invoked, a court may consider whether there is a practice in the industry to excuse performance on the basis of the claimed force majeure event that has such regularity of observance as to justify an expectation of its observance.[20]

A force majeure clause may provide that if performance does not occur within a specified time after the force majeure event, the party owed the affected performance may cancel all or part of the contract.[21]

- Considerations:

1. Is the event specified in the parties' agreement
2. The event was unforeseeable, event's non-occurrence was basic assumption (going forward is an epidemic or pandemic "unforeseeable"?)
3. Has the party who is using force majeure as a defense tried to mitigate the effects of the event

- What will trigger COVID as a force majeure defense?

Diagnosis?
Symptoms?
Governing jurisdiction acknowledgement?
Executive PAUSE Orders/Lockdown?
Language sufficient to excuse performance?
Acts of G-d
Strikes, lock-outs, or other labor disputes
War, riot, civil commotion
Terrorism (September 11)
Fire
Flood, storm or natural disaster (Superstorm Sandy)
Other conditions beyond party's control

- How did the Court rule?

Case #1 (Court of Appeals 1987)
• Lessee of commercial lease for roller skating rink brought action for declaratory judgment excusing its performance under the lease as "impossible" or "force majeure" which included a catch all
• Lease required lessee to procure and maintain liability insurance
• Insurer would not renew and tried to obtain the insurance elsewhere but couldn't (liability insurance crisis)

Case #2 (Second Department 2009)

• Landlord of commercial lease brought action against tenant for judgment declaring tenant was obligated to start paying rent
• Lease was for "any legalized betting and ancillary uses"
• Force majeure clause in commercial lease included "governmental action or inaction"
• Prior to tenant using premises as intended OTB, zoning ordinance restricted locations of off track betting parlors

Case #3 (First Department 2009)

• Lessee of commercial lease brought action for rent abatement
• Commercial lease required landlord to make improvements to the building before lessee took possession
• Force majeure clause listed "governmental prohibitions"
• Landlord was subject to a judicial TRO against proceeding with construction necessary to deliver possession

***DEAL LITIGATION IN A POST-COVID WORLD:**
MATERIAL ADVERSE CHANGES AND MATERIAL ADVERSE EVENTS
Stephen L. Brodsky – 15 minutes (7:35-7:50 pm.)

I. INTRODUCTION: The current market and business conditions resulting from the covid pandemic have affected businesses in extremely significant ways. Nearly all have been affected negatively.

A. Target Companies' Decrease In Value: One result of the covid world is businesses that are party to agreements to acquire other businesses may now find that the desired business sought to be acquired has substantially less value or is otherwise less attractive, for other reasons, when the deal agreement was executed. This may be due to overall market impact or due to the particular business model of the target company

B. Current Conditions: Some general market conditions are:

1. Type of Business and Business Model: First and foremost, the type of business is critical. Is it a brick and mortar retailer (e.g., Nieman Marcus)? A commercial leasing company or brokerage company (e.g., CBRE)? A restaurant chain (Cheesecake Factory)? A movie theater chain (AMC)? Conversely, is business particularly well suited for the covid world? Examples

are: internet retailers (e.g., Amazon); cybersecurity firms; professional such as trust and estate counsel and tax accountants; and very large companies that can best bear the costs and impacts, and thereby take the market share of their smaller competitors who cannot).

2. Decreased Demand: Demand for a particular company's goods or services may have fallen drastically, whether due to curtailed spending or state-mandated safety measures, e.g., Disney, movie theaters, consumers are not buying what the company is selling. Can the company adjust, both in the short and long term? Can it lower its prices? Can it change its busines model?

3. Disruptions in Supply Chain: Supply shortages and delays affect companies, often resulting in scarcity and higher costs. A particular company have specific supply issues, e.g., raw materials from across the globe, finished products from factories that cannot provide, etc.

4. Employment Issues: Employment matters of various kinds abound. For some businesses, it is simply not feasible to have employees work remotely while shelter in place orders are in

effect or due to general fear of covid. Others may transition well to a remote work or flex office work environment.

5. Fixed Costs: Every company will have certain costs that will remain due and owing, such as mortgages, rent, utilities and insurance premiums. Is the company unable to pay rent, a mortgage or other fixed cost? What is happening? Forebearance? Enforcing a security interest?

6. Liquidity and Financing: Cash and financing needs may have changed drastically. Events may have triggered a default or material adverse change in a financing agreement. Is restructuring debt possible, and if so, can the owners agree to new obligations?

II. MAC AND MAE CLAUSES: Each of the above may constitute a MAC or MAE. The covid pandemic itself may constitute a MAC or MAE. Litigation has ensued over whether a MAC/MAE clause in an acquisition agreement has been triggered.

A. **MAC/MAE Contract Provision:** A MAC clause (also called MAE clause) is a contract provision that allocates risk among the contracting parties, post execution and before closing. The clause, generally speaking, provides that if there has been a material adverse change of

circumstance or a material adverse event, during the period between signing and closing, one party may be excused from performing the contract (e.g., excused from closing the acquisition, lend funds, etc.) We are focused on those in deals.

B. **Typical MAC/MAE Clause:** A typical clause provides that a "material adverse change" means "any change, event, development, condition, occurrence or effect that is reasonably likely to be material and adverse to the financial condition, business, result, operations, or prospects of [X]."

1. Exclusions and Carve-Outs: A list of exclusions or carve-outs then follow the broad MAC/MAE clause. This is a list of what will not constitute a MAC/MAE.

2. Typical Examples: acts of God, floods, earthquakes, natural disasters, terrorism and general economic downturns.

3. Disease Exclusions: Some agreements go further. They may exclude pandemics, epidemics, etc.

4. Developments: Some agreements now specifically exclude the COVID-19 pandemic.

5. Negotiated Clauses: These clauses are highly negotiated by very sophisticated parties, often in conjunction with investment

bankers, analysts, consultants, and, of course, attorneys. The actual language can vary greatly from agreement to agreement. MAE clauses are commonly broader than MAC clauses, in that they cover not only a change to the counter-party's business, but also changes to the business environment that may negatively impact the transaction.

6. Types of Agreements: lending agreements and acquisition agreements.

III. LITIGATION

A. **Suit To Terminate Agreement:** Some parties have sued to terminate deal agreements on the ground that a MAC/MAE clause has been triggered.

B. **Suit/Counterclaim for Specific Performance:** Others have sued to enforce the deal agreement.

C. **Delaware Decisions:** Many actions are in Delaware Chancery Court, not New York. This is likely because the companies are formed under Delaware law. Moreover, Delaware Chancery Courts are particularly suited to handle the litigation, which proceeds extremely quickly, usually commenced with a TRO, then expedited discovery and a flurry of motions.

D. **Settlements under Seal:** There are very few available decisions. Most litigations proceed and then a settlement is abruptly reached and filed under seal pursuant to confidentiality agreements. Or, a bench ruling is made, with no available opinion.

E. **Parties Reach Business Settlement:** The parties appear to make business judgments, rather than rely on decisions. They may use legal process to gain leverage in negotiations, but settlement, not a litigated result in the typical desire. Parties are sophisticated businesses. They adjust their deal structure, allow a renegotiation, termination, etc. because business metrics and dynamics are in play.

IV. **CASES**: Some instructive cases are below.

A. MAC/MAE Cases:

1. *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *52 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018): Holding that contracting parties had accepted material adverse change that resulted from "acts of war, violence, pandemics, disasters, and other *force majeure* events.") (***Not attached because it is a 106 page opinion)***

2. *Forescout Technologies, Inc. v. Ferrari Group Holdings,* No. CV 2020-0385-SG, 2020 WL 3971012 (Del. Ch. July 14, 2020):

Plaintiff Forescout sought injunctive relief to compel defendants to consummate a merger. At issue was "whether Forescout has suffered material adverse effect ('MAE') under the terms of the merger agreement." Court found that "[t]he parties appear to have negotiated the merger agreement in light of the pending COVID-19 pandemic, and agreed to limit – but not eliminate – the extent to which a pandemic could constitute a MAE." The decision at issue, however, deal with whether trial testimony of a witness may be taken virtually and whether a witness may be compelled to testify live.

a. *Forescout Technologies, Verified Complaint.* See paragraphs 12-15; 57 (MAE clause); 81-85.

3. *Khan et al. v. Cinemex USA Real Estate Holdings Incl et al.,* No. 2020-CV-1178, 2020 WL 1808264 (S.D. Tex. April, 2, 2020) (complaint): Kahn alleges in the complaint that Cinemex is "exploiting the … health disaster" created by COVID-19, even thought the companies considered the potential effects of the virus during deal negotiations. Kahn agreed in March to sell of Star Cinema Grill's 10 existing locations and another sited under development to Cinemex for undisclosed financial terms.

According to the lawsuit, the parties finalized the deal "while the coronoavirus outbreak was already burgeoning" and Cinemex negotiated almost a 10% discount from the price initially discussed to account for the effects of the pandemic. However, when it came time to close in March, Cinemex said it would no longer consummate the deal, in light of COVID-19-related issues. Kahn's suit contended that the parties negotiated the transaction with the pandemic in mind and that Cinemex cannot rely on the pandemic to avoid closing. The suit demands specific performance.

4. *Realogy Holdings Corp v. Sirva Worldwide, Inc. et al.*, No. CV 2020-0311-MTZ, 2020 WL 4559519 (Del. Ch. Aug. 7, 2020): Plaintiff Realogy applied for certification of an interlocutory appeal from a bench ruling issued July 17, 2020 which dismissed Realogy's claims for specific performance under the governing Purchase and Sale agreement because the unambiguous contractual conditions on that remedy failed. Interlocutory appeal not certified.

   a. *Amended Verified Complaint,* 2020 WL 2749095 (Del Ch. May 17, 2020)

B. Settlements:

1. *Comtech/Gilate Satellite Networks Ltd. (Oct. 6, 2020):* Comtech and Gilat terminated their $532 million merger agreement and settled a Delaware Chancery Court lawsuit seeking interpretation of the deals "material adverse effect clause in the wake of the COVID-19 pandemic. Comtech filed a July lawsuit seeking a declaratory judgment that it longer had to complete the acquisition because the pandemic had caused a material adverse effect to Gilat's business. Gilat countered that Comtech was using the pandemic as an excuse to skirt its contractual obligation to close.

C. Other Cases of Note:

1. *In re: Condado Plaza Acquisition LLC,* Case No. 20-12094 (MEW), 2020 WL 6038813 (S.D.N.Y. Oct. 9, 2020): A purchase agreement regarding hotel that later had to shut down temporarily due to Puerto Rico's COVID-19 restrictions did not require, under New York law, hotel seller to deliver an "operating" hotel. Particularly important was Section 7.4(a) which stated: "EXCEPT AS EXPRESSLY SET FORTH HEREIN, SELLER MAKES NO REPRESENTAITONS OR

WARRANTIES WHATSOEVER, WHETHER EXPRESS OR IMPLIED OR ARISING BY OPERATION OF LAW, WITH RESPECT TO THE ASSETS OR THE CONDITION OF THE ASSETS."

November 17, 2020 Theodore Roosevelt Inn of Court CLE
COVID-19 Program Part I

INDEX OF MATERIALS

VIRTUAL DEPOSITIONS – CAN'T LOOK BACK NOW

Covid-19 has substantially changed the landscape of federal and state litigation. Depositions, for example, are now primarily being conducted virtually using audio and video technology (such as Zoom, WebEx and Skype) to avoid the spread of infection that may occur from an in-person deposition (with numerous individuals, gathered in tight quarters, for extended periods of time). Virtual depositions are likely to become more ingrained in federal and state litigation once the pandemic is over because of significant advancements in technology, the ease with which virtual depositions can be conducted, and the cost efficiencies they generate.

The proliferation of virtual depositions in such a short period of time means litigants are navigating novel issues on a daily basis, including establishing a framework for consistent rules and procedures to govern them. The purpose of this report is to enumerate best practices when conducting virtual depositions. Accordingly, below is a list of provisions that may be incorporated into stipulations between counsel for parties and non-parties governing virtual depositions.

- Court Reporter. The stipulation should provide that: (i) a court reporter may administer the oath to a witness remotely (even if the court reporter is not in the physical presence of the witness);[1] (ii) the transcripts and video recordings may be used by or against all parties in the litigation;[2] (iii) the recorded video provided in digital form by the court-reporting service may be used as if it were recorded by a certified videographer and each side waives objections based on authenticity;[3] and (iv) the individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be.

- Cooperation. The stipulation should provide that the parties and any non-parties involved in the virtual deposition will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps) and work collaboratively in good faith with the video-conferencing service to assess each witness's technological abilities and to troubleshoot any issues in advance of the deposition. Federal Rule of Civil Procedure 30(b)(4) provides that a remote deposition in a federal proceeding is permitted by stipulation of the parties or order of the court. Non-parties would be subject to this stipulation or order because they generally may not refuse to proceed with a deposition merely on the grounds that they object to the manner of recording set forth in the subpoena, although in rare circumstances they may seek a protective order.[4] The

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[1] This would comply with Federal Rule of Civil Procedure 28 and New York Civil Practice Law and Rules 3113(d).

[2] This would be in accordance with Federal Rule of Civil Procedure 30(b)(5) and New York Civil Practice Law and Rules 3117.

[3] This would be under Federal Rule of Civil Procedure 29(a) and 22 NYCRR 202.15.

[4] According to the 2005 Advisory Committee Note to Federal Rule of Civil Procedure 45, "A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner."

stipulation should further provide who will bear the burden of ensuring that the witness has the proper software, hardware, and other relevant equipment to attend a deposition by video conference; when that technology will be made available to the witness; and a mechanism for a "test run," if needed.

- Vendor. The stipulation should provide for the name of the court reporting service and platform used to record the deposition. Unless otherwise agreed, the stipulation should require that the witness and all counsel be displayed on the platform at all times during the deposition, except when one or more counsel must be taken off to display an exhibit. The stipulation should also state that counsel may elect to have a technical specialist attend the deposition to address technical issues and administer any virtual breakout rooms or an exhibit specialist to ensure that exhibits are properly displayed during the deposition. The stipulation should provide that confidential information may be disclosed to any such specialists involved in the deposition without violating any confidentiality restrictions.

- Exhibits. The parties may stipulate to the timing under and means by which deposing counsel could send the witness and defending counsel exhibits to be potentially marked during the deposition. Such means may include: (a) sending them, pre-marked, by overnight courier in a sealed envelope or banker's box(es) in advance of the deposition; (b) making them available through a pre-arranged FTP or file-sharing site or emailing pre-marked exhibits to the witness, defending counsel, all attending counsel, and the court reporter in advance of the deposition; (c) using a video-conferencing platform or other electronic application for presenting exhibits which will enable deposing counsel to share exhibits with the witness, court reporter, and all counsel attending; or (d) any other means agreeable between counsel. For hard-copy exhibits transmitted in advance, the stipulation should provide that the sealed exhibits must remain sealed and unopened until the deposition begins and the witness is instructed on the record to open a sealed hard-copy exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). The parties should also provide for a mechanism to address last-minute exhibits not provided to the witness or defending counsel in advance.

- Witness Notes. Witnesses should testify on the record that they do not have any notes or documents available to them while the deposition is pending, except that which they disclose and provide to all parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all parties, appropriate non-parties and counsel.

- Witness Communications. The stipulation should provide that there should be no unrecorded conversations between the witness and any counsel involved in the case during a remote deposition while the witness is on the record. All counsel may be asked to confirm on the record and at the beginning and end of each deposition that they will not communicate and have not communicated with the witness while the witness is on the record other than in the presence of the court reporter and videographer. However, nothing in the stipulation should prevent a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a deposition, nor should the stipulation prevent defending counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another authorized purpose, so long as defending counsel first states his or her

intention on the record before initiating such communication. Nothing in the stipulation should prevent the questioner from asking the witness at any time who else, if anyone, is in the room with the witness.

Virtual depositions are becoming more prevalent in federal and state litigation every day, causing a major shift in the manner in which cases are litigated on a rapid basis. It is important that litigants adapt and embrace technology permitting the use of virtual depositions in place of in-person ones. In anticipation of a virtual deposition, parties and non-parties should enter into a clear stipulation to ensure the deposition is streamlined, minimizes the risk of technical problems, focuses on maintaining the integrity and reliability of the record, and governs the conduct of the parties and non-parties involved. A copy of a model stipulation incorporating is set forth in Exhibit A to demonstrate how these objectives may be achieved.

October 28, 2020

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Federal Procedure Committee

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Persons marked with an asterisk are principal authors of the Report.

EXHIBIT A
REMOTE DEPOSITION STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Plaintiffs, on the one hand, and counsel for Defendants, on the other hand, that:

Purpose of this Stipulation. In light of the ongoing Covid-19 pandemic, the Parties and Non-Parties shall meet, confer, and cooperate with one another regarding the scheduling of Depositions and the procedures for taking Depositions. Parties agree to take reasonable steps, in good faith, to enable witnesses, Deposing Counsel, Defending Counsel, and Attending Counsel to complete Depositions in a manner that takes into account and accommodates, as necessary, the needs of dependent care and personal health and safety.

Definitions

"Attending Counsel" means any legal counsel for a Party or Non-Party that is attending a Deposition, other than Deposing Counsel or Defending Counsel.

"Court Reporter" means an individual retained by the Party or Parties taking a Deposition to transcribe the Deposition who is authorized to administer oaths under either federal or state law.

"Defending Counsel" means the legal counsel for the Party, Parties, Non-Party, or Non-Parties being deposed who is principally defending the Deposition. For a witness who is represented by personal and company counsel for the purpose of his or her Deposition, both personal and company counsel shall be treated as "Defending Counsel."

"Deposing Counsel" means the legal counsel for the Party or Parties noticing a Deposition.

"Deposition" means any deposition upon oral examination taken pursuant to Federal Rule of Civil Procedure 30 or any court order in the litigation.

"Exhibit" means any document or electronically stored information that is marked as an exhibit at a Deposition.

"Party" or "Parties" means any plaintiff, any defendant, and any of their current or former employees, executives, officers, or directors.

"Non-Party" or "Non-Parties" means all natural or legal persons that are not Parties from whom a Party is seeking a Deposition in the litigation.

In-Person Depositions

Nothing in this Stipulation shall prevent a Deposition from proceeding in person if Deposing Counsel, Defending Counsel, and the witness agree.

If the noticing Party, the responding Party or Non-Party, and the witness agree, a Deposition may take place in person at an agreed upon location with the noticing Party, responding Party or Non-Party, witness, court reporter, and videographer appearing in person.

All Parties and appropriate Non-Parties should confer in advance to ensure that only those attorneys who plan to question or represent the witness will appear in person. Any other Party may participate in any in-person Deposition by telephone or via video conference.

Deposing Counsel and Attending Counsel intending to participate by telephone shall cooperate in good faith to facilitate such participation.

Remote Depositions

Notice of Remote Deposition: Any Party may notice a Deposition to be taken remotely pursuant to the terms of this Stipulation by so indicating in the notice of deposition. All objections to the use and admissibility of the transcript or video of a Deposition taken pursuant to this Stipulation based solely on the fact that the Deposition was taken by remote means are deemed waived. The Party that noticed the Deposition shall be responsible for procuring a written transcript and video recording of the Deposition. The Parties and any Non-Parties shall bear their own costs in obtaining a transcript or video recording of the Deposition and copies of any Exhibits.

Notice of Change from In-Person to Remote Deposition: If a Deposition was previously anticipated or agreed to be an in-person Deposition, the witness or that person's attorney may request the Deposition be changed to a remote Deposition. Such a request to change the format for the Deposition should be provided as soon as reasonably practicable, but no later than seven days in advance of the Deposition. The Parties and any appropriate Non-Party will work cooperatively and timely to arrange for the necessary logistics required for the change in format of the Deposition.

Remote Administration of Oath and Recording of Video: The Parties agree that a Court Reporter may administer the oath to a witness remotely, even if the Court Reporter is not in the physical presence of the witness. Further, if a Court Reporter is not authorized to take oaths in the place of examination pursuant to Federal Rule of Civil Procedure 28, the Parties agree that (i) extenuating circumstances warrant proceeding with the administration of such oaths remotely and (ii) the transcripts and video recordings may be used by or against all Parties in the litigation to the same extent that would otherwise be permissible under applicable court orders, rules of court, rules of procedure, and rules of evidence, including Federal Rule of Civil Procedure 30(b)(5). The Parties further stipulate, pursuant to Federal Rule of Civil Procedure 29(a), that the recorded video provided in a digital file by the court-reporting service or platform vendor may be used as if it were a recording prepared by a certified videographer and that each side will waive any objections based on authenticity. The individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be, and, if appropriate, have the witness show identification.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those

portions of the deposition that are on record should be recorded, and affixing time stamps). The time shown on the transcript and video shall be the local time in the place where the witness is located. Absent a special need, the witness will not have access to or use of a real-time feed from the Court Reporter at any time during the Deposition. Both the Court Reporter and the Deposition vendor or videographer will maintain an official record of the Deposition. Accordingly, both will need to agree when proceedings are on or off the record. Once proceedings go on the record, absent extenuating circumstances, all Parties and appropriate Non-Parties must agree before the record stops.

Video-conferencing: Where the witness, Defending Counsel, or the Deposing Counsel are appearing for the Deposition remotely, then a video-conferencing service will be used, and such video may be recorded for later use in proceedings in this case, including trial. The video-conferencing software must have sufficient security features in place to prevent the public disclosure of protected information designated under the Confidentiality Order in the litigation. The Parties and any appropriate Non-Parties will discuss any further details related to the video-conferencing service in advance of the Deposition, and, if there are any disagreements, will raise those with the Court. To the extent possible, the video-conferencing service should display the witness, Defending Counsel, and Deposing Counsel on the video screen at all times, unless one or more counsel must be taken off screen to display an Exhibit; however, the witness should always be on screen. Statements by the witness, Deposing Counsel, Defending Counsel, Attending Counsel, the Court Reporter, and the videographer shall be audible to all participants, and they should each strive to ensure their environment is free from noise and distractions.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps). Deposing Counsel and Defending Counsel shall meet, confer, and cooperate to ensure that the witness has technology sufficient to attend a Deposition via remote means. If necessary, this shall include arranging for the witness to participate in a "test run" of the Deposition video-conferencing software at least three business days or five calendar days before the scheduled date of the Deposition (whichever is longer).

Vendor and Platform

Plaintiffs are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. Defendants are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. _____ 's and _____'s cost structures for the services being rendered are attached to this stipulation. To the extent any Deposition will proceed using a service other than as set forth above, details regarding the video conferencing to be used for each Deposition will be made available to all Parties and any appropriate Non-Parties at least five business days before the Deposition.

Deposition Recording

In addition to recording the Deposition by stenographic means, the deposing Party may record the Deposition by video. The video recording shall be limited to the witness; however, this provision is separate from, and does not supplant, Section __ above as to the individuals that should be *displayed* (rather than recorded for the official Deposition video) during the Deposition. Deposing Counsel is responsible for ensuring that the remote means used for a Deposition allow for the Court Reporter to accurately record the witness's testimony. Either Deposing Counsel or Defending Counsel may elect to have a technical specialist attend a Deposition taken by remote means to ensure that technical issues are dealt with in a timely manner and to administer any virtual breakout rooms. Deposing Counsel may also elect to have an exhibit specialist attend a Deposition taken by remote means to ensure that Exhibits are properly displayed during the Deposition. If Deposing Counsel uses an exhibit specialist, Deposing Counsel will act in good faith to make their exhibit specialist available to assist the Defending Counsel or other Parties or appropriate Non-Parties to present any Exhibits to the witness during cross-examination or redirect. For purposes of clarity, Confidential or Highly Confidential information may be disclosed to such technical or exhibit specialists during the course of a Deposition without violating the Court's Confidentiality Order, and such technical and exhibit specialists shall be bound by the Confidentiality Order.

Exhibits

Generally: Deposing Counsel shall be responsible for ensuring that any Exhibits that they wish to mark and use at the Deposition can be shown to the witness and Defending Counsel in a manner that enables the witness and Defending Counsel to independently review the Exhibits during the course of the Deposition. Such means of marking and using Exhibits for the Deposition shall include, by way of example: (a) using a video-conferencing platform or other electronic application for presenting Deposition Exhibits (*e.g.*, Remote Counsel/Cameo, eDepoze, or Zoom screen-sharing) which enables Deposing Counsel to share Exhibits with the witness, Court Reporter, Defending Counsel, and Attending Counsel; (b) sending via overnight courier sealed courtesy copy or pre-marked Exhibits to the witness (and Defending Counsel, if requested) in advance of the Deposition; (c) making available via a pre-arranged FTP or file-sharing site or emailing pre-marked Exhibits to the witness, Defending Counsel, Attending Counsel, and the Court Reporter in advance of the Deposition; or (d) any other means to which the Deposing Counsel and Defending Counsel agree. If the remote means used do not permit marking of Exhibits remotely, Deposing Counsel shall either pre-mark Exhibits or direct the witness and other attendees as to how Exhibits should be marked.

Electronic Exhibits: A Party may use electronic Exhibits in connection with a Deposition so long as the Party provides notice to the witness and Defending Counsel and arranges for the technology to permit the presentment of the electronic Exhibit at the Deposition to the witness, Defending Counsel, and Attending Counsel. The Parties will provide electronic copies of Exhibits introduced during the course of a Deposition, either via email, deposition exhibit software, or via a pre-arranged FTP or file-sharing site, to ensure that Defending Counsel and Attending Counsel may participate in the Deposition. Similarly, where an Exhibit is used electronically and was not

provided in hard copy before the Deposition, the Parties will provide electronic copies of that document by the same means described in the previous sentence. Deposing Counsel shall not begin questioning a witness concerning an electronic Exhibit until that Exhibit has been received by Defending Counsel and Attending Counsel.

Hard-Copy Exhibits: At the sole discretion of the noticing Party, a remote Deposition may be conducted using sealed, pre-marked, hard-copy paper Exhibits as the official Exhibits. Such hard-copy Exhibits shall be transmitted so that they are received at least by noon of the business day before the Deposition (with tracking information available upon request) to the witness, Defending Counsel, and the Court Reporter. Upon delivery, each recipient shall confirm by email to Deposing Counsel receipt of the Exhibits. Anyone receiving sealed hard-copy Exhibits agrees pursuant to this Stipulation that the sealed Exhibits must remain sealed and unopened until the Deposition begins and the witness is instructed on the record to open a sealed hard-copy Exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). Deposing Counsel may ask the witness and others receiving sealed exhibits to confirm on the record that no exhibit was opened prior to the time they are opened during the Deposition. At the conclusion of a Deposition, any unused exhibits will remain sealed and, within two business days, shall be returned, unopened, to the counsel who provided those exhibits with a prepaid, self-addressed return shipping label or envelope. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in their hard-copy set all the exhibits on which they plan to question the witness; however, nothing in this Stipulation is intended to prevent, nor in fact prevents, counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy.

Courtesy Hard Copies for Depositions Conducted with Electronic Exhibits: Upon request by the witness or Defending Counsel, courtesy hard copies of Exhibits will be provided to the witness and Defending Counsel at an agreed upon time (*e.g.*, 48 hours) prior to the Deposition. Voluminous exhibits upon which only a portion of the document will be the subject of questioning (beyond authentication and evidentiary questions) need not be transmitted in hard copy and may be presented electronically, but Deposing Counsel will provide excerpts of key portions of the document as part of the hard-copy courtesy set. If these hard copies are delayed in arriving, the Parties and any appropriate Non-Parties will meet and confer on rescheduling the Deposition, if necessary. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in the courtesy hard copies all the Exhibits on which they plan to question the witness. For the avoidance of doubt, the official Exhibit will remain the electronic copy presented to the witness and all participants.

Last-Minute Exhibits: The Parties recognize that there may be last-minute Deposition Exhibits, which are not able to be provided to the witness or Defending Counsel in advance. Nothing in this Stipulation is intended to prevent, nor in fact prevents, Deposing Counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy. Questioning about a last-minute Exhibit shall not commence until Defending Counsel has received a copy of the exhibit electronically via one of the electronic methods specified in this Stipulation.

Witness Notes

Witnesses will testify on the record that they do not have any notes or documents available to them while the Deposition is on the record, other than any that are disclosed and provided to all Parties and appropriate Non-Parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all Parties, appropriate Non-Parties and counsel. Upon conclusion of the Deposition, the Court Reporter will make available or circulate the Exhibits to all counsel attending the Deposition.

Witness Communications

There should be no unrecorded or unnoted conversations between the witness and any counsel involved in this case (including Defending Counsel) during a remote Deposition while the witness is on the record, and Deposing Counsel may ask the witness and Defending Counsel to certify, on the record, that no such conversations have taken place. Further, witnesses in Depositions taken pursuant to this Stipulation shall not use or consult any means of communications while on the record during the Deposition (other than audio and video communications used to conduct the Deposition itself), including, without limitation, electronic communications (email, text, social media, or the chat function in a video-conferencing system) and other communications (telephone). All counsel attending the Deposition will also stipulate, on the record and at the beginning and end of each Deposition, that they (and any individual working with them) will not communicate and have not communicated with the witness orally, in writing, or electronically (including, but not limited to, emails, texts, or posts). Nothing in this Stipulation prevents a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a Deposition taken pursuant to this Stipulation. Nothing in this Stipulation prevents Defending Counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another salutary purpose (e.g., admonishing the witness to answer the question asked), provided Defending Counsel first states Defending Counsel's intention on the record before initiating such communication. Nothing in this Stipulation shall prevent Defending Counsel from being physically present in the same room as the witness regardless of whether a Deposition is treated as in-person or remote under this Stipulation.

During breaks in the Deposition, the Parties may use a breakout room feature provided and controlled by the video-conferencing service, which simulates a live breakout room and may be used to discuss a topic the deponent should not hear. Conversations in the breakout rooms shall not be recorded. Off-the-record communications are or are not discoverable to the extent permitted under the rules and practices in the court where the case is pending.

Technical Audio or Visual Issues

Should technical issues, such as audio or video issues, prevent the Court Reporter, witness, Deposing Counsel, or Defending Counsel from reliably seeing one another, hearing one another, or, in the case of the Court Reporter, transcribing the testimony at any point during a Deposition taken pursuant to this Stipulation, the Deposition shall be recessed until the technical issue is resolved. Should technical issues prevent the Court Reporter from reliably hearing or transcribing the testimony at any Deposition taken pursuant to this Stipulation and such technical issue cannot be remedied in a timely manner, Deposing Counsel, Defending Counsel, and Attending Counsel shall meet, confer, and cooperate with one another to address the problem, including, but not limited to, rescheduling or continuing the Deposition. These provisions shall not be interpreted to compel any Party or appropriate Non-Party to proceed with a Deposition where the witness cannot hear or understand the other participants or where the participants cannot hear or understand the witness. The Parties and any appropriate Non-Parties will also act in good faith to account for any time lost to technical issues to permit the deposing Party to use the full time it is permitted for the Deposition.

If a technical issue prevents Defending Counsel from hearing a question or interposing a timely objection on the record, then Defending Counsel shall notify the Deposition attendees as soon as possible (*e.g.*, by using the chat features of the video conference or emailing counsel). Defending Counsel's objection to that question is preserved if (i) the objection is asserted promptly on the record after the technical issue is resolved, or (ii) if the technical issue cannot be resolved and the Deposition is continued, the objection is asserted in writing to Deposing Counsel, Attending Counsel, and the Court Reporter within three business days of receiving the rough or final transcript, whichever comes first, that includes the question at issue.

Can You See Me Now? Lessons Learned From Virtual Proceedings

A focus on the authors' experiences in virtual depositions, arguments, and trials, outlining the challenges they see and offering solutions they've found that others can apply to their practice.

By **Mike Bowe and Lauren Tabaksblat** | October 28, 2020

"No one ever went to law school to be a zoom trial lawyer," said a good friend and oft co-trial counsel when asked about his thoughts on the subject. Of course, he was right. But as the saying goes, "it is not about us" trial lawyers. It is about our clients and the courts who hear their cases.

Our recent experience in a remote trial over a commercial contract in Federal District Court for the Southern District of New York left us with certain clear takeaways and less certain observations.

First, remote trials and proceedings are effective means for courts to give parties their day in court, resolve cases, and move along their docket.

Second, beyond simply advancing cases toward resolution during a pandemic, they provide undeniable efficiency and cost and time savings that courts and parties will want to continue enjoying after the pandemic in certain circumstances, particularly in the context of commercial ADR. This bell simply will not be unrung entirely. Third, there is much to do to maximize the potential of remote proceedings.

Remote Trials Are Not ideal

Let's begin by dispensing with the obvious. Remote trials are not ideal. There is a reason that courthouses and courtrooms project the gravitas and solemnity that they traditionally do. The rule of law is the bedrock of our society. And our courthouses and courtrooms are the neutral playing fields where citizens of all stripes must come to seek relief or defend themselves from accusations of wrongdoing. It is by its nature and design imposing and communicates the seriousness of the process to all, like an oath communicates the seriousness of telling the truth. The trial is the ultimate peak in this hallowed process and its fact-finding function is certainly best served in the traditional, focused, and controlled interpersonal courtroom experience.

But courts and parties, at least plaintiffs, need to move cases toward resolution, and there is nothing more conducive to resolving a case than a trial date. Pursuant to F.R.C.P. Rule 43(a), "[a]t trial, the witnesses' testimony must be taken in open court" unless "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

Courts have quite reasonably held that the existing pandemic constitutes "good cause" under Rule 43(a) and its state law equivalents. As the pandemic continues and docket backlogs grow, courts certainly will press parties to agree and otherwise begin to impose remote proceedings and trials. And there is every reason to believe, and our experience confirms, that remote trials can be conducted fairly and effectively and with benefits that many parties will appreciate.

The Remote Trial Experience

In our case, we faced a choice of proceeding with a September trial date remotely, or waiting an indefinite period for a traditional trial. The judge had recently concluded another remote trial and was pleased with its effectiveness as, he reported, were other S.D.N.Y. judges who had done likewise. With the parties' consent, the judge issued an order finding "good cause" for a remote trial and providing basic rules for doing so.

Under those rules, the party offering a witness would provide the court, witness, and opposing counsel direct exhibits for that witness' and others for potential redirect; the party crossing would provide potential cross exhibits in a sealed box that neither the witness nor opposing counsel could open before the examination began. The party offering the witness was responsible to ensure that the witness had the requisite technology and hard copy exhibits.

During the witness' testimony, only counsel and the provided exhibits were permitted in the room with the witness. Counsel, however, were not required to be with the witness, and no witnesses were accompanied. The court, counsel, witnesses, and client representatives shared video access, while the public was limited to an audio feed. All those listening or watching were prohibited from recording. Finally, the court ordered that "[t]he formalities of the courtroom shall be observed," and witnesses were instructed to remain on camera at all times.

To host and manage the remote trial, the parties jointly retained TrialGraphix, which had served the same function in the judge's prior remote trial. TrialGraphix essentially served as the virtual courtroom clerk, checking that the participants were ready and their Zoom connections operational and monitoring to ensure none dropped during the proceedings.

The decision to consent was an easy one for us given the alternative indefinite delay. We do not know why the defendant consented, but suspected it was because they believed the remote proceedings would pose a bigger challenge to us in presenting our evidence and meeting our burden of proof. Fortunately for us, we did not feel that the experience posed any such difficulties.

Witnesses

Going in, our main concern was our ability to effectively cross-examine remotely defendant's experts and central witness, who we intended to call in our case-in-chief. It is not as easy to control a hostile witness remotely for various reasons. For example, hostile witnesses may feel more in control and less restrained in their home or business offices than alone in a courtroom witness box; the examiner's ability to cut-off a non-responsive witnesses is limited by the technology; and the use of documents, particularly multi-page documents at distance is more cumbersome. Our approach to these realities was to narrow our examination to the traditional series of narrow, baby-step questions that required yes or no answers more than we would otherwise typically have done.

On the other hand, while familiar surroundings might provide a witness with a greater sense of comfort and control, talking to a machine instead of a person, with a limited ability to read the audience, is, for many, uncomfortable. An uncomfortable witness is a vulnerable witness. And we perceived this at times with the witnesses we examined and worked hard to prepare our witnesses for the same. Remote trial attorneys should be prepared to both exploit this possibility and prepare their own witnesses for it. This includes preparing witnesses in the same video format that they will experience at trial.

Equally important, courts and trial counsel must consider potential witness misconduct. When witnesses testify in front of a computer and cannot be fully observed, an opportunity for mischief exists that does not in a courtroom. We had no such concerns at any point in our case, but trial counsel need to consider the risk on a case-by-case basis. There are a host of potential steps that can and over time will likely become standard to minimize these risks, including the use of additional cameras and software that monitors or controls the witness' screen.

The Virtual Courtroom Experience

More mundane challenges also abound in the context of all remote proceedings. Most obviously, counsel will be selecting a virtual courtroom for themselves and their witnesses, and they should not need a court directive to do so in a manner that best recreates the dignity of the courtroom. Our experience in various remote proceedings also prompts the suggestion that lawyers familiarize themselves with some basics of videography, composition, and lighting so their appearances are as effective as possible and do not look like they are being shot from a shoe-cam or in front of a bright divine presence. And in more than a few instances, virtual backdrops while initially stately have produced speakers who seemed to skip across the screen like a Jib-Jab election cartoon.

Likewise, where, as in our case, members of both trial teams were operating in different locations, trial teams need to find ways to internally communicate in real time and with the opposing trial team during breaks as if they were in the same courtroom. Chat apps that allow real time feeds are an obvious option for this function that other trial lawyers we polled have satisfactorily employed.

Of course, the issues and observations we encountered in this bench trial of a relatively straightforward contract dispute would increase exponentially in a remote jury trial with more complicated facts and issues. Where remote jury trials are conducted, we share the view of those trial lawyers who have already conducted such trials or are preparing to do so that the presentation needs to be transformed from a Broadway play into a Netflix special. Jurors are used to watching polished and entertaining presentations on their phones and computers, and the practitioners who are able to deliver the same in a remote jury trial, especially in openings and closings, will have a distinct advantage.

Finally, although our remote trial experience was an effective and excellent alternative to an indefinite delay, it did lack one of the more satisfying elements of trial practice: the camaraderie among the trial team itself and (sometimes) between the opposing trial teams. While irrelevant to the court and client, having team members and opposing counsel operating elsewhere eliminated the usual post-trial day and end-of-trial debriefs, team building, mentoring, and professional fun. We acknowledge this a minor complaint during a pandemic but nevertheless pray it will soon be no more.

Mike Bowe *and* Lauren Tabaksblat *are partners in the litigation & commercial disputes practice group in Brown Rudnick's New York office.*

Helpful Hints for using Zoom for Remote Mediations

Introduction

The article below, originally written for the South Carolina Bar Dispute Resolution Section, was shared with our office on March 26, 2020. Authors, Karl Folkens and Richard Hinson, have graciously given the NCDRC permission to re-post the article and disseminate to all NC mediators to use as a resource tool for online dispute resolution. We are very thankful to have out-of-state colleagues who are willing to share their knowledge of online dispute resolution with our organization. NCDRC staff is continuing to receive positive feedback from NCDRC mediators who are experiencing great success conducting mediations through remote technology.

This article was prepared by mediators, for mediators. The NCDRC is providing this information to help educated NC mediators on the use of ODR. **Please note, the comments regarding the Agreement to Mediate in the article below are not relevant to NCDRC rules, please disregard. Additionally, all contact information has been removed from the article. Should you have any questions, please contact NCDRC staff. The NCDRC does not endorse Zoom, or any other brand name item listed within the article, nor has the article been checked for accuracy.** However, that being said, I believe this is an excellent read. Thank you, Karl and Richard!

Sincerely,
Tara L. Kozlowski
Executive Director, NCDRC

Article by Karl Folkens and Richard Hinson

Friends,

Richard Hinson and I have developed the following for use in Zoom-based online dispute resolution sessions which we send out ahead of time. Given the Chief Justice's recent Order regarding attendance by video-conference, strong consideration should be given to video-conferenced mediations and arbitrations instead of simply postponing them, at least until the coronavirus crisis is over.

TIPS, GROUND RULES and ASSURANCES:

- Make sure you have a laptop, desktop, smartphone, or tablet, with a working microphone and camera.
    - If you don't, you can still call in with any telephone, but that's not ideal.
- Download the Zoom app if you do not already have it. Apps are available for smartphones, tablets, laptops and desktops here: https://zoom.us/download (You can

also use a web browser, such as Google Chrome, Firefox, Edge, etc. in lieu of the app).

  - You DO NOT need to sign up for Zoom. Just download the app for your device.

- Be in an "Interruption Free Zone", silence your notifications and ringer on your device, and ensure that no one is eavesdropping on your participation during this mediation.

- Test your microphone and video long before participating in the mediation.

- If two or more are participating on separate devices in the same room, you may need to mute your audio to avoid annoying sound feedback.
- Be sure to position your head and shoulders in the middle of the video frame.

- Log on to the mediation at least 5 minutes before the start time to work out any technical difficulties.

- Log on from a secure location and with a secure internet connection. Starbucks, your local library and a hotel guest wifi are not secure locations and don't provide secure connections.

- Remember to be respectful to others and communicate effectively during the online mediation session. Multiple people talking at the same time makes it difficult for everyone to hear.

- Your app may allow "Speaker View", "Gallery View" or other view formats. Pick the one you find most helpful during the mediation.

- You will enter the "Waiting Room" when you sign on. Once everyone is in the Waiting Room, you will be brought into the Main Meeting Room.

- Breakout rooms have been assigned for private caucusing. After the initial caucus, you will be directed by the mediator to click on the button to go to your assigned breakout room.

- If you run into technical problems during the session, signing-off and signing back-in usually resolves those problems.

- Be sure to have power sources for your devices, including charging cables for cell phones, tablets and laptops.

- No one may record the mediation session in any manner, including taking videos or audio recordings of any session. Anyone recording the mediation session without the full consent of all parties, counsel and the mediator shall be deemed to have violated the mediation confidentiality rules.

- You will receive an Agreement to Mediate for this online session which includes a provision allowing email acknowledgements of consent and acceptance. Your email acknowledgement, when sent to the mediator, constitutes your legal signature which will not be subject to the confidentiality rules, and the mediator may report such outside of

the mediation without violating any confidences.

- PowerPoint presentations and the like can be shared with the group in Zoom. If you intend to share anything during the session, learn how to "share your screen" in Zoom beforehand. If using the app, make sure your computer security settings are checked to allow Zoom to share your screen.

- If you encounter any problems before or during the conference, please call the mediator.

- If you get disconnected, use the same link to try to reconnect.
- If you have a total video failure on your end, you can call the mediator above in order to join the conference solely via phone with no video.

- If there is a total failure of the video conference, we have a conferencing number and will go to a traditional audio call.

- Please be patient and flexible as we all work together to try to get this case resolved.

Here are some suggestions to pass along to lawyers:

- Set your screen to "Gallery View" instead of "Speaker View" and watch whether the participants are listening or not. Don't lose your audience. Reading from depositions and the like isn't as effective as looking straight into the camera and taking advantage of the captive audience you have.

- Haven't had anyone use a PowerPoint presentation or the like, yet; but that's very doable in Zoom. If your case is well-suited for PowerPoint, learn how to do that on Zoom.

- When another lawyer or adjuster is speaking, look into the camera and listen. You're asking them to give your client and you lots of money, or you're asking the other side to accept significantly less than they expect to receive. They can see you doing other things, such as checking email or surfing the web, in an even more conspicuous way than in a standard in-person mediation format, which seems counter-intuitive. But think about it: They're stuck staring at a 24" - 27" television screen and taking in every pixel, rather than sitting in a 400 sq. ft. conference room with lots of places for eyes to wander!
- If your client(s) and you are sharing the same camera, set it up ahead of time so the mediator can see everyone, or at least arrange for them to have their own devices (being sensitive to the feedback issue).

- Unless it's a "speed mediation", be mindful that many of the same mediation techniques that are used in a live, in-person mediation also occur in an online mediation. Even one nationally-renowned mediator who uses Zoom regularly is reporting that non-lawyers are finding the online process more engaging than the lawyers. I think lawyers tend to be more impatient, and we old lawyers are especially thinking, "Can't we just move on!" For many clients, this is their entire life and most likely their first real encounter with the judicial system. Richard Hinson commented to me on a successful Zoom mediation he conducted yesterday where he had to intentionally slow the process down to keep people focused. As some of you have heard me say before, mediation is like baking a

cake, and you don't want to take it out of the oven too early or else it will fall. The online version of mediation seems to accentuate all of that.

- In that same vein, be sure to give your clients some screen time with the mediator. Their comfort level with the process will go up the more engaged they are in it.

Some tips for mediators:

- Be sure to have a computer with a fast processor and the best Internet speed your area offers. We have 1gig service now in Florence, and it's well worth it. We tweaked the firewall to get as much throughput as possible, and it's paying off in these online conferences and mediations.

- Use a wired connection as your best option assuming your modem can handle the speed. A wireless connection is dependent upon your wireless access point/router bottleneck, and there may be a significant price to pay if you're choosing wireless over wired.

- A 27" monitor gives you much more real estate to work with when more than four connections are videoing in. I did one yesterday with ten participants, and the larger monitor allowed for plenty of room for chats, managing breakout rooms, etc.

- When folks log in, use the "rename" function to change what's displayed. "John Smith" looks better than "Johnny's iPhone." There's plenty of time as people are coming it to do that on the fly.

- Learn how to create breakout rooms on the fly. When a lawyer asked to speak with an insured about a *Tyger River* demand in a private room, they're impressed when you can move them into their own private room instead of relegating them to calling each other on their cell phones. Same with "woodshed sessions" with lawyers. Take them into a separate, secure room, and have at it.

- Get at least the Pro version of Zoom. The free version has fewer features and ends after 40 minutes! At $150/yr., the Pro price is well worth it, even if you only use it a few times a quarter.

- Use the Calendar Invite feature to schedule. You can add to it (like we do with the TGRAs listed above), and it will populate the date into the recipients' Calendar (in most cases) without their having to do any manual importing.

- Offer up a "Dry Run" late in the day one day before the scheduled mediation. Invite the lawyers and anyone else to sign up in a separate Calendar Invite at, say, 4:00 p.m. three days before the mediation. For lawyers (and their legal assistants) new to online discussion platforms, such a session will go a long way to helping them feel more at ease when the actual mediation begins. I had one lawyer who was very tentative about the whole process go through such a dry run, and then she was helping the others on her team during the actual session on how to navigate around.

- We're still working through the best practice to push the initial "Agreement to Mediate" out and get consent from everyone. That continues to be a work in progress, and you'll

note how we're struggling with that with the consent provisions in the TGRAs above.

- Buy a decent microphone. Most device-built-in microphones have a tunnel/well effect that can be better avoided with a good microphone. I use the Apogee MiC96k USB mic which I think has been discontinued. It sits below screen level, is portable, and was at the right price point. There are many others out there. Do some research on podcast mics, and you'll see what's available. It's money well-spent.

- Do some dry runs with your office staff, adult children, and anyone else you can corral from the first step of sending out the Calendar Invite to actually getting them into the Welcome Room, into the Main Room and into breakout rooms.

- Learn how to Share Your Screen. You can display the Mediated Settlement Agreement and walk through it with everyone...Folks can even watch you type it up, and if you're doing "single text mediation", it's outstanding. Remember, you have to set it up before starting the Zoom app. If you're on a new computer and wait until the actual mediation, you'll have to sign out and sign back in to give your computer permission to Share.

- Learn the nuances to renaming the Breakout Rooms. Breakout Rooms 1, 2 and 3 don't work very well when you're in the middle of herding cats. For multiple parties, I've found using the party side and last name of the team's lawyer as the best way: "Defendant - Jones' Room". An alternative is: "Allstate Room" or "Walmart Room", etc.

- Learn the "Mute All" and "Unmute All" buttons, and how to quickly mute and unmute individual speakers. That will save time clicking each individual participant when a session begins. You'll find that keeping everyone muted except for the speaker and the person on-deck helps prevent feedback, tapping pens on desks, background jackhammers, and the like.

- Be mindful of when to bring folks into the Main Meeting Room from the Waiting Room. Some may be offended if they see you've already been in the Main Meeting Room without them. Some don't let anyone in until everyone is in the Waiting Room. I like not letting anyone in until someone from the "other side" has also entered the Waiting Room. Find a comfortable practice.

- Read through ALL your available Meetings settings and learn each one. The app is very robust, and the more time you spend tweaking the settings, the better user experience you'll offer to others.

- There are several other platforms out there but Zoom appears to be the choice of online mediators for the time being.

- Let Richard or me know if we can help you get going with mediations on Zoom. Feel free to use or build on the TGRAs above.

Final Thoughts

I've been asked if I think lawyers and their clients will get as good of a result as they would in a traditional, in-person mediation. My knee-jerk reaction is to say, "No."

But on further reflection, I think it depends on a number of factors, including how well the mediator knows the attorneys and/or adjuster(s); how well the attorneys know each other (making a woodshed session more effective); whether a party (usually on the plaintiff's side) needs in-person attention to understand the process; whether it's the kind of process where we're all just trying to figure out how much the insurer has put on the claim with little or no flexibility on that number; and whether there's a modicum of technical abilities by everyone participating.
I haven't done an arbitration using Zoom, yet; but I think it is well-suited for most kinds of arbitrations.

I also think that for the next few months, this is still new for folks, and it's a novelty. I think in time we might see online mediations used by some segments as simply a cost-savings device to avoid in-person mediations which, in my experience, have higher resolution rates. Once we come out of this crisis, we'll see if this is still a viable, effective tool for getting cases resolved. For now, it definitely is.

I hope this helps some of you interested in online dispute resolution.

Stay well and stay safe.

Karl

_____
Karl A. Folkens

"ZOOM" TIPS & GROUND RULES:

Make sure you have a laptop, desktop, smartphone, or tablet, with a working microphone and camera. *Test your microphone, video, and device long beforehand to make sure everything is working.*

It is recommended that you download the Zoom app if you do not already have it. Apps are available for smartphones, tablets, laptops and desktops here: https://zoom.us/download (However, you can also use a web browser, such as Google Chrome, Firefox, Edge, etc., on your computer in lieu of the app.)

You will receive a calendar invitation to accept along with a link to the conference. You DO NOT need to sign in or open a Zoom account. When the time comes for the conference, simply click the link and follow the instructions. You will want to select the option for "computer audio" in order to use your computer microphone.

Important: If two or more people are participating on separate devices in the same room, they will probably need to mute their audio/speakers in order to avoid annoying sound feedback. Multiple persons in the same room can always use one device, but make sure that the computer is situated so that everyone in the room can be seen/heard.

Be in an "Interruption Free Zone", silence your notifications and ringer on your device, and ensure that no one is eavesdropping on your participation during this mediation.

Log on to the mediation at least 5 minutes before the start time to work out any technical difficulties.

Log on from a secure location and with a secure internet connection. Starbucks, your local library, and a hotel guest Wi-Fi are not secure locations.

Your app may allow "Speaker View", "Gallery View" or other view formats. Pick the one that you find most helpful during the mediation.

You will enter the "Waiting Room" when you sign on. Once everyone is in the Waiting Room, the mediator will bring you into the Main Meeting Room.

Breakout rooms have been assigned for private caucusing. After the initial caucus, you will be directed by the mediator to click on the button to go to your assigned breakout room. Other rooms can be created, and participants can be moved about in order to have private sessions. Participants can also send chat messages to each other and the mediator at certain times.

Be sure to have power sources for your devices, including charging cables for cell phones, tablets and laptops. It is recommended you leave them charging all the time, as the video will drain batteries quickly.

PowerPoint presentations, photos, documents, and the like can be shared with the group in Zoom. If you intend to share anything during the session, learn how to "share your screen" in Zoom beforehand (it's a single button). *If using the app, make sure your computer security settings are checked to allow Zoom to share your screen before you join the conference.*

Keep your email client open, as any mediation or settlement agreements that need to be signed or consented to will usually be sent via traditional email.

No one may record the mediation session in any manner, including taking videos or audio recordings of any session.

TROUBLESHOOTING AND ASSURANCES:

If you encounter any problems before or during the conference, please call the mediator, Richard Hinson, directly at 843.xxx.xxxx (office); or 843.xxx.xxxx (cell).

If you run into technical problems during the session, signing-off and signing back-in usually resolves those problems.

If you have a total video failure on your end, you can use your phone to call one of the numbers at the bottom of the email in order to join the conference solely via phone with no video.

If there is a total failure of the video conference for everyone, we have a conferencing number and will go to a traditional audio call. Please be patient and flexible as we all work together to try to get your case resolved.

Expert Opinion

The Use of Private Judges: New World, New Wave?

The New York judicial system provides a legal method for parties who have legal disputes to hire a "private judge" to resolve their dispute while affording all the remedies and protections that the formal court system offers. This article explains the legal authority and benefits.

By **Kevin Schlosser** November 06, 2020 at 03:02 PM

Photo: Zolnierek via Shutterstock

Our system of justice has certainly faced various challenges over the years, but no one can deny that the COVID-19 crisis has forced us to confront unprecedented obstacles—2020 has been a year no one will forget. In March, the entire state court system virtually shut down, except

for cases deemed "essential." While our administrative judges and the office of court administration have worked tirelessly to restore some semblance of normalcy, the challenges are formidable.

On top of trying to balance life and death issues with providing timely and effective justice, our court administrators and the judiciary are facing debilitating budget cuts. As our chief administrative judge has recently acknowledged, "the economic fallout of the coronavirus pandemic has led to enormous pressures on the State budget, including the Judiciary budget," noting a $300 million hit to the court system. *NYLJ* Sept. 30, 2020, "As NY State Courts Report Budget Cut, Lawyers Fear Delays, Employee Unions Worry Over Jobs."

The New York State Bar Association president has ominously predicted: "This budget cut is a matter of grave concern to the New York State Bar Association because it will inevitably create hardship for litigants and delay the administration of justice." **https://nysba.org/new-york-state-bar-association-president-scott-karson-calls-cuts-to-judiciary-budget-a-grave-concern/**

Yet unanticipated silver linings have awakened in the crisis. The convenience and cost-savings of remote, virtual appearances, depositions and proceedings are beginning to overcome the initial resistance and reluctance. Both the Bar and the courts are adapting to a new, more flexible approach to dispensing and achieving justice.

Particular problems with jury trials have led many to consider and in fact advocate more use of bench trials. Additionally, more than ever before, "alternative dispute resolution" is seeing a supercharged interest.

Amidst all this, there should be renewed interest in the often overlooked yet extremely useful provisions of the CPLR authorizing parties to hire a "referee," or as I call it, a "private judge," to help resolve their differences, including significantly, to determine commercial and business disputes. The utility of a private judge to determine legal disputes has actually been available under the New York justice system for over a century. *See Woodruff v. Dickie*, 31 How. Pr. Rep. 164 (Sup. Ct. N.Y. Co., 1866). It has largely been hibernating.

Authority and Powers

The authority for such an appointment of a private judge is contained in CPLR 4001: "A court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." CPLR Article 43 provides the power and authority of a private judge to "determine an issue."

As soon as a new case is filed in court, the parties can immediately stipulate to the appointment of a private judge. CPLR 4317(a) provides: "The parties may stipulate that any issue shall be determined by a referee." Only in three limited circumstances must leave of court be sought first: "[1] for references in matrimonial actions; [2] actions against a corporation to obtain a dissolution, to appoint a receiver of its property, or to distribute its property, unless such action is brought by the attorney-general; or [3] actions where a defendant is an infant." *Id.* All the parties need to do is stipulate and name their private judge, and the clerk must then issue an order effectuating the stipulation: "Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein." *Id.*

CPLR 4301 affords the private judge broad powers, equivalent to a Supreme Court Justice, with limited restrictions: "A referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function; but he shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt."

The private judge has the power not only to issue a decision, but also a fully effective and enforceable judgment. See CPLR 5016(c) ("Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment.")

Benefits and Advantages

There are plenty of benefits to hiring a private judge who is dedicated exclusively to the case at hand:

1. **Flexibility and Certainty**. While the authority to appoint a private judge to determine issues in dispute derives from the CPLR, the private judge is free to conduct the affairs and proceedings at times, places and in a manner at his or her discretion, and entirely consistent with the preferences of the parties and their counsel. The parties deal with just one person, rather than the entire administration of the court system. (There is no "clerk's law.") The parties are able to secure real, reliable dates certain for written submissions, hearings and/or trials, which afford for advance planning. In short, the parties have a captive audience of one—their own private judge. Particularly now, given concerns about appearing in a large, public courthouse for hearings or other appearances, meetings with private judges could be in a more controlled, private law office or other location, or of course conducted virtually.

2. **Expertise.** The parties can select who they jointly believe is the best person for the job. They can identify and choose someone with precisely the experience, knowledge and temperament that fits the case and the subject matter of the dispute. It is obviously enormously helpful to have someone particularly experienced in the issues presented by the case. Of course, counsel for both parties must feel comfortable with the integrity and objectivity of whom they choose.

3. **Avoiding Cost and Bureaucracy of ADR Forums.** While ADR companies are certainly adept at resolving disputes, they often saddle parties with unwieldy bureaucracy. To be sure, the parties will need to pay for the services of the private judge, but hiring a private judge can afford advantages over resolving a dispute in arbitration or administered through the large well-known dispute resolution organizations. The private judge can avoid the administrative bureaucracy and cost associated with the large ADR forums and venues. The private judge has the luxury of dealing directly with the parties as and when they need attention. The direct attention afforded by the private judge is ultimately likely to reduce the overall cost of resolving disputes, even with the cost of the private judge's services. Additionally, the parties could enlist the private judge to help settle their case or formally decide particular issues, without a full blown adjudication of the entire merits.

4. **An Enforceable Judgment.** Unlike arbitration awards, as noted above, the private judge can reduce his or her decision to an enforceable judgment. CPLR 5016(c). There is no extra step to institute an entirely new proceeding under CPLR 7511 to confirm the private judge's decision as there is after an arbitration award is issued. Thus, the additional time, expense and litigation attendant to confirming an award is eliminated.

5. **Full Appeal Rights Preserved.** Litigants are often reluctant to submit to arbitration because of the very limited opportunity to obtain a full and fair review of the arbitrator's determination. It is well-recognized that

courts will not vacate or nullify the decision of an arbitrator, except in exceptional and clear circumstances.

It can be daunting to place all of that unchecked discretion in one person (or in a small panel). Unlike in arbitration, the decisions and judgment of the private judge are fully reviewable on appeal through the New York Court system based upon all the grounds available to challenge any decision of a court. See *Bedford v. Hol-Tan Co.*, 140 App.Div. 282, 285–286, 125 N.Y.S. 173, 175–176 (1st Dept. 1910) ("A referee appointed to hear and determine has the same power and authority as a justice of the court, and his decision stands as the decision of the court. [CPLR 4319.] His [or her] decision can be reviewed and set aside only for the same reason and in the same manner as can a decision of the court."); *Hampton Bays Supply Co. v. Adler*, 3 Misc.2d 224, 226, 147 N.Y.S.2d 775, 778 (N.Y. Sup. 1955).

Therefore, the reluctance that attorneys and their clients may have to the relatively unchecked power of an arbitrator to determine their dispute is ameliorated by the appellate review process. While the appellate courts are also facing overwhelming burdens, having a last resort in accordance with traditional appellate protections is a useful safety latch.

Our system of justice is facing unparalleled pressures. As we all try to find ways to resolve disputes in the most humane, fair, cost-efficient and expeditious manner, the use of private judges offers an additional, potentially-appropriate option.

Kevin Schlosser *is a partner at Meyer, Suozzi, English & Klein, where he is chair of the firm's litigation and alternative dispute resolution department.*

2020 WL 4559519
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Re: REALOGY HOLDINGS CORP.,
v.
SIRVA WORLDWIDE, et al.,

C.A. No. 2020-0311-MTZ
|
August 7, 2020

Attorneys and Law Firms

Robert S. Saunders, Esquire, Edward B. Micheletti, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, 920 North King Street, Wilmington, Delaware 19801

William M. Lafferty, Esquire, Kevin M. Coen, Esquire, Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, Delaware 19801

Opinion

Morgan T. Zurn, Vice Chancellor

***1** Dear Counsel:
Plaintiff Realogy Holdings Corp. ("Realogy" or "Plaintiff") applied for certification of an interlocutory appeal from the bench ruling issued July 17, 2020 (the "Bench Ruling").[1] The Bench Ruling dismissed Realogy's claims for specific performance because under the governing Purchase and Sale Agreement ("Purchase Agreement"), the unambiguous contractual conditions on that remedy failed.[2] For the following reasons, I recommend against certifying an interlocutory appeal.

I. Background

A. The Parties & Procedural History

Plaintiff Realogy is a "full-service residential real estate services company, including brokerage, franchising, relocation, mortgage, and title and settlement services."[3] Non-party Cartus Corporation ("Cartus"), Realogy's indirect, wholly-owned subsidiary, "provides relocation counseling to newly-hired or transferring employees of large corporations, logistical relocation support, international assignment compensation services, intercultural and language training, and consulting solutions."[4]

Defendant SIRVA is a "global relocation and moving service provider, providing integrated business-to-business mobility solutions for corporations, government institutions and consumers."[5] SIRVA is a Madison Dearborn Partners, LLC ("MDP LLC") portfolio company.[6] MDP LLC acquired SIRVA in 2018.[7] Defendants Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P. (collectively, "MDP") are entities through which MDP LLC conducts business.[8] Defendant North American Van Lines, Inc. ("North American," and collectively with SIRVA and MDP, "Defendants") provides moving services and is a SIRVA affiliate.[9]

Under the November 6, 2019, Purchase Agreement between Realogy and SIRVA, SIRVA was to purchase all of Cartus' issued and outstanding shares of common stock for $400 million.[10] MDP provided $125 million in equity financing and a limited guaranty of a termination fee.[11] On December 2, SIRVA and North American entered into an Assignment and Assumption of Agreement, by which SIRVA assigned its rights under the Purchase Agreement to North American.[12] In the context of the COVID-19 pandemic, and as the Purchase Agreement's outside date neared, the relationship between SIRVA and Realogy fractured.[13]

On April 27, 2020, Realogy filed its Verified Complaint for Breach of Contract ("Original Complaint").[14] The Original Complaint contains the following counts: (i) breach of contract against SIRVA, seeking specific performance; (ii) in the alternative, breach of contract against all Defendants, seeking the termination fee; and (iii) declaratory judgment, seeking, *inter alia*, declarations that Defendants breached their obligations under the Purchase Agreement and are not excused from performing thereunder.[15]

***2** The next day, Plaintiff filed a motion to expedite.[16] I heard oral argument on that motion on May 8.[17] I granted the motion in part, expediting Defendants' anticipated motion to dismiss based on the contractual availability of specific

performance to mid-July and expediting trial to November 30 through December 4 of this year. [18]

After the hearing on the motion to expedite, on May 17, Plaintiff filed an Amended Complaint for Breach of Contract ("Amended Complaint"). The Amended Complaint contains the following counts: (i) breach of contract against SIRVA seeking specific performance of its reasonable best efforts and "iterative steps to close"; (ii) breach of contract against SIRVA seeking specific performance consummating the transaction; (iii) in the alternative, breach of contract against SIRVA for the termination fee; (iv) declaratory judgment against SIRVA; (v) breach of the implied covenant of good faith and fair dealing against SIRVA; and (vi) in the alternative, breach of contract against MDP for the termination fee. [19] Notably, the Amended Complaint did not seek any relief against MDP under the Purchase Agreement.

On June 8, Defendants filed an answer to the Amended Complaint and Verified Counterclaim ("Counterclaim"). [20] The next day, Defendants filed a motion to dismiss Counts I and II of the Amended Complaint ("Motion to Dismiss"). [21] Plaintiff answered the Counterclaim on July 10. [22] The parties briefed their positions on the Motion to Dismiss, and I heard argument on July 17. Following argument, I gave the Bench Ruling granting the Motion to Dismiss Counts I and II. Realogy's request for interlocutory appeal followed.

B. The Purchase Agreement

The provisions of the Purchase Agreement most relevant to the Motion to Dismiss follow.

In Section 13.8, entitled "Specific Performance and Other Equitable Relief," SIRVA and Realogy agreed to several limitations on, and conditions for, obtaining the remedy of specific performance of the Purchase Agreement.

> (b) Notwithstanding anything to the contrary set forth in this Agreement, (i) in no event shall Seller or any of its Representatives (including the Acquired Companies prior to the Closing) be entitled to, or permitted to seek, specific performance against the Debt Financing Sources, except in each case indirectly through the enforcement of Buyer's obligations hereunder, and (ii) Seller shall be entitled to bring an Action to specifically enforce Buyer's obligation to consummate the Closing and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded ***if (and only if and for so long as)*** **(A)** ***all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied*** or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied at the Closing, each of which shall then be capable of being satisfied at the Closing and the date of termination) and Buyer fails to consummate the Closing on the date required pursuant to the terms of Section 2.3, **(B)** ***the proceeds of the Debt Financing (or any alternative debt financing) have been funded to Buyer or the agent for the Debt Financing Sources under the Debt Financing Commitments (or any definitive agreements executed pursuant thereto) has irrevocably confirmed in writing to Buyer that the Debt Financing will be funded subject only to the funding of the Equity Financing***, (C) Seller has not terminated this Agreement in accordance with Article XI and has irrevocably confirmed to Buyer in writing that all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied by actions to be taken at the Closing, each of which shall then be capable of being satisfied at the Closing) and that if the Debt Financing and Equity Financing are funded, then

> Seller will consummate the Closing in accordance with the terms of this Agreement, and (D) Buyer has failed to consummate the Closing within three (3) Business Days after receipt of such irrevocable confirmation. ***For the avoidance of doubt,*** (a) in no event shall Seller be entitled to specifically enforce (or to bring any Action in equity seeking to specifically enforce) Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded other than as expressly provided in the immediately preceding sentence, and (b) ***in no event shall Seller be entitled to seek to specifically enforce any provision of this Agreement or to obtain an injunction or injunctions, or to bring any other Action in equity in connection with the transactions contemplated by this Agreement, against Buyer other than against Buyer and, in such case, only under the circumstances expressly set forth in this Section 13.8.*** [23]

***3** Thus, Realogy is only entitled to seek specific performance against SIRVA; this limitation is reinforced by Section 13.16, which states, "This Agreement may be enforced only against Seller and Buyer." [24] And Realogy may obtain that remedy "if (and only if and for so long as)" under Section 13.8(b)(ii)(A), all closing conditions "have been and continue to be satisfied," and under Section 13.8(b)(ii)(B), the Debt Financing is funded or "irrevocably confirmed in writing." [25]

Article X sets forth the closing conditions. Under Section 10.2(b), which Section 13.8(b)(ii)(A) directs must be satisfied for specific performance, the "Seller shall have performed and complied with, in all material respects, each covenant and obligation required by this Agreement to be so performed or complied with by Seller on or before the Closing." [26]

The Purchase Agreement limits the financing SIRVA must seek and provide. Under Section 6.6(e), "subject in all respects to Article XI and Section 13.8(b), [Buyer's] obligations set forth in this Agreement are not contingent or conditioned upon Buyer's, its Affiliate's or any other Person's ability to obtain financing (including the Financing or any Alternative Financing) for or in connection with the Transaction." [27] Section 7.3(c) compels SIRVA to use its reasonable best efforts to obtain alternative financing if debt financing—but not equity financing—becomes unavailable.

> If any portion of the Debt Financing becomes unavailable on the terms and conditions ... ***Buyer shall use its reasonable best efforts*** to (x) arrange and obtain, as promptly as practicable following the occurrence of such event, alternative financing from the same or alternative sources (the "Alternative Financing") in an amount sufficient to consummate the Transaction with terms and conditions not materially less favorable in the aggregate to Buyer than those set forth in the Debt Financing Commitments (or replace any unavailable portion of the Financing) and (y) obtain a debt financing commitment letter (including any associated fee letter) with respect to such Alternative Financing, true, accurate and complete copies of which shall be promptly provided to Seller upon execution thereof (which fee letters may be redacted with respect to any interest rates, fee amounts, pricing caps and other similar economic terms (including flex terms) set forth therein). The ***Alternative Financing*** (A) ***shall be sufficient to pay, when added to the Equity Financing and the remaining Debt Financing (if any), the Required Amount*** and (B) shall not include conditions or contingencies that could reasonably be expected to materially impair, delay or prevent or make less likely to occur the funding of the Debt Financing (or

> satisfaction of the conditions to the Debt Financing) on the Closing. [28]

Section 7.3(e) further states,

> Notwithstanding anything contained in this Section 7.3 or anything else in this Agreement, in no event shall the reasonable best efforts of Buyer be deemed or construed to required Buyer to, and Buyer shall not be required to, (x) incur or pay any fees to obtain a waiver or amendment of any term of the Debt Financing Commitments or fees (in the aggregate) in excess of those contemplated by the Debt Financing Commitments as of the date hereof, (y) ***agree to conditionality or economic terms of the Debt Financing Commitments that are less favorable than those contemplated by the Debt Financing*** or related fee letter (including any flex provisions therein) as of the date hereof, or (z) ***seek equity financing from a Person other than the Guarantors or in an amount in excess of the Equity Financing Commitments*** as of the date hereof. [29]

***4** Section 11.3 governs termination of the Purchase Agreement and the termination fee.

> (a) If this Agreement is terminated (i) by either Seller or Buyer pursuant to Section 11.1(a) and all conditions to Closing set forth in Section 10.1 (other than Section 10.1(a)(i) and other than Section 10.1(b)(to the extent arising under Antitrust Laws)) and Section 10.2 are satisfied or capable of being satisfied or are waived (other than those conditions that by their nature are to be satisfied at the Closing, each of which shall be capable of being satisfied at the Closing and the date of termination), (ii) by either Seller or Buyer pursuant to Section 11.1(b) and the applicable injunction or other order giving rise to such termination right arises under Antitrust Laws, or (iii) by Seller pursuant to (x) Section 11.1(d) or (y) Section 11.1(e), then, in each such case, Buyer shall, no later than two (2) Business Days after the date of such termination, pay, or cause to be paid, to Seller or its designee an amount equal to thirty million dollars ($30,000,000) (the "Termination Fee") without deduction or offset of any kind. Notwithstanding anything to the contrary contained in this Agreement, in no event shall Buyer be required to pay the Termination Fee on more than one occasion. [30]

The Limited Guaranty between Realogy and MDP conditionally guarantees the Termination Fee. [31]

Lastly, the Purchase Agreement defines a material adverse event ("MAE") and its consequences. [32] While this definition plays a role in Plaintiff's overarching theory of the case, it does not inform the Motion to Dismiss.

C. The Related Agreements

The Limited Guaranty between Realogy and MDP guarantees the payment of the Termination Fee if the terms and conditions in Section 11.3 of the Purchase Agreement are satisfied. [33] The Limited Guaranty limits Realogy's legal recourse against MDP solely and exclusively to "Retained Claims," as defined to include claims for payment of the Termination Fee. [34] A claim against MDP to enforce the Purchase Agreement is a "Non-Retained Claim." [35] While the Limited Guaranty may terminate upon assertion of a Non-Retained Claim, it permits Realogy to cure that assertion by dismissing the action within ten business days of receiving a "written demand for such withdrawal by [SIRVA]" (the "Cure Provision"). [36] In this case, SIRVA never sent Realogy such

a written demand because SIRVA believes any claim against it for the termination fee is not valid. [37]

The Equity Financing Commitment Letter ("ECL") between SIRVA and MDP establishes that MDP conditionally agreed to purchase up to $125 million of SIRVA equity to finance the transaction ("Equity Financing"). [38] MDP's funding obligations terminate "automatically and immediately" upon certain events, including the filing of an action against MDP for anything other than a Retained Claim. Section 3 states:

> The ***obligation of the Investors to fund the Commitment shall, in each case, automatically and immediately terminate upon the earliest to occur*** of (a) the Closing... (b) the valid termination of the Purchase Agreement in accordance with its terms, (c) ***Seller or any of its Representatives asserting, filing or otherwise commencing any Action against, any Investor Affiliate*** (as defined below) relating to this letter agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby ***other than Retained Claims (as defined in, and to the extent permitted under, the Limited Guaranty)***, in each case, subject to all of the terms, conditions and limitations herein and therein[.] [39]

***5** While Realogy is not a party to the ECL, it is explicitly listed as a third-party beneficiary that can enforce the ECL subject to Section 13.8(b) of the Purchase Agreement. [40] The ECL limits Realogy's remedies against MDP to those enumerated in the Limited Guaranty. [41]

Lastly, under the Amended Debt Commitment Letter ("DCL") between SIRVA and various lenders, those lenders agreed to fund up to $285 million of the purchase price ("Debt Financing"). [42] The Debt Financing was conditioned on the Equity Financing. [43] The DCL states that "[p]rior to, or substantially concurrently with," the funding contemplated by the DCL, "[SIRVA] shall have received the Equity Contributions." [44] The DCL further provides that the lenders' obligations to fund the Debt Financing "automatically terminate ... if the initial borrowing thereunder does not occur on or before 11:59 p.m., New York City time, on the date that is five business days after the [April 30, 2020] Outside Date[.]" [45] The DCL terminated under that provision on May 7, 2020.

D. The Timeline of Events

On April 24, 2020, Realogy sent SIRVA a letter stating that "all of the conditions set forth in Sections 10.1 and 10.2 of the Purchase Agreement had been satisfied (with the exception of those conditions that were to be satisfied at closing, all of which are capable of being satisfied)." [46] Realogy also stated "that assuming the Debt Financing and Equity Financing are funded," it would "consummate the Closing on April 29, 2020, the third Business Day following the expiration of the Marketing Period, in accordance with the terms of the Purchase Agreement." [47]

The same day, Thomas Souleles of MDP LLC called Realogy's Chief Executive Officer, Ryan Schneider. [48] Schneider was unable to speak at that time and the two agreed to speak the next morning. [49] When they spoke, Souleles indicated that SIRVA did not agree with Realogy's April 24 letter, and that SIRVA did not believe all of the conditions in Sections 10.1 and 10.2 of the Purchase Agreement had been satisfied. [50] SIRVA sought to invoke the Purchase Agreement's MAE provision, pointing to the impact of COVID-19 on Cartus's business. [51] SIRVA followed this phone call with a letter claiming the Purchase Agreement's MAE provision was triggered because (i) Cartus had been disproportionately impacted by COVID-19 [52] and (ii) Realogy will have solvency issues in the future that will prevent it from performing post-closing obligations. [53]

***6** Realogy filed the Original Complaint two days after receiving that letter. The same day, Realogy released a press release entitled, "Realogy Files Litigation Against Madison Dearborn Partners and SIRVA Worldwide to Enforce Commitments Under Purchase Agreement." [54]

On April 28, SIRVA sent Realogy a termination notice stating the Purchase Agreement was terminated effective immediately.[55] SIRVA claimed Realogy breached the Purchase Agreement by seeking specific performance in the Original Complaint when the conditions under Section 13.8 had not been satisfied. SIRVA explained:

> As a result, your filing of the Complaint on April 27, 2020 and the allegations made therein constitute a breach (moreover, a Willful Breach) of the Purchase Agreement by Seller such that the condition set forth in Section 10.2(b) of the Purchase Agreement would not be satisfied at the Closing. Moreover, in light of that improper, unpermitted filing coupled with your accompanying press release and the incalculable harm to SIRVA caused by the many false statements contained therein, such failure is incapable of being cured.[56]

SIRVA terminated the Purchase Agreement pursuant to Section 11.1(c), which permits the buyer to terminate the Agreement if "Seller has breached or failed to comply with any of its obligations under this Agreement such that the condition set forth in Section 10.2(b) would not be satisfied at the Closing."[57]

April 30 was the Purchase Agreement's Outside Closing Date.[58] On that day, Realogy sent SIRVA a letter claiming the termination notice was invalid.[59] On May 1, SIRVA sent Realogy a supplemental termination notice[60] stating that since the Outside Closing Date had passed, SIRVA was also terminating the Purchase Agreement under Section 11.1(a).[61] This notice once again alleged Realogy breached the Purchase Agreement by asserting a Non-Retained Claim against MDP.[62]

On May 7, the Debt Financing expired by its own terms.[63]

E. The Bench Ruling

I heard argument on the Motion to Dismiss on July 17. Following argument, I entered the Bench Ruling granting the Motion to Dismiss. The Bench Ruling adopted Defendants' reasoning as presented at oral argument, with two exceptions.[64] First, I did not "reach the abstract or doctrinal boundaries of the prevention doctrine because I believe that Realogy, and not SIRVA, caused the conditions to fail by filing the Non-Retained Claims."[65] Second, I elaborated upon Section 13.8's timing provisions:

> ***7** I agree with SIRVA's interpretation of the language "for so long as" and its interpretation of the clause "for the avoidance of doubt" regarding obtaining an injunction. Reading the provision as Realogy suggests would read out the contractual consequences of filing a Non-Retained Claim, which I believe would be an absurd result. And more globally, reading Section 13.8 to have the narrow window of time that Realogy suggests would lead us to the fundamental quandary we discussed at the motion to expedite of ordering specific performance without the contractually requisite equity financing.[66]

The remainder of Defendants' presentation's "exposition, explanation, and reasoning aligned with what I would write in a written opinion."[67] The Motion to Dismiss "turns entirely on the plain text of Section 13.8(b) of the [P]urchase [A]greement, Realogy's [Original Complaint], and the [ECL]... It has nothing to do with the MAE issues in the case."[68] Dismissal here "is a matter-of-law determination for the Court based on an unambiguous contract provision and the direct contractual consequences of what Realogy alleged and requested in its [Original Complaint]."[69]

Section 13.8(b)(ii)(B) precludes specific performance of the Purchase Agreement because the proceeds of the Debt Financing have not been funded or irrevocably confirmed in writing to Buyer.[70] The Debt Financing failed

because Realogy's Original Complaint terminated the Equity Financing; the Debt Financing also expired under the DCL's own terms on May 7th. [71]

Realogy asks for leniency in characterizing the Original Complaint, but to overlook Realogy's filing would be to "eliminate and change direct contract rights for [MDP] regarding its obligation to fund the equity, when that obligation, quote, 'automatically and immediately' terminated with [the Original Complaint]." [72] The Original Complaint defined "Defendants" as SIRVA and MDP. [73] Count III of the Original Complaint set forth six requests for declaratory judgment. [74] The first request seeks a declaration that "Defendants have breached their obligations under the Purchase Agreement;" the fifth request seeks a declaration that "SIRVA has no right to terminate the Purchase Agreement;" and the sixth seeks a declaration that "the Defendants are not excused from performing their obligations under the Purchase Agreement." [75] The first and sixth requests thus seek declarations against MDP under the Purchase Agreement. Additionally, Realogy's prayer for relief asks the Court to declare that "SIRVA has no valid basis to terminate the Purchase Agreement, the Defendants are not excused from performing their obligations under the Purchase Agreement, and that the Defendants committed material breaches of the Purchase Agreement." [76] The Original Complaint's "declaration and requested relief asking ... that MDP committed material breaches of the purchase agreement [is] not a [R]etained [C]laim" [77] as defined by the Limited Guaranty.

Under the ECL, filing a Non-Retained Claim against MDP via the Original Complaint had immediate consequences. The ECL states that MDP's equity funding obligation "automatically and immediately terminate[s]" if and when "Seller or any of its Representatives assert[s], fil[es] or otherwise commenc[es] any Action against, any Investor Affiliate (as defined below) relating to this letter agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby other than Retained Claims." [78] Realogy's allegations and requested relief against MDP automatically and immediately terminated the Equity Financing. [79]

***8** Under the unambiguous terms of the ECL, DCL, and Purchase Agreement, the Equity Financing's termination cascades into precluding specific performance. "Realogy itself acknowledges ... that the lenders' obligations under the [DCL] [are] subject to the condition that SIRVA receives a $125 million equity commitment from MDP." [80] The Debt Financing was conditioned on the Equity Financing, which terminated; and the Debt Financing would have expired on May 7 in any event. Without the Equity and Debt Financing, the conditions required for specific performance under Section 13.8(b)(ii)(B) can never be met.

Realogy's arguments were peripheral to the core contractual terms. Four arguments persist in its request for interlocutory appeal. First, it argued it did not intend to sue MDP under the Purchase Agreement; rather, it simply committed a few scrivener's errors by asserting Purchase Agreement claims against "Defendants." The governing agreements are blind to Realogy's intent. [81] And Realogy's press release precludes a forgiving conclusion that Realogy made a typo.

> [Realogy] meant it because they issued a press release on the very same moment that they filed it, doubling down on exactly what they say is a typographical error. The headline to their press release, issued to the media, put out on a website, says, 'Realogy Files Litigation Against Madison Dearborn Partners And SIRVA Worldwide To Enforce Commitments Under Purchase Agreement.' That's their headline. And in the body of the press release it said exactly what it now tells the Court was a scrivener's error. It said, quote, 'MDP and SIRVA,' leading again with MDP, 'have made false claims in an attempt to avoid their obligations under the purchase agreement.' And they vowed that they will, quote, 'pursue all legal remedies to ensure that SIRVA and MDP honor the commitments made under the purchase agreement.' [82]

Realogy failed to reconcile its purported scrivener's errors with its press release. [83] Realogy's Original Complaint comprised a Non-Retained Claim against MDP. [84]

Second, Realogy argued that the ECL's incorporation of the definition of Retained Claims "as defined in, and to the extent permitted under, the Limited Guaranty" [85] pulls the Limited Guaranty's Cure Provision into the ECL, such that Realogy's amended complaint should obviate its filing of a Non-Retained Claim. But "[t]he notion of a cure provision is directly contrary and inconsistent with the automatic and immediate termination language in the ECL." [86] The ECL "doesn't have a cure provision:" [87] instead, it provides for

"automatic and immediate termination" upon the filing of a Non-Retained Claim. [88]

***9** The language Realogy cites does not support incorporation. [89] The ECL addresses "Retained Claims (as defined in, and to the extent permitted under, the Limited Guaranty), in each case, subject to all of the terms, conditions and limitations herein and therein." [90] This language incorporates only the Limited Guaranty's definition, not the Cure Provision. It does not permit Realogy to file Non-Retained Claims against MDP, and then invoke the Cure Provision from the Limited Guaranty to eliminate the ECL's plain consequence of automatic and immediate termination. [91] Realogy's attempt to incorporate the Cure Provision of the Limited Guaranty into the ECL fails.

Third, Realogy argued that the Equity and Debt Financing failed because SIRVA claimed a MAE in a last-minute ambush a few days prior to closing. [92] But, under the ECL's plain terms, the Equity Financing automatically and immediately terminated upon filing of the Original Complaint. [93]

> [W]hen Realogy filed these nonretained claims against MDP, they did that on their own, and they blew up the equity and they blew up -- which then blew up the debt. And nothing [SIRVA] did caused or prevented that from happening. No action [SIRVA] took dictated Realogy's choice of litigation strategy, deciding who to sue for what. There's no line to be drawn, none, between SIRVA sending Realogy a letter about concerns of the deal on April 25th and Realogy's choice to sue Madison Dearborn Partners to enforce the purchase agreement on April 27th. They promised that they'd never do that ever under any circumstances, and they did. They didn't even have to sue MDP at all. They didn't have to, but they did and they chose that, and that filing had automatic and immediate consequences. [94]

Realogy's filing of the Non-Retained Claim, not SIRVA's purported "last-minute ambush," terminated the Equity Financing, which caused a condition of the Debt Financing to fail, as well as the conditions to specific performance.

Finally, Realogy argued that the Purchase Agreement's reasonable best efforts provisions require SIRVA to perform its financing obligations. [95] Realogy misreads the Purchase Agreement. SIRVA is required to use its reasonable best efforts to arrange and obtain Alternative Financing only in an amount "sufficient to pay ... when added to the Equity Financing and the remaining Debt Financing ... the Required Amount[.]" [96] Because Realogy filed a Non-Retained Claim, "[t]he equity financing is now gone forever... [s]o there's nothing for alternative financing to be additive to." [97] Additionally, under Section 7.3(e), SIRVA is not obligated to obtain new equity financing. [98] The "whole notion of alternative financing... blew up when [Realogy] blew up [the] equity. Once [Realogy] filed [a Non-Retained Claim] against MDP, that eliminated the equity to the deal, and that equity is a condition of the debt." [99] In the absence of Equity Financing, SIRVA has no obligation to seek Alternative Financing.

II. Analysis

***10** Supreme Court Rule 42(b)(i) provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment." [100] "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources." [101] Under Supreme Court Rule 42(b)(iii), this Court's analysis should include whether:

> (A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question

> of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice. [102]

After considering the Supreme Court Rule 42(b)(iii) factors and the Court's "own assessment of the most efficient and just schedule to resolve the case," the Court "should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal." [103]

Here, the Bench Ruling does not present any substantial issue of material importance to merit appellate review before a final judgment. "As a general matter, issues of contract interpretation are not worthy of interlocutory appeal." [104] The Motion to Dismiss required me to interpret the unambiguous provisions of the Purchase Agreement and related agreements. In dismissing Counts I and II, I determined that Realogy's assertion of a Non-Retained Claim in the Original Complaint triggered a series of events culminating in the failure of unambiguous contractual conditions required for specific performance under the Purchase Agreement. Standard contract interpretation issues are not suited for interlocutory appeal. [105] As a "mere contract dispute," that should "end it there." [106] On the threshold requirement of a substantial issue of material importance, alone, I recommend against Plaintiff's application.

***11** For completeness, I also consider the factors set forth in Supreme Court Rule 42(b)(iii). These factors reinforce my recommendation. Plaintiff addresses only Supreme Court Rule 42(b)(iii)(A), (B), and (H) as favoring its application. None of the factors Plaintiff addresses, nor the five others, support an interlocutory appeal. My analysis follows by factor.

A. The appeal does not involve a question of law resolved for the first time in Delaware. The dismissal was based on straightforward interpretations of contractual terms and Realogy's Original Complaint. Realogy argues that no "authority supports the notion that even the slightest pleading imprecision can cause the avalanche of dire consequences" [107] seen here, but this argument misconstrues the issues. Realogy's plain breach of unambiguous contractual language pushed over the first domino in a series of contractual consequences. Additionally, while Realogy argues that its theory incorporating the Cure Provision into the ECL makes this case unique, that argument further demonstrates that this is a straightforward contract interpretation case. [108] When, a "trial court applie[s] well-established principles of contract interpretation," "the case [does] not involve a matter of first impression." [109] This factor weighs against certifying the interlocutory appeal.

B. Trial court decisions do not conflict on the substance of the Bench Ruling. Plaintiff has not identified any Delaware decision to the contrary. The Bench Ruling did not address or rely on Delaware's pleading standards. It traced the direct and immediate contractual consequences of Realogy's Original Complaint. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* does not conflict with the Bench Ruling. [110] In *Hexion*, the financing had not terminated and thus, the transaction could still be consummated. [111] But under the governing merger agreement, even if all "conditions precedent to closing [we]re met, Hexion [would] remain free to choose to refuse to close." [112] Because the seller had agreed to forego specific performance, the Court ordered Hexion "to specifically perform its obligations under the merger agreement, other than the obligation to close." [113] This order placed the parties in the same situation on closing

day as they would have been if all parties had performed and satisfied all of the closing conditions. In *Hexion*, as here, the Court considered the seller's request for specific performance "to the extent permitted by the merger agreement itself." [114]

But here, SIRVA's reasonable best efforts to obtain Alternative Financing would not and could not lead to closing because Alternative Financing alone, without Equity Financing, will not satisfy conditions to closing or to specific performance. The immediate and automatic consequences of filing a Non-Retained Claim cannot be undone. SIRVA and Realogy cannot possibly be placed in the same situation on closing day as they would have been if all parties had performed and satisfied all of the closing conditions.

Plaintiff also takes issue with the form of the Bench Ruling. In resolving a straightforward, but multifaceted, contractual issue, I strove to maintain this Court's commitment to meaningful expedition even during a pandemic. I did so by leveraging, and distinguishing, Defendants' counsel's accurate, organized, and measured explanation. [115] I believe the Bench Ruling "ma[d]e a record to show what factors [I] considered and the reasons for [my] decision." [116] Based on the nuances of Realogy's application, it appears Realogy understands those factors and reasons. For my part, I do not believe the Bench Ruling's form alone warrants interlocutory appeal, particularly where the substance does not.

***12** C. The question of law does not relate to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by the Supreme Court in advance of an appeal from a final order, and Plaintiff identifies none. This factor weighs against certifying the interlocutory appeal.

D. The Bench Ruling does not sustain the controverted jurisdiction of the trial court, and Plaintiff does not argue that it does. [117] This factor weighs against certifying the interlocutory appeal.

E. The Bench Ruling does not reverse or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and review of the interlocutory order will not terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice. Plaintiff does not address this factor. This factor weighs against certifying the interlocutory appeal.

F. The Bench Ruling does not vacate or open a judgment of the trial court. Plaintiff does not address this factor. This factor weighs against certifying the interlocutory appeal.

G. Review of the Bench Ruling will not terminate the litigation. The Bench Ruling disposes of two counts seeking specific performance, but does not address the remaining four counts in the Amended Complaint and six counts in the Counterclaim still pending in this litigation. An interlocutory appeal would not terminate the litigation. This element weighs against certifying the interlocutory appeal.

H. Considerations of justice will not be served by an interlocutory appeal. Contrary to Realogy's argument, I did not apply a "hyper-technical pleading standard" in the midst of a pandemic. [118] I applied well-established principles of contractual interpretation to an unambiguous contract.

Further, Realogy now claims it needs immediate review of the Bench Ruling to avoid injustice from the passage of time. [119] But, in opposing the Motion to Dismiss, Realogy argued that the Court should "defer consideration and determination" of the specific performance issues until after trial to allow discovery on liability. [120] Realogy's new desire for speed rings hollow. The potential efficiencies or benefits of an interlocutory appeal do not outweigh the costs.

Considering all of the factors under Supreme Court Rule 42(b)(iii), I believe the balance weighs against certifying the interlocutory appeal. I recommend against certification.

III. Conclusion

***13** For the following reasons, I recommend against Plaintiff's application for certification of an interlocutory appeal. To the extent an order is required to implement this decision, **IT IS SO ORDERED**.

Sincerely,

/s/ Morgan T. Zurn
Vice Chancellor

All Citations

Not Reported in Atl. Rptr., 2020 WL 4559519

Footnotes

1 Docket Item ("D.I.") 78.
2 D.I. 83 [hereinafter, the "Bench Ruling"].
3 D.I. 32 [hereinafter, "Am. Compl."] ¶ 12.
4 Am. Compl. ¶ 13.
5 *Id.* ¶ 22.
6 *Id.* ¶ 24.
7 *Id.*
8 *Id.* ¶ 15.
9 *Id.* ¶ 26.
10 *Id.* ¶ 9.
11 *Id.* ¶¶ 52–53, 94, 99–100,
12 *Id.* ¶ 27.
13 *See e.g.*, *Id.* ¶¶ 138–141, 148–152.
14 D.I. 1 [hereinafter, "Compl."].
15 Compl. ¶¶ 92—112.
16 D.I. 2.
17 D.I. 34 [hereinafter, the "MTE Transcript"].
18 MTE Transcript at 80—82.
19 Am. Compl. ¶¶ 185—220.
20 D.I. 44.
21 D.I. 45.
22 D.I. 61.
23 Am. Compl. Ex. A [hereinafter, the "Purchase Agreement"] § 13.8(b) (emphasis added).
24 *Id.* §§ 13.8, 13.16.
25 *Id.* §§ 13.8(b)(ii)(A)-(B).
26 *Id.* § 10.2(b).
27 *Id.* § 6.6(e).
28 *Id.* § 7.3(c) (emphasis added).
29 *Id.* § 7.3(e) (emphasis added).
30 *Id.* § 11.3.
31 Am. Compl. Ex. B [hereinafter, the "Limited Guaranty"].
32 Purchase Agreement § 1.1.
33 Limited Guaranty § 1.
34 *Id.* § 4.
35 *Id.* § 4.
36 *Id.* § 6(b).
37 Bench Ruling at 23–24.
38 Am. Compl. Ex. C [hereinafter, the "ECL"].
39 *Id.* § 3 (emphasis added).
40 *Id.* § 7.

41 *Id.* § 8 ("Seller's remedies against the Investors as set forth in Sections 4(c) and 4(d) under the Limited Guaranty shall, and are intended to, be the sole and exclusive remedy available to Seller and its Affiliates against the Investors or any of their respective Affiliates in respect of any liabilities or obligations arising under, or in connection with, the Purchase Agreement or the Transactions from and after termination of the Purchase Agreement.").
42 Am. Compl. Ex. D [hereinafter, the "DCL"].
43 *Id.* ¶ 59.
44 DCL § 6, Ex. C.
45 *Id.* § 10.
46 Am. Compl. ¶ 153 (quoting Am. Compl. Ex. E).
47 *Id.* ¶ 153 (quoting Am. Compl. Ex. E).
48 *Id.* ¶¶ 20, 152, 154.
49 *Id.* ¶¶ 152, 154.
50 *Id.* ¶ 154.
51 *Id.*
52 *Id.* ¶ 156.
53 *Id.* ¶ 157.
54 D.I. 46 at 13, Ex. 5.
55 Am. Compl. ¶ 166.
56 *Id.* Ex. G.
57 Purchase Agreement § 11.1(c).
58 *Id.* § 11.1(a).
59 Am. Compl. ¶ 168.
60 *Id.* ¶ 169, Ex. I.
61 Purchase Agreement § 11.1 ("This Agreement may be terminated at any time prior to the Closing: (a) by either Seller or Buyer at or after 11:59 p.m. Eastern Time, on April 30, 2020 (as may be extended pursuant to the immediately following proviso, the "Outside Date") unless the Closing has occurred on or prior to the Outside Date...").
62 Am. Compl. ¶ 169.
63 DCL at 15 ("This Commitment Letter and the commitments hereunder shall automatically terminate in the event that (a) in respect of the Incremental Credit Facilities, if the initial borrowing thereunder does not occur on or before 11:59 p.m., New York City time, on the date that is five business days after the Outside Date (as defined in the Purchase Agreement as in effect on the Original Commitment Letter Date, including any extension of the Outside Date pursuant to the provisio of Section 11.1(a)) thereof (as in effect on the Original Commitment Letter Date)..."); *see also* MTE Transcript at 79.
64 Bench Ruling at 98–99.
65 *Id.*
66 *Id.* at 99.
67 *Id.* at 98.
68 *Id.* at 4.
69 *Id.*
70 *Id.* at 10–11.
71 *Id.* at 11.
72 *Id.* 14–15.
73 Compl. at 1.
74 *Id.* ¶ 112.
75 *Id.*; Bench Ruling at 15–16.
76 Bench Ruling at 16–17; Compl. at 44–45.
77 Bench Ruling at 19; *see also* ECL § 3.

78 ECL § 3; *see also* Bench Ruling at 19.
79 Bench Ruling at 22–23; *see also* ECL § 3.
80 Bench Ruling at 23 (citing Am. Compl. ¶ 59).
81 *Id.* at 16, 89 ("We think it's crystal-clear from the April 27 complaint. They can say it's a scrivener's error, they can say they really didn't mean it, notwithstanding their -- the fact that they flip back and forth from SIRVA in their press release. Their intent doesn't matter. If they filed it, it blew up the equity.").
82 *Id.* at 17 (quoting D.I. 46 Ex. 5). I took judicial notice of Realogy's press release announcing the filing of this litigation. *See In re Duke Energy Corp. Deriv. Litig.*, 2016 WL 4543788, at *4 n.34 (Del. Ch. Aug. 31, 2016) (taking judicial notice of a corporate press release); *see also Jimenez v. Palacios*, 2019 WL 3526479, at *2 n.3 (Del. Ch. Aug. 2, 2019), *as revised* (Aug. 12, 2019), *aff'd*, *Jimenez v. Palacios*, 2020 WL 4207625 (Del. July 22, 2020) (taking judicial notice of government press statements and releases).
83 Bench Ruling at 18.
84 *See id.* at 22.
85 ECL § 3.
86 Bench Ruling at 20–21; *see also id.* at 90–92.
87 *Id.* at 20.
88 *Id.*
89 *Id.* at 21–22.
90 ECL § 3 (emphasis added).
91 Bench Ruling at 22.
92 Am. Compl. ¶¶ 158, 160-162, 184.
93 Bench Ruling at 7.
94 *Id.* at 27–28.
95 In a footnote, Realogy also hints that SIRVA should not be aligned with MDP in this action because Section 7.3(d) of the Purchase Agreement required SIRVA to use its reasonable best efforts, including through litigation, to maintain the ECL in effect. D.I. 78 at 14 n.5. But the terms of the ECL itself terminated the Equity Financing automatically and immediately. Maintaining the ECL in effect is incongruous with overlooking its plain termination requirements.
96 Bench Ruling at 25 (citing Purchase Agreement § 7.3(c)(A)).
97 *Id.*
98 *Id.* (citing Purchase Agreement § 7.3(e)).
99 *Id.* at 26.
100 Supr. Ct. R. 42(b)(i).
101 Supr. Ct. R. 42(b)(ii).
102 Supr. Ct. R. 42(b)(iii).
103 Supr. Ct. R. 42(b)(iii).
104 *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *3 (Del. Ch. Feb. 28, 2018).
105 *See Lexington Ins. Co. v. Almah LLC*, 167 A.3d 499 (Del. 2016) (TABLE) (denying interlocutory appeal upon noting the "dispute turn[s] on issues of contract interpretation"); *Robino–Bay Court Plaza, LLC v. West Willow–Bay Court, LLC*, 941 A.2d 1019 (Del. 2007) (TABLE) (declining to grant interlocutory appeal of this court's construction of the operative contract); *McKnight v. USAA Cas. Ins. Co.*, 872 A.2d 959 (Del. 2005) (TABLE) (declining interlocutory appeal where "the trial court applied well-established principles of contract interpretation and thus the case did not involve a matter of first impression"); *Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2015 WL 1830476, at *2 n.3 (Del. Ch. Apr. 20, 2015) ("The Court's contract interpretation, even if wrong, would not seem to warrant interlocutory appeal.").
106 *Steadfast Ins. Co. v. DBi Servs., LLC*, 2019 WL 3337127, at *2 (Del. Super. July 25, 2019) (denying application for interlocutory review).
107 D.I. 78 ¶ 22.
108 D.I. 78 ¶ 23.

109 *McKnight v. USAA Cas. Ins. Co.*, 872 A.2d 959 (Del. 2005) (Table).

110 965 A.2d 715 (Del. Ch. 2008).

111 *See id.* at 758 ("Thus, if the other conditions to closing are met, Hexion will be obligated to call upon the lending banks to perform on their funding obligations. In that circumstance, the banks will then have to choose whether to fund on the basis of the solvency letter delivered by Huntsman or, instead, reject that letter as unsatisfactory and refuse to fund. If the lending banks refuse to fund, they will, of course, be opening themselves to the potential for litigation, including a claim for damages for breach of contract.").

112 *Id.* at 761.

113 *Id.* at 761–62 ("The issues in this case relate principally to the cost of the merger and whether the financing structure Apollo and Hexion arranged in July 2007 is adequate to close the deal and fund the operations of the combined enterprise. The order the court is today issuing will afford the parties the opportunity to resolve those issues in an orderly and sensible fashion.").

114 *Id.* at 722, 760.

115 *Compare Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1104 (Del. 2001) (rejecting a trial court order that adopted a brief in fourteen words without comment); *B.E.T., Inc. v. Bd. of Adjustment of Sussex Cty.*, 499 A.2d 811, 811 (Del. 1985) (rejecting a trial court order adopting, without further explanation, a brief "in those portions which are appropriate to adopt").

116 *See B.E.T., Inc.*, 499 A.2d at 811 (quoting *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979); *accord*, *Ball*, 780 A.2d at 1104; *see also B.E.T., Inc.*, 499 A.2d at 811 (citing *Ademski v. Ruth*, 229 A.2d 837, 838 n.1 (Del. 1967)) ("[a] judge may state [her] reasons briefly").

117 Since I have determined the equitable claims for specific performance fail, the only remaining issues are legal in nature, and "either party may elect to transfer this matter back to an appropriate court [*i.e.* Superior Court]." *Draper v. Westwood Development Partners, LLC*, 2010 WL 2432896, at *5 (Del. Ch. June 3, 2010).

118 D.I. 78 ¶ 33.

119 *Id.*

120 D.I. 57 at 28.

State of New York

Executive Chamber

No. 202.70

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue:

NOW THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202.36, 202.37, 202.46, 202.47, 202.54, 202.58, and 202.59, as continued and contained in Executive Order 202.65 for another thirty days through November 19, 2020;

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directive through November 19, 2020:

- The directive contained in Executive Order 202.64, which modified the directive in Executive Order in 202.28 that relates to eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through January 1, 2021.

- The directive contained in Executive Order 202.3, as extended, that closed movie theatres, is hereby modified to provide that movie theatres shall be allowed to open effective October 23, 2020 at 25% capacity with up to 50 people maximum per screen, subject to adherence to Department of Health guidance, provided that movie theatres in the New York City region, in counties with infection rates above 2% over a 14-day average, and in counties with red cluster zones continue to be closed.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twentieth day of October in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

November 6, 2020

NYC Extends Moratorium on Enforcement of Personal Guarantees of Commercial Leases Affected by COVID-19

Francis Gorman III

Harris Beach PLLC

[co-author: Christopher Williams, Law Clerk]

On Sept. 23, 2020, the New York City Council amended the personal guarantor provisions of Local Law 55 of 2020, which went into effect on May 28, 2020 and was designed to protect businesses affected by Gov. Andrew Cuomo's COVID-19 emergency executive orders. The amendment, which became effective on Sept. 28, 2020, contains two minor but important modifications to the guarantor protection portion of Local Law 55:

- First, the amendment clarifies the intent of the law by stating that it applies to all personal guarantor agreements, regardless of whether those agreements were contained in the original lease.
- Second, it extends those guarantor provisions through March 31, 2021.

In addition to modifying the content of Local Law 55 of 2020, the amendment's enabling legislation provides further insight into the New York City Council's intended purpose of the guarantor protections. It explicitly states that these provisions were not intended by the Council to limit any other legal remedies that a landlord may pursue, such as bringing suit for damages or satisfying obligations with tenant assets such as inventory, equipment, or accounts receivable. It also states that these protections are temporary measures designed to prevent individuals from facing further financial hardship.

Although the courts have yet to rule on the constitutionality of Local Law 55, the reference to the temporary nature of the provisions as well as the U.S. Constitution's ban on state impairment of contracts suggests that the law is intended to be a temporary hold on enforcement of qualified guarantor agreements rather than a permanent forgiveness of obligations.

As a reminder, under Local Law 55 of 2020, qualified guarantors include natural persons, not corporate or limited liability companies, who have guaranteed the obligations of a commercial tenant who:

- was required to cease operations per Gov.Cuomo's Executive Order 202.3 (applies to restaurants, bars, gyms, casinos and movie theaters, effective March 16, 2020); or
- is a non-essential retail establishment per Executive Order 202.6; or closed to the public per Executive Order 202.7, (applying to barbershops, hair salons, tattoo or piercing parlors and related personal care services including nail technicians, cosmetologists and estheticians and the provision of electrolysis, laser hair removal services.

Harris Beach Law Clerk Christopher R. Williams contributed to this legal alert.

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Harris Beach PLLC

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HARRIS BEACH PLLC ON:

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.*, at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

2020 WL 3498456
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ELMSFORD APARTMENT ASSOCIATES, LLC, 36 Apartment Assocaites, LLC, and 66 Apartment Associates, J.V., Plaintiffs,

v.

Andrew CUOMO, as Governor of the State of New York, Defendant.

20-cv-4062 (CM)
|
Signed 06/29/2020

Synopsis

Background: Residential landlords brought action against Governor of State of New York, alleging that executive order related to COVID-19 pandemic, which order temporarily permitted tenants to apply their security deposit funds to rents due and owing, provided tenants replenished those funds at later date, and temporarily prohibited landlords from initiating eviction proceedings against tenants who were facing financial hardship due to pandemic, violated landlords' rights under Contracts Clause, Takings Clause, Due Process Clause, and Petition Clause. Landlords moved for summary judgment. Governor cross-moved for summary judgment.

Holdings: The District Court, Colleen McMahon, Chief Judge, held that:

[1] it lacked jurisdiction to address landlords' claims that Governor violated New York Constitution and New York law by issuing executive order;

[2] executive order did not constitute Fifth Amendment physical taking of landlords' property;

[3] executive order did not constitute categorical regulatory taking of landlords' property under Fifth Amendment;

[4] economic impact of executive order weighed against finding that order was non-categorical regulatory taking of landlords' property under Fifth Amendment;

[5] executive order did not disrupt residential landlords' investment-backed expectations, for purposes of determining whether order was non-categorical regulatory taking under Fifth Amendment;

[6] nature of executive order weighed against finding that order was non-categorical regulatory taking of residential landlords' property under Fifth Amendment; and

[7] executive order should have come as no surprise to residential landlords, and thus could not amount to substantial impairment of their rights under their rental agreements in violation of Contracts Clause.

Motion denied; cross-motion granted.

West Headnotes (53)

[1] **Federal Civil Procedure** Presumptions

When considering cross-motions for summary judgment, all reasonable inferences must be drawn against the party whose motion is under consideration.

[2] **Constitutional Law** Facial invalidity

A facial challenge to the constitutionality of a statute is the most difficult challenge to mount successfully, since the challenger must establish no set of circumstances under which the statute would be valid.

[3] **Constitutional Law** Facial invalidity

Outside of the First Amendment context, facial challenges to legislation are generally disfavored. U.S. Const. Amend. 1.

[4] **Federal Courts** Other particular entities and individuals

Federal court lacked jurisdiction to address residential landlords' claims that Governor of State of New York violated New York Constitution and New York law by issuing executive order imposing 60-day eviction moratorium in response to COVID-19 pandemic; while Governor may have overstepped his authority under New York law, curing those alleged harms would have required court to ignore doctrine of state sovereign immunity and principles of federalism embodied in Eleventh Amendment, and, further, landlords did not claim that Governor lacked power to respond to COVID-19 pandemic, only that he had abused that power. U.S. Const. Amend. 11.

[5] **Federal Courts** Agencies, officers, and public employees

Under the Eleventh Amendment, federal court may intervene and address claims that a state official has violated state law when the state official may be said to act ultra vires, meaning that he or she acts without any authority whatever. U.S. Const. Amend. 11.

[6] **Constitutional Law** Fifth Amendment

The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. U.S. Const. Amends. 5, 14.

[7] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

The law recognizes two species of Fifth Amendment takings: physical takings and regulatory takings. U.S. Const. Amend. 5.

[8] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

The paradigmatic Fifth Amendment taking requiring just compensation, known as a "physical taking," is a direct government appropriation or physical invasion of private property. U.S. Const. Amend. 5.

[9] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

A Fifth Amendment regulatory taking occurs when the government acts in a regulatory capacity. U.S. Const. Amend. 5.

[10] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

The gravamen of a Fifth Amendment regulatory taking claim is that the state regulation goes too far and in essence effects a taking. U.S. Const. Amend. 5.

[11] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

The government affects a Fifth Amendment physical taking only where it requires the landowner to submit to the physical occupation of his land; government action that does not entail a physical occupation, but merely affects the use and value of private property, does not result in a physical taking of property. U.S. Const. Amend. 5.

[12] **Eminent Domain** Rent control; housing

Executive order issued by Governor of State of New York, which executive order imposed 60-day eviction moratorium in response to COVID-19 pandemic, did not constitute Fifth Amendment physical taking of residential landlords' property, where order did not deny landlords control of their property, order was not permanent and had expiration date, order preserved landlords' rights to either obtain warrant for eviction or sue tenants for back rent once order expired, and order neither reduced amounts tenants had to pay for occupying apartments nor forgave tenants' rental obligations altogether. U.S. Const. Amend. 5.

[13] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

In the Second Circuit, a Fifth Amendment physical taking only occurs when a government has committed or authorized a permanent physical occupation of property. U.S. Const. Amend. 5.

[14] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

In the Second Circuit, the absolute exclusivity of the occupation, and the absolute deprivation of the owner's right to use and exclude others from the property are the hallmarks of a physical taking. U.S. Const. Amend. 5.

[15] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

Fifth Amendment regulatory takings may be either categorical or non-categorical. U.S. Const. Amend. 5.

[16] **Eminent Domain** ⇐ Zoning, Planning, or Land Use; Building Codes

Under the Fifth Amendment, a "categorical regulatory taking" occurs in the extraordinary circumstance when no productive or economically beneficial use of land is permitted. U.S. Const. Amend. 5.

[17] **Eminent Domain** ⇐ Rent control; housing

Executive order issued by Governor of State of New York, which executive order responded to COVID-19 pandemic by imposing 60-day eviction moratorium and permitting tenants to apply their security deposit funds to rents due, did not constitute categorical regulatory taking of residential landlords' property under Fifth Amendment, where landlords could continue to accept rental payments from tenants not facing financial hardship, while also covering cost of ownership by collecting security deposit funds from consenting tenants who had been affected by pandemic, and thus landlords' properties had not been rendered worthless or economically idle. U.S. Const. Amend. 5.

[18] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

Under the Fifth Amendment, anything less than a complete elimination of value, or a total loss, is a "non-categorical regulatory taking." U.S. Const. Amend. 5.

[19] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

The *Penn Central* analysis of a non-categorical regulatory taking under the Fifth Amendment requires an intensive ad hoc inquiry into the circumstances of each particular case, and courts must weigh three factors to determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. U.S. Const. Amend. 5.

[20] **Eminent Domain** ⇐ What Constitutes a Taking; Police and Other Powers Distinguished

Because of the ad-hoc nature of regulatory takings analysis, facial challenges brought under the Takings Clause face an uphill battle made especially steep when the parties seeking relief have not claimed that government action makes it commercially impracticable for them to continue business operations on their property; such cases present no concrete controversy concerning either application of the government action to particular operations or its effect on specific property. U.S. Const. Amend. 5.

[21] **Eminent Domain** ⇐ Rent control; housing

Regulations altering the landlord-tenant relationships are not susceptible to facial

constitutional analysis under the Takings Clause. U.S. Const. Amend. 5.

[22] **Eminent Domain** 🔑 Rent control; housing

Economic impact of executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, weighed against finding that order was non-categorical regulatory taking of residential landlords' property under Fifth Amendment; vague allegations that landlords were owed back rents and that some tenants had applied security deposits to rents were insufficiently precise to find that order had constitutionally significant economic impact, and landlords provided no basis for treating subset of apartments occupied by tenants facing financial hardship as separate parcel and did not claim that order made it commercially impracticable for them to operate their buildings as a whole. U.S. Const. Amend. 5.

[23] **Eminent Domain** 🔑 What Constitutes a Taking; Police and Other Powers Distinguished

The economic impact of a government action can only qualify as a Fifth Amendment non-categorical regulatory taking if it effectively prevented the plaintiff from making any economic use of the plaintiff's property. U.S. Const. Amend. 5.

[24] **Eminent Domain** 🔑 What Constitutes a Taking; Police and Other Powers Distinguished

To compare the value that a plaintiff's property has lost with the value it held prior to a government action, for purposes of determining whether the action qualifies as a Fifth Amendment non-categorical regulatory taking, the court must first determine the unit of property whose value is to furnish the denominator of the fraction. U.S. Const. Amend. 5.

[25] **Eminent Domain** 🔑 Rent control; housing

Executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, did not disrupt residential landlords' investment-backed expectations, for purposes of determining whether order was non-categorical regulatory taking under Fifth Amendment, where landlords knew their contractual right to collect rent was conditioned on compliance with variety of state laws, and order's temporary adjustment of laws did nothing more than defer landlords' ability to collect full amount of rents tenants freely agreed to pay. U.S. Const. Amend. 5.

[26] **Eminent Domain** 🔑 What Constitutes a Taking; Police and Other Powers Distinguished

The purpose of the investment-backed expectation requirement, in determining whether a government action qualifies as a Fifth Amendment non-categorical regulatory taking, is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime. U.S. Const. Amend. 5.

[27] **Eminent Domain** 🔑 Rent control; housing

Nature of executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, weighed against finding that order was non-categorical regulatory taking of residential landlords' property under Fifth Amendment; nothing was affirmatively taken by government when order mandated nonpayment of preexisting obligation, and any reallocation of resources was purely temporary, since nothing in order diminished a tenant's ultimate responsibility to pay entire amount of rent due and owing under lease, or to suffer judgment to be entered against tenant for that full amount plus interest. U.S. Const. Amend. 5.

[28] **Constitutional Law** ⇦ Application in general

Constitutional Law ⇦ Police power; purpose of regulation

Although facially absolute, the Contracts Clause's prohibition is not the Draconian provision that its words might seem to imply and does not trump the police power of a state to protect the general welfare of its citizens, a power which is paramount to any rights under contracts between individuals. U.S. Const. art. 1, § 10, cl. 1.

[29] **Constitutional Law** ⇦ Existence and extent of impairment

Constitutional Law ⇦ Police power; purpose of regulation

When deciding whether a state action affecting contracts is unconstitutional under the Contracts Clause, courts in the Second Circuit ask: (1) whether the contractual impairment is substantial and, if so, (2) whether the law serves a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and necessary. U.S. Const. art. 1, § 10, cl. 1.

[30] **Constitutional Law** ⇦ Police power; purpose of regulation

When a law which allegedly violates the Contracts Clause only impairs private contracts, and not those to which the state is a party, courts must accord substantial deference to the State's conclusion that its approach reasonably promotes the public purposes for which it was enacted. U.S. Const. art. 1, § 10, cl. 1.

[31] **Constitutional Law** ⇦ Contracts with Non-Governmental Entities

The Contracts Clause affords States a wide berth to infringe upon private contractual rights when they do so in the public interest rather than self-interest. U.S. Const. art. 1, § 10, cl. 1.

[32] **Constitutional Law** ⇦ Existence and extent of impairment

The first question when determining if a law violates the Contracts Clause is whether the state law has operated as a substantial impairment of a contractual relationship. U.S. Const. art. 1, § 10, cl. 1.

[33] **Constitutional Law** ⇦ Existence and extent of impairment

Impairment of a contractual relationship, in violation of the Contracts Clause, is greatest where the challenged government legislation was wholly unexpected. U.S. Const. art. 1, § 10, cl. 1.

[34] **Constitutional Law** ⇦ Existence and extent of impairment

For those who do business in a heavily regulated industry, the expected costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation, for purposes of determining whether a law which impairs the contracts violates the Contracts Clause. U.S. Const. art. 1, § 10, cl. 1.

[35] **Constitutional Law** ⇦ Existence and extent of impairment

Because past regulation puts industry participants on notice that they may face further government intervention in the future, a later-in-time regulation is less likely to violate the Contracts Clause where it covers the same topic as the prior regulation and shares the same overt legislative intent to the protect the parties protected by the prior regulation. U.S. Const. art. 1, § 10, cl. 1.

[36] **Constitutional Law** ⇦ Leases in general

Health ⇨ Contagious and Infectious Diseases

Landlord and Tenant ⇨ Deposits and Other Security by Tenant

Executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order permitted tenants to apply their security deposit funds to rents due, should have come as no surprise to residential landlords, and thus could not amount to substantial impairment of their rights under their rental agreements in violation of Contracts Clause, where residential leases were subject to number of regulations that did not implicate Contracts Clause, and order also protected same parties as those protected by New York statutes temporarily displaced during emergency. U.S. Const. art. 1, § 10, cl. 1; N.Y. General Obligations Law §§ 7-101, 7-103.

[37] **Constitutional Law** ⇨ Leases in general

Health ⇨ Contagious and Infectious Diseases

Landlord and Tenant ⇨ Deposits and Other Security by Tenant

Executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order permitted tenants to apply their security deposit funds to rents due, did not prevent landlords from safeguarding or reinstating their rights, and thus did not impose substantial impairment on landlords' contractual rights in violation of Contracts Clause, where landlords were operating in pervasively regulated area and order sought on its face only to fulfill landlords' contractual expectations, order did not displace civil remedies available to landlords seeking to recover costs of repairs or unpaid rents still owed at end of lease term, and nothing in order diminished tenants' rental obligations. U.S. Const. art. 1, § 10, cl. 1.

[38] **Constitutional Law** ⇨ Leases in general

Regulations that reimburse landlords for lost rental income do not impose a substantial impairment on those parties' contract rights in violation of the Contracts Clause. U.S. Const. art. 1, § 10, cl. 1.

[39] **Constitutional Law** ⇨ Leases in general

Health ⇨ Contagious and Infectious Diseases

Landlord and Tenant ⇨ Right to Maintain Action and Conditions Precedent

Executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium, did not impair implied term of rental agreements, namely, residential landlords' right to use legal process to evict their tenants, and thus order did not violate Contracts Clause, where eviction moratorium did not eliminate suite of contractual remedies available to landlords, but merely postponed date on which landlords could commence summary proceedings against tenants, and tenants were still bound to their contracts and landlords could obtain judgments for unpaid rent if tenants failed to honor their obligations. U.S. Const. art. 1, § 10, cl. 1.

[40] **Contracts** ⇨ Existing law as part of contract

Generally, the laws which subsist at the time and place of the making of a contract enter into and become a part of it.

[41] **Constitutional Law** ⇨ Existence and extent of impairment

Constitutional Law ⇨ Leases in general

The implied contractual rights conferred by state laws, including judicial remedies such as eviction, may be the subject of a Contracts Clause claim only when those laws affect the validity, construction, and enforcement of contracts. U.S. Const. art. 1, § 10, cl. 1.

[42] **Constitutional Law** ⇨ Procedural due process in general

To succeed on a procedural due process claim, a plaintiff must first identify a property right, second show that the state has deprived him or her of that right, and third show that the

deprivation was effected without due process. U.S. Const. Amend. 14.

[43] **Constitutional Law** Landlord and Tenant

Constitutional Law Eviction and proceedings therefor

Health Contagious and Infectious Diseases

Landlord and Tenant Deposits and Other Security by Tenant

Landlord and Tenant Right to Maintain Action and Conditions Precedent

Residential landlords, who brought action challenging executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, failed to identify property interest independent of interests addressed by their other constitutional claims, and thus failed to establish that order violated landlords' procedural due process rights. U.S. Const. Amend. 14.

[44] **Constitutional Law** Landlord and Tenant

Constitutional Law Eviction and proceedings therefor

Health Contagious and Infectious Diseases

Landlord and Tenant Deposits and Other Security by Tenant

Landlord and Tenant Right to Maintain Action and Conditions Precedent

Residential landlords failed to show that executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, deprived landlords of property interests, and thus failed to establish that order violated landlords' procedural due process rights; all that landlords complained of was potential that they would have to wait before pursuing remedies otherwise available to them. U.S. Const. Amend. 14.

[45] **Constitutional Law** Property in General

The Second Circuit requires something more than proof that a party's property has suffered "a decrease in value" to prevail on a procedural due process claim. U.S. Const. Amend. 14.

[46] **Constitutional Law** Landlord and Tenant

Constitutional Law Eviction and proceedings therefor

Health Contagious and Infectious Diseases

Landlord and Tenant Deposits and Other Security by Tenant

Landlord and Tenant Right to Maintain Action and Conditions Precedent

Residential landlords failed to show that executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium and permitted tenants to apply their security deposit funds to rents due, denied landlords procedural due process, where landlords would be able to initiate new proceedings in same forum and manner once order expired, and landlords could still initiate eviction proceedings against tenants who were not facing financial hardship but who had chosen not to pay their rent. U.S. Const. Amend. 14.

[47] **Constitutional Law** Notice and Hearing

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14.

[48] **Constitutional Law** Right to Petition for Redress of Grievances

The right to petition for a redress of grievances in the form of judicial relief is protected by the First Amendment. U.S. Const. Amend. 1.

[49] **Constitutional Law** Right to Petition for Redress of Grievances

The right of access to courts under the First Amendment's Petition Clause is burdened when state officials take systemic action to frustrate a plaintiff or class of plaintiffs from preparing and filing lawsuits. U.S. Const. Amend. 1.

[50] **Constitutional Law** ⇐ Right to Petition for Redress of Grievances

To prevail on a claim that a state official violated a plaintiff's right to petition for a redress of grievances in the form of judicial relief, the plaintiff must show that the defendant took or was responsible for actions that hindered the plaintiff's efforts to pursue a legal claim. U.S. Const. Amend. 1.

[51] **Constitutional Law** ⇐ First Amendment in General

The requirement of actual injury, for purposes of a claim that a state official violated a plaintiff's right to petition for a redress of grievances in the form of judicial relief, derives ultimately from the doctrine of standing. U.S. Const. Amend. 1.

[52] **Constitutional Law** ⇐ Right to Petition for Redress of Grievances

Health ⇐ Contagious and Infectious Diseases

Landlord and Tenant ⇐ Right to Maintain Action and Conditions Precedent

Residential landlords failed to show that executive order issued by Governor of State of New York in response to COVID-19 pandemic, which order imposed 60-day eviction moratorium, had actual effect of frustrating their efforts to pursue legal claims, and thus order did not violate landlords' right to petition for redress of grievances in form of judicial relief; although nonpayment proceedings had been suspended, landlords could still sue their tenants for arrearages through breach-of-contract action, and landlords would also have opportunity to bring eviction proceedings for reason of nonpayment once order expired. U.S. Const. Amend. 1.

[53] **Civil Rights** ⇐ Property and housing

Residential landlords failed to show that Governor of State of New York, who issued executive order in response to COVID-19 pandemic permitting tenants to apply their security deposit funds to rents due, was responsible for injury for which landlords sought cure, and thus order did not violate landlords' right to petition for redress of grievances in form of judicial relief; Governor was not to blame for landlords' lack of access to holdover proceedings, which was normal remedy for failure to replenish security deposit, given that suspension of all petitions in state courts, including holdover proceedings for all reasons other than nonpayment, was ordered by court's chief administrative judge, not Governor. U.S. Const. Amend. 1.

Attorneys and Law Firms

Mark A. Guterman, Lehrman, Lehrman & Guterman, LLP, White Plains, NY, for Plaintiffs.

Matthew Lawrence Conrad, New York State Office of the Attorney General, New York, NY, for Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

McMahon, C.J.

***1** The world is navigating the deadliest pandemic in over a century. Presently, the United States has suffered more than any other country, reporting over two million cases of the novel coronavirus known as COVID-19, and over one hundred and twenty thousand deaths as a result.[1] Among the fifty states, New York has experienced the highest number of cases, with nearly four hundred thousand cases and twenty-five thousand dead.[2]

The New York State Legislature and the Governor, Defendant Andrew Cuomo, have worked together to respond to this evolving crisis and its effects on the health, safety, and economic wellbeing of New Yorkers. At issue here is the Governor's Executive Order 202.28, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," issued May 7, 2020 (the "Order" or "EO 202.28"), which, *inter alia*, temporarily permits tenants to apply their security deposit funds to rents due and owing – provided the tenants replenish those funds at a later date – and temporarily prohibits landlords from initiating eviction proceedings against tenants who are facing financial hardship due to the pandemic.

Three residential landlords – Plaintiffs Elmsford Apartment Associates, LLC; 36 Apartment Associates, LLC; and 66 Apartment Associates, J.V. ("Plaintiffs") – ask this Court to enjoin EO 202.28 on the grounds that the Order violates their rights under the United States Constitution's Contracts Clause, Takings Clause, Due Process Clause and Petition Clause.[3] While the Plaintiffs initially sought only a temporary restraining order and preliminary injunction, the parties agreed that Plaintiffs' challenge turns entirely on legal issues that required no discovery and could be resolved on cross-motions for summary judgment. After an expedited briefing schedule, the Court heard oral argument via telephone conference on June 24, 2020.

For the following reasons, Plaintiffs' motion for summary judgment is denied, and Defendant's motion for summary judgment dismissing this action is granted.

BACKGROUND

A. New York's response to COVID-19

On March 2, 2020, in response to the first reported cases of COVID-19 in New York state, the legislature passed Senate Bill S7919, which afforded Governor Cuomo the power to suspend statutes or regulations, and issue necessary accompanying directives, in the event of an epidemic or other disease outbreak. *See* SB S7919; N.Y. Exec. Law Art. 2-B § 29-a. Specifically, Governor Cuomo may respond to the current pandemic by:

> ***2** "temporarily suspend[ing] any statute, local law, ordinance, or order, rules or regulations, or parts thereof, or any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster."

N.Y. Exec. Law Art. 2-B § 29-a. Any such suspensions must be "in the interest of the health or welfare of the public," "reasonably necessary to aid the disaster effort," and must "provide for the minimum deviation" from pre-suspension legal requirements "consistent with the goals of the disaster action deemed necessary." *Id.* Suspensions are only authorized for period of 30 days, although Section 29 of the amended Executive Law allows the Governor to "extend the suspension[s] for additional periods not to exceed thirty days each." *Id.*

To reduce the spread of COVID-19, government officials around the world ordered all "non-essential" businesses closed, and instructed their constituents to shelter in place, so that medical professionals and other first responders could try to stem the exponential wave of infections that reached catastrophic levels in mid-March. By mid-March, New York State was rapidly becoming the epicenter of this unprecedented public health crisis. Governor Cuomo declared a statewide emergency on March 6. (EO 202.) On March 20, he ordered all non-essential businesses either to close or to require their employees to work from home. (EO 202.8.) The initial orders also prohibited public gatherings not related to essential work.

These indefinite disruptions to everyday life had a number of second-order economic effects. Tens of millions of Americans filed for unemployment in the weeks following the stay-at-home orders, as bars, restaurants, shops, and live entertainment venues were forced to close.[4] As a result of these shutdowns, more and more households were forced to eat into their financial resources as they waited out the emergency. Many are still waiting as New York continues to gradually reopen sectors of the economy.

On March 27, 2020, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The CARES Act provided numerous forms of relief to affected industries and industries, including a prohibition against new eviction cases filed by housing providers who participate in certain federal housing rental programs on the basis of non-payment of rent. *See* 15 U.S.C. § 9058.

Which brings us to the order that is the subject of this lawsuit.

B. The Order Under Review

On March 20, 2020, in response to this emergency. Governor Cuomo issued EO 202.8 (the "First Moratorium") – the first of several orders designed to prohibit the eviction or foreclosure of either residential or commercial tenants for a period of 90 days. As he did when initially declaring a state of emergency, Governor Cuomo said the measures included in EO 202.8 were justified in light of "travel-related cases and community contact transmission of COVID-19" which were "documented in New York State and expected to ... continue," and because allowing landlords to continue evictions and foreclosures "would prevent, hinder, or delay action necessary to cope with the disaster emergency."

***3** Governor Cuomo later issued the challenged Order, EO 202.28, on May 7, 2020. (*See* Executive Order 202.28, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," available at https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.) The Order contains two sections that, while suspending the operation of certain state laws, have the effect of modifying existing relationships between landlords and their tenants.

i. Security Deposit Provisions

The Order suspends Sections 7-103, 7-107 and 7-108 of the General Obligations Law, dealing with the rights and obligations of lessors and lessees with respect to security deposits, for thirty days. Security deposits are deposits of rent – most commonly, one month's rent – to provide the landlord with security for the making of repairs to damage caused by the tenant once the tenant vacates the premises. By law, the landlord must place the security deposit into an interest bearing account for the benefit of the tenant (who retains legal title to the funds). The tenant is entitled to the return of the security deposit, with interest, at the conclusion of the lease, unless the landlord needs to use the funds to make repairs in order to re-lease the premises. All this is governed by the cited sections of the General Obligations Law.

The Order temporarily suspends the operation of the usual procedures governing the use of security deposits in order to permit tenants to apply their security deposit funds to rental payments:

> Landlords and tenants or licensees of residential properties may, upon the consent of the tenant or licensee, enter into a written agreement by which the security deposit and any interest accrued thereof, shall be used to pay rent that is in arrears or will become due. If the amount of the deposit represents less than a full month rent payment, this consent does not constitute a waiver of the remaining rent due and owing for that month. Execution in counterpart by email will constitute sufficient execution for consent;
>
> Landlords shall provide such relief to tenants or licensees who so request it that are eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic;
>
> It shall be at the tenant or licensee's option to enter into such an agreement and landlords shall not harass, threaten or engage in any harmful act to compel such agreement;
>
> Any security deposit used as a payment of rent shall be replenished by the tenant or licensee, to be paid at the rate of 1/12 the amount used as rent per month. The payments to replenish the security deposit shall become due and owing no less than 90 days from the date of the usage of the security deposit as rent. The tenant or licensee may, at their sole option, retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment, which the landlord, must accept such insurance as replenishment.

Even if the landlord does not want the tenant to use his security deposit to cover a month's rent, the tenant may invoke these new procedures and the landlord must allow it to do so.

ii. Eviction Moratorium

The order also suspends the landlord's ability to commence eviction proceedings for nonpayment of rent pursuant to Article 7 of the Real Property Actions and Proceedings Law, ("RPAPL") and Article 7 of the Real Property Law ("RPL"). (*See* Pl. Br. at 2-3.) That law (to which reference is made in many standard leases) provides that, after following certain procedures, the landlord may commence what is known as a summary non-payment proceeding in order to evict the tenant who is occupying leased premises without paying rent and obtain a money judgment for any unpaid rent. Specifically, the order provides:

> *4 "There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020."

A bit of background is in order. Evicting a tenant – especially a residential tenant – in New York is a slow, cumbersome and extremely tenant-favorable process, especially when compared to analogous procedures in other states. As Plaintiffs acknowledge, tenants in New York City enjoy even more generous protections. (Dkt. No. 10, Pl.'s Br. at 2 n.1.) The way the process actually plays out belies the term "summary proceeding" that is statutorily authorized to recover real property from a non-paying tenant.

To secure an eviction warrant from the housing courts, a New York landlord must serve the tenant a notice of nonreceipt of payment (*see* RPL § 235-e(d)), and give the tenant one final chance to pay by making a demand of payment within 14 days (*See* RPAPL § 711(2)). If the landlord is still owed payment after two weeks have passed, he may commence what is known as a summary nonpayment proceeding by filing a petition in the civil court, returnable by the tenant within 10 days. (RPAPL § 732(1).) If the tenant does not respond in ten days, the court may (but rarely does) issue an eviction warrant immediately. (RPAPL § 732(3).) However, if the tenant does respond, however, a trial is set for eight days hence. (RPAPL § 732(2).) The trial may be adjourned up to ten additional days if the parties so require in order to produce their witnesses. (RPAPL § 745(1).)

If, after trial, a judgment is entered for the landlord and the court issues a warrant for eviction, the Sheriff must give the tenant 14 days' notice in writing prior to execution. (*See* RPAPL § 749(2)(a).) There are the usual provisions for appeal (to the Appellate Term of Supreme Court) and stays issue routinely so that non-defaulting tenants are not evicted before their cases are fully reviewed.

But even if the evidence supports a judgment for the landlord, the housing court is not required to order the tenant's immediate eviction. A tenant may obtain a stay of the issuance of the warrant for up to one year by showing that "it would occasion extreme hardship to the [tenant] or the [tenant's] family if the stay were not granted." (RPAPL § 753(1).) Such stays are far from uncommon.

On June 6, 2020, Governor Cuomo issued Executive Order 202.38, which renewed the security deposit provision of EO 202.38 for an additional 30 days, but did not extend the eviction moratorium period beyond August 19. (*See* Executive Order 202.38, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," *available at* https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.)

The Governor's Order does not address any summary proceeding that was commenced prior to its effective date; however, as a practical matter, there was not much that a landlord could do to prosecute an ongoing proceeding, as the New York State courts were closed until very recently. (*See* March 16, 2020 Administrative Order, AO/68/20, *available at* nycourts.gov/latest-AO.shtml (suspending "All eviction proceedings and pending eviction orders ... until further notice").) Also, Governor Cuomo did nothing to impede the commencement of holdover proceedings brought when a tenant fails to cure a violation of the terms of its lease – such as when a tenant enters into an unauthorized sublease, *see, e.g.*, *Mann Theatres Corp. of Calif. v. Mid-Island Shopping Plaza, Inc.*, 94 A.D.2d 466, 464 N.Y.S.2d 793, 799 (2d Dep't 1983), operates a "bawdy-house" on the premises, *see* RPAPL § 711(5), or overstays their agreed lease term, *see, e.g, Riverdale Realty Development LLC v. EJM Rest. Corp.*, 65 Misc.3d 1227(A), 119 N.Y.S.3d 706 (Table), 2019 WL 6335262, at *1 (N.Y. Civ. Ct. Nov. 25, 2019). Nor does EO 202.28 suspends the landlords' right to initiate a common law breach of contract action in the New York State Supreme Court to redress a tenant's failure to perform its payment obligations under his or her lease, *see, e.g.*, *1000 Northern of N.Y. Co. v. Great Neck Med. Assocs.*, 7 A.D.3d 592, 775 N.Y.S.2d 884 (2d Dep't 2004) – although this court recognizes that such a remedy is not the one to which landlords usually resort.

C. The Current Availability of Eviction Remedies in New York Civil Courts

*5 The First Moratorium, which placed a 90-day pause on all evictions, whether commenced for reason of nonpayment of rent or otherwise, expired on June 20. Recognizing the potential for confusion – compounded by New York's gradual and incomplete reopening of public spaces across the state,

including state courts – Chief Administrative Judge Lawrence K. Marks issued an order clarifying the current availability of eviction remedies. (Dkt. No. 23, Reply Decl. of M. Guterman, Ex. 1 (the "Administrative Order" or "AO") at 1.)

The Administrative Order permits landlords to file a new eviction petition electronically, provided that the petition includes an affirmation that, to the best of the landlord's knowledge, the petition "comports with the requirements of ... Executive Order 202.28." (*Id.* at 3.) Although landlords remain barred from initiating new summary proceedings "for nonpayment of rent" against a tenant "eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship," they may seek eviction of any tenant for any reason other than nonpayment of rent. (*Id.*)

However, the Administrative Order only allows the action to be filed; it cannot proceed to trial as long as "state and federal emergency measures addressing the COVID-19 pandemic" remain in place. (AO at 1.) All RPAPL eviction matters, new or old, "shall continue to be suspended," although parties represented by counsel may schedule virtual, judicially-supervised settlement conferences. (*Id.*)

D. The Pending Motion

Plaintiffs assert that EO 202.28 violates their rights under the Contracts Clause by allowing security deposit funds to be disposed contrary to the terms of the parties' leases, as well as by denying the landlords a forum in which to commence (or, presumably, prosecute) eviction proceedings for non-payment of rent, a remedy to which they claim at least an implied contractual right. Plaintiffs further argue that Governor Cuomo's denial of access to housing court for the prosecution of summary nonpayment proceedings violates their rights under Petition Clause of the First Amendment. Finally, they claim that the Order violates both the Takings Clause and the procedural due process protections of the Fourteenth Amendment, because the temporary suspension of evictions forces landlords to provide their property for use as housing without just compensation. (Dkt. No. 10, at 1.)

Governor Cuomo argues in response that the temporary modifications to New York's residential rent regulation scheme do not violate the Constitution because they do not upset a landlord's expectations relating to state interference with their business operations. EO 202.28 neither robs the Plaintiffs' of the entire value of their property interests nor does it bar them from vindicating those interests to the fullest extent provided by lease and by law once the current health crisis has abated. He urges that state governments are entitled to deference when their exercise of the police power to protect the general welfare of their citizens incidentally burdens private contractual relationships, and points out that the purely temporary nature of the burden to the landlords renders that burden "incidental" as a matter of law. (Dkt. No. 21.)

The Court has also received and reviewed the brief of *amici curiae* Housing Court Answers, Mount Vernon United Tenants, and United Tenants of Albany (collectively, the "*Amici*"). (Dkt. No. 19.) In addition to the arguments made by Governor Cuomo, *Amici* stress that lifting the eviction moratorium "would require tenants to make impossible choices between their health (and the community's health) and their homes," and could ultimately "risk further spread of COVID-19," thus aggravating the very emergency that the Governor and the Legislature hoped to curtail. (Dkt. No. 19 at 5-6.) Even worse, based on *Amici's* experience, the housing courts would experience "extreme stress" and overcrowding if tenants, landlords, court officials, and counsel were forced to cram into housing courts in order to attend evictions proceedings, thereby exacerbating the current public health emergency. (*Id.* at 6-7.)

LEGAL STANDARD

***6** [1] Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering cross-motions for summary judgment, "all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). As a government actor, it is the Defendant's burden to justify its actions as consistent with the U.S. Constitution. *See Vugo, Inc. v. City of New York*, 931 F.3d 42, 48 (2d Cir. 2019) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011)).

[2] [3] Because Plaintiffs do not allege imminent or actual harm to any particular property interest or contractual relationship as a result of the Order, the parties agreed at the June 5 conference that this case takes the form of a facial challenge. As the Supreme Court has held, a facial challenge "is ... the most difficult challenge to mount successfully, since the challenger must establish no set of circumstances under

which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Outside of the First Amendment context, "facial challenges to legislation are generally disfavored." *Sanitation & Recycling Indus., Inc. v. City of New York ("Sanitation I")*, 928 F. Supp. 407, 416 (S.D.N.Y. 1996) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)).

DISCUSSION

I. This Court Does Not Have Jurisdiction to Enjoin Purported Violations of the Executive Law or the New York State Constitution.

[4] Before reaching the constitutional issues, the Court must first make clear that it lacks the jurisdiction necessary to reach the merits of the state law questions raised in Plaintiffs' papers.

Plaintiffs claim that the Governor "has effectively legislated new laws" in violation of the Executive Law and the New York Constitution (Pl.'s Br. at 7-13; Reply at 14-16.) For instance, Plaintiffs object to the imposition of a 60-day eviction moratorium in light of the language in § 29-a forbidding suspensions "in excess of thirty days." (*Id.* (citing N.Y. Exec. Law Art. 2-B § 29-a(2)(a)).)

Federal courts do not have the power to address claims that Governor Cuomo has violated state law. While it may be the case that Governor has overstepped his authority under New York's Executive Law, curing those alleged harms would require this Court to ignore the doctrine of state sovereign immunity and principles of federalism embodied in the Eleventh Amendment. As the Supreme Court has said, "it is difficult to think of a greater intrusion on state sovereignty than ... a federal court instruct[ing] state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). In *Pennhurst*, the Supreme Court ruled that federal courts could not grant relief against state officials for their purported violations of state law, because doing so does not implicate any aspect of federal law, nor does it "vindicate the supreme authority of federal law." *Id.* Therefore, efforts to cure violations of state law fall beyond the jurisdiction of federal courts, because they do not "aris[e] under the Constitution, the Laws of the United States, [or] Treaties ...." U.S. Const. Art. III § 2.

[5] The only acknowledged exception to the rule in *Pennhurst* is not applicable here. A federal court may intervene when a state official "may be said to act *ultra vires*," meaning that he or she "acts without any authority whatever." *Id.* at 101, 104 S.Ct. 900 n.11 (internal quotation marks omitted). Yet, by their own admission, Plaintiffs "do not argue ... that Executive Law § 29-a as amended is, itself, unconstitutional." (Pl.'s Br. at 11 n.3.) Their claim is not that the Governor lacks the power to respond to the COVID-19 emergency – only that he has abused that power. Therefore, by seeking redress for Governor Cuomo's alleged violations of the authority delegated to him by the New York legislature, Plaintiffs ask the Court "to police the boundaries of [state law]," *ACA Int'l v. Healey*, No. 20-cv-10767, —— F.Supp.3d ——, ——, 2020 WL 2198366, at *4 (D. Mass. May 6, 2020).

*7 In *ACA*, the District of Massachusetts rejected similar arguments made against a regulation promulgated in response to COVID-19, citing *Pennhurst* to conclude that federal courts may not enjoin the actions of state officials for purported violations of state law. I concur with the court in that case: this Court lacks jurisdiction to address the issues of New York law raised in Plaintiffs' papers.

II. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Takings Clause.

[6] The Takings Clause of the Fifth Amendment provides that no "private property shall be taken for public use, without just compensation." U.S. Const. Amend. V. The clause applies to the states through the Fourteenth Amendment. *See Kelo v. New London*, 545 U.S. 469, 125 S.Ct. 2655, 2658 n. 1, 162 L.Ed.2d 439 (2005). Courts have construed "private property" to include rights secured in private contract, but parties cannot simply " 'remove the subject matter of their agreement by making contracts about them'." *Sanitation I*, 928 F. Supp. at 416 (citing *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223-24, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)).

[7] [8] [9] [10] "The law recognizes two species of takings: physical takings and regulatory takings." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006). "The paradigmatic taking requiring just compensation," known as a physical taking, "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). A regulatory taking occurs "when the government acts in a regulatory capacity." *Buffalo Teachers*, 464 F.3d at 374. "The gravamen of a regulatory taking claim

is that the state regulation goes too far and in essence effects a taking." *Id.* (internal quotation marks omitted).

Plaintiffs fails to demonstrate that the Order cause them to suffer either type of taking.

A. EO 202.28 does not constitute a physical taking.

[11] "[T]he government affects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *accord Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992). Government action that does not entail a physical occupation, but merely affects the use and value of private property, does not result in a physical taking of property.

The Supreme Court has ruled that a state does not commit a physical taking when it restricts the circumstances in which tenants may be evicted. For example, in *Yee v. City of Escondido*, mobile home park owners challenged a municipal rent control ordinance and a California statute that "limit[ed] the bases upon which a park owner may terminate a mobile homeowner's tenancy." *Yee*, 503 U.S. at 524, 112 S.Ct. 1522. They argued that this regime of mobile home regulations effected a physical taking because "what has been transferred from park 10 owner to mobile homeowner is no less than a right of physical occupation of the park owner's land." *Id.* at 527, 112 S.Ct. 1522. The Supreme Court rejected the park owners' argument, holding that it "cannot be squared with our cases on physical takings," which occur only when the government "requires the landowner to submit to the physical occupation of his land." *Id.* The local rent controls and state law at issue in Yee "authorize[d] no such thing." To the contrary, the park owners "voluntarily rented their land to mobile homeowners .... Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528, 112 S.Ct. 1522. The Second Circuit, in evaluating New York's rent control laws, has agreed, holding that these laws "regulate[ ] land use rather than effecting a physical occupation." *W. 95 Hous. Corp. v. New York City Dep't of Hous. Pres. & Dev.*, 31 F. App'x 19, 21 (2d Cir. 2002); *see also Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011) (affirming dismissal of physical takings claim on the ground that the rent stabilization law "does not affect permanent physical occupation of the [owners'] property").

***8** **[12]** **[13]** **[14]** Second Circuit precedent further clarifies that restrictions like those contained in EO 202.28 do not amount to a physical taking. In this circuit, a physical taking only occurs when "a government has committed or authorized a permanent physical occupation of property." *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). "The *absolute* exclusivity of the occupation, and the *absolute* deprivation of the owner's right to use and exclude others from the property ... [are] the hallmarks of a physical taking." *Id.* at 93 (emphasis in original) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)). In *Southview*, the court upheld the Vermont Environmental Commission's decision to deny a building permit to a developer whose plans would have threatened a white-tail deer population, because the plaintiff "retain[ed] substantial power to control the use of the property." *Id.* at 94. So too here: because the landlords fail to show that EO 202.28 denies them control of their property, which they continue to rent to their tenants, and collect rents from, a temporary halt on evictions does not take on the character of a physical taking.

Nor does the fact that the landlords object to some tenants' continued occupancy in a subset of their units transform the Order enabling those occupancies into a physical taking. In *Kirsh v. City of New York*, No. 94-cv-8489, 1995 WL 383236 (S.D.N.Y. June 27, 1995), the court held that New York State does not violate the Takings Clause when it assumes management of a property from a landlord and rents units therein to parties without the landlords' approval. *Id.* at *5. In that case, the Civil Court exercised its authority under Article 7A of RPAPL to appoint administrators to manage a particular property in response to a number of tenant complaints alleging harassment by their landlords. The plaintiff landlords challenged the Housing Court's order as a physical taking, complaining that the administrators were permitted to decrease rent, spend the landlord's funds on repairs, and rent vacant units. Even though the administration went on for over six years, the Court rejected the landlord's physical takings claim, reasoning "7A administration does not constitute a permanent, physical occupation because the City has not permanently extinguished [the landlord's] property rights." *Id.*

Plaintiffs have temporarily lost the ability to expel tenants facing COVID-related financial setbacks. They argue that these restrictions prohibit them from asserting their implied contractual rights to summary proceedings for nonpayment

under RPAPL § 711(2), thereby "effectively creat[ing] an actual, state-sponsored occupancy" of the units that amounts to a physical taking. (Dkt. No. 10, Pl.'s Br. at 14.) However, the intrusions at issue in this case pose a much shorter and less significant burden to Plaintiffs' property rights than those upheld in *Kirsh*. First, contrary to the Plaintiffs' insinuation that the Governor will extend duration of the Order as long as he can, into 2021 (Dkt. No 24, Pl.'s Reply at 6), there is nothing permanent about EO 202.28; it expires on August 19. Second, the Order preserves Plaintiffs' rights as property owners to either obtain a warrant for eviction or sue their tenant (or former tenants, or the successors and assigns of the former tenant) for back rent. And, finally, the Order neither reduces the amount a tenant must pay their landlord for occupying the apartments, nor forgives the tenant's rental obligations altogether, thereby allowing them to live on the landlord's property rent free.

As long as the order is in place, tenants will continue to accrue arrearages, which the landlord will be able to collect with interest once the Order has expired. Furthermore, landlords will regain their ability to evict tenants once the Order expires. Since EO 202.28 is temporary on its face, and does not disturb the landlords' ability to vindicate their property rights, the Order is one more example of "government regulation of the rental relationship [that] does not constitute a physical taking." *Fed. Home Loan Mtge. Corp. v. N.Y.S. Div. of Hous. & Cmty. Renewal ("FHMLC")*, 83 F.3d 45, 47-48 (2d Cir. 1996) (citing *Yee*, 503 U.S. at 529, 112 S.Ct. 1522).

B. EO 202.28 does not constitute a regulatory taking.

***9** **[15]** **[16]** **[17]** Regulatory takings may be either categorical or non-categorical. *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 n. 2 (Fed. Cir. 2008). A categorical regulatory taking occurs in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (emphasis in original). The Order is clearly not a categorical regulatory taking, since Plaintiffs still enjoy many economic benefits of ownership. Even under the eviction moratorium, landlords can continue to accept rental payments from tenants not facing financial hardship, while also covering the cost of ownership by collecting security deposit funds from consenting tenants who have been affected by the pandemic. As such, their properties have not been rendered "worthless or 'economically idle'." *Alexandre v. New York City Taxi & Limousine Com'n*, No. 07-cv-8175, 2007 WL 2826952, at *8 (S.D.N.Y. Sept. 28, 2007) (quoting *Lucas v. S.C. Costal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

[18] **[19]** "Anything less than a complete elimination of value, or a total loss," is a non-categorical taking, which is analyzed under the framework established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). The *Penn Central* analysis of a non-categorical taking "requires an intensive *ad hoc* inquiry into the circumstances of each particular case." *Buffalo Teachers*, 464 F.3d at 375. Courts must "weigh three factors to determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* (internal quotation marks omitted).

[20] Because of the ad-hoc nature of regulatory takings analysis, facial challenges brought under the Takings Clause "face an uphill battle ... made especially steep" when the parties seeking relief "have not claimed ... that [government action] makes it commercially impracticable" for them to continue business operations on their property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495–96, 107 S. Ct. 1232, 1247, 94 L. Ed. 2d 472 (1987). Such cases present "no concrete controversy concerning either application of the [government action] to particular ... operations or its effect on specific [property]." *Id.* at 495, 107 S.Ct. 1232 (quoting *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)). Therefore, the only issue properly before this Court is "whether the mere enactment of the [Order] constitutes a taking." *Id.*

[21] Applying the *Penn Central* factors to this case, the Court finds that Plaintiffs have not shown that the Order inflicts "any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone*, 480 U.S. at 493, 107 S.Ct. 1232. That conclusion is in line with the Second Circuit's holding that regulations altering the landlord-tenant relationships are "not susceptible to facial constitutional analysis under the Takings Clause." *W. 95 Hous.*, 31 F. App'x at 21.

1. Economic Impact

[22] **[23]** **[24]** The economic impact of EO 202.28 can only qualify as a regulatory taking if it "effectively prevented [Plaintiffs] from making *any economic use* of [their] property." *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) (emphasis added). To compare the value that the property has lost with the value it held prior to the Order, the court must first determine the "unit of property whose value is to furnish the denominator of the fraction." *Keystone*, 480 U.S. at 497, 107 S.Ct. 1232. For example, an ordinance prohibiting construction on the curtilage of a single-family dwelling does not cause a regulatory taking, because courts focus "on the nature of the interference with rights *in the parcel as a whole*," including the portions of the property not subject to restrictions. *Id.* (quoting *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646).

***10** It is difficult to quantify the precise economic impact that the eviction moratorium and security deposit provisions have had on Plaintiffs' property, because the Complaint contains only two allegations relevant to the question and Plaintiffs elected not to introduce evidence in support of their application.[5] First, they argue that, "Each of the Plaintiffs is owed rents by various tenants" – a statement that could just as easily encompass those tenants against whom an eviction proceeding was initiated prior to pandemic as it could to those actually protected from immediate eviction by the Order – and, second, that each landlord "has had [at] least one tenant that has directed the tenant's security deposit be applied to rent arrears." (Compl. ¶¶ 29-30.) Like the vague allegation that the landlords are owed back rent by some of their tenants, the security deposit allegations are insufficiently precise to support a finding that EO 202.28 has a constitutionally significant economic impact -- not least because the Order decrees that, "Any security deposit used as a payment of rent shall be replenished by the tenant or licensee."

Besides, even if an unspecified number of tenants are behind in their rental payments, that is not enough for Plaintiffs to prevail on a facial challenge to the Order under the Takings Clause. Plaintiffs may not frame their takings claim by "narrowly defin[ing] certain segments of their property [to] assert that ... [EO 202.28] denies them economically viable use" of their property. *Keystone*, 480 U.S. at 496, 107 S.Ct. 1232. In *Keystone*, the Supreme Court rejected a Takings Clause challenge to a Pennsylvania law that prevented a mining company from extracting 2% of its coal from the ground, reasoning that some 2% of the company's total raw materials, "do not constitute a separate segment of property for takings law purposes." *Id.* at 498. The same is true for the subset of rental units currently occupied by tenants behind in their rent. As was true in *Keystone*, Plaintiffs provide no basis for treating the subset of their rented apartments occupied by tenants facing financial hardship as a separate parcel; nor do they claim that EO 202.28 makes it "commercially impracticable" for them to operate their buildings as a whole -- let alone every building impacted by the Order, as they must to prevail on a facial challenge. *See id.* 495-498. I note that the court specifically asked whether plaintiffs required discovery in order to bring/oppose a motion for summary judgment and was told that none was required.

2. Investment-backed expectations

[25] **[26]** The second *Penn Central* factor is the extent to which EO 202.28 has interfered with Plaintiffs' "investment-backed expectations." "The purpose of the investment-backed expectation requirement is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996). To analyze the effect of the Order on Plaintiff's expectations, this Court must acknowledge that the Governor did not act on a blank slate, but, rather, made temporary adjustments to a statutory scheme that has governed landlord-tenant relations in the state for some time. As my colleague, the Hon. Richard Berman, reiterated, when denying a takings challenge to a rule requiring costly technological upgrades to New York City taxis, "[o]ne who chooses to engage in a publicly regulated business ... by so doing surrenders his right to unfettered discretion as to how to conduct same." *Alexandre*, 2007 WL 2826952, at *8 (internal quotation marks omitted).

Because landlords understand that the contractual right to collect rent is conditioned on compliance with a variety of state laws, their reasonable investment-backed expectations cannot extend to absolute freedom from "public program[s] adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646. That is why numerous New York rent regulations have withstood Takings Clause challenges over the years, and why New York landlords do not enjoy a constitutional right to realize a profit from their rental

properties – let alone all the profits contemplated in each of their individual rental agreements. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 140 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985). In *Park Avenue*, the court upheld a zoning amendment limiting the height of commercial real estate towers, rejecting the argument that the Takings Clause protects commercial landlords' right "to use ... property in a 'profitable' manner." Because the property retained economically beneficial use to the current owner as long as "others 'might be interested in purchasing all or part of the land' for permitted uses," the court held that the height restriction did not qualify as a regulatory taking. *Id.* at 139 (quoting *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983)).

***11** The decision in *Park Avenue* establishes that the particular profitability of a heavily regulated property interest may fluctuate under a new regulation without that regulation affecting a regulatory taking, provided that the state's action does not destroy the marketability of the regulated property. The record before this court contains no evidence that would allow me to conclude that the plaintiffs' properties have become unmarketable by virtue of the order in suit.

Park Avenue involved commercial real estate. Twelve years later, the Circuit applied the rule that a regulatory taking only occurs where government action affects total deprivation of marketability to residential real estate. In *FHLMC*, the Second Circuit rejected a takings challenge to a provision of the New York City Rent Stabilization Law ("RSL") that imposed a maximum allowable rent on three quarters of the apartments in a residential rental building. *See FHMLC*, 83 F.3d 45. The court analyzed the plaintiff-landlord's expectations in light of the fact that "FHLMC purchased an occupied building and acquiesced in its continued use as rental housing." *Id.* at 48. In *FHLMC*, as here, the challenged enactment still allowed landlords to "use the[ir] property as previously planned," even though they "[would] not profit as much as ... under a market-based system." *Id.* If a residential landlord continues to derive "economically viable use" from his investments by "rent[ing] apartments and collect[ing] the regulated rents," he cannot establish a regulatory taking under the controlling precedents. *Id.*

Indeed, prior to EO 202.28, the state enacted New York Senate Bill S6458, the New York Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), which doubled the length of a stay of eviction available to a tenant facing financial hardship from six months to one year. (*See* RPAPL § 753(1).) It is telling that Plaintiffs did not challenge the HSTPA's adjustment to the stay period, even though it would, in some cases, result in eviction delays considerably longer than any that might be occasioned by the Order in suit. That silence is consistent with what the Second Circuit has long held: the extent to which Plaintiffs' can realize a profit from their rental properties is not the relevant measure of their investment-backed expectations for the purposes of Takings Clause analysis.

Prior to the Order, millions of tenants in this state avoided ever-increasing rents, as well as the threat of immediate eviction, thanks to rules limiting a landlord's ability to extract the maximum value from their properties. Plaintiffs knew that they operated as landlords under those rules. The Order's temporary adjustment of those rules, which does nothing more than defer the ability of the landlord to collect (or obtain a judgment for) the full amount of the rent the tenant freely agreed to pay, does not disrupt the landlords' investment-backed expectations.

3. The character of the governmental action

[27] The nature of the Order also weighs against a finding that Plaintiffs have suffered a regulatory taking. Relying in part on *FHLMC*, the Second Circuit explained in *Buffalo Teachers* that government actions possess the character of regulatory takings when they visit "affirmative exploitation" on affected parties, as opposed to "negative restrictions." *Buffalo Teachers*, 464 F.3d at 375. There, the court ruled that a temporary wage freeze imposed to ensure a municipality's fiscal stability did not amount to a regulatory taking because "Nothing is affirmatively taken by the government" when a state action mandates nonpayment of a preexisting obligation. *Id.* Although the Order may embody a policy decision to "take from Pete [the landlords] to pay Paul [the tenants] ... such burden shifting does not, without more, amount to a regulatory taking." *Id.* at 376 (citing *Connolly*, 475 U.S. at 223, 106 S.Ct. 1018 ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.")). And again, I must note that any reallocation of resources is purely temporary, since nothing in the Order diminishes the tenant's ultimate responsibility to pay the entire amount of rent due and owing under the lease, or to suffer judgment to be entered against him for that full amount plus interest.

* * *

***12** Plaintiffs object to the Order because it "has foisted exclusively upon landlords the burden of rental issues." (*See* Dkt. No. 9, Lehrman Decl. ¶ 15.) But the law in this Circuit is clear: state governments may, in times of emergency or otherwise, reallocate economic hardships between private parties, including landlords and their tenants, without violating the Takings Clause. Plaintiffs' takings claim is dismissed.

III. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Contracts Clause

[28] Article I, Section 10 of the U.S. Constitution prohibits the states from passing any law "impairing the Obligation of Contracts." U.S. Const. Art. I § 10, cl. 1. "Although facially absolute, the Contracts Clause's prohibition 'is not the Draconian provision that its words might seem to imply' and does not trump the police power of a state to protect the general welfare of its citizens, a power which is 'paramount to any rights under contracts between individuals.' " *Buffalo Teachers*, 464 F.3d at 367 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)).

[29] When deciding whether a state action affecting contracts is unconstitutional, courts in this Circuit ask: "(1) [whether] the contractual impairment [is] substantial and, if so, (2) [whether] the law serve[s] a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) [whether] the means chosen to accomplish this purpose [are] reasonable and necessary." *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54 (2d Cir. 2020) (quoting *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006)).

[30] **[31]** When, as in this case, the challenged law only impairs private contracts, and not those to which the state is a party, courts "must accord substantial deference to the [State's] conclusion that its approach reasonably promotes the public purposes for which [it] was enacted." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) (citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412-13, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)). Accordingly, the law affords States a wide berth to infringe upon private contractual rights when they do so in the public interest rather than sel. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

Because the Court concludes that neither of the challenged sections of the Order substantially impairs Plaintiffs' contract rights, it does not address the purpose of the Order, or the means that Governor Cuomo chose to pursue that purpose.

A. The Security Deposit provisions do not substantially impair Plaintiffs' rights under the Contract Clause.

[32] The first question when determining if a law violates the Contracts Clause is "whether the state law has 'operated as a substantial impairment of a contractual relationship.' " *Sveen v. Melin*, —— U.S. ——, 138 S.Ct. 1815, 1821-22, 201 L.Ed. 2d 180 (2018) (quoting *Spannaus*, 438 U.S. at 244, 98 S.Ct. 2716). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S.Ct. at 1822.

1. Plaintiffs could not reasonable expect to be free of additional rental regulations.

[33] **[34]** The Second Circuit treats the aggrieved party's reasonable expectations as the touchstone of the analysis: "Impairment is greatest where the challenged government legislation was wholly unexpected." *Sanitation & Recycling Indus., Inc. v. City of New York ("Sanitation II")*, 107 F.3d 985, 993 (2d Cir. 1997). Similar to the "investment-backed expectation" prong of the *Penn Central* analysis, a long line of cases teaches that the foreseeability of an impairment on contractual rights, and therefore the extent to which such impairment qualifies as substantial, "is affected by whether the relevant party operates in a heavily regulated industry." *Sullivan*, 959 F.3d at 64 (citing *Sanitation II*, 107 F.3d at 993); *see also Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792, 84 L.Ed. 1061 (1940). For those who do business in a heavily regulated industry, "the expected costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation." *All. of Auto. Mfrs., Inc. v. Currey ("AAM")*, 984 F. Supp. 2d 32, 55 (D. Conn. 2013), *aff'd*, 610 F. App'x 10 (2d Cir. 2015).

***13** **[35]** **[36]** Because past regulation puts industry participants on notice that they may face further government intervention in the future, a later-in-time regulation is less

likely to violate the contracts clause where it "covers the same topic [as the prior regulation] and shares the same overt legislative intent to the protect [the parties protected by the prior regulation]." *AAM*, 984 F. Supp. 2d at 55. Again, there is no question that residential leases are subject to a number of regulations that do not implicate the Contracts Clause. For example, "It is well established that [New York] City's rent control laws do not unconstitutionally impair contract rights." *Brontel, Ltd. v. City of N.Y.*, 571 F. Supp. 1065, 1072 (S.D.N.Y. 1983) (citing *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198, 41 S.Ct. 465, 65 L.Ed. 877 (1921)). Therefore, EO 202.28 -- which modifies aspects of the statutory scheme relating to permissible uses of security deposits -- should have come as a no surprise to the landlord Plaintiffs, and thus could not amount to a substantial impairment of their rights under their rental agreements.

Furthermore, the foreseeability of additional regulation allows states to interfere with both past and future contracts. The landlords may not limit application of the Order to agreements they have yet to negotiate and execute; the Contracts Clause also permits states to modify and abrogate existing contract terms long since agreed to and performed by the parties. For example, in *Buffalo Teachers*, the Second Circuit upheld a wage freeze that prohibited payment of a 2% raise the plaintiff unions had previously negotiated with the city government. *Buffalo Teachers*, 464 F.3d at 367. And in *Tinnerello*, the court permitted a Connecticut town to invalidate seventy of the plaintiff's existing commercial waste contracts "in order to provide a safe and efficient disposal operation." *Tinnerello*, 141 F.3d at 54.

EO 202.28 also protects the same parties as those protected by General Obligations Laws temporarily displaced during the emergency. Security deposits are, by law, the property of the tenant, not the landlord. N.Y. Gen. Oblig. L. § 7-103. The preexisting security deposit regime ensured the landlord access to deposit funds "as security for performance of the contract or to be applied to payments upon such contract when due," while allowing the tenant to earn interest on the deposit funds during the period of the rental. N.Y. Gen. Oblig. L. § 7-101. So, the statutory scheme to which the Plaintiffs hope to return allows the same flow of deposit funds that the Order now mandates: deposits are "applied to payments," *i.e.*, collected by landlords, while renters experiencing financial hardship are able to rely on their security deposits to avoid falling behind in their rent. The Order also preserves the Plaintiffs' pre-emergency status quo, by ensuring that "Any security deposit used as a payment of rent shall be replenished by the tenant or licensee" within 90 days. Indeed, the Order provides even more protection for the landlord Plaintiffs than they enjoyed prior to the emergency, because they are also temporarily protected from foreclosure of their properties to the extent that their properties are is subject to a mortgage, which the landlords may have difficulty paying if tenants are defaulting on their rent.

2. EO 202.28 sufficiently safeguards Plaintiffs' ability to realize the benefit of their bargain.

[37] The security deposit provisions allow the landlords to collect deposit funds in lieu of their tenants' missed rental payments, without waiving their right to collect "the remaining rent due and owing for that month" at a later time. For that reason, the other two aspects of a "substantial impairment" enumerated in *Sveen* -- the extent to which an impairment undermines the contractual bargain, and the ability of the impaired party to safeguard or reinstate their rights at a later time -- weigh against finding a substantial impairment arising from the security deposit provisions.

14 [38]** At bottom, provisions ensure that landlords will be made whole while their tenants are facing extraordinary financial hardships. As a court in this district once held, regulations that "reimburs[e] landlords for lost rental income" do not impose a substantial impairment on those parties' contract rights. *Kraebel v. New York City Dep't of Hous. Pres. & Dev.*, No. 90-cv-4391 (MJL), 1991 WL 84598, at *5 (S.D.N.Y. May 13, 1991), ***aff'd in part, rev'd on other grounds, 959 F.2d 395 (2d Cir. 1992). In *Kraebel*, the court dismissed a challenge to a program exempting senior citizens from paying rent increases, while reimbursing landlords through tax abatements and cash payments. The Court reasoned that, because the landlords were operating "in such a pervasively regulated area" and the program "seeks on its face only to *fulfill* landlords' contractual expectations," the claim under the Contracts Clause failed as a matter of law. *Id.* So to here.

Furthermore, the Order does not displace the civil remedies always available to landlords seeking to recover the costs of repairs or unpaid rents still owed at the end of a lease term. The security deposit is held as security for repairs the landlord might be required to make at the end of a tenancy. If the tenant uses the security deposit to pay a month's rent, and the tenancy ends before the deposit is fully replenished, the landlord can obtain a judgment for the amount expended in repairs. The whole scheme is no different than what actually

happens in the real world, where tenants routinely forfeit their security deposit by allowing it to "cover the last month's rent" on a lease. And I again emphasize that nothing in the Order diminishes the tenant's rental obligation by even a nickel. The landlord can collect all he is owed at the end of the day by the simple expedient of going to some court when the courts are fully reopened. The fact that landlords would prefer not to avail themselves of their legal remedies – because it is often not worth the trouble to pursue a deadbeat tenant – does not mean that the state has impaired their contractual rights.

Because the security deposit provisions do not prevent Plaintiffs from "safeguarding or reinstating [their rights]," *Sveen*, 138 S.Ct. at 1822, as soon as the Order expires, they do not impose a substantial impairment on Plaintiffs' contractual rights.

B. The eviction moratorium in EO 202.28 does not violate the Contracts Clause.

[39] Plaintiffs also claim that the Order impairs an implied term of their rental agreements: the landlords' right to use legal process to evict their tenants. At argument, Plaintiffs impressed upon the Court that eviction proceedings are critical tools for bringing the parties together to resolve nonpayment disputes. Plaintiffs argue that by pausing evictions and removing the landlords' enforcement mechanism, the Governor is encouraging tenants to shirk their obligations to pay rent, and thus "dictating the result" of potential evictions in favor of tenants who are in arrears. (Dkt. No. 27, at 3.)

[40] **[41]** On the present record, it is not clear whether the rental agreements between plaintiffs and their tenants expressly provide the landlords with contractual rights to pursue evictions. Plaintiffs have represented that the default clauses in each agreement allow the landlords to seek relief under state law, but that does not settle whether the right is express or implied. It is generally true that "the laws which subsist at the time and place of the making of a contract ... enter into and become a part of it." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30, 54 S.Ct. 231, 78 L.Ed. 413 (1934.) However, the implied contractual rights conferred by state laws, including judicial remedies such as eviction, may be the subject of a Contracts Clause claim "only when those laws affect the validity, construction, and enforcement of contracts." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 189, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

***15** The Court (which has seen more than its fair share of leases over the course of a 40+ year career in the law) will assume, *arguendo*, that the default provisions of the various rental agreements indicate that eviction proceedings are essential to "enforcement" of their rental agreements—and indeed, that the leases between Plaintiffs and their tenants contain standard provisions about the landlord's remedies in case of non-payment of rent, which specifically refer to RPAPL 711(2) – a remedy created by statute and not by contract -- in the event of non-payment.

Proving a violation of the Contracts Clause based on implied rights is difficult, especially when the party retains the opportunity to vindicate those rights by some other avenue. As the Supreme Court has noted, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *U.S. Trust*, 431 U.S. at 19 n.17, 97 S.Ct. 1505. The Supreme Court reiterated the point in *Sveen* when it held that a measure altering available remedies without nullifying them neither undermines the contractual bargain or "prevents the party from safeguarding or reinstating [their] rights." *Sveen*, 138 S.Ct. at 1822.

The eviction moratorium does not eliminate the suite of contractual remedies available to the Plaintiffs; it merely postpones the date on which landlords may commence summary proceedings against their tenants. The tenants are still bound to their contracts, and the landlord may obtain a judgment for unpaid rent if the tenants fail to honor their obligations. Furthemore, on August 20, this Court is sure that Plaintiffs and others similarly situated will exercise their rights to commence eviction proceedings to make up for lost time. That being so, the implied right to such legal process has not been impaired by the Order. *See Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 499 (E.D.N.Y. 2012) (" 'Impairment' occurs when the law prohibits performance of an obligation and extinguishes available remedies for nonperformance.") (citing *Blaisdell*, 290 U.S. at 431, 54 S.Ct. 231 ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them.")).

Plaintiffs' claims under the Contract Clause fail as a matter of law. Defendant's cross motion for summary judgment on this claim is granted.

IV. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Due Process Clause.

Plaintiffs' failure to demonstrate substantial impairment of their property rights is fatal to their procedural due process claim, too.

[42] "To succeed on a procedural due process claim, 'a plaintiff must first identify a property right, second show that the state has deprived him [or her] of *that* right, and third show that the deprivation was effected without due process.' " *Progressive Credit Union v. City of New York*, 889 F.3d 40, 51 (2d Cir. 2018) (quoting *Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) (internal quotation marks omitted)).

[43] To begin with, Plaintiffs have not identified a property interest independent of the interests addressed by their other constitutional claims. That is fatal to their due process claim. The Second Circuit has expressly forbidden this sort of duplication, because the Due Process Clause cannot be called upon to safeguard a right, "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior." *Harmon*, 412 Fed. Appx. at 423 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010)).

*16 [44] [45] Nor have the Plaintiffs shown a deprivation of those interests. As in the takings context, the Second Circuit requires something more than proof that a party's property has suffered "a decrease in ... value" to prevail on a procedural due process claim. *Progressive*, 889 F.3d at 52. But all that Plaintiffs complain of is the potential that they will have to wait before pursuing the remedies otherwise available to them. Therefore, EO 202.28 does not deprive Plaintiffs' of their property rights.

[46] [47] For the same reason, Plaintiffs also fail to show a denial of due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). There is no question that, as to manner, Plaintiffs will be able to initiate new proceedings in the same forum and manner that they always have, after August 19. And as for Plaintiff's claim that "the Order precludes [them] from being heard at *any* time" (Pl.'s Br. at 13.), that is wrong for two reasons. First, they can still initiate eviction proceedings against the tenants who are not facing financial hardship but who have chosen not to pay their rent. And, second, they will be able to move against their other tenants after August 19. No case says that "a meaningful time" means as soon as a cause of action accrues – especially where, as in New York, the filing of a summary proceeding is but the first step in what often takes years to accomplish, which is the ultimate eviction of a tenant. Therefore, the delay embodied mandated by the Order does not deny the Plaintiffs a meaningful opportunity to be heard.

Plaintiffs' Due Process claim fails as a matter of law.

V. EO 202.28 Does Not Violate Plaintiffs' Rights Under the Petition Clause.

Finally, Plaintiffs argue that EO 202.28 denies them their constitutional rights to petition the government, because they can no longer file summary proceedings for nonpayment of rent, or for their tenants' failure to replenish their security. This claim is meritless.

[48] [49] [50] [51] The right to petition for a redress of grievances in the form of judicial relief is protected by the First Amendment. *See, e.g., Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994) (citing *United Mine Workers v. Ill. Bar Assoc.*, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967)). The right of access to courts is burdened when state officials take systemic action to frustrate a plaintiff or class of plaintiffs from preparing and filing lawsuits. *Christopher v. Harbury*, 536 U.S. 403, 413, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). To prevail on a denial of access claim, the plaintiff must show "that the defendant took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim," *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); (quoting *Lewis v. Casey*, 518 U.S. 343, 349, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (alteration in original)). "As the Supreme Court has explained, the requirement of actual injury 'derives ultimately from the doctrine of standing.' " *Monsky v. Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997) (quoting *Lewis*, 518 U.S. at 349, 116 S.Ct. 2174).

[52] Plaintiffs have not shown that the eviction moratorium EO 202.28 "had the actual effect of frustrating the [their] effort[s] to pursue a legal claim." *Oliva v. Town of Greece*, 630 Fed. Appx. 43, 45 (2d Cir. 2015). Although nonpayment proceedings have been suspended, Plaintiffs can still sue their tenants for arrearages through a breach of contract action in the New York Supreme Court – and the fact that is not their preferred remedy is of no moment. They will also have the opportunity to bring eviction proceedings for reason of

nonpayment once the order expires, a right preserved by the portion of EO 202.28 that extends relevant statutes of limitation for the duration of court closures. Since "mere delay" to filing a lawsuit cannot form the basis of a Petition Clause violation when the plaintiff will, at some point, regain access to legal process, *Davis*, 320 F.3d at 352, the Plaintiffs' right to collect both the monetary remedies and injunctive relief they would seek through an eviction proceeding has not been "completely foreclosed" by EO 202.28, *Sousa v. Marquez*, 702 F.3d 124, 125 (2d Cir. 2012). The eviction moratorium in EO 202.28 does not violate Plaintiffs' First Amendment rights.

***17 [53]** At the hearing, Plaintiffs argued that the security deposition provisions caused a distinct, and irreparable, denial of access: because EO 202.28 allows the tenant to replenish the funds applied to rent due and owing on an incremental basis, the Order does not guarantee that the deposit will be made whole before the tenant vacates the premises, thus potentially leaving Plaintiffs to foot the bill for any necessary repairs to the unit. Normally, the failure to replenish the security deposit would be the proper subject of a holdover proceeding. Plaintiffs claim that the suspension of all petitions in state Civil Courts – including holdover proceedings for all reasons other than nonpayment – denies them the possibility of a remedy against tenants who have failed to maintain necessary deposit funds in escrow.

It is not the case that Plaintiffs will some day have no way to hale their tenants into court for failing to replenish their security deposits – it is merely the case that it will generally not be worth a landlord's while to do so. But even if Plaintiffs were correct, Governor Cuomo is not to blame for the Plaintiff's lack of access to holdover proceedings for reasons other than nonpayment. EO 202.28 only applies to evictions "for nonpayment." It is the order of the Chief Administrative Judge that suspends all eviction proceedings in Civil Courts, "whether brought on the ground that respondent has defaulted in the payment of rent *or on some other ground.*" (AO at 1 (emphasis added).) Therefore, Governor Cuomo is not responsible for the injury for which Plaintiffs seek a cure, because striking his Order would not grant the Plaintiffs access to the Civil Courts to file holdover proceedings for reasons other than nonpayment.

Be that as it may, Plaintiffs argue that this Court should strike the Order under the Petition Clause because "the issues on this motion ... are similar to those raised" in *ACA International v. Healey*, No. 20-cv-10767, —— F.Supp.3d ——, 2020 WL 2198366 (D. Mass. May 6, 2020). (Pl.'s Br. at 4.) The plaintiff in *ACA*, a trade association representing the credit-and-collection industry, attacked the constitutionality of an emergency regulation issued by the Massachusetts Attorney General in response to the COVID-19 pandemic. *Id.* —— F.Supp.3d at ——, 2007 WL 2826952, at *1. Through the new regulation, the Attorney General used her authority to interpret the state's consumer protection statutes to define the initiation, filing, or threat to file "any new collection lawsuit" as an unfair or deceptive act subject to civil liability. *Id.* —— F.Supp.3d at —— – ——, 2007 WL 2826952, at *1-2 (citing Mass. Gen. Laws ch. 93A § 2). The court found that the plaintiff had demonstrated a likelihood of success on the merits of their Petition Clause claim, explaining that the regulation exceeded the sort of "mere procedural obstacles" permissible under the Petition Clause since it precluded the plaintiff's members from obtaining any "relief ... through authorized judicial proceedings." *Id.* —— F.Supp.3d at ——, 2007 WL 2826952, at *9 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934)).

EO 202.28 is not nearly as broad as the regulation struck down in *ACA*. In that case, the attorney general effectively outlawed legal remedies of any kind in any court, state or federal, for a whole class of creditors, debt buyers, and collections agencies. By contrast, Governor Cuomo's Order suspended one of several avenues by which landlords can seek relief for nonpayment, while leaving other (if less favored) remedial proceedings for breach of contract (which is exactly what a breach of a lease is) in place. That most of New York's courts suspended their operations during the pandemic, thereby incidentally burdening other rights not addressed by EO 202.28, does not mean that the Order forecloses Plaintiffs from petitioning the government. To rule otherwise would greatly exaggerate the actual effects of a temporary pause on a subset of evictions, which nevertheless preserved the landlords' economic rights under the affected rental agreements, and which was tailored to avoid crowding in housing courts and homeless shelters during an ongoing public health emergency.

***18** Accordingly, Governor Cuomo is entitled to summary judgment on Plaintiffs' claim that EO 202.28 violates the Petition Clause of the First Amendment.

CONCLUSION

Plaintiffs' motion for summary judgment is DENIED in full.

Defendant's motion for summary judgment is GRANTED in full.

The Clerk of Court is directed to close the motion at Docket Number 7, and close this case.

All Citations

--- F.Supp.3d ----, 2020 WL 3498456

Footnotes

1 *See Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited June 29, 2020).

2 *See New York State Department of Health COVID-19 Tracker*, available at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last visited June 29, 2020).

3 The complaint originally sought relief under the New York State Constitution as well (*see* Dkt. No. 1, Compl. ¶ 43), but constitutional principles of federalism and state sovereign immunity constraint this Court from judging a New York official's interpretation and application of New York law. State constitutional issues will not be further addressed. For a brief discussion of non-constitutional state law issues, *see* Point I, *infra*.

4 *See* Rakesh Kochnar, Pew Research Center, "Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession" (June 11, 2020), https://www.pewresearch.org/facttank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-twoyears-of-the-great-recession/ (last visiting June 22, 2020).

5 As noted above, plaintiffs originally moved for a preliminary injunction; the motion was converted to a motion for a permanent injunction (i.e., a motion for summary judgment) after a conference with the court. In either instance, the plaintiffs bore the burden to introduce such evidence as might be necessary to support their legal arguments. By foregoing discovery the plaintiffs did not eliminate that burden.

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Los Quatros, Inc. v. State Farm Life Ins. Co., N.M., August 23, 1990

54 S.Ct. 231
Supreme Court of the United States

HOME BUILDING & LOAN ASS'N
v.
BLAISDELL et ux.

No. 370.
|
Argued Nov. 8, 9, 1933.
|
Decided Jan. 8, 1934.

Synopsis
Action by John H. Blaisdell and wife against the Home Building & Loan Association. Judgment for plaintiff was affirmed by the state Supreme Court (249 N.W. 893) on the authority of a former opinion (249 N.W. 334), and defendant appeals.

Affirmed.

Mr. Justice SUTHERLAND, Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER dissenting.

West Headnotes (19)

[1] **Constitutional Law** ⇐ Application in general
Constitutional Law ⇐ Literal application
Constitutional prohibition against impairment of obligation of contracts is not absolute, and is not to be read with literal exactness like mathematical formula. U.S.C.A.Const. art. 1, § 10.

162 Cases that cite this headnote

[2] **Constitutional Law** ⇐ What is a "contractual obligation"; existing law
Obligation of contract is law which binds parties to perform their agreement. U.S.C.A.Const. art. 1, § 10.

21 Cases that cite this headnote

[3] **Constitutional Law** ⇐ Existence and extent of impairment
Constitutional Law ⇐ Invalidation of contract
Obligations of a contract are impaired by law which renders them invalid, or releases or extinguishes them. U.S.C.A.Const. Amend. 1, § 10.

31 Cases that cite this headnote

[4] **Corporations and Business Organizations** ⇐ Express or implied grant of power in general
Though charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against state.

5 Cases that cite this headnote

[5] **Constitutional Law** ⇐ Eminent domain
All contracts are subject to right of eminent domain. U.S.C.A.Const. art. 1, § 10.

4 Cases that cite this headnote

[6] **Constitutional Law** ⇐ Police power; purpose of regulation
States retain adequate power to protect public health against maintenance of nuisances and to protect public safety despite insistence upon existing contracts. U.S.C.A.Const. art. 1, § 10.

55 Cases that cite this headnote

[7] **Constitutional Law** ⇐ Police power; purpose of regulation
Economic interests of state may justify exercise of its continuing and dominant protective power, notwithstanding interference with contracts. U.S.C.A.Const. art. 1, § 10.

105 Cases that cite this headnote

[8] **Constitutional Law** ⇦ Police power; purpose of regulation

Where protective power of state is exercised in manner otherwise appropriate in regulation of business, it is no objection that performance of existing contracts may be frustrated by prohibition of injurious practices. U.S.C.A.Const. art. 1, § 10.

58 Cases that cite this headnote

[9] **States** ⇦ Powers Reserved to States

Whatever is reserved of state power must be consistent with fair intent of constitutional limitation of that power.

14 Cases that cite this headnote

[10] **Constitutional Law** ⇦ Police power; purpose of regulation

Power of state to give temporary relief from enforcement of contracts exists when urgent public need demanding such relief is produced by economic causes as well as in the presence of disasters caused by fire, flood or earthquake.

75 Cases that cite this headnote

[11] **Constitutional Law** ⇦ Emergency

Whether exigency still exists upon which continued operation of law depends to relieve an economic emergency is always open to judicial inquiry.

38 Cases that cite this headnote

[12] **Evidence** ⇦ Legislative proceedings and journals

Evidence ⇦ Proceedings in other courts

United States Supreme Court takes judicial notice that finding of state court respecting emergency has support in facts.

9 Cases that cite this headnote

[13] **Constitutional Law** ⇦ Liens and mortgages

Relief afforded mortgage debtors from foreclosure of valid mortgages justified by economic emergency could only be of character appropriate to that emergency, and could be granted only upon reasonable conditions.

98 Cases that cite this headnote

[14] **Constitutional Law** ⇦ Liens and mortgages

Constitutional Law ⇦ Execution sales; redemption

Constitutional Law ⇦ Real property in general

Constitutional Law ⇦ Enforcement; proceedings

Mortgages and Deeds of Trust ⇦ Redemption

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as impairing obligation of contract. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

53 Cases that cite this headnote

[15] **Constitutional Law** ⇦ Particular Issues and Applications

Whether legislation designed to relieve an economic emergency is wise or unwise as a matter of policy is question with which courts are not concerned.

83 Cases that cite this headnote

[16] **Evidence** ⇦ Legislative proceedings and journals

United States Supreme Court takes judicial notice that finding of Legislature respecting emergency has support in facts.

22 Cases that cite this headnote

[17] **Mortgages and Deeds of Trust** ⇦ Redemption

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held valid. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

24 Cases that cite this headnote

[18] **Constitutional Law** ⇨ Real property in general

Mortgages and Deeds of Trust ⇨ Redemption

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as violating equal protection clauses. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

8 Cases that cite this headnote

[19] **Constitutional Law** ⇨ Enforcement; proceedings

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as violating due process clause. Laws Minn.1933, c. 339; U.S.C.A. Const. art. 1, § 10, and Amend. 14.

21 Cases that cite this headnote

****231** ***398** Appeal from the Supreme Court of the State of Minnesota.

Attorneys and Law Firms

***402** Messrs. Karl H. Covell and Alfred W. Bowen, both of Minneapolis, Minn., for appellant.

***409** Messrs. Harry H. Peterson and Wm. S. Ervin, both of St. Paul, Minn., for appellees.

Opinion

***415** Mr. Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, ***416** as being repugnant to the contract clause (article 1, s 10) and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota (249 N.W. 334, 86 A.L.R. 1507; 249 N.W. 893), and the case comes here on appeal.

****232** The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act (part 1, s 8). There are separate provisions in part 2 relating to homesteads, but these are to apply 'only to cases not entitled to relief under some valid provision of Part One.' The act is to remain in effect 'only during the continuance of the emergency and in no event beyond May 1, 1935.' No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part 2, s 8.

The act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part 1, s 9. We are here concerned with the provisions of part 1, s 4, authorizing the district court of the county to extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable,' subject to the above-described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor 'to pay all or a reasonable part of such ***417** income or rental value, in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness at such times and in such manner' as shall be determined by the court.[1] The section also provides that the time for redemption ***418** from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the act, shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the act, no action, prior to May 1, 1935,

may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the act has expired. Prior to the expiration of the extended period of redemption, the court may revise or alter the terms of the extension as changed circumstances may require. Part 1, s 5.

****233** Invoking the relevant provision of the statute, appellees applied to the district court of Hennepin county for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot ***419** in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement, and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3,700.98; that appellant was the holder of the sheriff's certificate of sale; that, because of the economic depression, appellees had been unable to obtain a new loan or to redeem, and that, unless the period of redemption were extended, the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage, including all liens, costs, and expenses.

On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state Constitutions, and moved that the petition be dismissed. The motion was granted, and a motion for a new trial was denied. On appeal, the Supreme Court of the state reversed the decision of the district court. 249 N.W. 334, 337, 86 A.L.R. 1507. Evidence was then taken in the trial court, and appellant renewed its constitutional objections without avail. The court made findings of fact setting forth the mortgage made by the appellees on August 1, 1928, the power of sale contained in the mortgage, the default and foreclosure by advertisement, and the sale to appellant on May 2, 1932, for $3,700.98. The court found that the time to redeem would expire on May 2, 1933, under the laws of the state as they were in effect when the mortgage was made and when it was foreclosed; that the reasonable value of the income on the property, and the reasonable rental value, was $40 a month; that the bid made by appellant on the foreclosure sale, and the purchase price, were the full amount of the mortgage indebtedness, and that there was no deficiency after the sale; that the reasonable present market value of the premises was $6,000; and that the ***420** total amount of the purchase price, with taxes and insurance premiums subsequently paid by appellant, but exclusive of interest from the date of sale, was $4,056.39. The court also found that the property was situated in the closely built-up portions of Minneapolis; that it had been improved by a two-car garage, together with a building two stories in height which was divided into fourteen rooms; that the appellees, husband and wife, occupied the premises as their homestead, occupying three rooms and offering the remaining rooms for rental to others.

The court entered its judgment extending the period of redemption of May 1, 1935, subject to the condition that the appellees should pay to the appellant $40 a month through the extended period from May 2, 1933; that is, that in each of the months of August, September, and October, 1933, the payments should be $80, in two installments, and thereafter $40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness.[2] It is this judgment, sustained by the Supreme Court of the state on the authority of its former opinion, which is here under review. 249 N.W. 893.

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract cause of the Federal Constitution, within the police power of the state as that power was called into exercise by the public economic emergency which the Legislature had found to exist. Attention is thus directed to the preamble and first section of the ***421** statute which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords.[3] The state court, declaring that it ****234** ***422** could not say that this legislative finding was without basis, supplemented that finding by its own statement of conditions of which it took judicial notice. The court said:

'In addition to the weight to be given the determination of the Legislature that an economic emergency exists which demands relief, the court must take notice of other considerations. The members of the Legislature come from every community of the state and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession, and business in the state. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had

closed banks temporarily. The Congress, *423 in addition to many extraordinary measures looking to the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the Legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief.'

Justice Olsen of the state court, in a concurring opinion, added the following:

'The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people, and threatens to result in the loss of their homes by many other people in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and Congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.'[4]

**235 *424 We approach the questions thus presented upon the assumption made below, as required by the law of the state, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable the period of redemption from the sale was one year, and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser; and that, during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute *425 not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions *426 which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U.S. 332, 348, 37 S.Ct. 298, 302, 61 L.Ed. 755, L.R.A. 1917E, 938, Ann.Cas. 1918A, 1024. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war sucessfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.[5] When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a state to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which

the States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by ***427** the fact that the contract clause is associated in the same section with other and more specific prohibitions. Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See Groves v. Slaughter, 15 Pet. 449, 505, 10 L.Ed. 800; Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434, 52 S.Ct. 607, 76 L.Ed. 1204.

In the construction of the contract clause. the debates in the Constitutional Convention ****236** are of little aid.[6] But the reasons which led to the adoption of that clause, and of the other prohibitions of section 10 of article 1, are not left in doubt, and have frequently been described with eloquent emphasis.[7] The widespread distress following the revolutionary period and the plight of debtors had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. 'The sober people of America' were convinced that some 'thorough reform' was needed which would 'inspire a general prudence and industry, and give a regular course to the business of society.' The Federalist, No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of 'private faith.' The occasion and general purpose of ***428** the contract clause are summed up in the terse statement of Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. 213, 354, 355, 6 L.Ed. 606: 'The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.'

[1] But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. Nor does an examination of the details of prior legislation in the States yield criteria which can be considered controlling. To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. Justice Johnson, in Ogden v. Saunders, supra, page 286 of 12 Wheat., 6 L.Ed. 606, adverted to such a misdirected effort in these words: 'It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings.' And, after giving his view as to the purport of the clause, 'that the states shall pass no law, ***429** attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport,' Justice Johnson added: 'But to assign to contracts, universally, a literal purport, and to exact from them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfilment of contracts, as over the form and measure of the remedy to enforce them.'

The inescapable problems of construction have been: What is a contract?[8] What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, 'of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.' Story on the Constitution, s 1375.

****237** **[2]** The obligation of a contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L.Ed. 529; Story, op. cit., s 1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it ***430** is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * *

* Nothing can be more material to the obligation than the means of enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.' Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552, 18 L.Ed. 403. See, also, Walker v. Whitehead, 16 Wall. 314, 317, 21 L.Ed. 357. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. Sturges v. Crowninshield, supra, 4 Wheat. 200, 4 L.Ed. 529. Said he: The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in Von Hoffman v. City of Quincy, supra, 4 Wall. 553, 554, 18 L.Ed. 403, the general statement above quoted was limited by the further observation that 'it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' And Chief Justice Waite, quoting this language in Antoni v. Greenhow, 107 U.S. 769, 775, 2 S.Ct. 91, 96, 27 L.Ed. 468, added: 'In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge.'

***431** **[3]** The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them[9] (Sturges v. Crowninshield, supra, 4 Wheat. 197, 198, 4 L.Ed. 529) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.[10] In Sturges v. Crowninshield, supra, a state insolvent law, which discharged the debtor from liability, was held to be invalid as applied to contracts in existence when the law was passed. See Ogden v. Saunders, supra. In Green v. Biddle, 8 Wheat. 1, 5 L.Ed. 547, the legislative acts, which were successfully assailed, exempted the occupant of land from the payment of rents and profits to the rightful owner, and were 'parts of a system the object of which was to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them, without his consent or default.' In Bronson v. Kinzie, 1 How. 311, 11 L.Ed. 143, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed condition of business,[11] following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extinguished ***432** for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the Bronson Case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. McCracken v. Hayward, 2 How. 608, 11 L.Ed. 397; Gantly's Lessee v. Ewing, 3 How. 707, 11 L.Ed. 794, and Howard v. Bugbee, 24 How. 461, 16 L.Ed. 753, followed the decision in Bronson v. Kinzie; that of McCracken, condemning a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of three householders; that of Gantly's Lessee, condemning a statute which required a sale for not less than one-half the appraised ****238** value; and that of Howard, making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale. In Planter's Bank v. Sharp, 6 How. 301, 12 L.Ed. 447, a state law was found to be invalid which prevented a bank from transferring notes and bills receivable which it had been duly authorized to acquire. In Von Hoffman v. City of Quincy, supra, a statute which restricted the power of taxation which had previously been given to provide for the payment of municipal bonds was set aside. Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish, 111 U.S. 716, 4 S.Ct. 648, 28 L.Ed. 574, and Seibert v. Lewis, 122 U.S. 284, 7 S.Ct. 1190, 30 L.Ed. 1161, are similar cases. In Walker v. Whitehead, 16 Wall. 314, 21 L.Ed. 357, the statute, which was held to be repugnant to the contract clause, was enacted in 1870, and provided that, in all suits pending on any debt or contract made before June 1, 1865, the plaintiff should not have a verdict unless it appeared that all taxes chargeable by law on the same had been ***433** duly paid for each year since the contract was made; and, further, that in all cases of indebtedness of the described class the defendant might offset any losses he had suffered in consequence of the late war either from destruction or depreciation of property. See Daniels v. Tearney, 102 U.S. 415, 419, 26 L.Ed. 187. In Gunn v. Barry, 15 Wall. 610, 21 L.Ed. 212, and Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793, statutes applicable to prior contracts were condemned because of increases in the amount of the property of judgment debtors which were exempted from levy and sale on execution. But, in Penniman's Case, 103 U.S. 714, 720, 26 L.Ed. 602, the Court decided

that a statute abolishing imprisonment for debt did not, within the meaning of the Constitution, impair the obligation of contracts previously made;[12] and the Court said: 'The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right.' In Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93, the Court held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This ruling was to the same effect as that in Bronson v. Kinzie, supra, and Howard v. Bugbee, supra. But in the Barnitz Case, the statute contained a provision for the prevention of waste, and authorized the appointment of a receiver of the premises sold. Otherwise the extension of the period for redemption was unconditional, and, in case a receiver was appointed, ***434** the income during the period allowed for redemption, except what was necessary for repairs and to prevent waste, was still to go to the mortgagor.

None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. Cohens v. Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257.

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes,[13] but ****239** the state also continues to possess authority to safeguard the vital interests of its people. It does ***435** not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

[4] **[5]** While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the state. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L.Ed. 773. And all contracts are subject to the right of eminent domain. West River Bridge v. Dix, 6 How. 507, 12 L.Ed. 535.[14] The reservation of this necessary authority of the state is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the state's power by the following statement of the controlling principle, a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 692, 17 S.Ct. 718, 721, 41 L.Ed. 1165: 'But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise, not out of the literal ***436** terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.'

[6] The Legislature cannot 'bargain away the public health or the public morals.' Thus the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state Constitution which put an end to a lottery theretofore authorized by the Legislature. Stone v. Mississippi, 101 U.S. 814, 819, 25 L.Ed. 1079. See, also, Douglas v. Kentucky, 168 U.S. 488, 497—499, 18 S.Ct. 199, 42 L.Ed. 553; compare New Orleans v. Houston, 119 U.S. 265, 275, 7 S.Ct. 198, 30 L.Ed. 411. The lottery was a valid enterprise when established under express state authority, but the Legislature in the public interest could put a stop to it. A similar rule has been applied to the control by the state of the sale of intoxicating liquors. Boston Beer Company v. Massachusetts, 97 U.S. 25, 32, 33, 24 L.Ed. 989. See Mugler v. Kansas, 123 U.S. 623, 664, 665, 8 S.Ct. 273, 31 L.Ed. 205. The states retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. Northwestern Fertilizing Company v.

Hyde Park, 97 U.S. 659, 667, 24 L.Ed. 1036; Butchers' Union Company v. Crescent City Company, 111 U.S. 746, 750, 4 S.Ct. 652, 28 L.Ed. 585. Legislation to protect the public safety comes within the same category of reserved power. Chicago, B. & Q.R.R. Co. v. Nebraska, 170 U.S. 57, 70, 74, 18 S.Ct. 513, 42 L.Ed. 948; Texas & N.O.R.R. Co. v. Miller, 221 U.S. 408, 414, 31 S.Ct. 534, 55 L.Ed. 789; Atlantic Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721. This principle has had recent and noteworthy application to the regulation of the use of public highways by common carriers and 'contract carriers,' where the assertion of ***437** interference with existing contract rights has been without avail. Sproles v. Binford, 286 U.S. 374, 390, 391, 52 S.Ct. 581, 76 L.Ed. 1167; Stephenson v. Binford, supra.

[7] **[8]** The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In Manigault v. Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the Legislature of the state, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests ****240** were subservicent to the public right. The Court said (Id. page 480 of 199 U.S., 26 S.Ct. 127, 130): 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.' A statute of New Jersey (P.L.N.J. 1905, p. 461 (4 Comp.St. 1910, p. 5794)) prohibiting the transportation of water of the state into any other state was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the state. Said the Court, by Mr. Justice Holmes (Hudson County Water Co. v. McCarter, 209 U.S. page 357, 28 S.Ct. 529, 531, 52 L.Ed. 828, 14 Ann.Cas. 560): 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making ***438** a contract about them. The contract will carry with it the infirmity of the subject-matter.' The general authority of the Legislature to regulate, and thus to modify, the rates charged by public service corporations, affords another illustration. Stone v. Farmers' Loan & Trust Company, 116 U.S. 307, 325, 326, 6 S.Ct. 334, 388, 1191, 29 L.Ed. 636. In Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420, a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained. To the same effect are Producers' Transportation Co. v. Railroad Commission, 251 U.S. 228, 232, 40 S.Ct. 131, 64 L.Ed. 239, and Sutter Butte Canal Co. v. Railroad Commission, 279 U.S. 125, 138, 49 S.Ct. 325, 73 L.Ed. 637. Similarly, where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 363, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455. See, also, St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 274, 39 S.Ct. 274, 63 L.Ed. 599.

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the Legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety, or welfare, or ***439** where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

[9] **[10]** Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation

to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See American Land Co. v. Zeiss, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And, if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that ***440** power cannot be said to be nonexistent when the urgent public ****241** need demanding such relief is produced by other and economic causes.

Whatever doubt there may have been that the protective power of the state, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595. The case of Block v. Hirsh, supra, arose in the District of Columbia and involved the due process clause of the Fifth Amendment. The cases of the Marcus Brown Company and the Levy Leasing Company arose under legislation of New York, and the constitutional provision against the impairment of the obligation of contracts was invoked. The statutes of New York,[15] declaring that a public emergency existed, directly interfered with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the city of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels), were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances) providing the tenants or occupants were ready, able, and willing to pay a reasonable rent or price for their use and ***441** occupation. People v. La Fetra, 230 N.Y. 429, 438, 130 N.E. 601, 16 A.L.R. 152; Levy Leasing Co. v. Siegel, 230 N.Y. 634, 130 N.E. 923. In the case of the Marcus Brown Company the facts were thus stated by the District Court (269 F. 306, 312): 'The tenant defendants herein, by law older than the state of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman et al. may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, i.e., pay what 'a court of competent jurisdiction' regards as fair and reasonable compensation for such enforced use and occupancy.' Answering the contention that the legislation as thus applied contravened the constitutional prohibition, this Court, after referring to its opinion in Block v. Hirsh, supra, said: 'In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.' 256 U.S. page 198, 41 S.Ct. 465, 466, 65 L.Ed. 877. This decision was followed in the case of the Levy Leasing Company, supra.

[11] In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was ***442** prevented from regaining possession. The Court also decided that, while the declaration by the Legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law 'depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' It is always open

to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. Chastleton Corporation v. Sinclair, 264 U.S. 543, 547, 548, 44 S.Ct. 405, 406, 68 L.Ed. 841.

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

****242** It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time ***443** of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a constitution we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579); 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' Id. page 415 of 4 Wheat. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641, 11 A.L.R. 984, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the states to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs ***444** and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in Ogden v. Saunders, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, supra, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the state is read into all contracts, and there is no greater reason for efusing to apply this principle to Minnesota mortgages than to New York leases.

Applying the criteria established by our decisions, we conclude:

[12] **[13]** 1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. Block v. Hirsh, supra. The finding of the Legislature and state court has support in the facts of which we take judicial notice. Atchison, T. & S.F. Rwy. Co. v. United States, 284 U.S. 248, 260, 52 S.Ct. 146, 76 L.Ed. 273. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said (249 N.W. 334, 337), the economic emergency which threatened

'the *445 loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence' was a 'potent cause' for the enactment of the statute.

2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under **243 the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as *446 insurance companies, banks, and investment and mortgage companies.[16] These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The Legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience.[17] The 'equity of redemption' is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security, that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, *447 notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common-law judges, who thought that by 'the Growth of Equity on Equity the Heart of the Common Law is eaten out.' The equitable principle became firmly established, and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim 'once a mortgage, always a mortgage, and nothing but a mortgage.'[18] Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

[14] [15] We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or *448 unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause. Block v. Hirsh, supra.

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one. Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; Clark v. Tutusville, 184 U.S. 329, 22 S.Ct. 382, 46 L.Ed. 569; Quong Wing v. Kirkendall, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350; Ohio Oil Co. v. Conway, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775; Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

****244** Mr. Justice SUTHERLAND, dissenting.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. ***449** It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in Ex parte Milligan, 4 Wall. 2, 120, 121, 18 L.Ed. 281, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist to-day. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. 'Those great and good men,' the Court said, 'foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.' And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the 'supreme law of the land,' binding equally upon governments and governed at all times ***450** and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. * * *'

Chief Justice Taney, in Dred Scott v. Sandford, 19 How. 393, 426, 15 L.Ed. 691, said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.' And in South Carolina v. United States,

199 U.S. 437, 448, 449, 26 S.Ct. 110, 111, 59 L.Ed. 261, 4 Ann.Cas. 737, in an opinion by Mr. Justice Brewer, this court quoted these words with approval and said:

'The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. * * * Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.'

***451** The words of Judge Campbell, speaking for the Supreme Court of Michigan in People ex rel. Twitchell v. Blodgett, 13 Mich. 127, 139, 140, are peculiarly apposite. 'But it may easily happen,' he said, 'that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. ****245** They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not completent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

'* * * Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. * * * But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions.'

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning.[1] But, their meaning is changeless; it is only their application which is extensible. See South Carolina v. United States, supra, 199 U.S. pages 448, 449, 26 S.Ct. 110, 59 L.Ed. 261, 4 Ann.Cas. 737. Constitutional grants of ***452** power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. These doctrines, upon the principles of the common law itself, modify or abrogate themselves whenever they are or whenever they become plainly unsuited to different or changed conditions. Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, decided December 11, 1933. The distinction is clearly pointed out by Judge Cooley, 1 Constitutional Limitations (8th Ed.) 124:

'A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, ***453** and it is not different at any subsequent time when a court has occasion to pass upon it.'

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. Lake County v. Rollins, 130 U.S. 662, 670, 9 S.Ct. 651, 32 L.Ed. 1060. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. Knowlton v. Moore, 178 U.S. 41, 95, 20 S.Ct. 747, 44 L.Ed. 969. The history of the times, the state of things existing when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy. Rhode Island v. Massachusetts, 12 Pet. 657, 723, 9 L.Ed. 1233; Craig v. Missouri, 4 Pet. 410, 431, 432, 7 L.Ed. 903. As nearly as possible we should place ourselves in the condition of those who framed and adopted it. In re Bain, 121 U.S. 1, 12, 7 S.Ct. 781, 30 L.Ed. 849. And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted. Maxwell v. Dow, 176 U.S. 581, 602,

20 S.Ct. 448, 494, 44 L.Ed. 597; Jarrolt v. Moberly, 103 U.S. 580, 586, 26 L.Ed. 492.

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause ****246** will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress. Indeed, ***454** it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 518, 644, 645, 4 L.Ed. 629.

Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise far beyond their capacity to pay. From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted. On the other hand, it was insisted that the case of the debtor should be viewed with tenderness; and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc. There followed, as there must always follow from such a course, a long trail of ills; one of the direct ***455** consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent. Real property could be sold only at a ruinous loss. Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and in some instances threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and in many instances the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultuous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy. Marshall, Life of Washington (1807), vol. 5, pp. 88—131.

That this brief outline of the situation is entirely accurate is borne out by all contemporaneous history, as well as by writers of distinction of a later period.[2] Compare ***456** ****247** Edwards v. Kearzey, 96 U.S. 595, 604—607, 24 L.Ed. 793. The appended note might be extended for many pages by the addition of similar quotations from the same and other writers, but enough appears to establish beyond all question ***457** the extreme gravity of the emergency, the great difficulty and frequent impossibility which confronted debtors generally in any effort to discharge their obligations.

***458** In an attempt to meet the situation, recourse was had to the Legislatures of the several states under the Confederation; and these bodies passed, among other acts, the following: Laws providing for the emission of bills of credit and making them legal tender for the payment of debts, and providing also for such payment by the delivery of specific property at a fixed valuation; installment laws, authorizing payment of overdue obligations at future intervals of time; stay laws and laws temporarily closing access to the courts; and laws discriminating against British creditors, I have selected, out of a vast number, a few historical comments upon the character and effect of these legislative devices.[3]

****248** ***459** In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defects of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution. Shortly prior to the meeting of the Convention, Madison had

assailed a bill pending in the Virginia Assembly, proposing the payment of private debts in three annual installments, on the ground that 'no legislative principle could vindicate such an interposition ***460** of the law in private contracts.' The bill was lost by a single vote.[4] Pelatiah Webster had likewise assailed similar laws as altering the value of contracts; and William Paterson, of New Jersey, had insisted that 'the legislature should leave the parties to the law under which they contracted.'[5]

In the plan of government especially urged by Sherman and Ellsworth there was an article proposing that the Legislatures of the individual states ought not to possess a right to emit bills of credit, etc., 'or in any manner to obstruct or impede the recovery of debts, whereby the ***461** interests of foreigners or the citizens of any other state may be affected.'[6] And on July 13, 1787, Congress in New York, acutely conscious of the evils engendered by state laws interfering with existing contracts,[7] passed the Northwest Territory Ordinance, which contained the clause: 'And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.'[8] It is not surprising, therefore, that, after the Convention had adopted the clauses, no state shall 'emit bills of credit,' or 'make any thing but gold and silver coin a tender in payment of debts,' Mr. King moved to add a 'prohibition on the states to interfere in private contracts.' This was opposed by Gouverneur Morris and Colonel Mason. Colonel Mason thought that this would be carrying the restraint too far; that cases would happen that could not be foreseen where some kind of interference would be essential. This was on August 28. But Mason's view did not prevail, for, on September 14 following, the first clause of article 1, s 10, was altered so as to include the provision: 'No state shall * * * pass any * * * law impairing the obligation of contracts,' and in that form it was adopted.[9]

Luther Martin, in an address to the Maryland House of Delegates, declared his reasons for voting against the provision. He said that he considered there might be times of such great public calamity and distress as should render ***462** it the duty of a government in some measure to interfere by passing laws totally or partially stopping courts of justice, or authorizing the debtor to pay by installments; that such regulations had been found necessary in most or all of the states 'to prevent the wealthy creditor and the moneyed man from totally destroying the poor, though industrious debtor. Such times may again ****249** arrive.' And he was apprehensive of any proposal which took from the respective states the power to give their debtor citizens 'a moment's indulgence, however necessary it might be, and however desirous to grant them aid.'[10]

On the other hand, Sherman and Ellsworth defended the provision in a letter to the Governor of Connecticut.[11] In the course of the Virginia debates, Randolph declared that the prohibition would be promotive of virtue and justice, and preventive of injustice and fraud; and he pointed out that the reputation of the people had suffered because of frequent interferences by the state Legislatures with private contracts.[12] In the North Carolina debates, Mr. Davie declared that the prohibition against impairing the obligation of contracts and other restrictions ought to supersede the laws of particular states. He thought the constitutional provisions were founded on the strongest principles of justice.[13] Pinckney, in the South Carolina debates, said that he considered the section including the clause in question as 'the soul of the Constitution,' teaching the states 'to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness.'[14]

***463** The provision was strongly defended in The Federalist, both by Hamilton in No. 7 and Madison in No. 44. Madison concluded his defense of the clause by saying:

***464** '* * * One legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.'

Contemporaneous history is replete with evidence of the sharp conflict of opinion with respect to the advisability of adopting the clause. Dr. Ramsay (The History of South-Carolina (1809), vol. 2, pp. 431—433), already referred to, writing of the action of South Carolina and especially referring to the contract impairment clause, says that this Constitution was accepted and ratified on behalf of the state, and speaks of it as an act of great self-denial:

'The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not

have made at any period of the last five years; for in them she had passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future legislatures so as to deprive them of a power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used.'

There is an old case, Glaze v. Drayton, 1 Desaus. (S.C.) 109, decided in 1784, where the South Carolina court of chancery entered a decree for the specific performance of a contract ****250** for the purchase of land, but providing for the payment of the balance due under the contract ***465** 'by instalments, at the times mentioned in the acts of assembly respecting the recovery of old debts.' In reporting that case soon after the adoption of the Constitution, Chancellor De Saussure added the following explanatory and illuminating note:

'The legislature, in consideration of the distressed state of the country, after the war, had passed an act, preventing the immediate recovery of debts, and fixing certain periods for the payment of debts, far beyond the periods fixed by the contract of the parties. These interferences with private contracts, became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent, that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty, and adopting an efficient national government, than these abuses of power by the state legislatures.'

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency. And, if further proof be required to strengthen what already is inexpugnable, such proof will be found in the previous decisions of this court. There are many such decisions; but it is necessary to refer to a few only which bear directly upon the question, namely: Bronson v. Kinzie, 1 How. 311, 11 L.Ed. 143; McCracken v. Hayward, 2 How. 608, 11 L.Ed. 397; Gantly's Lessee v. Ewing, 3 How. 707, 11 L.Ed. 794; Howard v. Bugbee, 24 How. 461, 16 L.Ed. 753; Gunn v. Barry, 15 Wall. 610, 21 L.Ed. 212; ***466** Walker v. Whitehead, 16 Wall. 314, 318, 21 L.Ed. 357; Edwards v. Kearzey, 96 U.S. 595, 604, 24 L.Ed. 793; Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93, and Bradley v. Lightcap, 195 U.S. 1, 24 S.Ct. 748, 49 L.Ed. 65.

Bronson v. Kinzie was decided at the January term, 1843. The case involved an Illinois statute, extending the period of redemption for a period of twelve months after a sale under a decree in chancery, and another statute preventing a sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. This Court held both statutes invalid, when applied to an existing mortgage, as infringing the contract impairment clause. No more need now be said as to the points decided. The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter.[15] And, in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the Court.

The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so.[16] Mr. Warren, in his book, 'The Supreme Court in United States History,' vol. 2, pp. 376—379, gives a vivid picture of the situation. After referring to Bronson v. Kinzie and the statute extending the period of redemption therein dealt with, he points to the prevailing state of business and finance ***467** which had called the statute into existence; to the bank failures, state debt repudiations, scarcity of hard money, the inability to pay debts except by disposing of property at ruinous prices; to the enactment of statutes for the relief of debtors, stay laws postponing collection of debts, etc., which had been passed by state after state; and to the action of this court in striking down the state statute in the face of these conditions.

'Unquestionably,' he continues, 'the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts; and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however,

entirely natural; and while, ultimately, these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve and to increase the financial distress, fraud and extortion, temporarily, debtors have always believed such laws to be their salvation and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the Bronson Case aroused great antagonism in the Western States. In Illinois, ****251** a mass meeting was held which resolved that the decision ought not to be heeded. * * * Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring void 'any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States. * * *"

McMaster (supra, note 2) vol. 7, pp. 44-48, is to the same effect.

***468** McCracken v. Hayward, decided at the January term, 1844, dealt with the same Illinois statute; but involved a sale on execution after judgment, whereas Bronson v. Kinzie involved a mortgage. The decision simply followed the Bronson Case. What has been said in respect of the background and setting of that case is equally applicable and need not be repeated.

Gantly's Lessee v. Ewing was decided at the January term, 1845. It held unconstitutional, as applied to a pre-existing mortgage, an act of Indiana providing that no real property should be sold on execution for less than half its appraised value. The statute, like those of Illinois, was enacted for the benefit of hard-pressed debtors as a result of the same emergency. It is referred to by McMaster, supra, as one of the 'marks on the statute books' which the 'evil times through which the people were passing' had left.

Howard v. Bugbee, decided at the December term, 1860, dealt with an Alabama statute authorizing a redemption of mortgaged property in two years after the sale under a decree. The statute was declared unconstitutional principally upon the authority of Bronson v. Kinzie. The opinion is very short, and does not refer to the question of emergency. The statute was passed, however, in 1842 (the mortgage having been executed prior thereto), and was therefore one of the emergency statutes of that period. The Alabama Supreme Court, whose decision was under review here, so treated it, and justified the statute upon that ground. 32 Ala. 713, 716, 717. It is worthy of note that, after the decision of this court in the Bugbee Case, Judge Walker, who delivered the opinion therein for the Alabama court, filed a dissenting opinion in Ex parte Pollard (Ex parte Woods), 40 Ala. 77, 110, in the course of which he said that his former opinion had been overruled by this court, and he could no longer perceive ***469** any ground upon which the convictions of a Legislature as to the welfare of the people could enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts. The basis of the legislation was, and is shown by the decision of the Alabama Supreme Court sustaining it to be, the existence of the great emergency beginning in 1837; and that question, since the Alabama decision was reviewed, was quite plainly before this court for consideration.

Walker v. Whitehead, decided at the December term, 1872, held unconstitutional a Georgia statute requiring the plaintiff, suing on a debt or contract, to prove as a condition precedent to the entry of judgment in his favor that all legal taxes chargeable by law thereon had been duly paid for each year since the making of the debt or contract. The Georgia Supreme Court, 43 Ga. 538, 544—546, had sustained the act as a measure made necessary by the desperate financial and economic conditions in that state due to the Civil War. This court, making no response to the somewhat fervid presentation of this view of the matter by the state court, simply said that the degree of impairment was immaterial; that any impairment of the obligation of a contract is within the prohibition of the Constitution; that 'a clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur.'

Edwards v. Kearzey, decided at the October term, 1877, held invalid, as applied to a preexisting debt, the provision of the North Carolina Constitution of 1868 increasing the exemptions to which a debtor was entitled. The North Carolina Supreme Court, in a series of decisions, had sustained the state constitutional provision, principally upon the ground (Garrett v. Chesire, 69 N.C. 396, 405, 12 Am.Rep. 647) that it was adopted at a time when 'probably one-half of the debtor class are owing more old debts than ***470** they can pay'; and that, 'if under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of. * * *' In the brief of defendant in error in this court (pp. 7, 8), the view was strongly urged that the provision was not so much for the benefit of the debtor as for that of the state to prevent the evils of almost universal pauperism. Attention was called to the desperate condition of the people of the state following the Civil War, and it was said that one-third of the whole population were paupers, all their property except lands having disappeared; that one-

half of the people did not own and enough to afford burial for that proportion of the population; and against those who did own land the antewar debts were piled mountain high. It was submitted that the state, on being rehabilitated, was not bound to allow the creditor to strip the few self-supporting landowners of their means of existence and thereby add them to the vast army of the impoverished; but that it had the right to defer ****252** a portion of the creditor's claim until the prostrated community had opportunity to recoup some of its losses.

This court, in response, reviewed the history of the adoption of the contract impairment clause and held the state constitutional provision invalid. "Policy and humanity," it said, 'are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. (Italics added.) Our duty is simply to execute it.'

Barnitz v. Beverly was decided May 18, 1896. A law of Kansas extended the period of redemption from a sale under a mortgage for a period of eighteen months, during which time the mortgagor was to remain in possession and receive rents and profits, except as necessary for repairs. ***471** The act was passed in 1893 in the midst of another panic, the severity of which, still within the memory of the members of this court, is a matter of common knowledge. The effects of that panic extended into every form of industry; bank failures were on an unprecedented scale; more than half the railroads of the country were in the hands of receivers; securities fell to 50 per cent., often to 25 per cent., of their former value; commercial failures and unemployment became general; heavy inroads were made upon public and private resources in caring for the hungry and destitute;[17] great bodies of idle men—the so-called 'industrial armies'—marched toward Washington, feeding like locusts upon the country through which they passed.

These conditions were brought to the attention of this court. In addition, the Supreme Court of Kansas, 55 Kan. 466, 484, 485, 42 P. 725, 731, 31 L.R.A. 74, 49 Am.St.Rep. 257, had relied upon them as a justification for the legislation, and had inquired why the state Legislature in a time of general depression could not 'extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice?'

In response to all of which, this court, after reviewing its former decisions, held the statute invalid as applied to a sale under a mortgage executed before its bassage.

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, ***472** financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this Court. That defense should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.

The lower court, and counsel for the appellees in their argument here, frankly admitted that the statute does constitute a material impairment of the contract, but contended that such legislation is brought within the state power by the present emergency. If I understand the opinion just delivered, this court is not wholly in accord with that view. The opinion concedes that emergency does not create power, or increase granted power, or remove or diminish restrictions upon power granted or reserved. It then proceeds to say, however, that, while emergency does not create power, it may furnish the occasion for the exercise of power. I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion for diminishing it; and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied.

***473** It is quite true that an emergency may supply the occasion for the exercise of power, dependent upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion

for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion. The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence. Const. art. 4, s 4. But we are here dealing, not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence the **253 question is, not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were nonexistent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a *474 circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: Does the Minnesota statute constitute an impairment of the obligation of the contract now under review?

In answering that question, we must first of all distinguish the present legislation from those statutes which, although interfering in some degree with the terms of contracts, or having the effect of entirely destroying them, have nevertheless been sustained as not impairing the obligation of contracts in the constitutional sense. Among these statutes are such as affect the remedy merely, as to which this court said in Bronson v. Kinzie, supra, 1 How. at page 316, 11 L.Ed. 143, and repeated in Edwards v. Kearzey, supra, 96 U.S. page 604, 24 L.Ed. 793: 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.'

Another class of statutes is illustrated by those exempting from execution and sale certain classes of property, like the tools of an artisan. Chief Justice Taney, in Bronson v. Kinzie, supra, speaking obiter, said that a state might properly exempt necessary implements of agriculture, or the toold of a mechanic, or articles of necessity in household furniture. But this court, in Edwards v. Kearzey, supra, struck down a provision of the North Carolina Constitution which exempted every homestead, and the dwelling and buildings used therewith, not exceeding in value $1,000, on the ground of its unconstitutionality as applied to a contract already in existence. Referring to the opinion in Bronson v. Kinzie, the court said (page 604 of 96 U.S.) *475 that the Chief Justice seems to have had in his mind the maxim 'de minimis,' etc. 'Upon no other ground can any exemption be justified.'

It is quite true also that 'the reservation of essential attributes of sovereign power is also read into contracts'; and that the Legislature cannot 'bargain away the public health or the public morals.' General statutes to put an end to lotteries, the sale or manufacture of intoxicating liquors, the maintenance of nuisances, to protect the public safety, etc., although they have the indirect effect of absolutely destroying private contracts previously made in contemplation of a continuance of the state of affairs then in existence but subsequently prohibited, have been uniformly upheld as not violating the contract impairment clause. The distinction between legislation of that character and the Minnesota statute, however, is readily observable. It may be demonstrated by an example. A, engaged in the business of manufacturing intoxicating liquor within a state, makes a contract, we will suppose, with B to manufacture and deliver at a stipulated price and at some date in the future a quantity of whisky. Before the day arrives for the performance of the contract, the state passes a law prohibiting the manufacture and sale of intoxicating liquor. The contract immediately falls because its performance has ceased to be lawful. This is so because the contract is made upon the implied condition that a particular state of things shall continue to exist, 'and when that state of things ceases to exist the bargain itself ceases to exist.' Marshall v. Glanvill, (1917) 2 K.B. 87, 91. In that case the plaintiff had been employed by the defendants upon a contract of service. While the contract was in force, the country became involved in the World War, and plaintiff was called into the military service. The court held that this rendered

performance unlawful and that the contract was at an end. It said:

***476** 'Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end.'

****254** In Re Shipton, Anderson & Co., (1915) 3 K.B. 676, a parcel of wheat then lying in a warehouse was sold for future payment and delivery. The wheat was subsequently requisitioned by the English government, and the sellers became unable to deliver. The Court of King's Bench Division held that the sellers were not liable. Darling, Justice, agreeing with the opinion of Lord Reading, said (pages 683, 684 of (1915) 3 K.B.):

'If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.'

The general subject is discussed by this court in Omnia Commercial Co. v. United States, 261 U.S. 502, page 513, 43 S.Ct. 437, 67 L.Ed. 773, and it is there pointed out that the effect of such a requisition is not to appropriate the contract but to frustrate it—an essentially different thing.

The same distinction properly may be made as to the contract impairment clause, in respect of subsequent state legislation rendering unlawful a state of things which was lawful when an obligation relating thereto was contracted. ***477** By such legislation the obligation is not impaired in the constitutional sense. The contract is frustrated—it disappears in virtue of an implied condition to that effect read into the contract itself. Thus, in F. A. Tamplin Steamship Co., Ltd., v. Anglo-Mexican Petroleum Products Co., Ltd., (1916) 2 A.C. 397, the House of Lords had before it a case where a steamer, then subject to a charter party having nearly three years to run, had been requisitioned by the Admiralty. The applicable rule was there stated to be that the court should examine the contract and the circumstances in which it was made in order to see whether or not from their nature the parties must have made their bargain on the footing that a particular state of things would continue to exist. And, if they must have done so, a term to that effect would be implied, though not expressed in the contract. In Metropolitan Water Board v. Dick, Kerr & Company, (1918) A.C. 119, 127, 128, 137, that rule was reaffirmed, with the additional statement that a subsequent law might be the cause of an impossibility of performance, by taking away something from the control of the party as to which thing he had contracted to do or not to do something else; and that the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties when the contract was made.

Bearing in mind these aids toward determining whether such an implied condition may be read into a particular contract, let us revert to the example already given with respect to an agreement for the manufacture and sale of intoxicating liquor. And let us suppose that the state, instead of passing legislation prohibiting the manufacture and sale of the commodity, in which event the doctrine of implied conditions would be pertinent, continues to recognize the general lawfulness of the business, but, because of what it conceives to be a justifying emergency, provides that the time for the performance of existing ***478** contracts for future manufacture and sale shall be extended for a specified period of time. It is perfectly admissible, in view of the state power to prohibit the business, to read into the contract an implied proviso to the effect that the business of manufacturing and selling intoxicating liquors shall not, prior to the date when performance is due, become unlawful; but in the case last put, to read into the contract a pertinent provisional exception in the event of intermeddling state action would be more than unreasonable, it would be absurd, since we must assume that the contract was made on the footing that, so long as the obligation remained lawful, the impairment clause would effectively preclude a law altering or nullifying it however exigent the occasion might be.

That, in principle, is precisely the case here. The contract is to repay a loan within a fixed time, with the express condition that upon failure the property given as security shall be sold, and that, in the absence of a timely redemption, title shall be vested absolutely in the purchaser. This contract was lawful when made; and it has never been anything else. What the Legislature has done is to pass a statute which does not have the effect of frustrating the contract by rendering its performance unlawful, but one which, at the election of one of the parties, postpones for a time the effective enforcement of the contractual obligation, notwithstanding the obligation, under the exact terms of the contract, remains lawful and

possible of performance after the passage of the statute as it was before.

The rent cases—Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595—which are here relied upon, dealt with an exigent situation **255 due to a period of scarcity of housing caused by the war. I do not stop to consider the distinctions between them and the present case or to do more than point out that the question of contract impairment *479 received little, if any, more than casual consideration. The writer of the opinions in the first two cases, speaking for this Court in a later case, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321, characterized all of them as having gone 'to the verge of the law.' It therefore seems pertinent to say that decisions which confessedly escape the limbo of unconstitutionality by the exceedingly narrow margin suggested by this characterization should be applied toward the solution of a doubtful question arising in a different field with a very high degree of caution. Reasonably considered, they do not foreclose the question here involved, and it should be determined upon its merits without regard to those cases.

We come back, then, directly, to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions.

It is necessary, first of all, to describe the exact situation. Appellees obtained from appellant a loan of $3,800; and, to secure its payment, executed a mortgage upon real property consisting of land and a fourteen-room house and garage. The mortgage contained the conventional Minnesota provision for foreclosure by advertisement. The mortgagors agreed to pay the debt, together with interest and the taxes and insurance on the property. They defaulted; and, in strict accordance with the bargain, appellant foreclosed the mortgage by advertisement and caused the premises to be sold. Appellant itself bought the property at the sale for a sum equal to the amount of the mortgage debt. The period of redemption from that sale was due to expire on May 2, 1933; and, assuming no redemption at the end of that day, under the law in force *480 when the contract was made and when the property was sold and in accordance with the terms of the mortgage, appellant would at once have become the owner in fee and entitled to the immediate possession of the property. The statute here under attack was passed on April 18, 1933. It first recited and declared that an economic emergency existed. As applied to the present case, it arbitrarily extended the period of redemption expiring on May 2, 1933, to Mary 18, 1933—a period of sixteen days; and provided that the mortgagor might apply for a further extension to the district court of the county. That court was authorized to extend the period to a date not later than May 1, 1935, on the condition that the mortgagor should pay to the creditor all or a reasonable part of the income or rental value, as to the court might appear just and equitable, toward the payment of taxes, insurance, interest and principal mortgage indebtedness, and at such times and in such manner as should be fixed by the court. The court to whom the application in this case was made extended the time until May 1, 1935, upon the condition that payment by the mortgagor of the rental value, $40 per month, should be made.

It will be observed that, whether the statute operated directly upon the contract or indirectly by modifying the remedy, its effect was to extend the period of redemption absolutely for a period of sixteen days, and conditionally for a period of two years. That this brought about a substantial change in the terms of the contract reasonably cannot be denied. If the statute was meant to operate only upon the remedy, it nevertheless, as applied, had the effect of destroying for two years the right of the creditor to enjoy the ownership of the property, and consequently the correlative power, for that period, to occupy, sell, or otherwise dispose of it as might seem fit. This postponement, if it had been unconditional, undoubtedly would have constituted an unconstitutional *481 impairment of the obligation. This Court so decided in Bronson v. Kinzie, supra, where the period of redemption was extended for a period of only twelve months after a sale under a decree; in Howard v. Bugbee, supra, where the extension was for two years; and in Barnitz v. Beverly, supra, where the period was extended for eighteen months. Those cases, we may assume, still embody the law, since they are not overruled.

The only substantial difference between those cases and the present one is that here the extension of the period of redemption and postponement of the creditor's ownership is accompanied by the condition that the rental value of the property shall, in the meantime, be paid. Assuming, for the moment, that a statute extending the period of redemption may be upheld if something of commensurate value be given the creditor by way of compensation, a conclusion that payment of the rental value during the two-year period of postponement is even the approximate

equivalent of immediate ownership and possession is purely gratuitous. How can such payment be regarded, in any sense, as compensation for the postponement of the contract right? The ownership of the property to which petitioner was entitled carried with it, not only the right to occupy or sell it, but, ownership being retained, the right to the rental value **256 as well. So that in the last analysis petitioner simply is allowed to retain a part of what is its own as compensation for surrendering the remainder. Moreover, it cannot be foreseen what will happen to the property during that long period of time. The buildings may deteriorate in quality; the value of the property may fall to a sum far below the purchase price; the financial needs of appellant may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring.

However these or other supposable contingencies may be, the statute denies appellant for a period of two years *482 the ownership and possession of the property—an asset which, in any event, is of substantial character, and which possibly may turn out to be of great value. The statute, therefore, is not merely a modification of the remedy; it effects a material and injurious change in the obligation. The legally enforceable right of the creditor when the statute was passed was, at once upon default of redemption, to become the fee-simple owner of the property. Extension of the time for redemption for two years, whatever compensation be given in its place, destroys that specific right and the correlative obligation, and does so none the less though it assume to create in invitum another and different right and obligation of equal value. Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however much it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional restriction.

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, all remedy so far as the enforcement of that right is concerned. The phrase 'obligation of a contract' in the constitutional sense imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear. *483 As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. According to one Latin proverb, 'He who gives quickly, gives twice,' and according to another, 'He who pays too late, pays less.' 'Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.' Louisiana ex rel. Ranger v. New Orleans, 102 U.S. 203, 207, 26 L.Ed. 132. I am not able to see any real distinction between a statute which in substantive terms alters the obligation of a debtor-creditor contract so as to extend the time of its performance for a period of two years and a statute which, though in terms acting upon the remedy, is aimed at the obligation (as distinguished, for example, from the judicial procedure incident to the enforcement thereof), and which does in fact withhold from the creditor, for the same period of time, the stipulated fruits of his contract.

I quite agree with the opinion of the Court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

I am authorized to say that Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER concur in this opinion.

All Citations

290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481

Footnotes

1 That section is as follows:

'Sec. 4. Period of Redemption May be Extended.—Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired.'

2 A joint statement of the counsel for both parties, filed with the court on the argument in this court, shows that, after providing for taxes, insurance, and interest, and crediting the payments to be made by the mortgagor under the judgment, the amount necessary to redeem May 1, 1935, would be $4,258.82.

3 The preamble and the first section of the act are as follows:

'Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

'Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

'Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

'Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

'Whereas, The State of Minnesota passesses the right under its police power to declare a state of emergency to exist, and

'Whereas, the inherent and fundamental purposes of our government is to safeguard the public and promote the general walfare of the people; and

'Whereas, Under existing conditions the foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

'Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

'Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years, a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon.

'Section 1. Emergency Declared to Exist.—In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota.'

4 The Attorney General of the state in his argument before this court made the following statement of general conditions in Minnesota: 'Minnesota is predominantly an agricultural state. A little more than one half of its people live on farms. At the time this law was passed the prices of farm products has fallen to a point where most of the persons engaged in farming could not realize enough from their products to support their families, and pay taxes and interest on the mortgages on their homes. In the fall and winter of 1932 in the villages and small cities where most of the farmers must market their produce, corn was quoted as low as eight cents per bushel, oats two cents and wheat twenty-nine cents per bushel, eggs at seven cents per dozen and butter at ten cents per pound. The industry second in importance is mining. In normal times Minnesota produces about sixty per cent of the iron of the United States and nearly thirty per cent of all the iron produced in the world. In 1932 the production of iron fell to less than fifteen per cent of normal production. The families of idle miners soon became destitute and had to be supported by public funds. Other industries of the state, such as lumbering and the manufacture of wood products, the manufacture of farm machinery and various goods of steel and iron have also been affected disastrously by the depression. Because of the increased burden on the state and its political subdivisions which resulted from the depression, taxes on lands, which provide by far the major portion of the taxes in this state, were increased to such an extent that in many instances they became confiscatory. Tax delinquencies were alarmingly great, rising as high as 78% in one county of the state. In seven counties of the state the tax delinquency was over 50%. Because of these delinquencies many towns, school districts, villages and cities were practically bankrupt. In many of these political subdivisions of the state local government would have ceased to function and would have collapsed had it not been for loans from the state.' The Attorney General also stated that serious breaches of the peace had occurred.

5 See Ex parte Milligan, 4 Wall. 2, 120—127, 18 L.Ed. 281; United States v. Russell, 13 Wall. 633, 627, 20 L.Ed. 474; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, 40 S.Ct. 106, 64 L.Ed. 194; United States v. L. Cohen Grocery Co., 255 U.S. 81, 88, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045.

6 Farrand, Records of the Federal Convention, vol. 2, pp. 439, 440, 597, 610; Elliot's Debates, vol. 5, pp. 485, 488, 545, 546; Bancroft, History of the U.S. Constitution, vol. 2, pp. 137—139; Warren, The Making of the Constitution, pp. 552—555. Compare Ordinance for the Government of the Northwest Territory, art. 2.

7 The Federalist, No. 44 (Madison); Marshall, Life of Washington, vol. 5, pp. 85—90, 112, 113; Bancroft, History of the U.S. Constitution, vol. 1, p. 228 et seq.; Black, Constitutional Prohibitions, pp. 1—7; Fiske, The Critical Period of American History (8th Ed.) p. 168 et seq.; Adams v. Storey, Fed. Cas. No. 66, 1 Paine, 79, 90—92.

8 Contracts, within the meaning of the clause, have been held to embrace those that are executed; that is, grants, as well as those that are executory. Fletcher v. Peck, 6 Cranch, 87, 137, 3 L.Ed. 162; Terrett v. Taylor, 9 Cranch, 43, 3 L.Ed. 650. They embrace the charters of private corporations. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629. But not the marriage contract, so as to limit the general right to legislate on the subject of divorce. Id. page 629 of 4 Wheat., 4 L.Ed. 629; Maynard v. Hill, 125 U.S. 190, 210, 8 S.Ct. 723, 31 L.Ed. 654. Nor are judgments, though rendered upon contracts, deemed to be within the provision. Morley v. Lake Shore Railway Co., 146 U.S. 162, 169, 13 S.Ct. 54, 36 L.Ed. 925. Nor does a general law, giving the consent of a state to be sued, constitute a contract. Beers v. Arkansas, 20 How. 527, 15 L.Ed. 991.

9 But there is held to be no impairment by a law which removes the taint of illegality and thus permits enforcement, as, e.g., by the repeal of a statute making a contract void for usury. Ewell v. Daggs, 108 U.S. 143, 151, 2 S.Ct. 408, 27 L.Ed. 682.

10 See, in addition to cases cited in the text, the following: Farmers' & Mechanics' Bank v. Smith, 6 Wheat. 131, 5 L.Ed. 224; Piqua Bank v. Knoop, 16 How. 369, 14 L.Ed. 977; Dodge v. Woolsey, 18 How. 331, 15 L.Ed. 401; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L.Ed. 173; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L.Ed. 179; Farrington v. Tennessee, 95 U.S. 679, 24 L.Ed. 558; Murray v. Charleston, 96 U.S. 432, 24 L.Ed. 760; Hartman v. Greenhow, 102

U.S. 672, 26 L.Ed. 271; McGahey v. Virginia, 135 U.S. 662, 10 S.Ct. 972, 34 L.Ed. 304; Bedford v. Eastern Building & Loan Association, 181 U.S. 227, 21 S.Ct. 597, 45 L.Ed. 834; Wright v. Central of Georgia Railway Co., 236 U.S. 674, 35 S.Ct. 471, 59 L.Ed. 781; Central of Georgia Railway Co. v. Wright, 248 U.S. 525, 39 S.Ct. 181, 63 L.Ed. 401; Ohio Public Service Co. v. Ohio ex rel. Fritz, 274 U.S. 12, 47 S.Ct. 480, 71 L.Ed. 898.

11 See Warren, The Supreme Court in United States History, vol. 2, pp. 376—379.

12 See Sturges v. Crowninshield, 4 Wheat. 122, 200, 201, 4 L.Ed. 529; Mason v. Haile, 12 Wheat. 370, 378, 6 L.Ed. 660; Beers v. Haughton, 9 Pet. 329, 359, 9 L.Ed. 145.

13 Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 3 Pet. 280, 7 L.Ed. 679; Hawkins v. Barney's Lessee, 5 Pet. 457, 8 L.Ed. 190; Crawford b. Branch Bank, 7 How. 279, 12 L.Ed. 700; Curtis v. Whitney, 13 Wall. 68, 20 L.Ed. 513; Cairo & F.R. Co. v. Hecht, 95 U.S. 168, 24 L.Ed. 423; Terry v. Anderson, 95 U.S. 628, 24 L.Ed. 365; Tennessee v. Sneed, 96 U.S. 69, 24 L.Ed. 610; South Carolina v. Gaillard, 101 U.S. 433, 25 L.Ed. 937; Louisiana v. New Orleans, 102 U.S. 203, 26 L.Ed. 132; Connecticut Mutual Life Insurance Co. v. Cushman, 108 U.S. 51, 2 S.Ct. 236, 27 L.Ed. 648; Vance v. Vance, 108 U.S. 514, 2 S.Ct. 854, 27 L.Ed. 808; Gilfillan v. Union Canal Co., 109 U.S. 401, 3 S.Ct. 304, 27 L.Ed. 977; Hill v. Merchants' Insurance Co., 134 U.S. 515, 10 S.Ct. 589, 33 L.Ed. 994; New Orleans City & Lake R.R. Co. v. Louisiana, 157 U.S. 219, 15 S.Ct. 581, 39 L.Ed. 679; Red River Valley Bank v. Craig, 181 U.S. 548, 21 S.Ct. 703, 45 L.Ed. 994; Wilson v. Standefer, 184 U.S. 399, 22 S.Ct. 384, 46 L.Ed. 612; Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 23 S.Ct. 234, 47 L.Ed. 249; Waggoner v. Flack, 188 U.S. 595, 23 S.Ct. 345, 47 L.Ed. 609; Bernheimer v. Converse, 206 U.S. 516, 27 S.Ct. 755, 51 L.Ed. 1163; Henley v. Myers, 215 U.S. 373, 30 S.Ct. 148, 54 L.Ed. 240; Selig v. Hamilton, 234 U.S. 652, 34 S.Ct. 926, 58 L.Ed. 1518, Ann. Cas. 1917A, 104; Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391.
Compare the following illustrative cases, where changes in remedies were deemed to be of such a character as to interfere with substantial rights: Wilmington & Weldon R.R. Co. v. King, 91 U.S. 3, 23 L.Ed. 186; Memphis v. United States, 97 U.S. 293, 24 L.Ed. 920; Virginia Coupon Cases, 114 U.S. 269, 270, 298, 299, 330, 5 S.Ct. 903, 962, 29 L.Ed. 185, 207; Effinger v. Kenney, 115 U.S. 566, 6 S.Ct. 179, 29 L.Ed. 495; Fisk v. Jefferson Police Jury, 116 U.S. 131, 6 S.Ct. 329, 29 L.Ed. 587; Bradley v. Lightcap, 195 U.S. 1, 24 S.Ct. 748, 49 L.Ed. 65; Bank of Minden v. Clement, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857.

14 See, also, New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 673, 6 S.Ct. 252, 29 L.Ed. 516; Offield v. New York, N.H. & H.R.R. Co., 203 U.S. 372, 27 S.Ct. 72, 51 L.Ed. 231; Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481; Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 23, 38 S.Ct. 35, 62 L.Ed. 124; Galveston Wharf Company v. Galveston, 260 U.S. 473, 476, 43 S.Ct. 168, 67 L.Ed. 355; Georgia v. Chattanooga, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796.

15 Laws of 1920 (New York), chapters 942—947, 951.

16 Department of Agriculture, Technical Bulletin No. 288, February, 1932, pp. 22, 23; Year Book, Department of Agriculture, 1932, p. 913.

17 Graffam v. Burgess, 117 U.S. 180, 191, 192, 6 S.Ct. 686, 29 L.Ed. 839; Schroeder v. Young, 161 U.S. 334, 337, 16 S.Ct. 512, 40 L.Ed. 721; Ballentyne v. Smith, 205 U.S. 285, 290, 27 S.Ct. 527, 51 L.Ed. 803; Howell v. Baker, 4 Johns Ch. (N.Y.) 118, 121; Gilbert v. Haire, 43 Mich. 283, 286, 5 N.W. 321; Littell v. Zuntz, 2 Ala. 256, 260, 262, 36 Am.Dec. 415; Farmers' Life Insurance Co. v. Stegink, 106 Kan. 730, 189 P. 965; Strong v. Smith, 68 N.J.Eq. 650, 653, 58 A. 301, 64 A. 1135. Compare Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556, 85 A.L.R. 1477.

18 See Coote's Law of Mortgages (8th Ed.) vol. 1, pp. 11, 12; Jones on Mortgages (8th Ed.) vol. 1, ss 7, 8; Langford v. Barnard, Tothill, 134, temp. Eliz.; Emmanuel College v. Evans, 1 Rep. in Ch. 10, temp. Car. I; Roscarrick v. Barton, 1 Ca. in Ch. 217; Noakes v. Rice, (1902) A.C. 24, per Lord Macnaghten; Fairclough v. Swan Brewery, 81 L.J.P.C. 207.

1 In such cases it is no more necessary to modify constitutional rules to govern new conditions than it is to create new words to describe them. The commerce clause is a good example. When that was adopted, its application was necessarily confined to the regulation of the primitive methods of transportation then employed; but railroads, automobiles, and aircraft automatically were brought within the scope and subject to the terms of the commerce clause the moment these new means of transportation came into existence, just as they were at once brought within the meaning of the word 'carrier,' as defined by the dictionaries.

2 Thus McMaster (History of the People of the United States, vol. 1, p. 425), after referring to the conditions in Rhode Island, where 'the bonds of society were dissolved by paper money and tender laws'; in New Jersey, where the people nailed up the doors of their courthouses; in Virginia, where the debtors 'set fire to theirs in order to stop the course of justice,' says:

'The newspapers were full of bankrupt notices. The formers' taxes amounted to near the rent of their farms. Mechanics wandered up and down the streets of every city destitute of work. Ships, shut out from every port of Europe, lay rotting in the harbors.'

Channing (History of the United States, vol. 3, pp. 410—411, 482—483) paints this graphic picture of the situation:

'Nowhere was the immediate prospect more gloomy than in South Carolina. * * * In Massachusetts, at the other end of the line, the case was as bad, if not worse * * * the resources of New England were insufficient to pay even what was then owing. The case of New York was even more desperate, and for the moment Philadelphia alone seemed prosperous, for the wastage of the later years of the war had been severely felt in Virginia. * * *

'* * * Virginia was honeycombed with debt. * * *

'In South Carolina, the planters were even more heavily in debt. * * * The case of Thomas Bee is to the point. His creditors had secured executions against him; the sheriff had seized his property and had sold it at one-thirteenth of what it would have brought at private sale in ordinary times.'

Nevins (The American States During and After the Revolution, p. 536), says:

'The town of Greenwich computed that during each of the five years preceding 1786 the farmers had paid in taxes the entire rental value of their land.'

John Fiske (The Critical Period of American History (8th Ed.) pp. 175, 180) thus describes conditions:

'* * * About the market-places men spent their time angrily discussing politics, and scarcely a day passed without street-fights, which at times grew into riots. In the country, too, no less than in the cities, the goddess of discord reigned. The farmers determined to starve the city people into submission, and they entered into an agreement not to send any produce into the cities until the merchants should open their shops and begin selling their goods for paper (money) at its face value. * * * The farmers threw away their milk, used their corn for fuel, and let their apples rot on the ground. * * *

'* * * The courts were broken up by armed mobs. At Concord one Job Shattuck brought several hundred armed men into the town and surrounded the court-house, while in a fierce harangue he declared that the time had come for wiping out all debts.'

Dr. David Ramsay (History of the United States (2d Ed.) 1818, vol. 3, pp. 46, 47), a member of the old Congress under the Confederation, and who lived in the midst of the events of which he speaks, says:

'The non-payment of public debts sometimes inferred a necessity, and always furnished an apology, for not discharging private contracts. Confidence between man and man received a deadly wound. Public faith being first violated, private engagements lost much of their obligatory force. * * *

'From the combined operation of these causes trade languished; credit expired; gold and silver vanished; and real property was depreciated to an extent equal to that of the depreciation of continental money. * * *'

And, finally, George Ticknor Curtis, in his History of the Origin, Formation, and Adoption of the Constitution of the United States, vol. 1, pp. 332, 333:

'All contemporary evidence assures us that this (1783 to 1787) was a period of great pecuniary distress, arising from the depreciation of the vast quantities of paper money issued by the Federal and State governments; from rash speculations; from the uncertain and fluctuating condition of trade; and from the great amount of foreign goods forced into the country as soon as its ports were opened. Naturally, in such a state of things, the debtors were disposed to lean in favor of those systems of government and legislation which would tend to relieve or postpone the payment of their debts; and as such relief could come only from their State governments, they were naturally the friends of State

'Maryland, * * * In 1782 * * * enacted a not friendly to any enlargement of the powers of the Federal Constitution. The same causes which led individuals to look to legislation for irregular relief from the burden of their private contracts, led them also to regard public obligations with similar impatience. Opposed to this numerous class of persons were all those who felt the high necessity of preserving inviolate every public and private obligation; who saw that the separate power of the States could not accomplish what was absolutely necessary to sustain both public and private credit; and they were as naturally disposed to look to the resources of the Union for these benefits, as the other class were to look in an opposite direction. These tendencies produced, in nearly every State, a struggle, not as between two organized parties, but one that was all along a contest for supremacy between opposite opinions, in which it was at one time doubtful to which side the scale would turn.'

3 Charles Warren, The Making of the Constitution, pp. 5, 6:

'The actual evils which led to the Federal Convention of 1787 are familiar to every reader of history and need no detailed description here. As is well known, they arose, in general; * * * second, from State legislation unjust to citizens and productive of dissensions with neighboring States—the State laws particularly complained of being those staying

process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure of mortgages. * * *'

Fiske, supra, note 2, p. 168:

'By 1786, under the universal depression and want of confidence, all trade had well-nigh stopped, and political quackery, with its cheap and dirty remedies, had full control of the field. * * * A craze for fictitious wealth in the shape of paper money ran like an epidemic through the country. There was a Barmecide feast of economic vagaries. * * * And when we have threaded the maze of this rash legislation, we shall the better understand that clause in our federal constitution which forbids the making of laws impairing the obligation of contracts.'

Beard, An Economic Interpretation of the Constitution of the United States, pp. 31, 32:

'Money capital was * * * being positively attacked by the makers of paper money, stay laws, pine barren acts, and other devices for depreciating the currency or delaying the collection of debts. In addition there was a wide-spread derangement of the monetary system. * * *

'Creditors, naturally enough, resisted all of these schemes in the state legislatures, and * * * turned to the idea of a national government so constructed as to prevent laws impairing the obligation of contract, emitting paper money, and otherwise benefiting debtors. It is idle to inquire whether the rapacity of the creditors or the total depravity of the debtors * * * was responsible for this deep and bitter antagonism. It is sufficient for our purposes to discover its existence and to find its institutional reflex in the Constitution.'

Fisher Ames, 'Eulogy on Washington,' The Life and Works of Fisher Ames, vol. 2, p. 76:

'Accordingly, in some of the States, creditors were treated as outlaws; bankrupts were armed with legal authority to be persecutors; and by the shock of all confidence and faith, society was shaken to its foundations.'

Illuminating comment upon some of this state legislation is to be found in chapter VI (volume 1) of Bancroft's 'History of the Formation of the Constitution of the United States,' under the heading, 'State Laws Impairing the Obligation of Contracts Prove the Need of an Overruling Union,' pp. 230—236.

'(In Massachusetts) Repeated temporary stay-laws gave no real relief; they flattered and deceived the hope of the debtor, exasperating alike him and his creditor. * * *

'* * * (In Pennsylvania) in December, 1784, debts contracted before 1777 were made payable in three annual instalments. * * *

'Mayland, * * * in 1782 * * * enacted a stay-law extending to January, 1784, * * *

'Georgia, in August, 1782, stayed execution for two rears from and after the passing of the act. * * *

'* * * (In South Carolina in 1782) the commencement of suits was suspended till ten days after the sitting of the next general assembly. * * * On the twenty-sixth day of March, 1784, came the great ordinance for the payment of debts in four annual instalments. * * *'

Ramsay, supra, note 2, vol. 3, pp. 65, 66, 106:

'The distrust which prevailed among the people, respecting the punctual fulfilment of contracts, arose from the powers claimed, and, in too many instances, exercised by the state legislatures, for impairing the obligation of contracts. * * * These prolific sources of evil were completely done away by the new constitution. * * *

'* * * State legislatures, in too many instances, yielded to the necessities of their constituents, and passed laws, by which creditors were compelled, either to wait for payment of their just demands, on the tender of security, or to take property, at a valuation, or paper money falsely purporting to be the representative of specie. These laws were considered, by the British, as inconsistent with * * * the treaty. * * * The Americans palliated these measures, by the plea of necessity. * * *'

Ramsay, The History of South-Carolina (1809) vol. 2, pp. 429, 430:

'The effects of these laws, interfering between debtors and creditors, were extensive. They destroyed public credit and confidence between man and man; injured the morals of the people, and in many instances ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward.'

4 Bancroft, supra, note 3, Vol. I, p. 239.

5 Id. vol. 1, p. 241.

6 Id. vol. 2, p. 136.

7 See Curtis, supra, note 2, volume 2, pp. 366, 367.

8 Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, art. II; Thorpe, American Charters, Constitutions and Organic Laws, vol. 2, pp. 957, 961.

9 Elliot's Debates, vol. 5, pp. 485, 488, 545, 546; Id. vol. 1, pp. 271, 311; Farrand, The Records of the Federal Convention, vol. 2, pp. 439, 440, 596, 597, 610.

10 Elliot's Debates, vol. 1, pp. 344, 376, 377.

11 Id. vol. 1, pp. 491, 492.

12 Id. vol. 3, p. 478.

13 Id. vol. 4, pp. 156, 191.

14 Id. vol. 4, p. 333.

Mr. Warren, in his book, 'The Making of the Constitution,' pp. 552—555, has an interesting re sume of the proceedings in the Convention and of the conflicting views which were before the state conventions for consideration. He says in part: 'The Convention then was asked to perfect their action in favor of honesty and morality, by adding a prohibition on the States which would put an end to statutes enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for. The State Legislatures had hitherto passed such laws in abundant measure, and the situation was graphically described later by Chief Justice Marshall in one of his most noted decisions (Ogden v. Saunders, 12 Wheat. 213, 354, 6 L.Ed. 606), as follows:

"The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State Legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as virtuous of this great community, and was one of the important benefits expected from a reform of the government.'

'To obviate the conditions thus described, King of Massachusetts proposed the insertion of a new restriction on the States. * * * Wilson and Madison supported his motion. Mason and G. Morris, however, believed that it went too far in interfering with the powers of the States. * * * There was also a genuine belief by some delegates that, under some circumstances and in financial crises, such stay and tender laws might be necessary to avert calamitous loss to debtors. * * * The other delegates had been deeply impressed by the disastrous social and economic effects of the stay and tender laws which had been enacted by most of the States between 1780 and 1786, and they decided to make similar legislation impossible in the future.'

15 See Dewey, Financial History of the United States, p. 229 et seq.; Schouler, History of the United States, vol. 4, p. 276 et seq; McMaster, supra, note 2, vol. 6, pp. 389 et seq., 523 et seq., 623 et seq.

16 See Dewey, supra, note 15, p. 243 et seq.; McMaster, supra, note 2, vol. 6, p. 627 et seq., vol. 7, p. 19 et seq.; Centennial History of Illinois, vol. 2, p. 231 et seq.

17 See Dewey, supra, note 15, p. 444 et seq.; Andrews, The Last Quarter Century in the United States, vol. 2, p. 301 et seq.

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LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 2020

No. 98

Introduced by Council Members Rivera, the Speaker (Council Member Johnson), Kallos, Rosenthal, Chin, Powers, Rose and Louis.

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to extending temporary personal guaranty protection provisions for commercial tenants impacted by COVID-19

Be it enacted by the Council as follows:

Section 1. Declaration of legislative intent and findings. a. The council finds and declares that:

1. The city is in the midst of a local, state, and federally declared disaster emergency due to a global pandemic. While the numbers increase daily, the 2019 novel coronavirus, or COVID-19, has killed over 900,000 people worldwide, over 200,000 people in the United States, and about 33,000 people in New York state. Within the city itself, about 243,000 people have been infected with the disease and about 24,000 people have likely died because of it.

2. Governments around the world, the country, and the state, including the city, have taken drastic measures to limit the spread of COVID-19. While many of these measures appear to have helped slow the progress of the disease, many have also contributed to a catastrophic impact on the city's economic and social livelihood.

3. For example, as part of the effort to stop the spread of COVID-19, the governor in March 2020 issued executive order numbers 202.3, 202.6, and 202.7. These orders, as subsequently amended and extended through other executive orders, and interpreted through guidance issued by

the New York state departments of economic development and health, effectively prohibited restaurants, bars, gyms, fitness centers, movie theaters, non-essential retail stores, barbershops, hair salons, nail salons, tattoo or piercing parlors, and related personal care services from operating with any indoor occupancy.

4. These operational limitations, while necessary to combat the spread of a global pandemic, have contributed to the severe economic damage suffered by the city. For example, the most recently available labor statistics from the New York state department of labor relating to the businesses subject to these orders indicate that:

(a) The city lost 151,100 jobs in the food services and drinking places subsector from February 2020 to July 2020, leaving employment in that subsector down 48.9% in July 2020 compared to July 2019. This includes a loss of 94,000 jobs in the full service restaurants industry between February 2020 and July 2020, which left employment in that industry down 57.7% in July 2020 compared to July 2019.

(b) Within the retail trade sector, the city lost about 34,700 jobs from industries subject to the above-described executive orders; this includes a combined loss of 29,300 jobs in the clothing stores industry, the furniture and home furnishings stores subsector, and the sporting goods, hobby, book, and music stores subsector between February 2020 and July 2020, which left employment in those industries and subsectors down 49.5%, 38.5%, and 24.2%, respectively, in July 2020 compared to July 2019.

(c) Within the personal and laundry services subsector, which includes barbershops, hair salons, and other personal care businesses, the city lost 22,800 jobs, leaving employment in that subsector down 34.4% in July 2020 compared to July 2019.

5. While businesses may be willing to weather the economic hardships imposed upon them by governmental measures to combat COVID-19 by either staying open or temporarily closing and later reopening, individual owners and other natural persons who personally guarantee the financial obligations of these businesses face a different and more substantial risk than losing revenue and profit. They risk losing their personal assets, including their possessions and even their own homes, transforming a business loss into a devastating personal loss. This is particularly a risk for small businesses, as the scale of the financial obligations of larger businesses generally renders having a natural person guarantee those obligations impracticable.

6. If these individual owners and natural persons are forced to close their businesses permanently now or to suffer grave personal economic losses like the loss of a home, the economic and social damage caused to the city will be greatly exacerbated and will be significantly worse than if these businesses are able to temporarily close and return or, failing that, to close later, gradually, and not all at once.

7. For the foregoing reasons, the council passed, and the mayor signed, local law number 55 for the year 2020, which provides temporary protections to natural persons who personally guarantee the financial obligations of businesses subject to the substantial occupancy limitations imposed by the above-described executive orders issued by the governor. These protections are, however, due to expire on September 30, 2020.

8. As of September 30, 2020, these businesses will have been either prohibited from operating with any indoor occupancy at all, or subject to significant indoor occupancy restrictions, for over six months, and it is likely that such significant indoor occupancy restrictions will continue for the foreseeable future as the so-called first wave of the COVID-19 crisis has not yet fully subsided and

there is substantial risk of a second wave of the disease beginning in the fall or winter of 2020, particularly as the city enters its normal flu season.

9. Beginning on September 30, 2020, most of the businesses subject to the above-described executive orders will be able to operate with at least minimal indoor occupancy. Extending the duration of the personal liability protections contained within local law number 55 for the year 2020 by six months, as this local law does, is intended to provide these businesses a reasonable recovery period with a duration that is comparable to the period of time that these businesses were forced to close or operate with significant limitations on indoor occupancy and thereby to provide them with an opportunity to not only survive but also to generate sufficient revenues to defray owed financial obligations.

10. As with local law number 55 for the year 2020 before it, this local law does not, nor is it intended to, limit any other lawful remedies that a landlord may be able to seek against a commercial tenant itself, such as bringing suit against that tenant for damages; collecting or offsetting financial obligations by using the revenues, inventory, equipment, or other assets of that tenant; or evicting or declining to renew the lease or rental agreement of that tenant.

11. This local law also modifies the language of local law number 55 for the year 2020 to clarify the council's intent that its personal liability protections apply regardless of whether a personal liability provision appears within a commercial lease or other rental agreement itself or appears within a separate agreement relating to the same property.

b. For the foregoing reasons, the council finds that it is necessary and appropriate to extend the duration of the personal liability protections in local law number 55 for the year 2020.

§ 2. Section 22-1005 of the administrative code of the city of New York, as added by local law number 55 for the year 2020, is amended to read as follows:

§ 22-1005. Personal liability provisions in commercial leases. A provision in a commercial lease or other rental agreement involving real property located within the city, *or relating to such a lease or other rental agreement,* that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and [September 30, 2020] *March 31, 2021*, inclusive.

§ 3. The department of small business services, or another mayoral agency or office designated by the mayor, shall conduct an information and outreach campaign to educate commercial tenants affected by this local law about its protections.

§ 4. This local law takes effect immediately.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on September 23, 2020 and approved by the Mayor on September 28, 2020.

MICHAEL M. McSWEENEY, City Clerk, Clerk of the Council.

CERTIFICATION OF CORPORATION COUNSEL

I hereby certify that the form of the enclosed local law (Local Law No. 98 of 2020, Council Int. No. 2083-A of 2020) to be filed with the Secretary of State contains the correct text of the local law passed by the New York City Council and approved by the Mayor.

STEPHEN LOUIS, Acting Corporation Counsel.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Marcia Melendez, Jarican Realty Inc., 1025 Pacific LLC, Ling Yang, Top East Realty LLC, and Haight Trade LLC,

Plaintiffs,

v.

The City of New York, *a municipal entity*, Bill de Blasio, *as Mayor of the City of New York*, Louise Carroll, *Commissioner of New York City Department of Housing Preservation & Development,* and Jonnel Doris, *Commissioner of New York City Department of Small Business Services,*

Defendants.

Civ. No. 20-cv-5301 (RA)

Oral Argument Requested

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTIVE AND DECLARATORY RELIEF

PATTERSON BELKNAP WEBB & TYLER LLP
Stephen P. Younger
Alejandro H. Cruz
Hyatt M. Howard
Esther Y. Kim
Timothy H. Smith

1133 Avenue of Americas
New York, NY 10036
Telephone: 212-336-2685
Facsimile: 212-336-2222

Attorneys for Plaintiffs

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Statutes

Plaintiffs respectfully submit this memorandum of law in support of their motion for preliminary injunctive and declaratory relief, pursuant to Federal Rule of Civil Procedure 65, 28 U.S.C. § 2201 and 42 U.S.C. § 1983, which seeks to enjoin Defendants from enforcing, and to declare unconstitutional and preempted, New York City Local Law 53 of 2020 (the "Commercial Harassment Law"), Local Law 56 of 2020 (the "Residential Harassment Law") (together, the "Harassment Laws"), and Local Law 55 of 2020 (the "Guaranty Law") (collectively, the "Laws").

PRELIMINARY STATEMENT

This case is about three New York City Laws, rushed to passage in the midst of the COVID-19 pandemic (the "Pandemic"), that run roughshod over the constitutional rights of New York City (the "City") property owners. Together, these widely sweeping Laws—the Commercial Harassment Law, the Residential Harassment Law, and the Guaranty Law—squelch Plaintiffs' ability to engage in lawful speech and extinguish Plaintiffs' contractual rights to enforce critical lease guaranties.

Plaintiffs Marcia Melendez and Ling Yang are entrepreneurs who built up modest real estate holdings through the sweat of their labors. They rent their properties to businesses and individuals, and depend on those rent collections to pay their taxes, mortgage obligations, and other expenses. The City's new Laws threaten Plaintiffs' livelihoods by shifting onto them the economic burden of tenants' unpaid rents. While the new Laws may have sincere intentions—*i.e.,* assisting certain New Yorkers impacted by the Pandemic—their extraordinary breadth and one-sided impact render them unconstitutional.

This Court should grant Plaintiffs' motion because these new Laws violate Plaintiffs' constitutional rights in two main ways.

First, the Harassment Laws infringe Plaintiffs' rights to free commercial speech by muzzling ordinary business communications with tenants, including lawful requests to collect unpaid rent. These speech restrictions fail First Amendment scrutiny because they: a) were passed based on pure speculation and conjecture and b) are far more extensive than necessary. Indeed, the Harassment Laws' extraordinary over-reach is shown by the fact that major retail and restaurant chains—such as Old Navy LLC, Gap Inc. and Sweetcatch Poke—have already sought their protection.

Second, the City's Guaranty Law re-writes Plaintiffs' contracts with their tenants, by forever stripping them of bargained-for remedies to enforce personal guaranties, thereby destroying the value of those leases for the period covered by this new Law. Extinguishing this crucial contractual remedy violates the Contracts Clause of the Constitution by improperly shifting these mounting economic burdens solely onto the backs of property owners for the benefit of tenants' special interests. Significantly, like the Harassment Laws, the Guaranty Law lacks any substantial injury requirement—an obvious less restrictive alternative—such that the Law is open to being invoked by well-capitalized commercial tenants.

Additionally, and equally important, all three Laws are preempted – under State law preemption doctrines – by acts of the New York State Legislature (the "Legislature"), which has both legislated in this field itself and granted New York's Governor, Andrew M. Cuomo, sweeping powers to address the COVID-19 crisis that conflict with the City's Laws. In contrast to these new local Laws, New York State has acted in a measured and even-handed way to address the serious landlord-tenant issues that have arisen from the Pandemic.

While it is well-settled that Plaintiffs are entitled to a presumption of irreparable harm on their First Amendment and Contracts Clause claims, Plaintiffs also demonstrate irreparable

harm—separate and apart from these constitutional violations—because the enforcement of these Laws against Plaintiffs creates a substantial risk that their businesses will be ruined beyond monetary repair. An injunction, moreover, is in the public interest because enforcement of an unconstitutional law is always contrary to the public interest, and these Laws pose a substantial threat to the City's property tax revenues. Accordingly, this Court should enjoin enforcement of each of the unconstitutional Laws.

STATEMENT OF FACTS

A. Plaintiffs Built a Living from Their Properties

Plaintiff Marcia Melendez ("Ms. Melendez") owns two properties in Brooklyn through Plaintiffs Jarican Realty Inc. and 1025 Pacific LLC (the "Melendez Companies" and together with Ms. Melendez, the "Melendez Plaintiffs"). (Melendez Decl. ¶¶ 3-6) Originally from Jamaica, Ms. Melendez immigrated to the U.S. at the age of 17. (*Id.* ¶ 7) In or around 1983, she started a flower shop, which she later extended into a landscaping business with her husband. (*Id.* ¶ 9) Ms. Melendez and her husband thereafter funded the purchase of the two properties they own in Brooklyn. (*Id.* ¶¶ 10, 12) In 2000, they bought their first property located at 547 Nostrand Ave., Brooklyn, New York, scraping together the funds for the down payment, and taking out loans to fund extensive renovations.[1] (*Id.* ¶¶ 10–11) In 2016, Ms. Melendez and her husband invested in the purchase of the second Brooklyn property located at 283 East 55th St. (*Id.* ¶ 12)

In 2017, Ms. Melendez and her husband retired. (*Id.*) Ms. Melendez and her husband rely on the rent payments from their two properties to fund their retirement, in addition to some income from Ms. Melendez's part-time work as a real estate broker and social security benefits.

[1] In 2004, Jarican Realty Inc. became the record owner of 547 Nostrand Ave., Brooklyn, New York.

(*Id.* ¶¶ 13–14) They also rely on this rent revenue to pay various tax and mortgage obligations on the properties, as well as to fund maintenance on the properties. (*Id.* ¶¶ 15–18)

Plaintiff Ling Yang ("Ms. Yang") and her son own two properties in Queens, New York through Haight Trade LLC and Top East Realty LLC ("Yang Companies" and together with Ms. Yang, the "Yang Plaintiffs"). (Yang Decl. ¶¶ 3-6) Ms. Yang is originally from the People's Republic of China, where she was a successful businessperson. (*Id.* ¶¶ 7-8) But in 1994, she decided to immigrate to the United States after experiencing the Cultural Revolution and the Chinese government's actions which caused the ruin of individual businesses. (*Id.* ¶¶ 8-9)

Ms. Yang arrived in the United States with very little money, and unable to speak, read or write English. (*Id.* ¶ 10) For years, she worked hard to support herself and her family. (*Id.* ¶ 11) She was employed as a housekeeper, as a nanny, in restaurants, at a clothing factory, and in food delibery. (*Id.*) In 2002, she started and invested in small businesses using the savings she accumulated through her jobs and the assets from her former life in China. (*Id.* ¶¶ 12-14)

In 2012, Ms. Yang invested in the purchase of the property located at 4118 Haight St., Flushing, New York. (*Id.* ¶ 15) Several years later, she invested in the purchase of a second property located at 4059 College Point Blvd., Flushing, New York. (*Id.* ¶ 16) Ms. Yang funded these purchases with money from the sale of her assets in China, and her life savings. (*Id.* ¶ 17)

The Yang Companies are not yet profitable: all of the rent payments need to be dedicated to pay various tax and mortgage obligations, plus expenses related to maintaining the two buildings. (*Id.* ¶¶ 19-23) Ms. Yang does plan to support herself and her family after her retirement from the rent payments once more of the mortgage loans are satisfied. (*Id.* ¶ 23)

The Yang Companies require all their commercial tenants to provide personal guaranties in order to secure their commercial leases. (*Id.* ¶ 31) For example, the lease agreement with their

commercial tenant, Home Décor Expo, is personally guaranteed by its principal. (*Id.* ¶ 30) Absent a personal guaranty, the risk of having a small business (with few assets) as a tenant would be so great as to be prohibitive, and the Yang Companies would not be able to enter into leases with small businesses. (*Id.*)

B. New York State Becomes the Epicenter of the Pandemic

In December 2019, the highly infectious novel coronavirus called COVID-19 was first detected in China. (Younger Decl. ¶ 2) By March 2020, New York State had become the epicenter of the United States outbreak. (*Id.* ¶ 4) As of July 21, 2020, New York continues to have the highest number of confirmed cases and related deaths of any State. (*Id.* ¶ 5)

C. COVID-19's Impact on the New York City Real Estate Market

COVID-19's impact goes well beyond public health; it has also severely disrupted everyday business and economies across the world, within the United States and around New York State—especially real estate markets. (*Id.* ¶¶ 7-17) Surveys indicate that landlords are unable to collect rent from numerous commercial tenants. In New York, some commercial landlords report failing to receive rent from as much as 80% of their commercial tenants. (*Id.*, Ex. 3 at 1) Many commercial tenants who fail to pay rent have the financial ability to pay the rent, such as Old Navy LLC, Gap Inc., Victoria's Secret Stores LLC, Bath & Body Works LLC, and Sweetcatch Poke. (*Id.* ¶¶ 14-16, 73) These types of well-financed tenants have already invoked the Commercial Harassment Law as a reason to avoid making rent payments. (*Id.* ¶¶ 14-15, 73)

Many property owners across New York are or will soon be in financial distress. The precipitous decline in their rental income has threatened the ability of many landlords—including Plaintiffs—to pay their own bills, such as taxes, mortgages, maintenance expenses and employee

salaries. (Melendez Decl. ¶ 30; Yang Decl. ¶ 37) Nevertheless, many property owners, including Plaintiffs, are assisting distressed tenants by offering rent concessions. (Younger Decl. ¶ 10). For example, in Brooklyn, approximately 20% of commercial tenants have received a rent concession each month since March 2020. (*Id.*)

Real estate taxes account for more than half of the City's tax revenue. (*Id.*, Ex. 13 at 8) If New York City property owners—like Plaintiffs—are unable to generate enough revenue to pay those taxes, the City will be starved of an enormous revenue stream that helps pay for an array of critical public services. (*Id.* ¶¶ 20-21)

The Melendez Companies owe City property tax obligations for their two properties in Brooklyn. (Melendez Decl. ¶ 16) For the period January 1–June 30, 2020, these obligations total over $20,500. (*Id.*) But during March–June 2020, they incurred losses of thousands of dollars due to their inability to collect full rent payments from their tenants. (*Id.* ¶ 30) As a result, the Melendez Companies have been unable to pay their full property tax obligations. (*Id.*)

The Yang Companies have tax and mortgage obligations for their two properties, which total approximately $32,000 per month. (Yang Decl. ¶ 20) Both of the Yang Companies have incurred losses of approximately $100,000 as a direct consequence of their commercial tenants' failure to pay their full rent owed during March–July 2020. (*Id.* ¶ 36) If rent payments drop further, they may face difficulty paying their January 2021 property taxes. (*Id.* ¶ 37)

D. New York State's Response to COVID-19

1. New York State Legislature's Amendment of Section 29-a

New York State has taken extensive, but tailored, measures to address the Pandemic. In March 2020, the Legislature expanded Governor Cuomo's emergency powers under Section 29-a of the New York Executive Law, amending this statute to allow the Governor: a) to "*issue any directive during a state disaster emergency declared*" in an "*epidemic[] [or] disease outbreak*

. . . ." and b) to "provide for procedures reasonably necessary to enforce such directives." N.Y. Exec. Law § 29-a (emphasis added) This amendment currently expires on April 30, 2021. (*Id.*)

2. Governor Cuomo's Response to COVID-19

On March 7, 2020, using these newly conferred powers, Governor Cuomo declared a state of disaster emergency for the entire State of New York due to COVID-19. (*Id.*, Ex. 17) Governor Cuomo also directed in Executive Order 202.3 that no city issue any orders that conflict with or supersede any of his executive orders and suspended any local orders, administrative codes, laws or regulations that are "different" from or "in conflict with" any of the Governor's directives. (*Id.*, Ex. 18) Then, to mitigate the economic impact of COVID-19 on both landlords and tenants alike, and the real estate industry more broadly, Governor Cuomo issued Executive Orders Nos. 202.8, 202.28, and 202.48. (*Id.* ¶¶ 36-37, 39-41, 43) These gubernatorial orders provide for, among other things: a) a moratorium on tenant evictions, b) a requirement that landlords provide certain rent relief to tenants if they face financial hardships due to COVID-19, and c) a temporary prohibition against demands for payment of fees or charges for late payments of rent. (*Id.* ¶¶ 37, 39, 41-43) Recently, because of the protections afforded to tenants under New York State's Tenant Safe Harbor Act (the "TSHA"), Governor Cuomo issued an executive order rescinding his eviction moratorium as to residential tenants, but that order continues to apply to commercial tenants, further evincing a carefully circumscribed approach. (*Id.*, Ex. 25 at 2) Notably, much of the relief extended under these directives is restricted to those New Yorkers who have suffered substantial injuries. Importantly, the Governor's orders are evenhanded in that they impact both tenants and landlords.[2]

[2] New York State also launched the New York Forward Loan Fund, a loan program aimed at providing working capital loans to small businesses, including small landlords. (Younger Decl. ¶¶ 49-50)

3. Recent Legislation in Response to COVID-19

The Legislature also recently passed two statutes to provide relief to both landlords and residential tenants: the Emergency Rent Relief Act of 2020 ("ERRA") and the TSHA. (*Id.* ¶¶ 45-46) The ERRA makes rental assistance vouchers available to landlords on behalf of those tenants who have experienced an increase in their rent burdens between April 1 through July 31, 2020 because of a loss in income due to COVID-19. (*Id.*, Ex. 26) The TSHA prevents a court from issuing a warrant of eviction for any residential tenant or occupant that has experienced "financial hardship" for nonpayment of rent that accrues from March 7, 2020 until the Governor's executive orders on non-essential gatherings expire. (*Id.*, Ex. 27) The TSHA explicitly recognizes the power of courts to grant landlords money judgments so that they can recover back rents. (*Id.*)

E. The City Council Passes the Laws Based on Speculation and Conjecture, Ignoring Less Restrictive Alternatives

On May 13, 2020, the New York City Council ("Council") passed its own local laws, which, *inter alia*, purported to focus on the impact of the Pandemic on the real estate industry, including the Harassment Laws and the Guaranty Law challenged here. (*Id.* ¶¶ 51-52) These Laws are phrased in terms that cover broad swaths of the City, including those who can afford to weather the crisis. They thus seek to shift the economic burden wrought by COVID-19 on the real estate industry entirely onto the backs of landlords. As the Council Speaker explained, "[i]t's essential that New Yorkers get the rent cancellation they need. . . ." (*Id.*, Ex. 32 at 1)

All three Laws were introduced a mere three weeks before their passage, with minimal time for consideration and review. (*Id.* ¶ 52) The Council's hearings on these Laws provided only a patchwork record of vague and anecdotal evidence, which failed to justify the Laws. (*Id.* ¶¶ 55–58) One hearing witness claimed, with no corroborating evidence, that her organization

had merely been "hearing" anecdotes of supposed harassment by landlords who believed their tenants have lost income. (*Id.*, Ex. 33 at 63) Another witness reported receiving "one call" about residential harassment by the tenant's roommate—not by the tenant's landlord—which was allegedly related to COVID-19. (*Id.*, Ex. 33 at 128) And, since the outbreak of COVID-19, the New York City Department of Housing Development and Preservation ("HPD") reported that the majority of harassment claims it received concerned heat or hot water, without a single mention of a harassment claim involving "threatening" speech. (*Id.*, Ex. 33 at 97)

The hearings, moreover, revealed that pre-existing laws already addressed some of the purported problems that the Laws sought to remedy. (*Id.* ¶ 59) Notably, a City official testified that "several of the protections contemplated in [the Residential Harassment Law] already exist" in "the City Human Rights Law and the Housing Maintenance Code." (*Id.*, Ex. 33 at 98–99)

The hearings also made clear that the Council ignored the impact that the Laws would have (and that the Pandemic itself already had) on the City's property owners. (*Id.* ¶ 59) A tenant organization testified that property owners—who were acknowledged to be mostly "small landlords who own one or two buildings"—will have to contend with "tenants who can pay but who are [nonetheless] going to withhold rent out of solidarity." (*Id.*, Ex. 33 at 40, 44) And a City Council Member warned that the Guaranty Law "may end up helping Louis Vuitton as much as it helps Louise'[s] pizza." (*Id.*, Ex. 31 at 37)

Some Council members openly challenged the bills' proposed approaches and offered alternatives which went ignored. (*Id.* ¶ 60) One Council member noted that the Guaranty Law was unconstitutional because "the city cannot retroactively adjust, amend a contract that was entered into by two parties at arm's length . . . [e]mergency or not." (*Id.*, Ex. 34 at 89) Another questioned if it made "more sense to have the state come up with a fund to pay for [] rent, just

like Delaware." (*Id.*, Ex. 33 at 51) But this alternative went nowhere (although New York State has since adopted a similar policy as a statewide measure). Rather than consider less burdensome and constitutional alternatives, the Council charged headlong to approve the Laws.

The committee reports for the Laws are similarly devoid of any meaningful consideration of ways to tailor the Laws' prohibitions to focus on a problem worthy of legislative relief. (*Id.* ¶¶ 62–64) The analyses behind these new Laws merely summarize the terms of the Laws. (*Id.* ¶ 64) Nowhere do these reports contain any analytical support for the legislation such as with empirical data tailored to the purported problems. Furthermore, those reports confirm that the Council failed to consider less burdensome alternatives to the proposed measures. (*Id.* ¶ 64)

On May 26, 2020, Mayor de Blasio signed the three bills into law in a ceremony that ignored the over-reach of the Laws' scope. (*Id.* ¶ 65)

F. The Challenged Laws

1. The Commercial Harassment Law

N.Y.C. Administrative Code Section 22-902 already prohibits commercial tenant harassment. It provides, in relevant part, that such harassment includes:

> any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property, and (ii) includes . . . threatening a commercial tenant based on [a protected characteristic.]

N.Y.C. Admin. Code § 22-902(a). The term "threatening" is nowhere defined in the Law. Section 22-902's anti-harassment prohibitions may be enforced through a private cause of action created for tenants. *Id.* § 22-903.

The Commercial Harassment Law broadly extends Section 22-902's harassment protections to a wide range of tenants who have either: 1) "status as a person or business impacted by COVID-19," a status defined in expansive terms; or 2) "recei[ved] a rent concession

or forbearance for any rent owed during the COVID-19 period."[3] (Younger Decl., Ex. 28) Violations of this new Law are punishable by a civil penalty of between $10,000 and $50,000. N.Y.C. Admin. Code § 22-903(a). Plaintiffs may also recover attorneys' fees and punitive damages. *Id.* § 22-903(a)(3).

2. The Residential Harassment Law

Section 27-2004(a)(48) similarly protects a sweeping range of residential tenants from harassment, defined as:

> any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes . . . threatening any person lawfully entitled to occupancy of such dwelling unit based on [a protected characteristic].

N.Y.C. Admin. Code § 27-2004(a)(48). This provision may be enforced by the City through HPD, *see* N.Y. Real Prop. Acts. Law § 770, or more typically, through a private cause of action, N.Y.C. Admin. Code §§ 27-2005(d), 27-2115(h)(1).

The Residential Harassment Law broadly extends this protection to tenants who have: 1) "actual or perceived status as an essential employee," 2) "status as a person impacted by COVID-19," or 3) "recei[ved] a rent concession or forbearance for any rent owed during the COVID-19 period." (Younger Decl., Ex. 30) Violations of this new prohibition are punishable by a civil penalty of $2,000 to $10,000. N.Y.C. Admin. Code § 27-2115(m)(2). In addition, plaintiffs may recover attorneys' fees and punitive damages. *See id.* §§ 27-2005(d), 27-2115(h)(1), 27-2115(o).

[3] The COVID-19 period for both Harassment Laws is defined as starting on March 7, 2020 and ending no sooner than September 30, 2020 and potentially as long as Governor Cuomo's commercial eviction moratorium lasts.

The two Harassment Laws would potentially cover at least tens of thousands of businesses and over a million individuals in the City, if not more, without regard to whether they were seriously injured by the Pandemic. (Younger Decl. ¶¶ 67–83)

3. The Guaranty Law

The Guaranty Law prevents landlords from holding natural person guarantors liable for a tenant's obligations if the tenant: 1) under the Governor's Executive Order 202.3, had to stop serving patrons food or beverage on premises or otherwise had to cease operations; 2) was a non-essential retail business owner subject to in-person limitations under Executive Order 202.6; or 3) was among a class of businesses (like cosmetologists and barber shops) that had to close to the public under Executive Order 202.7. N.Y.C. Admin. Code § 22-1005; (*see also* Younger Decl. ¶¶ 32–34, 85). If a tenant meets any of these conditions and has defaulted or otherwise become liable under its lease between March 7 and September 30, 2020, the landlord is forever prohibited from enforcing the personal guaranty. N.Y.C. Admin. Code § 22-1005. This Law also prohibits attempts to enforce such personal guaranties as "harassment." *Id.*

As with the Harassment Laws, the Guaranty Law contains no substantial injury requirement for businesses to invoke its protections and it thus sweeps numerous businesses under its protections, regardless of whether they merit such relief. (Younger Decl. ¶ 86) The stated objective of this Law is "so that city business owners don't face the loss of their businesses and also personal bankruptcy." (*Id.*, Ex. 34 at 11–12)

G. The Harassment Laws Chill Plaintiffs' Commercial Speech

Prior to the passage of the Harassment Laws, the Melendez Plaintiffs communicated from time-to-time with delinquent tenants concerning their unpaid rent. (Melendez Decl. ¶¶ 21, 25) One residential tenant in their property at 283 East 55th St. in Brooklyn failed to make timely

rent payments starting in November 2019. (*Id.* ¶ 20) As a result, before the COVID-19 outbreak, the Melendez Plaintiffs sent this delinquent tenant notices of late rent and sought to recover the unpaid rent in Housing Court in accordance with their normal practices. (*Id.* ¶ 21) They further sought to evict this delinquent tenant before Governor Cuomo's March 20, 2020 eviction moratorium took effect. (*Id.* ¶ 22) As a result of that moratorium, however, this tenant still remains in the premises. (*Id.*) Although this residential tenant has since paid a portion of the rent owed, the tenant has still failed to pay rent for April 2020 to the present. (*Id.* ¶ 21).

Similarly, a commercial tenant in the Melendez Plaintiffs' property at 527 Nostrand Ave. in Brooklyn, whose rent makes up over half the rent roll for that property, has not made any rent payments since February 2020, before the emergency's onset. (*Id.* ¶¶ 23-24) On April 27, 2020, the Melendez Plaintiffs sent the tenant a dispossess notice through their attorney. (*Id.* ¶ 25)

But for the enactment of the Harassment Laws, the Melendez Plaintiffs would have sent additional demand notices to their delinquent tenants. (*Id.* ¶ 29) In May 2020, however, Ms. Melendez learned of the new Harassment Laws, and feared that any attempt to enforce their contractual rights by issuing further notices could be considered harassment under these Laws. (*Id.* ¶ 26) This fear was particularly acute because their residential tenant had previously accused Ms. Melendez of "harassment" simply for seeking payments through demand notices even before the passage of the new Harassment Laws. (*Id.* ¶¶ 21, 29)

The Yang Plaintiffs likewise sent notices of late rent and sought to recover unpaid rent in Housing Court prior to the outbreak of COVID-19. (Yang Decl. ¶ 34) Since they learned of the Residential Harassment Law, however, they have stopped even mentioning to their residential tenants the consequences of the tenants' continued failures to pay rent out of fear that such statements could be considered "harassment" under the Law. (*Id.* ¶ 35)

H. The Guaranty Law Destroys a Critical Remedy

It is common practice for New York City property owners to require personal guaranties, usually from a tenant's principal, before entering into lease agreements with small and mid-sized commercial tenants. (Golino Decl. ¶¶ 27, 30) Personal guaranties are essential for commercial lease agreements because they provide a critical remedy, to recover unpaid rent. (*Id.* ¶¶ 30-31, 100) Indeed, the Yang Plaintiffs would not have entered into commercial leases with their tenants if they were not personally guaranteed. (Yang Decl. ¶ 31)

Personal guaranties, moreover, benefit both owners and tenants by encouraging property owners to lease property to commercial tenants who may not be as creditworthy, such as small business start-ups, and discouraging tenant holdovers following a lease default. (Golino Decl. ¶ 30) By suspending the operation of such personal guaranties, the Guaranty Law destroys this core remedy and prevents landlords from ever recovering rent for March to September 2020; this creates a perverse incentive for tenants to abandon their leases without repercussions, which will likely have a detrimental effect on this City by accelerating the blight of vacant storefronts. (Golino Decl. ¶ 100; *see also* Younger Decl. ¶¶ 69–70) But for the enactment of the Guaranty Law, the Yang Plaintiffs would have sought to enforce their rights under the personal guaranty.

I. Plaintiffs Face Potential Ruin of Their Businesses

Due to Plaintiffs' inability to collect the full rent due on their properties, they have or will likely face difficulties in meeting the various obligations and expenses owed on their properties. As discussed above, they are already struggling to meet their property tax and mortgage obligations, and they are likely to face further financial difficulties should they be unable to collect additional unpaid rent. (Melendez Decl. ¶ 30; Yang Decl. ¶¶ 36–38) If these economic difficulties continue, Plaintiffs face the prospect of financial ruin. (*Id.*)

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: "(1) irreparable harm; (2) either [i] a likelihood of success on the merits or [ii] both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Plaintiffs readily meet that burden here given that: a) the Harassment Laws impose extensive restrictions on their protected commercial speech; b) the Guaranty Law guts Plaintiffs' contracts and deprives them of material remedies; and c) the Laws were not within the Council's power to pass in the first place because they were preempted by the State.

I. Plaintiffs Are Likely to Succeed on Their Claims

To establish likely success on the merits, Plaintiffs need only show that "the probability of [their] prevailing is better than fifty percent." *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988).

A. The Harassment Laws Violate the First Amendment[4]

As applied to Plaintiffs, the Harassment Laws are content-based restrictions on commercial speech. To the extent they prohibit demands for rent and representations regarding the consequences of unpaid rent, the Laws prohibit communications that "relate[] solely to the economic interests of the parties," which is protected commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980); *see also San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 881 F.3d 1169, 1176 (9th Cir. 2018) (holding that a landlord and a tenant's discussion about "a buyout agreement is commercial speech").

[4] The New York State Constitution's Free Speech Clause and Due Process Clause "are at least as protective as their federal counterparts." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 40 (2d Cir. 2018). Accordingly, Plaintiffs are likely to prevail on their New York State Constitution claims for much the same reasons as their First and Fourteenth Amendment constitutional claims.

These speech restrictions are content-based for at least three reasons. *First*, they prohibit speech (specifically, harassing, "threatening" speech) that is "based on" the audience's membership in a protected class. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 267 (3d Cir. 2002); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596–97 (5th Cir. 1995). *Second*, "a court would be required to examine the content of the message at issue" to determine whether the content is proscribed by the Laws, which is "sufficient under [Supreme Court precedent] to render the provision[s] content based." *Mejia v. Time Warner Cable Inc.*, No. 15-CV-6445 (JPO), 2017 WL 3278926, at *14 (S.D.N.Y. Aug. 1, 2017); *see also Seals v. McBee,* 898 F.3d 587, 595 (5th Cir. 2018), as revised (Aug. 9, 2018) ("[B]y criminalizing 'threats,' the statute regulates content."). *Third*, these Laws proscribe expression based on its impact on the tenant,[5] and "Supreme Court [precedent] is unequivocal: a legislative proscription conditioned upon the impact an expression has on its listeners 'is the essence of content-based regulation.'" *Jamal v. Kane*, 105 F. Supp. 3d 448, 457–58 (M.D. Pa. 2015) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)).

Content-based restrictions on commercial speech are unconstitutional where: "(1) the speech restriction concerns lawful activity," and the government fails to make any one of the following showings: "(2) the [government's] asserted interest is substantial; (3) the prohibition 'directly advances' that interest; and (4) the prohibition is no more extensive than necessary to serve that interest;" that is, the law is narrowly tailored. *Vugo, Inc. v. City of New York*, 931 F.3d 42, 51 (2d Cir. 2019). Defendants bear the burden of proving that the restriction directly advances a substantial interest, and that it does so by means no more extensive than necessary.

[5] As detailed in the Golino Declaration, existing case law defines prohibited "harassment" based on its impact on the tenant, not on the landlord's intent. (Golino Decl. ¶ 87)

See id. at 52. The Harassment Laws prohibit lawful commercial speech, and are not narrowly tailored to a substantial interest given their expansive reach.

1. The Harassment Laws Restrict Plaintiffs' Lawful Speech

A restriction on commercial speech "concerns lawful activity" so long as the speech it restricts does not "*necessarily* constitute an illegal act." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 114 (2d Cir. 2017). Here, the Harassment Laws restrict Plaintiffs' lawful commercial speech.

As an initial matter, the Harassment Laws proscribe Plaintiffs' intended speech.[6] The Commercial Harassment Law prohibits conduct that: 1) involves "threatening" a tenant based on its status of having been impacted by COVID-19 or based on its receipt of a rent concession or forbearance; and 2) is of such a nature that it would "reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property." N.Y.C. Admin. Code § 22-902(a). Similarly, the Residential Harassment Law prohibits conduct that: 1) involves "threatening" a tenant based on his or her status as a COVID-19 impacted individual or as a recipient of a rent concession or forbearance; and 2) "causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy." *Id.* § 27-2004(a)(48).

[6] Because Plaintiffs are bringing a pre-enforcement claim, they need not establish that their speech is certainly proscribed to show an Article III injury-in-fact. Instead, they need only show that: 1) their alleged future course of constitutionally protected conduct is "arguably proscribed," and 2) there is a "credible threat of [enforcement]." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159–65 (2014) (quotations omitted); *see also Woodhull Freedom Found. v. United States*, 948 F.3d 363, 372 (D.C. Cir. 2020) (using this standard in an "as applied" Free Speech challenge); *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (same). Both requirements are readily met here.

Notably, the prohibited conduct of "threatening" is nowhere defined in the Harassment Laws. Case law under existing "harassment" prohibitions has interpreted this term as viewed through the lens of the tenant—not the property owner. *See* (Golino Decl. ¶ 87)[7] As a result, no matter how benign a landlord's intentions may be, they can still be accused of prohibited "harassment" based on their legitimate efforts to collect rent. This plainly infringes Plaintiffs' free speech rights.

Further, given that the Harassment Laws lack any definition of this key term, "threatening" must be interpreted in accordance with its "plain meaning." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).[8] The plain meaning of "threatening" includes making a "declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course." *U.S. v. Davila*, 461 F.3d 298, 302 (2d Cir. 2006). Plaintiffs' intended speech—*e.g.*, communicating intent to pursue eviction proceedings if a tenant fails to pay overdue rent—would fall within that plain meaning of threatening.

Because Plaintiffs have no intent to use fighting words or to threaten tenants with violence, (Melendez Decl. ¶ 21; Yang Decl. ¶ 34), their speech is protected by the First

[7] Because the term "threatening" is undefined in either Harassment Law, these Laws create tremendous uncertainty for landlords who attempt to recover back rent. And that confusion is compounded with respect to the Commercial Harassment Law because, under Section 22-902, "the effect on the small business tenant" is the sole focus. *See One Wythe LLC v. Elevations Urban Landscape Design Inc.*, 67 Misc. 3d 1207(A), 2020 WL 1917760, at *8 (N.Y. Civ. Ct. April 17, 2020). The Harassment Laws, moreover, apply a definition of "impacted by COVID-19" that is so sweeping as to make it nearly impossible for property owners, such as Plaintiffs, to know whether a tenant is "impacted" or not. *See supra* Section F.2. For these reasons, the Harassment Laws are also void for vagueness under the Fourteenth Amendment. (*See* Compl. ¶¶ 165–167)

[8] Any ambiguity in the meaning of "threatening" militates in favor of this Court resolving Plaintiffs' constitutional claims, rather than waiting for a state court to construe "threatening." It is well-settled that a federal court should exercise jurisdiction where, as here, a state or municipal law is "justifiably attacked . . . as applied for . . . discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965); *see also Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998).

Amendment. *See Seals*, 898 F.3d at 594, 597; *Vives v. City of New York*, 405 F.3d 115, 123–24 (2d Cir. 2005) (Cardamone, *J.*, concurring). Absent these Laws, Plaintiffs intend to communicate their desire to collect the rents owed and to describe the remedies available to them if tenants continue not paying. (Melendez Decl. ¶ 29; Yang Decl. ¶¶ 34-35) Demands for back rent through routine late payment and dispossess notices, and descriptions of the contractual consequences of failing to pay rent constitute lawful "threats," which Defendants' legislation nonetheless proscribes. Plaintiffs issued such notices in the past, but are now inhibited from doing so against anyone "impacted by COVID-19." (Melendez Decl. ¶¶ 21, 25; Yang Decl. ¶ 34)[9]

2. The Harassment Laws Fail to Directly Advance a Substantial Government Interest

Because these Laws' speech restrictions concern lawful commercial activity, Defendants must prove that the restrictions directly advance a substantial interest.[10] *Vugo*, 931 F.3d at 52 (citation omitted). To meet their burden, Defendants need to show: "(1) 'the harms [they] recite[] are real,' and (2) '[] [the] restriction[s] will in fact alleviate them to a material degree.'" *Id.* (citation omitted). Defendants' burden on these elements is "not slight," and, critically, "mere speculation or conjecture" will not suffice. *Hayes v. N.Y. Attorney Grievance Comm. of the Eight Judicial Dist.*, 672 F.3d 158, 166 (2d Cir. 2012) (quotations omitted). A commercial speech

[9] Section 22-902(b) of the N.Y.C. Administrative Code provides that a "landlord's lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession of the covered property shall not constitute commercial tenant harassment for purposes of this chapter." But that savings provision fails to address whether restatement of lease provisions requiring the payment of rent, communications concerning unpaid rent and the consequences of not paying rent are considered "threatening" under the Commercial Harassment Law. If such communications constitute "threatening" acts, it would gut the savings clause because before landlords can even commence non-payment proceedings in court, they must first make rent demands. (Golino Decl. ¶¶ 39-40, 54-56) Moreover, judges in these types of cases are likely to gloss over this savings provision when faced with claims of tenant harassment. (*Id.* ¶ 89)

[10] Plaintiffs do not contend that Defendants are incapable of identifying a substantial government interest, given the impact of the Pandemic. Rather, Defendants cannot carry their burden on the remaining prongs – *i.e,* whether these Laws directly advance such an interest and are narrowly tailored to do so.

regulation cannot be sustained where it "provides only ineffective or remote support for the government's purpose." *Cent. Hudson*, 447 U.S. at 564; *see also Bad Frog Brewery, Inc. v. N.Y.S. Liquor Auth.*, 134 F.3d 87, 100 (2d Cir. 1998) (it is not enough that the law makes "*any* contribution to achieving" the asserted interest) (emphasis in original).

First, the City's Harassment Laws were improperly premised on "mere speculation and conjecture."[11] *Hayes*, 672 F.3d at 166. Defendants cannot show that the specific harms the Laws are intended to address—*i.e.*, harassment by landlords of tenants affected by COVID-19—are real. The cursory committee reports for the Laws contain no factual basis to support such a substantial interest. (Younger Decl. ¶¶ 62–64) Similarly, the hearings on the bills lacked any meaningful evidence of the problems the bills are ostensibly designed to address. (*Id.* ¶¶ 56–58)

There is no dispute that COVID-19 has devastated the City. But the Pandemic does not excuse Defendants' obligation to provide fact-based support for their speech restrictions, as recent federal decisions confirm. *See e.g. ACA Int'l v. Healey*, No. CV 20-10767-RGS, 2012 WL 2198366, at *6 (D. Mass. May 6, 2020) (invalidating commercial speech restriction for lack of empirical evidence of identified problem).

Second, Defendants cannot show that the Harassment Laws will advance any identified government interest to a material degree. The Laws actually undermine the purported goal of protecting small businesses which include small property owners such as Plaintiffs. These new Laws gut their ability to collect rent—the principal means by which they earn revenue needed to fund their operations and pay obligations such as mortgages, property taxes, and maintenance

[11] Defendants cannot rely on *post hoc* rationalizations to restrict commercial speech. *See Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556 (2d Cir. 1990). And evidence on which Defendants did not rely at the time of the bills' enactment cannot justify a restriction retroactively. *See Citizens Union of City of New York v. Attorney Gen. of New York*, 269 F. Supp. 3d 124, 140–41 (S.D.N.Y. 2017).

expenses. (*See, e.g.*, Melendez Decl. ¶¶ 15-18, 30; Yang Decl. ¶¶ 19-23, 36) And large, well-capitalized tenants, such as national retailers, will be motivated to use the Commercial Harassment Law to avoid their rent obligations. For example, Old Navy LLC and Gap Inc. recently brought a lawsuit against their landlord, seeking to terminate their commercial lease agreements. (Younger Decl., Ex. 5) These large retailers allege that their landlord's notices of default, without more, constituted a "clear violation" of the Commercial Harassment Law. (*Id.*, Ex. 5 ¶ 24) A restaurant chain has also invoked the Commercial Harassment Law to avoid paying rent and to justify a request that its landlord rescind a default notice. (*Id.*, Ex. 42)

3. The Harassment Laws Are Not Narrowly Tailored

The Laws' speech restrictions also fail the "narrow tailoring" prong. Defendants must "establish that the regulation does not burden substantially more speech than is necessary to further the government's legitimate interests." *Vugo*, 931 F.3d at 58 (quotations omitted).

It is well-settled that a law is not narrowly tailored "if there existed numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *Centro*, 868 F.3d at 117. As the Second Circuit has held, the government must give "[]adequate consideration" to "alternatives that would prove less intrusive to the First Amendment's protections for commercial speech." *Bad Frog Brewery*, 134 F.3d at 101 (quotations omitted). Likewise, a speech restriction is more extensive than necessary where "[p]re-existing law provides a thoroughly effective way of protecting [the asserted interest]." *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014). If an ordinance "simply adds a speech-based component to an already existing prohibition," it is not narrowly tailored. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d at 118.

Here, there were several less burdensome alternatives to the restrictions that the City imposed on commercial speech. For example, although the Council was informed that numerous tenants who could pay rent were, nonetheless, "going to withhold rent out of solidarity," the City failed to limit the Laws' protections to those who have suffered financial hardship. (Younger Decl., Ex. 33 at 44) As did the State, the City easily could have enacted a law that was triggered by a tenant's inability to pay or conditioned eligibility on a showing of financial hardship. *See supra* at 8. Its decision instead to "'impose a prophylactic ban[,] merely to spare itself the trouble of distinguishing the harmless from the harmful," confirms that these Laws are not narrowly tailored. *Centro*, 128 F. Supp. 3d 597, 618 (E.D.N.Y. 2015) (quotations omitted), *aff'd* 868 F.3d at 115. As discussed above, the lack of an injury requirement has helped allow substantial commercial tenants—like Old Navy LLC, Gap Inc. and Sweetcatch Poke—to avoid paying rent, despite their financial ability to do so; this is a result that the City should have foreseen. (*See* Younger Decl. ¶¶ 14–16) The exceedingly broad reach of the Harassment Laws is further shown by conservative calculations—which do not account for all of the Laws' triggers—which reveal that a staggeringly high number of New Yorkers and City-based businesses could potentially invoke the protection of these new Laws. (*Id.*¶¶ 67–83)

The City also failed to adequately consider approaches that would not restrict protected speech, such as using government funds to "to pay for [] rent." (*Id.*, Ex. 33 at 51) Such an approach was actually floated before the Council but was never substantively discussed (although the State later adopted such a policy in the ERRA, confirming its viability). (*Id.*) Nor were any other less burdensome alternatives meaningfully deliberated.

Tenants, moreover, were already covered by numerous COVID-19 related protections even before these new Harassment Laws were passed. Tenants benefited from several of

Governor Cuomo's executive orders. *See supra* at 9. And residential tenants were also already covered by federal, state, and local law housing protections. A City official acknowledged as much before the Council, testifying that "*several of the protections* contemplated in [the Residential Harassment Law] *already exist*" under City law. (Younger Decl., Ex. 33 at 98–99) Given these pre-existing protections, the Harassment Laws' speech restrictions are clearly more extensive than is necessary to address any stated interest. *Safelite Grp.*, 764 F.3d at 265.

B. Plaintiffs Are Likely to Succeed on Their Contracts Clause Claim

Plaintiffs are also likely to succeed in showing that the Guaranty Law violates the Contracts Clause. Under that constitutional provision, municipalities are prohibited from enacting legislation that "extinguishes" or "renders [contractual obligations] invalid . . . ." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934); *see also Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018).

A law violates the Contracts Clause where: a) "the contractual impairment [is] substantial"; b) "the law [does not] serve a legitimate public purpose"; and c) "the means chosen to accomplish [the alleged legitimate] purpose [are not] reasonable and necessary." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006); *see also Sveen*, 138 S. Ct. at 1821.

1. Plaintiffs' Contractual Relationships Are Substantially Impaired

"[T]he primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). But "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). An impairment is considered substantial if it, *inter alia*: a) "deprives a private party of an important right"; b) "thwarts performance of an essential term"; or c) "alters a financial term." *S. Cal. Gas*

Co. v. City of Santa Ana, 336 F.3d 885, 890 (9th Cir. 2003). An "[i]mpairment of a remedy [is] held to be unconstitutional if it effectively reduced the value of substantive contract rights." *U.S. Trust Co. of New York v. New Jersey,* 431 U.S. 1, 19 n. 17 (1977).

The Guaranty Law not only disrupts, but actually destroys the reasonable expectations of the parties to commercial lease agreements. A personal guaranty is a critical inducement for commercial landlords to lease their properties in New York City. (Golino Decl. ¶ 97; *see also* Yang Decl. ¶ 31 ("We would not have entered into any lease agreements with small businesses if not for the personal guaranties given by the principals of the businesses.")) Such guaranties serve several critical purposes. *First*, such guaranties serve as much needed security to back up commercial leases. (Golino Decl. ¶¶ 28, 30) *Second*, these guaranties permit small businesses, which often are not very creditworthy, to enter into leases with landlords without needing to show that they have sufficient assets to pay their rent. (*Id.*) *Third*, they act as an efficient remedy in the event that a small corporate tenant, often with minimal assets, defaults under a lease because Housing Court proceedings in New York are "slow [and] cumbersome." *Elmsford Apartment Assocs., LLC v. Cuomo*, No. 20-CV-4062 (CM), 2020 WL 3498456, at *4 (S.D.N.Y. June 29, 2020); *see also* (Golino Decl. ¶¶ 33-52)

The Guaranty Law forever guts those reasonable expectations for the period covered by this Law. It permanently strips leasing arrangements of this critical remedy that landlords reasonably believed would be available should a tenant default. And the Law retroactively alters the economic benefits and burdens that existed at the time when property owners entered their leases, further upending landlords' reasonable expectations. *See Cal. Gas Co.*, 336 F.3d at 890; *HRPT Prop. Tr. v. Lingle*, 715 F. Supp. 2d 1115, 1137 (D. Haw. 2010) (substantial impairment where law prohibited enforcement of lease rental terms); *cf Elmsford Apartment Associates,*

LLC, 2020 WL 3498456, at *14 (no substantial impairment where Governor Cuomo's orders "d[id] not prevent Plaintiffs from safeguarding or reinstating their rights" after defined time period). Here, the Guaranty Law thwarts the performance of guaranties in perpetuity, making it impossible to enforce them as to any liabilities incurred between March 7 and September 30, 2020. (*See e.g.* Younger Decl., Ex. 29)

Absent these personal guaranties, property owners like the Yang Companies would not have agreed to their lease agreements. (Yang Decl. ¶ 31; Golino Decl. ¶ 96) For many landlords, including Plaintiffs, the party leasing the commercial space is (especially as to restaurants, bars, and small retailers that are the focus of this Law) typically an entity with no substantial assets; as a result, a personal guaranty is the landlord's sole means of collecting unpaid rent. (Golino Decl. ¶¶ 96, 100) Accordingly, extinguishing these guaranties results a substantial contract impairment as a matter of law. *See Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 499 (E.D.N.Y. 2012), *vacated in part*, 796 F.3d 171 (2d Cir. 2015).

The Guaranty Law's impact on the value of Plaintiffs' contracts is also amplified by the Commercial Harassment Law's proscription of communications to tenants regarding the contractual consequences of not paying rent. And because the Guaranty Law codifies "harassment" as including attempts to enforce personal guaranties, the Law poses yet another roadblock for landlords in collecting back rent. Due to these prohibitions, Plaintiffs have no other contractual remedy to invoke—thereby materially changing the binding force of Plaintiffs' contracts. *See Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577, 607 (D.P.R. Feb. 10, 2015), *aff'd*, 805 F.3d 322 (1st Cir. 2015), *aff'd*, 136 S. Ct. 1938 (2016); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 537, 546 (E.D. Va. 1999).

2. The Guaranty Law Fails to Serve a Legitimate Public Purpose

While Plaintiffs do not dispute that the Pandemic presents an economic emergency for small business owners, the Guaranty Law is not aimed at addressing that emergency in any legitimate way. The stated objective of the Guaranty law is "so that city business owners don't face the loss of their businesses and also personal bankruptcy." (Younger Decl., Ex. 34 at 11–12) But COVID-19 affects small business owners who are tenants and landlords alike. Plaintiffs own properties in the City for their small rental businesses and are finding it difficult, if not impossible, to meet their full tax and mortgage obligations due to their tenants withholding rent. (Yang Decl. ¶¶ 36–38) If Plaintiffs' rental incomes fall further, their companies are at risk of lacking sufficient assets to continue as a going concern, and the properties might be foreclosed, which could take them off the City's tax rolls. (*Id.* ¶¶ 37–38) Moreover, the Guaranty Law is phrased in such categorical terms and lacks any substantial injury requirement so that it sweeps in large swaths of businesses that would not merit assistance. (Younger Decl. ¶ 86)

By passing the Guaranty Law, Defendants have improperly transferred the economic burdens experienced by tenants onto their landlords—regardless of their respective financial situations. Such burden shifting is not a legitimate public purpose. *See Buffalo Teachers Fed'n*, 464 F.3d at 368; *Sanitation & Recycling Indus.*, 107 F.3d at 993 (noting that law should be "aimed at remedying an important general social or economic problem rather than providing a benefit to special interests") (quotations omitted); *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 861 (8th Cir. 2002) (finding that the law violates the Contract Clause because "the only real beneficiaries…are the narrow class of dealers of agricultural machinery").

3. The Guaranty Law Is Unreasonable and Unnecessary

Even assuming Defendants had a legitimate purpose, Defendants' chosen means to accomplish it must be reasonable and necessary to serve that purpose. *Sveen,* 138 S. Ct. at 1817.

Reasonable and necessary laws are those that are "temporary and conditional" and that provide the contracting parties with value commensurate with their reasonable expectations under the contract. *See Blaisdell*, 290 U.S. at 441. For leases, that standard is met when "reasonable compensation [was made] to the landlord" to accommodate modifications that were inconsistent with the parties' expectations. *Id.*; *see also Elmsford Apartment Assocs.*, 2020 WL 3498456, at *14 ("[R]egulations that reimburse landlords for lost rental income do not impose a substantial impairment on those parties' contract rights.") (quotations omitted); *Kraebel v. New York City Dep't of Hous. Pres. & Dev.*, NO. 90-cv-4391, 1991 WL 84598, at *5 (S.D.N.Y. May 13, 1991), *aff'd in part, rev'd on other grounds*, 959 F. 395 (2d Cir. 1992). A failure to consider less restrictive measures can show that the law is unreasonable and unnecessary. *See Ross v. City of Berkeley*, 655 F. Supp. 820, 835 (N.D. Cal. 1987) (holding that a prohibition of owner occupancy violated the Contracts Clause because the government failed to consider less restrictive measures that other municipalities had used).

Here, the City forever snuffed out Plaintiffs' personal guaranties in their entirety for this six-month period (and perhaps longer); and it did so with no means to compensate property owners, no alternative remedy, and no accommodation of the parties' contractual expectations. Extinguishing Plaintiffs' personal guaranties in this fashion is unreasonable because the Guaranty Law is not tailored at all to meet the societal ill it ostensibly seeks to ameliorate: *i.e.*, the economic impact of the Pandemic on the City's small businesses. Some tenants have been disproportionately affected financially by COVID-19, while others or the well-capitalized principals behind them have not seen their financial situations change dramatically. Also, landlords are not all similarly situated. Many landlords, like Plaintiffs, are small business owners—whom the Guaranty Law was ostensibly created to protect—and rely on rent

collections to meet the numerous obligations and expenses for their properties. They are at risk of failing to meet these obligations if rent payments decrease further. (Yang Decl. ¶¶ 19, 36-38) Moreover, the Guaranty Law creates a perverse incentive for commercial tenants to abandon their leaseholds prior to the Law's expiration date, which will likely accelerate the blight of vacant storefronts—to the detriment of all concerned in the City. (Golino Decl. ¶ 100).

Accordingly, the Guaranty Law "overreaches its stated objectives" by causing unnecessary harm to small landlords whose small businesses and livelihoods depend on rent payments while benefiting some well-funded commercial tenants. *See Ross*, 655 F. Supp. at 835.

C. Plaintiffs Are Likely to Succeed on Their Preemption Claims

In New York, local laws may be preempted when a locality 1) adopts a law that is in direct conflict with a State statute ("conflict preemption"); or 2) tries to legislate in a field over which the Legislature has assumed full regulatory responsibility ("field preemption"). *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95-96 (N.Y. 2001). All three Laws are preempted under the doctrines of both conflict preemption and field preemption.

1. The Harassment and Guaranty Laws Are Conflict Preempted

"Under the doctrine of conflict preemption, a local law is preempted by a state law when a right or benefit that is expressly given . . . by . . . State law. . . has then been curtailed or taken away by the local law." *Chwick v. Mulvey*, 81 A.D.3d 161, 167-68 (2d Dep't 2010) (quotations omitted). "The crux of conflict preemption is whether there is a head-on collision between the . . . ordinance as it is applied and a state statute." *Id.* at 168 (quotations omitted). The three Laws directly conflict with the TSHA, ERRA, and the Governor's Executive Orders.

First, these three Laws curtail residential rent collection that is expressly permitted under the TSHA and facilitated by rent subsidies of the ERRA. While the TSHA extends Governor Cuomo's eviction moratorium for individuals suffering from financial hardship during a defined

"COVID-19 covered period" (ending when the Governor's Executive Orders closing businesses and restricting non-essential gatherings expire), the Act expressly permits property owners to sue for, and courts to issue money judgments awarding, back rent. 2020 Sess. Law News of N.Y. Ch. 127, (*see also* Younger Decl., Ex. 27). These are the very same rent collection efforts that the City's Harassment Laws seek to hinder or even "cancel," creating an express conflict. Further, in passing the ERRA, the Legislature allocated $100 million for rent vouchers to be provided to property owners on behalf of their eligible residential tenants, and has permitted landlords to collect rent from these individuals while alleviating some of the economic strain on their tenants. 2020 Sess. Law News of N.Y. Ch. 125; *see also* (Younger Decl., Ex. 26). Accordingly, the ERRA recognizes that landlords can collect rent from eligible tenants in the form of rent subsidies and creates a State policy that funds such rent relief to property owners.

There are further conflicts. Both the TSHA and the ERRA narrowly define the tenants who qualify for this legislative assistance, whereas the Harassment Laws lack any substantial injury requirement and thus extend benefits to well-off tenants whom the Legislature deemed ineligible for assistance. Moreover, the City's Harassment Laws contain much different end dates for their relief, potentially extending this emergency assistance well beyond the Statewide emergency that the Governor declared and is empowered to end. N.Y. Exec. Law §§ 28, 29-a.

Second, because the Legislature has granted broad emergency powers to the Governor concerning the Pandemic under Section 29-a, any local laws that conflict with the Governor's Executive Orders are likewise conflict preempted. *Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead*, 91 A.D.3d 126, 139–40 (2d Dep't 2011), *aff'd sub nom.* 20 N.Y.3d 481 (2013). Significantly, in Executive Order 202.3, the Governor expressly prohibited the City from issuing "any local emergency order . . . inconsistent with . . . any . . . executive order issued

under Section 24 of the Executive Law," and suspended any such local laws. (Younger Decl., Ex. 18) These three Laws are in direct conflict with Executive Orders 202.28 and 202.48 which a) limit the current eviction moratorium to commercial tenants with a substantial injury; b) provide rent relief only for tenants facing late rent fees, and requires landlords to allow tenants facing financial hardship to use security deposits as rent payments; c) prohibit "threats" only regarding the use of security deposits to pay rent; and d) define the periods for which tenants can seek relief. (Younger Decl., Exs. 23, 25) In contrast, the City's new Laws prohibit threats against a wide group of residential and commercial tenants who may not be financially impacted by the Pandemic, and allow individuals not facing financial hardship due to the Pandemic to avoid paying rent and escape agreed guaranties for an uncertain period. Section 29-a gave the Governor the emergency powers to set the procedures for attacking COVID-19 and it would sow rampant confusion if cities could chart their own course in this time of crisis, thereby undermining the Governor's Statewide emergency order.

2. The Harassment and Guaranty Laws Are Field Preempted

The three new City Laws are also preempted because the Legislature has occupied the field of responding to the Pandemic in the real estate industry by conferring broad emergency powers on the Governor under Section 29-a. In New York, field preemption occurs when: 1) "a declaration of State policy evinces the intent of the Legislature to preempt local laws on the same subject matter" or 2) "the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws." *Chwick*, 81 A.D.3d at 169–70. "[W]hen the Legislature has demonstrated its intent to preempt the field, all local ordinances are preempted, regardless of whether they actually conflict with the State Law." *Id.* at 172. Even a local law that "merely makes minor additions . . . must be held

invalid" if it intrudes on a preempted field. *Lansdown Entm't Corp. v. New York City Dep't of Consumer Affairs*, 141 A.D.2d 468, 473 (1st Dep't 1988), *aff'd,* 74 N.Y.2d 761 (1989).

Here, the Legislature amended Section 29-a for the express purpose of granting the Governor broad emergency powers to address disasters by executive order, including this particular Pandemic through at least April 2021. N.Y. Exec. Law § 29-a. The Legislature made "these changes [to] ensure that the Governor has the necessary legal authority . . . to confront the [Pandemic.]" (Younger Decl., Ex. 16 at 1) And the Governor has used this authority to issue comprehensive Executive Orders to regulate landlord-tenant relationships during the Pandemic. (*See* Younger Decl. ¶¶ 36–43) Such a grant of exclusive powers to the Governor demonstrates the Legislature's intent to occupy the field of COVID-19 response regarding real estate. *See Walsh v. City of River Rouge*, 189 N.W.2d 318 (Mich. 1971).

The Supreme Court of Michigan came to precisely that conclusion in *Walsh*, where it considered whether the Michigan legislature preempted the field of emergency response by conferring broad emergency powers to the governor under that state's Emergency Powers of Governor Act. *Id.* at 326. There, Michigan's high court held that the comprehensive and broad grant of authority to a unitary executive in times of emergency demonstrated a legislative intent to occupy the field and preempt local laws. *Id.* New York courts likewise recognize that where the Legislature enacts a "comprehensive and detailed regulatory scheme," it is an indication by the Legislature that it intended to preempt that area of law. *Ba Mar, Inc. v. Cty. of Rockland*, 164 A.D.2d 605, 613 (2d Dep't 1991) (holding that the broad and detailed scope of the statutory scheme for mobile home park life evinced legislative intent to preempt this field).

Here, Section 29-a broadly confers emergency powers on the Governor to respond to this Pandemic, authorizing him to: issue "any" reasonable directive, specify the applicable

procedures and suspend conflicting laws during this Pandemic. The Governor exercised those powers to regulate the economic relationship between landlords and tenants during the Pandemic. Accordingly, Section 29-a evinces an intent that the Governor exercise exclusive authority to respond to the Pandemic as it impacts the Statewide real estate market.

The ERRA and TSHA, moreover, specify additional requirements and relief for residential renters and landlords alike, setting out a detailed rent subsidy system and permitting recovery of rent against non-paying tenants. *See supra*, Section F.3. These laws further confirm the Legislature's intent to occupy the field for real estate rent relief related to the Pandemic.

II. Plaintiffs Will Likely Suffer Irreparable Harm Without an Injunction

To show irreparable harm, "Plaintiffs must demonstrate that absent a preliminary injunction they will [likely] suffer an injury that is . . . actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quotations omitted). This requires only "'a showing of *probable* irreparable harm,'" not "certainty." *Wenner Media LLC v. N. & Shell N. Am. Ltd.*, No. 05 CIV. 1286 (CSH), 2005 WL 323727, at *3 (S.D.N.Y. Feb. 8, 2005) (citation omitted) (emphasis in original).

A. Defendants' Constitutional Violations Establish *Per Se* Irreparable Harms

Defendants' constitutional violations are sufficient—without more—to constitute irreparable harm. In this Circuit, such infringements create a presumption of irreparable harm. *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020).

This presumption applies to the First Amendment claims brought here, given that the challenged Laws impose a "direct limitation on speech." *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014). As the Second Circuit has repeatedly reaffirmed, the "loss of

First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013).

This presumption also applies to impairment claims under the Contracts Clause. *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012); *see also Ass'n of Equip. Mfrs. v. Burgum*, No. 1:17-CV-151, 2017 WL 8791104, at *10 (D.N.D. Dec. 14, 2017), *aff'd*, 932 F.3d 727 (8th Cir. 2019); *Allen v. State of Minn.*, 867 F. Supp. 853, 859 (D. Minn. 1994); *W. Indian Co. v. Gov't of V. I.*, 643 F. Supp. 869, 882 (D.V.I. 1986), *aff'd*, 812 F.2d 134 (3d Cir. 1987). A Contracts Clause violation creates a presumption of harm because it subjects Plaintiffs to a business risk they specifically "bargained for and contracted to avoid," and the damages associated with such a risk are not easily calculable. *Ass'n of Equip. Mfrs.*, 2017 WL 8791104, at *10 (quotations omitted); *see also Donohue*, 886 F. Supp. 2d at 151.

B. Plaintiffs Have Independently Demonstrated Irreparable Harm

Plaintiffs have also demonstrated irreparable harm here because these three Laws will make it difficult—if not impossible—for them to recover rent from a large portion of their tenants, even after the COVID-19 crisis is over, leading to the potential ruin of their businesses. (Mendez Decl. ¶ 30; Yang Decl. ¶¶ 36-38) *See Five Star Dev. Resort Communities, LLC v. iStar RC Paradise Valley LLC*, No. 09 CIV. 2085 (LTS), 2010 WL 1005169, at *4 (S.D.N.Y. Mar. 18, 2010) ("[A] threat to [a plaintiff's] ongoing financial viability can, in and of itself, [constitute] irreparable harm[.]") (citation omitted); *see also Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011), *as amended* (Mar. 7, 2012) (finding irreparable harm based on testimony that businesses would probably be "shut down"); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) ("[A] threat to the continued existence of a business can constitute irreparable injury.") (quotations omitted). This is particularly true here

given that the real property that these businesses own is unique, and its deprivation qualifies as irreparable harm. *See Five Star Dev. Resort Communities*, 2010 WL 1005169, at *3.

III. A Preliminary Injunction Is in the Public Interest

An injunction against these Laws is decidedly in the public interest. *First,* enforcement of an unconstitutional law is always contrary to the public interest. *See N.Y. Progress & Prot. PAC*, 733 F.3d at 486; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). And here there are three unconstitutional Laws.

Second, the injunction would "aid[] the local economy." *Minard Run Oil*, 670 F.3d at 257. These constitutional violations will ravage the City's economy. Hamstrung in their efforts to collect rent, property owners are desperately struggling to meet their own financial obligations—including hefty property tax bills. (*See* Mendez Decl. ¶ 30; Yang Decl. ¶¶ 36-38) And the Laws will likely advance the blight on vacant storefronts. The City's largest source of revenue, *i.e.,* property taxes, is in serious jeopardy due to these Laws. This drastic decline in property tax revenues will endanger the City's budget—even its fiscal solvency—due to this expected drop in City revenues. (Younger Decl. ¶¶ 19-21) Shifting the burden of the Pandemic onto the shoulders of real estate owners, leaving them unable to fulfill their tax burden, would have a terrible impact on the City. This is not in the public interest.

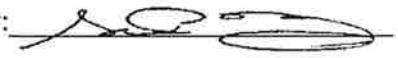
CONCLUSION

For all the foregoing reasons, this Court should enter an order: 1) granting Plaintiffs' motion for preliminary injunctive and declaratory relief, 2) enjoining the Defendants from enforcing the challenged Laws, *i.e.,* New York City Local Law 53 of 2020 (the Commercial Harassment Law), Local Law 56 of 2020 (the Residential Harassment Law) and Local Law 55 of 2020 (the Guaranty Law); 3) declaring that the Commercial Harassment Law and the Residential Harassment Law, as applied to Plaintiffs, violate the First Amendment, as well as the Free

Speech Clause of the New York Constitution; 4) declaring that the Guaranty Law, as applied to Plaintiffs, violates the Contracts Clause; 5) declaring that the Commercial Harassment Law, the Residential Harassment Law, and the Guaranty Law are preempted by New York State law; and 6) granting Plaintiffs' their reasonable attorneys' fees and costs; and 7) granting such other and further relief as may be just and proper.

Dated: July 22, 2020

Respectfully submitted,

By: 

Stephen P. Younger
Alejandro H. Cruz
Hyatt M. Howard
Esther Y. Kim
Timothy H. Smith
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone No.: (212) 336-2000
Facsimile No.: (212) 336-2222

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUKE'S CATERING SERVICE, LLC,
d/b/a Lucarelli's Banquet Center,
BUFFALO ROAD CATERING, INC.,
d/b/a Avanti Mansion,
CLINICAL RESEARCH SOLUTIONS, INC.,
d/b/a Notting Hill Farm,
KLOC'S GROVE INCORPORATED,
ROSEBUD STABLES, LLC,
d/b/a Rosebud Estate Weddings, and
O.P.T. MARKETING, INC.,
d/b/a O'Brien's Sleepy Hollow,

Plaintiffs,

v.

DECISION AND ORDER
20-CV-1086S

ANDREW M. CUOMO,
In his official capacity as Governor of the State of New York,
LETITIA A. JAMES,
In her official capacity as the Attorney General of the State of New York,
EMPIRE STATE DEVELOPMENT CORPORATION,
ERIE COUNTY DEPARTMENT OF HEALTH, and
CATTARAUGUS COUNTY DEPARTMENT OF HEALTH,

Defendants.

I. INTRODUCTION

When faced with a society-threatening epidemic, state officials are empowered to implement emergency protective measures that infringe federal constitutional rights. They may generally do so at their sole discretion and for so long as is necessary. And as long as the emergency measures bear some real or substantial relation to the threatening epidemic and are not unquestionably a plain invasion of rights, the efficacy

and wisdom of those measures are not subject to judicial second-guessing.

The State of New York faces a society-threatening epidemic in COVID-19. Beginning in March 2020, with his declaration of a disaster emergency throughout the state, New York Governor Andrew M. Cuomo has issued a series of emergency protective measures in the form of Executive Orders aimed at combatting COVID-19 and the public-health crisis it has created. Those measures have included imposing quarantines, mandating workforce reductions, closing schools, requiring face-coverings, and restricting activities of all types.

The plaintiffs here—six event and banquet centers that host large gatherings—challenge and seek to enjoin Defendants from continuing to enforce one of those emergency measures: Executive Order 202.45 and its progeny, which imposes a temporary 50-person limit on non-essential gatherings. Fiscally reeling from this ban that has effectively shut them down since March 2020, Plaintiffs understandably seek this Court's intervention in a bid to save their struggling businesses and avoid insolvency.

But as explained herein, this Court is constrained by decades-old Supreme Court precedent that requires great deference to the State's police power in times of crisis. Because the issuance of Executive Order 202.45 properly falls within this power, Plaintiffs' pending motion for preliminary injunction will be denied, Defendants' cross-motions to dismiss will be granted, and Plaintiffs' will be afforded leave to file an amended complaint.

II. BACKGROUND

The six plaintiffs are event, banquet, and catering facilities that serve as private

venues for weddings, religious services and celebrations, bridal and baby showers, family reunions, political events, and other large gatherings. (Complaint, Docket No. 1, ¶¶ 3-8, 20.) They are each "non-essential" businesses under the Governor's Executive Orders and are subject to the 50-person limitation on "non-essential" gatherings, which they allege has left them on the verge of insolvency. (Id. ¶¶ 23, 35.)

Defendants Andrew M. Cuomo and Letitia A. James are the Governor and Attorney General of the State of New York, respectively. (Id. ¶¶ 9, 10.) They are each sued in their official capacity. (Id.) Defendant Empire State Development Corporation is a New York State public benefit corporation. (Id. ¶ 11.) Defendants Erie County Department of Health and Cattaraugus County Department of Health are municipal corporations within the State of New York. (Id. ¶¶ 12, 13.) Each defendant is alleged to have interpreted and enforced Governor Cuomo's Executive Orders, including the 50-person limitation on "non-essential" gatherings. (Id. ¶ 1.)

A. COVID-19 and Governor Cuomo's Executive Orders

COVID-19 needs little introduction. It is the potentially lethal respiratory disease caused by a novel coronavirus for which there is no known cure, no effective treatment, and no vaccine. See S. Bay United Pentecostal Church v. Newsom, __ U.S. __, 140 S. Ct. 1613, 1613, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). Its rapid person-to-person spread has caused a global pandemic the likes of which has not been seen since 1918. And it continues to grip this nation, with new infections and deaths reported daily.

In response to this public-health crisis, the New York Legislature amended §§ 20

and 29-a of the New York Executive Law in early March 2020 to grant the Governor broad powers to "manage, prepare, respond to and contain the threat posed by" the virus. (Complaint, ¶ 25.) Shortly thereafter, Governor Cuomo declared a disaster emergency in New York on March 7, 2020, with the President of the United States proclaiming a national emergency on March 13, 2020. See N.Y. Exec. Order No. 202 (March 7, 2020);[1] Proclamation No. 9994, 85 Fed. Reg. 15,337-38 (March 13, 2020); Complaint, ¶ 29. As Plaintiffs themselves recognize, the outbreak poses a significant and ongoing danger to the public health and welfare. (Complaint, ¶ 50.) To date, there have reportedly been 445,881 cases and 32,611 deaths in New York.[2]

After declaring the state-wide disaster emergency, Governor Cuomo issued a series of Executive Orders that he, State Attorney General James, the Empire State Development Corporation, and the Erie and Cattaraugus Departments of Health allegedly interpreted and enforced. (Id. ¶¶ 1, 24, 31, 49.) The early Executive Orders canceled or limited public gatherings, required workforce reductions at "non-essential" businesses and entities, and precluded any place of business or accommodation from operating at greater than 50% occupancy or seating capacity. (Id. ¶¶ 32-34, 36, 37, 39; N.Y. Exec. Order No. 202.1 (March 12, 2020).) Enforcement of these orders came through other Executive Orders that made it a violation of the local building code for any facility to permit a prohibited gathering and a violation of the public health law for any individual to

1 All Executive Orders cited herein are available at https://www.governor.ny.gov/executiveorders (last visited August 26, 2020) and most are also included as exhibits to Plaintiffs' complaint.

2 See https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html (last visited September 10, 2020, at 12:04 p.m.).

participate in a prohibited gathering—with possible fines up to $1,000. (Complaint ¶ 38.)

On May 21, 2020, Governor Cuomo issued Executive Order 202.32, which relaxed the prohibition on "non-essential" gatherings by permitting gatherings of 10 or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration, provided that social-distancing, cleaning, and disinfection protocols required by the New York State Department of Health were observed. (Id. ¶ 40.) The following day, the Governor permitted such gatherings under the same conditions for any lawful purpose in Executive Order 202.33. (Id. ¶ 41.)

On May 28, 2020, Governor Cuomo began "Phase 1" of New York's reopening plan with Executive Order 202.34. (Id. ¶ 42.) While the 10-person limitation on "non-essential" gatherings remained in place, certain businesses and industries in regions designated for reopening in "Phase 1" (including Western New York) were permitted to operate within certain restrictions and guidelines. (Id.)

Approximately one week later, Governor Cuomo extended the prohibition on "non-essential" gatherings of more than 10 people in Executive Order 202.38 but carved out houses of worship, which were permitted to operate at 25% of their indoor capacity, provided that the house of worship was in a "Phase 2" reopening region and that all required social-distancing, cleaning, and disinfection protocols were observed. (Id. ¶ 43.)

This Executive Order also permitted restaurants to begin serving food and beverages on-premises but only in outdoor spaces, contingent on adherence to all applicable New York Department of Health guidance. See N.Y. Exec. Order No. 202.38

(June 6, 2020). The next day, the Governor limited Executive Order 202.38 to apply only to restaurants in regions that had reached "Phase 2" of reopening. See N.Y. Exec. Order No. 202.39 (June 7, 2020). Shortly thereafter, the Governor authorized the resumption of indoor dining at no greater than 50% capacity in restaurants located in "Phase 3" reopening regions. See N.Y. Exec. Order No. 202.41 (June 12, 2020).

On June 15, 2020, the Governor issued Executive Order 202.42, which increased permitted "non-essential" gatherings to 25 or fewer individuals, provided that the gatherings were in regions that had reached "Phase 3" of reopening and that all preventative protocols were observed. (Complaint ¶ 44.)

About one week later, the Governor issued Executive Order 202.45, which again increased permitted "non-essential" gatherings to allow

> gatherings of fifty (50) or fewer individuals for any lawful purpose or reason, so long as any such gatherings occurring indoors do not exceed 50% of the maximum occupancy for a particular indoor area, and provided that the location of the gathering is in a region that has reached Phase 4 of the State's reopening, and provided further that social distancing, face covering, and cleaning and disinfection protocols required by the Department of Health are adhered to.

(Id. ¶ 45; N.Y. Exec. Order No. 202.45 (June 26, 2020).) This Executive Order has twice been extended and now expires on September 19, 2020. (Complaint ¶ 47; N.Y. Exec. Order No. 202.55 (Aug. 5, 2020); N.Y. Exec. Order No. 202.57 (Aug. 20, 2020).)

B. The State's Justification for the Executive Orders

Defendants have submitted the Declaration of Howard A. Zucker, M.D., J.D., the Commissioner of the New York State Department of Health, who is charged with leading

New York's response to the COVID-19 pandemic. (Declaration of Howard A. Zucker, M.D., J.D. ("Zucker Decl."), Docket No. 29-9, ¶ 1.) Zucker personally participated in the development of the Executive Orders at issue. (Id. ¶ 37.) He explains that the Executive Orders were developed and issued in consultation with a team of epidemiologists in direct response to the COVID-19 threat to reduce the risk of person-to-person transmission during "super-spreader" events, particularly at indoor venues. (Id. ¶¶ 17, 37, 39.)

A "super-spreader" event is one in which a single person infects a disproportionate number of other individuals. (Id. ¶ 17.) The hallmarks of such an event, according to Zucker, are its size, the length and nature of expected interactions, and the length of the event itself. (Id. ¶ 18.) The more people with whom an individual interacts, and the longer those interactions, the higher the risk of transmission. (Id.) Transmission risks also increase when large groups arrive together, join for communal purposes, share facilities, spend many hours together, and depart together. (Id. ¶¶ 19, 22.) Scientists believe that such "super-spreader" events play an oversized role in the transmission of COVID-19, with some, according to Zucker, estimating that 10% of the cases may be responsible for 80% of the transmissions. (Id.) Limiting large events therefore reduces the risks of transmission, which is why the Executive Orders have placed size restrictions on gatherings. (Id. ¶ 18.)

C. Plaintiffs' Claims

Plaintiffs maintain that Governor Cuomo's 50-person limitation on "non-essential" gatherings— which persists despite the Governor's declaration in Executive Order 202.47

that New York has one of the lowest infection rates in the country and is on track to contain COVID-19—has effectively shut them down and left them unable to conduct any meaningful business. (Complaint, ¶¶ 52, 53, 55.) They allege that despite being similarly situated to restaurants,[3] which Defendants permit to operate at 50% capacity, they are not subject to the same operating conditions, an inequity that has placed them on the brink of insolvency. (Id. ¶¶ 23, 53.)

Plaintiffs maintain that implementation and enforcement of the 50-person limitation violates their federal and state rights. (Id. ¶ 2.) They bring nine causes of action. The first six, brought pursuant to 42 U.S.C. § 1983, allege violations of the following federal constitutional provisions: (1) Fourteenth Amendment Equal Protection Clause (id. ¶¶ 57-70); (2) Fifth and Fourteenth Amendment Substantive Due Process Clauses (id. ¶¶ 71-80); (3) Fifth and Fourteenth Amendment Procedural Due Process Clauses (id. ¶¶ 81-87); (4) the Commerce Clause (Art. 1, § 8, Cl. 3) (id. ¶¶ 88-95); (5) the Contracts Clause (Art. 1, § 10, Cl. 1) (id. ¶¶ 96-103); and (6) Fifth Amendment Takings Clause (id. ¶¶ 104-117). The seventh cause of action asserts a state constitutional equal protection claim under Article 1, § 11 of the New York Constitution. (Id. ¶¶ 118-124.) The eighth cause of action alleges a violation of N.Y. Exec. L. § 29-a. (Id. ¶¶ 125-132.) The final cause of action seeks attorney's fees and costs under 42 U.S.C. § 1988. (Id. ¶¶ 133-136.)

D. Procedural History

Plaintiffs filed their motion for preliminary injunction together with their complaint

3 Plaintiffs claim similarity to the "restaurant and bar industry." (Complaint, ¶ 61.) For ease of reference, this Court refers to restaurants only, with the intent that this reference includes, where applicable, the bar industry.

on August 14, 2020. (Docket No. 4.) After assignment of the case here on August 19, 2020, this Court conducted a conference with counsel on August 25, 2020, at which a briefing schedule was discussed and issued. (Docket Nos. 8, 14, 26.) Defendants cross moved to dismiss (Docket Nos. 23, 27, 29), with briefing on all motions concluded on September 3, 2020. In the absence of a need for a hearing or oral argument, this Court took the motion under advisement at that time.

III. MOTION FOR PRELIMINARY INJUNCTION

A. Preliminary Injunction Standard

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). It is an extraordinary and drastic remedy; one not awarded as a matter of right or entitlement. See Munaf v. Geren, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982).

A party seeking a preliminary injunction to enjoin governmental action taken pursuant to a statute, as Plaintiffs seek here, must demonstrate that (1) he or she is likely to succeed on the merits, (2) he or she will suffer irreparable harm absent injunctive relief, (3) the balance of equities tips in his or her favor, and (4) the issuance of an injunction is in the public interest. See Yang v. Kosinski, 960 F.3d 119, 127 (2d Cir. 2020) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) and Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton, 841 F.3d 133, 143 (2d Cir. 2016)).

But where, as here, a party seeks a "mandatory preliminary injunction"—one that seeks to modify the status quo—and where issuance of the requested injunction will provide the party substantially all the relief it seeks, a heightened standard applies. In such a case, the party must demonstrate a "clear or substantial" likelihood of success on the merits and make a "strong showing" of irreparable harm. Yang, 960 F.3d at 127-28 (citations omitted). Requiring such a heightened showing is consistent with the principle that "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995).

B. The Parties' Arguments

Plaintiffs argue that they are likely to succeed on the merits of their Equal Protection and Takings Clause claims. Relying on DiMartile v. Cuomo, they argue that there is no rational basis for Defendants to treat them differently than restaurants, which are not subject to the 50-person limitation and instead permitted to operate at 50% capacity. See 1:20-CV-0859 (GTS/CFH), 2020 WL 45587121, at *8 (N.D.N.Y. Aug. 7, 2020) (enjoining enforcement of the 50-person limitation). They further argue that Defendants have selectively enforced the 50-person limitation by permitting gatherings in excess of 50 people for graduations, religious services, and protests, yet prohibiting them from hosting events in excess of 50 people at their facilities. As to their Takings Clause claim, Plaintiffs maintain that Defendants' enforcement of the Executive Order has deprived them of all meaningful economic use of their private property, requiring just

compensation. Plaintiffs further argue that they will suffer irreparable harm to their constitutional rights and the solvency of their businesses if enforcement of the 50-person limitation is not enjoined. Finally, Plaintiffs maintain that the balance of equities and the public interest weigh in their favor, since their economic livelihoods are at stake.

In response, Defendants argue that Plaintiffs are neither likely to succeed on the merits of their claims nor to suffer irreparable injury. They argue that because the 50-person limitation is an exercise of the State's police power, it is squarely protected by the Tenth Amendment and permissible under the deferential standard set forth in Jacobson v. Massachusetts. 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905). In addition, Defendants argue that Plaintiffs are unlikely to succeed on their Equal Protection and Takings Clause causes of action because they fail to state claims upon which relief can be granted. Moreover, Defendants contend that Plaintiffs' request for compensatory damages is an admission that money damages will make them whole, which precludes a finding of irreparable harm. Finally, Defendants argue that the balance of equities and the public interest tip in favor of their continuing efforts to combat the virus and protect public health.

C. Analysis

1. Plaintiffs do not demonstrate a clear or substantial likelihood of success on the merits of their claims.

a. Jacobson Review

In Jacobson v. Massachusetts, decided more than 100 years ago, the United States Supreme Court developed the framework governing emergency public health and

public safety measures. Considering a Massachusetts mandatory-vaccination statute enacted to combat a smallpox epidemic, the Court rejected Jacobson's Fourteenth Amendment claim that the law violated his right to personal autonomy. Jacobson, 197 U.S. at 29. It instead found that "the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Jacobson, 197 U.S. at 26.

In so finding, the Court defined the expanse of the State police power, holding that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson, 197 U.S. at 29. Reserved to the States under the Tenth Amendment, the police power encompasses such power and authority reasonably necessary to "guard and protect" public health and public safety, including protecting communities "against an epidemic of disease which threatens the safety of its members." Id. at 27, 38; see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . .").

As relevant here, State officials have especially broad authority when they "undertake to act in areas fraught with medical and scientific uncertainties." S. Bay United Pentecostal Church, 140 S. Ct. at 1613 (involving temporary numerical restrictions on public gatherings to combat COVID-19); see also Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *30 (D.N.M. Apr. 17, 2020) ("when the state

faces a major public health threat, . . . its Tenth Amendment police and public health powers are at a maximum"). As the Fifth Circuit succinctly puts it: "Jacobson instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." In re Abbott, 954 F.3d 772 (5th Cir. 2020) (emphasis in original).

But the police power is not absolute. The Jacobson court recognized that "the police power of a state . . . may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression." Jacobson, 197 U.S. at 38. Circumscribed judicial review is therefore employed to ensure that actions taken under the guise of the police power do not invade federal authority or violate rights secured by the Constitution. See id. at 28.

Under the highly deferential Jacobson standard, courts are authorized to review only whether "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Jacobson, 197 U.S. at 28, 31 (citations omitted); see also DiMartile, 2020 WL 45587121, at *8 (discussing the police power in relation to the COVID-19 pandemic). This review encompasses "asking whether power has been exercised in an 'arbitrary, unreasonable manner,' or through 'arbitrary and oppressive' regulations." In re Abbott, 954 F.3d at 784 (citing Jacobson, 197 U.S. at 28, 38); see also Lawton v. Steele, 152 U.S. 133, 136, 14 S. Ct. 499, 38 L. Ed. 385 (1894) ("To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public

generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").

This limited review, however, does not permit courts to pass judgment on the "wisdom and efficacy" of the emergency measures implemented. In re Abbott, 954 F.3d at 783. To do so would impermissibly "usurp the functions of another branch of government." Jacobson, 197 U.S. at 28. Accordingly, where state officials act within their authority, they "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." S. Bay United Pentecostal Church, 140 S. Ct. at 1613-14 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)); see also Jacobson, 197 U.S. at 35 ("no court . . . is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best").

b. Jacobson review applies.

"[States] undoubtedly ha[ve] a compelling interest in combating the spread of COVID-19 and protecting the health of [their] citizens." S. Bay United Pentecostal Church, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief). Here, Plaintiffs concede that the COVID-19 outbreak poses a substantial and ongoing danger to society (Complaint, ¶ 50), and that Governor Cuomo issued his Executive Orders limiting "non-essential" gatherings to 50 or fewer individuals in response to this pandemic (id. ¶ 24). Plaintiffs further concede that Governor Cuomo's

Executive Orders are issued pursuant to New York Executive Law 29-a, which was specifically amended "to allow for the protection of the health and safety of New Yorkers due to the threat of the novel coronavirus." (Id. ¶ 27.) This Court therefore finds that Defendants are acting within their police power to protect the public health and public safety. The State's emergency measures are therefore subject to Jacobson review.[4] See In re Abbott, 954 F.3d at 785 (faulting the district court for "ignor[ing] the [Jacobson] framework governing emergency public health measures"); In re Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020) ("[T]he district court's failure to apply the Jacobson framework produced a patently erroneous result.")

State action taken pursuant to the police power is upheld under Jacobson unless it has "no real or substantial relation" to protecting public health or public safety or is "beyond all question, a plain palpable invasion of rights." See Jacobson, 197 U.S. at 28, 31; Ass'n of Jewish Camp Operators v. Cuomo, 1:20-CV-687 (GTS/DJS), 2020 WL 3766496, at *7-10 (N.D.N.Y. July 6, 2020) (applying the Jacobson standard to plaintiffs' challenge to COVID-19-related Executive Orders). Plaintiffs have not demonstrated a

4 While somewhat unclear, Plaintiffs seem to suggest that Jacobson review does not apply or should be modified in some way. They argue that the science surrounding the smallpox disease and vaccine at issue in Jacobson was known, whereas the science here is developing, and that Jacobson involved a statute passed by the state legislature, not an Executive Order. (Reply Memorandum of Law, Docket No. 33-9, pp. 6-8, 12-16.) Whatever the intent of these distinctions, the Jacobson standard for assessing state measures taken in response to an ongoing public-health emergency clearly applies. See Martin v. Warren, 20-CV-6538 CJS, 2020 WL 5035612, at *19 (W.D.N.Y. Aug. 26, 2020) (applying Jacobson in the course of denying request to enjoin public-gathering restriction partially intended to prevent the spread of COVID-19); Page v. Cuomo, 1:20-CV-732, 2020 WL 4589329, at *8 (N.D.N.Y. Aug. 11, 2020) (applying Jacobson and noting that while Jacobson has its detractors, "courts across the country have nearly uniformly relied on Jacobson's framework to analyze emergency public health measures put in place to curb the spread of coronavirus") (collecting cases); McCarthy v. Cuomo, 20-CV-2124 (ARR), 2020 WL 3286530, at *3 (E.D.N.Y. June 18, 2020) (listing COVID-19 cases employing Jacobson standard); see also In re Abbott, 954 F.3d at 783-84 (finding that "[t]he Supreme Court has repeatedly acknowledged [the Jacobson standard] and citing cases).

"clear or substantial" likelihood that they can successfully make either showing. Yang, 960 F.3d at 127-28.

c. Plaintiffs have not demonstrated a "clear or substantial" likelihood that the 50-person limitation has "no real or substantial relation" to protecting public health or public safety.

The first question under Jacobson review is whether the challenged governmental action bears a "real or substantial relation" to the danger it is designed to combat. At the outset, it must be noted that Plaintiffs do not argue or suggest that the Governor's Executive Orders are pretextual or subterfuge directed at any goal other than eradicating the coronavirus, which they agree is a public emergency that poses a significant risk to the public health and welfare. See Cassell v. Snyders, 20 C 50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020) (emphasizing that "Jacobson preserves the authority of the judiciary to strike down laws that use public health emergencies as a pretext for infringing individual liberties"). And Plaintiffs recognize that fundamental rights must sometimes cede for the public benefit. (Complaint, ¶ 51.) Nonetheless, Plaintiffs maintain that the 50-person limitation bears no real or substantial relation to protecting the public welfare and is arbitrary and unreasonable.

Plaintiffs first challenge the premise that large gatherings present an increased risk of COVID-19 transmission, characterizing the notion of a "super-spreader" event as a "myth that the State has started to spread in order to justify its lockdown on society." See Memorandum of Law, Docket No. 4-5, p. 15. Suggesting that the State's focus on large gatherings may be overreactive, they note that the CDC and states such as Maryland and New Hampshire recommend capacity-based regulation of large gatherings. (See Reply

Declaration of Nicholas P. DeMarco, Esq. ("DeMarco Reply Decl."), Docket No. 33, ¶¶ 16-18 and Exhibits D-H.) But New York is not required to respond to a public-health emergency the same as any other state, nor may the State's reliance on expert scientific advice that large gatherings promote increased transmission be second-guessed, for it is particularly when officials act "in areas fraught with medical and scientific uncertainties" that their latitude is "especially broad." S. Bay United Pentecostal Church, 140 S. Ct. at 1613. The State's chosen response is therefore entitled to deference. See Jacobson, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be most effective for the protection of the public against disease . . . That [is] for the [State] to determine in the light of all the information it had or could obtain."); Connecticut Citizens Def. League, Inc. v. Lamont, No. 3:20-cv-646 (JAM), 2020 WL 3055983, at *11 (D. Conn. June 8, 2020) ("[C]ourts owe great deference to the protective measures ordered by government officials in response to the COVID-19 crisis, not simply because the virus has lethal consequences but also because the virus acts in unknown ways that engender uncertainty about what scope of protective measures are warranted.").

And this is true even if the State's choice proves wrong:

> The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the

> common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government.

Jacobson, 197 U.S. at 35; see also S. Bay United Pentecostal Church, 140 S. Ct. at 1614 (instructing that unelected judges not accountable to the people must not second-guess State action taken to combat a public-health crisis).

Plaintiffs next argue that the 50-person limitation is arbitrary and unreasonable. Their position is simple: they see no distinction between their businesses, which serve food and beverages to diners, and restaurants, which likewise serve food and beverages to diners. In their view, the risks of transmission in restaurants operating at 50% capacity—which for some may exceed 50 people—is no less than the risks posed if they too operate under the same conditions. In fact, they contend that they are in a *better* position to guard against spread of the coronavirus because they abide by all recommended sanitization practices and their events are planned and private. (See, e.g., Reply Declaration of Laurie Clark ("Clark Reply Decl."), Docket No. 33-10, ¶¶ 4, 6-8.) By way of example, Plaintiffs point to the alleged irrationality of permitting Plaintiff Avanti Mansion to hold three simultaneous events in its facility, each capped at 50 people (150 people total), yet prohibiting it from hosting a single event for 51 people total. (Declaration of Laurie Clark, Docket No. 4-6, ¶ 9.) They thus contend that it is arbitrary and unreasonable to permit restaurants to operate at 50% capacity—with no cap no matter what their capacity—while Plaintiffs are subject to a 50-person limitation without regard to capacity.

While undoubtedly frustrating and difficult to understand in the face of losing one's business, the State's distinction between restaurant dining and large public gatherings cannot be said to be random or without reason. This is not simply a numbers game. Plaintiffs' venues are not similarly situated in all material respects to restaurants: they do not have similarly sized groups arriving and departing at the same time; they do not attract and foster the same types of patron interaction; and they do not serve their clientele for similar lengths of time.

The large gatherings Plaintiffs typically host—weddings, celebratory showers, religious celebrations, family reunions, funeral breakfasts, graduation parties, political events, etc.—are inherently different than typical restaurant outings. Guests at such events arrive and depart at the same time; Restaurant goers arrive and depart at varying times. (Zucker Decl., ¶¶ 19, 23.) Guests at such events are generally family and friends who all know each other and closely interact and mingle together; Restaurant goers, other than the immediate party, are generally strangers who do not mix with one another. (Id. ¶ 20.) Guests at such events stay for extended periods of time; Restaurant goers generally stay for only so long as their meals last. (Id. ¶ 21.) In short: restaurants do not host the type of "super-spreader" events that the scientists and medical professionals upon whom the State has elected to rely believe pose a heightened risk for COVID-19 transmission.[5] But Plaintiffs do.

Nonetheless, Plaintiffs' position finds some support in DiMartile v. Cuomo. There,

5 These distinctions also differentiate the large gatherings Plaintiffs typically host from graduation ceremonies, religious services, and protests, comparators that are even less compelling than restaurants.

the court enjoined the State defendants from enforcing the 50-person limitation against two soon-to-be-wed couples who challenged Executive Order 202.45 and its progeny on religious grounds. See DiMartile, 2020 WL 4558711, at *11. The facilities at issue operated as both public restaurants and private venues. See id. at *10. In granting injunctive relief, the court strayed from the religious claims and rejected the distinction between large gatherings and restaurant outings that Defendants raise here, finding "no discernable rational reason for limiting a wedding use of the venues to only 50 individuals when the individuals present at the wedding would be required to abide by the same safety rules applicable to ordinary diners." Id. at *10; DiMartile v. Cuomo, 1:20-CV-859 (GTS/CFH), 2020 WL 4877239, at *4-6 (N.D.N.Y. Aug. 19, 2020) (denying motion to stay the preliminary injunction and further rejecting the State defendants' distinctions between large gatherings and restaurant outings). The Second Circuit stayed the injunction on August 21, 2020, pending review by the next merits panel. (Docket No. 29-5.)

This Court is not persuaded by DiMartile. First, the decision of another district court is not binding precedent. See Camreta v. Greene, 563 U.S. 692, 709 n.7, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011). Second, the venues' rights were not before the court. Third, DiMartile involved unique facts not found here; it involved hybrid facilities that acted as both restaurants and private venues. See DiMartile, 2020 WL 4558711, at *11 ("this case presents a unique situation in that the Plaintiffs' chosen venues are already operating as functioning restaurants in addition to wedding venues and thus the unequal treatment is happening as a result of two different uses of the same venue"). Fourth, the DiMartile court specifically qualified its ruling, cautioning that "[the court] is not implying

that *any* wedding (particularly the typical wedding that existed before the COVID-19 pandemic) would be sufficiently similar to a typical dining experience." Id. Finally, this Court reads Jacobson to require more deference to State-chosen emergency measures than was afforded in DiMartile.

And there is yet another significant distinction between Plaintiffs' venues and restaurants: Defendants deem the restaurant industry an "essential" service that must be permitted to operate because it is a significant food supply source for New Yorkers (id. ¶ 40), a designation within the State's discretion. See Dark Storm Indus. LLC v. Cuomo, 1:20-CV-360 (LEK/ATB), 2020 WL 3833107, at *14 (N.D.N.Y. July 8, 2020) (finding the "essential v. non-essential' designation a policy decision that courts are "loathe to second-guess"). Defendants have therefore permitted restaurants to operate under restrictions dictated by infection rates to avoid eliminating a vital source of food supply. (Id. ¶¶ 40, 41, 47, 49.) As private venues serving private parties, banquet and catering facilities do not provide the same essential food service as restaurants. The State therefore need not tolerate the risks posed by individuals congregating and mingling at large, private gatherings as it must the risks posed by seemingly similar activity in restaurants providing essential food services. Again, this is a policy decision reserved to the State under its police power. See Jacobson, 197 U.S. at 30.

Finally, Plaintiffs suggest that the Governor's Executive Orders are no longer needed because sectors of the state continue to re-open and infection numbers continue to improve. While these improvements are promising—and some might say directly attributable to the very type of Orders that Plaintiffs challenge—Jacobson's reach does

not end until the epidemic *ends*. See Cassell, 2020 WL 2112374, at *7. At this point, the end is not in sight.

Based on the evidence submitted, this Court finds that Plaintiffs have failed to demonstrate a "clear or substantial" likelihood that the 50-person limitation in Executive Order 202.45 and its progeny bear "no real or substantial relation" to protecting public health and safety or are arbitrary or unreasonable. To the contrary, Defendants' 50-person limitation on large gatherings is based on expert scientific and medical advice and is directly related to protecting the citizenry against the mass transmission of COVID-19. Accordingly, the Executive Order passes muster under the first Jacobson prong. See Santore v. Cuomo, 1:20-CV-850, Docket No. 14, p. 15 (N.D.N.Y. Aug. 14, 2020) (finding that "gathering limits are emergency measures which, even if they did curtail constitutional rights, have a 'real or substantial' relation to the public health crisis"); Geller v. Cuomo, 20 Civ. 4653 (ER), 2020 WL 4463207, at *11 (S.D.N.Y. Aug. 3, 2020) (rejecting First Amendment challenge to Executive Order 202.45 and finding "no difficulty in concluding . . . that the restriction was enacted to protect the public health and bears a real and substantial relation to the public safety concerns at issue").

d. Plaintiffs have not demonstrated a "clear or substantial" likelihood that the 50-person limitation is "beyond all question, a plain palpable invasion of rights."

The second question under Jacobson review is whether the challenged governmental action is "beyond all question, a plain palpable invasion of rights." 197 U.S. at 31. Although asserting a number of causes of action in their complaint, Plaintiffs focus their motion for preliminary injunction on their Equal Protection and Takings Clause

claims under the Fifth and Fourteenth Amendments. They have not demonstrated, however, a "clear or substantial" likelihood that it is "beyond all question" that enforcement of Executive Order 202.45 invades their rights asserted under either amendment.

First, the Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985); see also Sound Aircraft Servs., Inc. v. Town of E. Hampton, 192 F.3d 329, 335 (2d Cir.1999) ("[a]t its core, equal protection prohibits the government from treating similarly situated persons differently"). The Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Bizzarro v. Miranda, 394 F.3d 82, 86 (2d Cir. 2005) (quoting LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980)). Where a plaintiff does not claim membership in a protected class, he or she may pursue a "selective-enforcement" or "class-of-one" claim. See Rankel v. Town of Somers, 999 F. Supp. 2d 527, 544 (S.D.N.Y. 2014). Under either theory, the plaintiff must demonstrate that he or she was treated differently from other similarly situated individuals.

Plaintiffs contend that the State has arbitrarily and unreasonably treated them differently from restaurants, which they allege are similarly situated entities. But for all

of the reasons set forth above, the record evidence establishes that Plaintiffs and restaurants are *not* similarly situated in all material respects. This forecloses Plaintiffs' equal protection claims.

Second, the Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This clause applies to the states through the Fourteenth Amendment. See Kelo v. City of New London, Connecticut, 545 U.S. 469, 472 n. 1, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (citing B.R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)). The Takings Clause imposes two conditions on a state's authority to take private property: "the taking must be for a public use and just compensation must be paid to the owner." Brown v. Legal Found. of Wash., 538 U.S. 216, 231, 123 S. Ct. 1406, 1417, 155 L. Ed. 2d 376 (2003) (internal quotations omitted); see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power"). The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

Generally speaking, there are two types of takings. The quintessential taking is one where "a direct government appropriation or physical invasion of private property" occurs. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L .Ed. 2d 876 (2005); see Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457,

150 L. Ed. 2d 592 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use."); see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-323, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (describing the Supreme Court's jurisprudence involving physical takings to be "as old as the Republic").

The other type of taking is the one first recognized in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), where "the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." Palazzolo, 533 U.S. at 617 (discussing Pennsylvania Coal). This type of taking is commonly referred to as a "regulatory taking." Plaintiffs assert a regulatory taking here.

"Regulatory takings are based on the principle that 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" Ganci v. New York City Transit Auth., 420 F. Supp. 2d 190, 195 (S.D.N.Y. 2005) (citing Pennsylvania Coal, 260 U.S. at 415). There are two types: categorical and non-categorical. A categorical regulatory taking involves "the extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted." See Tahoe-Sierra, 535 U.S. at 330 (quoting Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)) (emphasis in original). All other regulatory takings are non-categorical: those involving "[a]nything less than a complete elimination of value, or a total loss." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

Analyzing non-categorical takings under Penn Central "requires an intensive *ad hoc* inquiry into the circumstances of each particular case." Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 375 (2d Cir. 2006). Three factors are weighed: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986).

Plaintiffs allege a categorical regulatory taking in their complaint. (Complaint, ¶¶ 104-117.) They maintain that Governor Cuomo's Executive Orders "have resulted in Plaintiffs losing all economically viable use of their businesses and property." (Id. ¶ 111.) Yet Plaintiffs elsewhere concede that the Executive Orders do not preclude them from hosting events of 50 or fewer people, and in fact, several Plaintiffs admit that they are scheduled to host such events. (Id. ¶¶ 45, 53, 112; Clark Reply Decl., ¶ 14 (six conforming events scheduled); Reply Declaration of Joseph Kloc, Docket No. 33-13, ¶ 11 (four conforming events scheduled).) Any categorical claim would therefore fail, since Plaintiffs admit that they are not precluded from *all* economically beneficial uses of their property. See Tahoe-Sierra, 535 U.S. at 330 (providing that a plaintiff must show *no* productive or economically beneficial use of his or her property to sustain a categorical regulatory takings claim).

And Plaintiffs are unlikely to fare any better on a non-categorical regulatory takings claim. First, the Executive Orders are temporary and do not preclude all economic use of Plaintiffs' property. See Buffalo Teachers Fed'n, 464 F.3d at 375 (finding that

temporary and partial nature of wage freeze weighed against finding a taking); Kabrovski v. City of Rochester, N.Y., 149 F. Supp. 3d 413, 425 (W.D.N.Y. 2015) ("[I]t is well settled that a 'taking' does not occur merely because a property owner is prevented from making the most financially beneficial use of a property.") (citation omitted). Second, although Plaintiffs' investment-backed expectations are surely disrupted by the 50-person limitation, the Executive Orders are "a negative restriction rather than an affirmative exploitation by the state," which also weighs against a taking. See Buffalo Teachers Fed'n, 464 F.3d at 375. Third, and perhaps most importantly, the State "does not physically invade or permanently appropriate any of [Plaintiffs'] assets for its own use." Connolly, 475 U.S. at 225. Rather, the character of the government action here is a temporary and proper exercise of the police power to protect the health and safety of the community, which weighs against a taking. See id. (noting that "interference with the property rights of an employer aris[ing] from a public program that adjusts the benefits and burdens of economic life to promote the common good" does not constitute a compensable taking under Supreme Court precedents); see also Lebanon Valley Auto Racing Corp. v. Cuomo, 1:20-CV-804 (LEK/TWD), 2020 WL 4596921, at *8 (N.D.N.Y. Aug. 11, 2020) (finding that the character of COVID-related Executive Orders strongly favors the State defendants). The Penn Central analysis therefore weighs against finding a non-categorical regulatory taking.

For all of these reasons, this Court finds that Plaintiffs do not demonstrate "beyond all question, a plain palpable invasion" of their rights under the Equal Protection and Takings Clauses. Jacobson, 197 U.S. at 31. Executive Order 202.45 and its progeny

therefore pass muster under the second Jacobson prong. See Santore, 1:20-CV-850, Docket No. 14, p. 15 (finding that "gathering limits are not 'beyond all question, a plain palpable invasion of rights secured by the fundamental law'").

2. Plaintiffs do not make a strong showing of irreparable harm or establish that the balance of equities and public interest weigh in their favor.

While this Court need not consider the remaining preliminary injunction factors, see McCarthy v. Cuomo, 20-CV-2124 (ARR), 2020 WL 3286530, at *3 (E.D.N.Y. June 18, 2020), it does so briefly to highlight that they too counsel against injunctive relief.

First, Plaintiffs have not made the required "strong showing" of irreparable harm. Citing Jolly v. Coughlin, they first argue that a presumption of irreparable harm flows from the mere assertion of a constitutional violation. 76 F.3d 468, 482 (2d Cir. 1996). But "the favorable presumption of irreparable harm arises only *after* a plaintiff has shown a likelihood of success on the merits of the constitutional claim," which Plaintiffs have not done. Page, 2020 WL 4589329, at *6 (citing Jolly, 76 F.3d at 482 ("[W]e agree with the district court that the plaintiff has shown a substantial likelihood of success on his Eighth Amendment claim. The district court *therefore* properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights.") (emphasis added); see also Turley v. Giuliani, 86 F Supp. 2d 291, 295 (S.D.N.Y. 2000) (noting that when irreparable harm is premised on a constitutional violation, "the two prongs of the preliminary injunction threshold merge into one . . . to show irreparable injury, plaintiff must show a likelihood of success on the merits").

Moreover, while the economic impact of the 50-person limitation undoubtedly hits

hard, the Executive Orders are temporary; Plaintiffs are permitted to continue business operations within the confines of the Executive Orders; and no documentary evidence has been submitted to support Plaintiffs' claims of near insolvency. See Lebanon Valley, 2020 WL 4596921, at *8. The necessary "strong showing" of irreparable harm is therefore absent.

Second, Plaintiffs have not demonstrated that the balance of equities and public interest weigh in their favor. Weakening the State's response to a public-health crisis by enjoining it from enforcing measures employed specifically to stop the spread of COVID-19 is not in the public interest. Nor does the balance of equities in permitting Plaintiffs to host gatherings larger than 50 people outweigh the general welfare of the state and the pressing need to eradicate this insidious disease. The balance of equities and the public interest therefore favor Defendants. See Page, 2020 WL 4589329, at *10 (finding that balance of equities and public interest weighed against enjoining an Executive Order requiring self-quarantine because "the injunctive relief sought . . . would also upset a major component of the State's current public health response to COVID-19"); Ass'n of Jewish Camp Operators, 2020 WL 3766496, at *21 (denying request to require the opening of overnight summer camps as not in the public interest "[g]iven the unprecedented nature of the COVID-19 pandemic, the deadly nature of the virus itself, the lack of a vaccine . . ., and lack of scientific agreement about its transmission"); Geller, 2020 WL 4463207, at *11 (concluding that Executive Order 202.45 "promotes a substantial government interest . . ., namely, to mitigate the harm and spread of the pandemic, which would be 'achieved less effectively' absent the gathering restrictions")

(citation omitted).

* * * * *

Because Executive Order 202.45 passes scrutiny under Jacobson, it must be upheld as a valid exercise of the police power. Consequently, Plaintiffs cannot demonstrate a clear or substantial likelihood of success on any of their claims, nor have they made the required strong showing of irreparable harm or established that the balance of equities and public interest weigh in their favor. Plaintiffs' motion for preliminary injunction is therefore denied.

IV. CROSS-MOTIONS TO DISMISS

Defendants have moved to dismiss Plaintiffs' complaint on various grounds. Without reaching the merits of those individual arguments, this Court finds that Jacobson stands as a formidable obstacle to each of the claims asserted in the complaint. Since the complaint contains no claims pleaded under the Jacobson framework, it is subject to dismissal. See, e.g., Page, 2020 WL 4589329, at *12 (dismissing claims, in part, for "fail[ure] to state a plausible claim for relief under the deferential framework of Jacobson" and describing Jacobson as a "complete roadblock" to the plaintiff's claims).

But because this Court cannot determine as a matter of law on the record before it that none of Plaintiffs' claims would survive if re-pleaded under Jacobson, it will afford Plaintiffs the opportunity to file an amended complaint. See Fed. R. Civ. P. 15 (a)(2) (requiring that leave to amend be freely given when justice so requires). If Plaintiffs do not file an amended complaint within 14 days of the entry date of this decision, this case will be closed without further order of this Court.

V. CONCLUSION

This Court is sympathetic to Plaintiffs' plight. They see others in the food-service industry with an opportunity to survive this epidemic by operating at 50% capacity, yet they cannot. They are willing to engage in the same protective protocols that allow others in the industry to operate as safely as possible, yet they cannot. They have worked hard to build their businesses, for some their life's work, and have prepared their facilities to reopen safely, yet they cannot. Even in the face of a foe as fierce as COVID-19, one can understand why Plaintiffs implore this Court to engage in a more searching scrutiny of the wisdom, effectiveness, and need for the State's emergency measures, yet it cannot.

The grim fact is that New York and the rest of the world are engaged in a global battle to stave off COVID-19. While it is no secret that reasonable minds can and do differ over what defensive measures might be most effective and desirable, there is little room for debate in this forum. Jacobson instructs that it is "no part of the function of a court" to determine which measures are "likely to be the most effective for the protection of the public against disease." Jacobson, 197 U.S. at 30. Rather, it is for the State to determine and implement, with wide latitude, such emergency measures as it deems reasonably necessary to protect the public welfare. This Court would usurp the State's police power and the function of another branch of government if it were to engage in Monday-morning-quarterbacking or substitute its judgment for that of the State's.

Thus, no matter how tempting it may be to grant Plaintiffs the relief they seek to provide them a fighting chance at survival, Jacobson forbids it. Quite simply, this Court

is constrained by the standard of review that compels the result reached herein. Governor Cuomo's Executive Order satisfies minimal constitutional requirements and must be upheld. Plaintiffs' motion for preliminary injunction is therefore denied. Defendants' cross-motions to dismiss are granted, with leave afforded to Plaintiffs to amend their complaint.

VI. ORDERS

IT HEREBY IS ORDERED, that Plaintiffs' Motion for Preliminary Injunction (Docket No. 4) is DENIED.

FURTHER, that the Cross-Motions to Dismiss (Docket Nos. 23, 29) are GRANTED.

FURTHER, that Plaintiffs are granted leave to amend their complaint within 14 days of the entry date of this decision.

FURTHER, that if Plaintiffs do not file an amended complaint within 14 days of the entry date of this decision, the Clerk of Court is directed to CLOSE this case without further order of this Court.

SO ORDERED.

Dated: September 10, 2020
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

ANALYZING COMMERCIAL CONTRACT RIGHTS IN TROUBLED TIMES

By Joseph V. Cuomo and Danielle B. Gatto

Numerous companies and individuals will be (or already are) negatively impacted by the COVID-19 pandemic in some way. As a result, many will be looking to the terms of their commercial contracts to determine if there is a way to minimize their own financial losses and exposures in the face of forced closures, cancellations, and general business interruption. However, not all clauses are created equal and a careful analysis of the contract will be required.

Your own objectives may also dictate the "appropriate" manner to handle a potential contractual issue, including whether it is better, in the long run, to terminate the contract or to seek to amend the contractual obligations to better suit the new circumstances.

MAC and MAE Clauses

A Material Adverse Change (MAC) clause (sometimes called a Material Adverse Event or MAE clause) is a contract provision that allocates risk among contracting parties for the period between the time of the signing of an agreement and some future post-signing event, such as the ultimate closing (*e.g.*, in the case of an acquisition transaction) or subsequent lending (*e.g.*, in the case of a revolving loan transaction). In essence, a MAC clause provides that if there has been a significant change in circumstances between the signing and the defined subsequent event, that one party may be excused from further performance of the contract (*e.g.*, excused from having to close an acquisition, excused from having to further lend funds).

A typical MAC clause provides that a *"material adverse change"* means *"any change, event, development, condition, occurrence or effect that is or is reasonably likely to be material and adverse to the financial condition, business, results, operations, or prospects of [Party A]."* What often follows this broad general definition is a long list of exclusions or carve-outs that will not constitute a MAC. Customary exclusions include acts of God, floods, earthquakes, natural disasters, terrorism, and general economic downturns. Some agreements go even further and exclude pandemics, epidemics, disease, and the like, and there are now even reports of agreements with MAC clauses specifically excluding the COVID-19 pandemic. Therefore, the contracting parties have accepted the risk that a MAC or MAE event may excuse one party or both parties from their full performance of their obligations under the agreement.[1]

While the basic approach is standard – a broad general definition with specific exclusions – MAC and MAE clauses are often highly negotiated and the actual language can vary greatly from agreement to agreement. MAE clauses are often broader than MAC clauses in that they cover not only some change to the party's business, but also changes to the business environment that may negatively impact the transaction.

MAC and MAE clauses may also appear in certain agreements, typically lending agreements, as an event of default, and may trigger the default rights of one of the parties. In instances where a party defaults under a MAC or MAE clause, it is likely that there are other

[1] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *52 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (holding contracting parties accepted material adverse change that resulted from "acts of war, violence, pandemics, disasters, and other *force majeure* events.").

events of default already or soon forthcoming (*i.e.*, breach of a payment obligation, breach of a financial covenant).

Termination Clauses

In troubled times, one party to a contract may prefer to simply get out of the contract and be relieved of its obligations, whether they be continuing payments and/or continuing performance. The first place to look then is the termination section of the contract. Termination clauses can vary significantly in terms of scope and complexity. If a contract has a fixed term, or a fixed term followed by evergreen renewals, a party's termination rights are often limited to a defined set of circumstances, *e.g.*, material breach by the other party, the insolvency of the other party. In such cases, terminating the contract has to be a thoughtful affair and the terminating party needs to make sure it follows the applicable "rules" set forth therein. In most "termination for breach" provisions, for example, the terminating party must give the breaching party written notice of the breach and a reasonable opportunity to cure the breach. It is important therefore to follow strictly the prescribed guidelines for termination, or there is a risk that the terminating party will be deemed to be in breach as well for the poorly handled termination.

Agreements without a fixed term (and even some with a fixed term) that are more "ongoing relationship" arrangements (*e.g.*, for professional services) often provide for termination for any reason or no reason upon written notice. This is sometimes referred to as "termination for convenience." However, caselaw abounds regarding the invocation of these termination clauses[2] and it is a best practice to give a reasonable time period of notice before the effective date of the termination.

Many contract termination sections additionally cover the parties' rights and obligations post-termination, such as (i) the remedies that may be pursued by the terminating party, (ii) the obligations of the parties to return confidential information, and (iii) what sections of the agreement survive the termination and continue to govern, on a much more limited basis, the parties' rights and obligations. Some contracts will include a liquidated damages clause, which will define with specificity the damages, often with a fixed dollar amount or formula, recoverable by the non-breaching party. Contracts may also contain indemnification rights for the non-breaching party to recover for its losses as a result of the breach, including, importantly, attorneys' fees and expenses incurred in pursuit of a claim against the breaching party. Indemnification rights typically do survive the termination of a contract, as do confidentiality rights and other restrictive covenants (*e*.g., no-competition, non-solicitation).

Force Majeure Clauses

A contracting party may also be able to terminate, or relieve performance, by relying on a force majeure clause (also known as an "inability to perform" clause). These clauses may be

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[2] *See, e.g.*, *Watermelons Plus, Inc. v. New York City Dep't of Educ.*, 76 A.D.3d 973, 974 (2d Dep't 2010); *CGI Techs. & Sols., Inc. v. New York State Office of Mental Health*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 366 (Sup. Ct., Albany Co. 2019); *RSG Caulking & Waterproofing, Inc. v. J.P. Morgan Chase & Co.*, 13 Misc. 3d 1218(A), 831 N.Y.S.2d 350 (Sup. Ct., N.Y. Co. 2006).

non-specific, boilerplate provisions or may be carefully negotiated. Typically, force majeure clauses include language providing, in sum and substance, "Any delay or failure in the performance by either Party hereunder shall be excused if and to the extent caused by the occurrence of a Force Majeure."[3]

Whether COVID-19 will qualify as a force majeure event will depend on the exact terms of the contract. Some contracts include "epidemic", "forces beyond the parties' control", or "acts of governmental authority" as enumerated examples of a force majeure.[4] In addition, force majeure clauses typically require that the "triggering" event render performance impossible.[5]

These clauses will be construed by courts narrowly, irrespective if they are written broadly. For example, in *Goldstein v. Orensanz Events LLC*,[6] while the contract contained a force majeure provision providing that if the subject event covered by the contract must be cancelled "pursuant to a government order regardless of whether the order was unforeseeable or outside defendants' control", the sole remedy was to re-book the event for another date or a refund, the New York Appellate Division, First Department, held that "the clause must be interpreted as if it included an express requirement of unforeseeability or lack of control".[7]

Like the "termination for breach" provisions previously mentioned, if you have grounds to invoke the force majeure clause, you must provide written notice to the other party. Sometimes these notice requirements are included directly in the force majeure clause or they may be buried in another part of the contract, including a notice provision that requires notice for breaches or anticipated breaches. Again, like the "termination for breach" provisions, it is important to strictly follow the prescribed guidelines or else there is a risk that the terminating party will be deemed to be in breach.

Depending on the specific wording of a force majeure clause, a party invoking the clause may be entitled to either suspend performance of its obligations (for a particular period of time or indefinitely) or terminate the contract.

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[3] *See, e.g., Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508, at *2 (W.D.N.Y. Feb. 13, 2009).

[4] *See, e.g., Wyndham Hotel Grp. Int'l, Inc. v. Silver Entm't LLC*, No. 15-CV-7996 (JPO), 2018 WL 1585945, at *11 (S.D.N.Y. Mar. 28, 2018) (force majeure clause included, *inter alia*, epidemic "or other catastrophe or other forces beyond [defendant's] control", however clause was not implicated because defendant's failure to pay taxes was not triggered by force majeure); *Burnside 711, LLC v. Nassau Reg'l Off-Track Betting Corp.*, 67 A.D.3d 718, 719 (2d Dep't 2009) (holding force majeure clause relieved tenant from obligation to begin paying rent where Building Zone Ordinance was amended to restrict the ability to operate an off-track betting parlor at the leased space and lease expressly provided that premises was to be operated for "legalized betting and ancillary uses").

[5] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). Other *force majeure* clauses may merely require that performance be delayed. *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 69 (S.D.N.Y. 1991) (holding force majeure clause excused delayed performance of defendant's duty to take delivery where clause states, "[n]either seller nor buyer shall be liable for damages *or otherwise* for any failure or delay in performance of any obligation hereunder other than the obligation to make payment, where such failure or delay is caused by force majeure...").

[6] 146 A.D.3d 492 (1st Dep't 2017).

[7] *Id.* at 492-93.

When No Clauses Exist, There May Still Be Common Law Rights

Even where there is no force majeure clause and/or no termination clause in the contract, other remedies may still be available, including monetary damages (designed to place the aggrieved contracting party in the position that such party would have enjoyed but for the breach), and equitable remedies, including injunctive relief and specific performance of the contract.

There are also generally arguments available to excuse performance where performance was rendered impossible. However, for this argument to be available, the subject matter of the contract must be destroyed "or the means of performance makes performance objectively impossible."[8] In addition, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[9]

Amendment by Mutual Agreement

While legal remedies may be available, one must remember that New York courts are unlikely to look favorably upon a party who was not trying to amicably work through the current COVID-19 crisis. In addition, because of the limitations imposed by the New York State court system (including the inability to physically access the courts), the ability to get "immediate" relief from the court declaring that a contract was, or was not, appropriately terminated based on COVID-19 is significantly complicated, and the resolution of such cases is likely to take longer than normal.

Moreover, the termination of a contract in this environment may be risky as it is unclear whether another party will be able to provide the same goods/services as the original party.

Perhaps the most direct and efficient approach parties to a contract can consider in troubled times is to amend the contract to better address the new circumstances. This likely is the best option for contract parties who have enjoyed a solid long-time working relationship and wish for that type of relationship to continue into the future. In fact, the contracting parties may be required to try to take such actions in an effort to mitigate the damages caused by COVID-19. For example, in *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*,[10] the pertinent force majeure provision required the parties "to use reasonable efforts to mitigate the effects of events of Force Majeure" and required that, upon being notified of the occurrence or impending occurrence of a force majeure, "the Parties shall meet to determine what fair and reasonable

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[8] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).

[9] *Id.* (holding impossibility defense not applicable because plaintiff's "inability to procure and maintain requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease"); *see also Korea Life Ins. Co., Ltd.* v. *Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 447 (S.D.N.Y. 2003) (holding that devaluation of foreign currency required for a transaction was a foreseeable risk that precluded defense of impracticability).

[10] No. 06-CV-6155-CJS-MWP, 2009 WL 368508 (W.D.N.Y. Feb. 13, 2009).

adjustment to the delivery schedule or the price, may be necessary to compensate for the effect of the Force Majeure upon Seller's performance hereunder."[11]

In terms of mechanics, an amendment to an existing contract should, like the original contract, take the form of a written agreement and be signed by the parties. The amendment should also state the parties' names, formally reference the original contract with all relevant details, lay out the reasons for the amendment(s) in recitals, and set forth the amendments in section order corresponding to the sections of the original contract being amended. The amendment should conclude with a clause making clear that the original contract, now including the amendments made, remains in full force and effect. If the original contract was witnessed and/or notarized, the same should be done for the amendment. A best practice is to actually attach the original contract to the amendment as an exhibit, so that the process ends with the new "amended" contract in the form of a single document. An alternate approach to get the same result is to amend and restate the original contract in its entirety.

Conclusion

In conclusion, while there may be various avenues for you to take to terminate a contract, or to delay performance, the effect of taking these steps should be weighed against the long-term costs, including the likely delay in finding an alternative contracting partner and the extended delay in obtaining a final decision from a New York court.

[11] 2009 WL 368508, at *2; *see also PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475, 480 (S.D.N.Y. 2001) (requiring party invoking force majeure provision to "[e]xercise all reasonable efforts to mitigate or limit damages to the other Party").

2020 WL 1808264 (S.D.Tex.) (Trial Pleading)
United States District Court, S.D. Texas.
Houston Division

OMAR KHAN, S.C.G.C. INC., a Texas corporation, S.C.G.M. Inc., a Texas corporation, SCG-B Inc., a Texas corporation, SCG-VP Inc., a Texas corporation, District Theaters Inc., a Texas corporation, SCG-WR LLC., a Texas limited liability company, SCG-CS Inc., a Texas corporation, SCGK Inc., a Texas corporation, SCG-SW Inc., a Texas corporation, SCGWL Inc., a Texas corporation, and SCG-N Inc., a Texas corporation, Plaintiffs,

v.

CINEMEX USA REAL ESTATE HOLDINGS, INC., a Delaware corporation, and Cinemex Holdings USA, Inc., a Delaware corporation, Defendants.

No. 4:20-cv-01178.
April 2, 2020.

Plaintiffs' Verified Original Complaint

Jeff M. Golub, State Bar No. 00793823, Federal Bar No. 21606, Beck Redden LLP, 1221 McKinney Street, Suite 4500, Houston, TX 77010, (713) 951-6281, (713) 951-3720, jgolub@beckredden.com; Of Counsel: Nick Gorga (pro hac vice pending), Mohamed Awan (pro hac vice pending), Honigman LLP, 2290 First National Building, 660 Woodward Avenue, Detroit, MI 48226-3506, (313) 465-7000, ngorga@honigman.com, mawan@honigman.com.

Plaintiffs Omar Khan ("Khan"), S.C.G.C. Inc. ("SCGC"), S.C.G.M. Inc. ("SCGM"), SCG-B Inc. ("SCG-B"), SCG-VP Inc. ("SCG-VP"), District Theaters Inc. ("District Theaters"), SCG-WR LLC. ("SCG-WR"), SCG-CS Inc. ("SCG-CS"), SCGK Inc. ("SCGK"), SCG-SW Inc. ("SCG-SW"), SCGWL Inc. ("SCGWL"), and SCG-N, Inc., ("SCG-N," and together with SCGC, SCGM, SCG-B, SCG-VP, District Theaters, SCG-WR, SCG-CS, SCGK, SCG-SW, and SCGWL, each a "Company" and collectively, the "Companies"), by and through their undersigned attorneys, file this Verified Complaint against Defendants Cinemex USA Real Estate Holdings, Inc. ("Buyer") and Cinemex Holdings USA, Inc. ("Parent," and together with Buyer, unless otherwise noted, "Cinemex"), and allege as follows:

Nature of the Action

1. This case is about preventing Cinemex—a large Mexican cinema company backed by a multi-billionaire—from exploiting the Coronavirus-induced public health disaster as a pretext for walking away from a legally binding agreement.

2. On March 10, 2020, while the Coronavirus outbreak was already burgeoning, Cinemex entered into two related Equity Purchase Agreements (together, the "Agreement") to purchase Star Cinema Grill, a homegrown Sugar Land, Texas company solely owned by Omar Khan, a local businessman (the "Transaction"). Soon after that, Cinemex began executing a PR campaign focused on local and national publications.

3. But as the economy inched closer to a recession, and without a legitimate basis to back out of the deal, Cinemex suddenly began claiming that the supposedly unforeseen situation caused by the Coronavirus somehow relieved Cinemex's obligation to close under the Agreement. There is nothing in the Agreement to support that position.

4. Far from being unforeseen, the potential impact of the Coronavirus was a significant factor discussed by the parties during their negotiation of the Agreement. Cinemex was even able to extract a multi-million dollar reduction in the purchase price for the Transaction by pointing to the Coronavirus outbreak and raising the possibility that it could force the Star Cinema Grill

premises to close for an indefinite period of time. There is no doubt that Cinemex entered into the Agreement with its eyes wide open to the pandemic and its potential effects.

5. While breaching the Agreement will have little, if any, real impact on Cinemex or its multi-billionaire backer, the same cannot be said for Omar Khan. By executing the Agreement, Khan believed he was entering into the Transaction with a large, well-funded company that would provide him with a sizeable cash payment and the corresponding liquidity to make certain other investments. As a result, Khan insisted on, and Cinemex agreed to, a provision in the Agreement that requires specific performance of Cinemex's obligation to close on the Transaction. That is the remedy Plaintiffs now seek.

6. If Cinemex is not compelled to close the Transaction, Khan will be left to retain possession of his Companies as if the Transaction had never taken place—only now, facing significant changes in both internal and external circumstances bearing on the Business.

7. Khan's ability to operate the Business will be impacted by Cinemex having already publicized the Transaction in the industry—and Khan having to now backtrack that announcement. The resulting confusion and uncertainty likely will erode the Business' goodwill and reputation in the marketplace as well as Khan's relationships with key business contacts, including film studios, service providers, and lenders.

8. These contacts will be leery of investing their time and resources to build a relationship with Khan if they believe he will try to sell his Business again in the near term. Landlords will be less inclined to negotiate with Khan if they believe a sale of the Business is imminent. Likewise, lenders are less likely to extend credit to Khan because any such financing would be short-term in the event of a sale of the Business. [1] These are significant roadblocks impairing Khan's ability to resuscitate the Business.

9. Khan is facing an uphill battle to manage these issues—all caused by Cinemex's breach—while also navigating the fallout of the Coronavirus pandemic. All the while, the clock continues to tick—internal cash flow models forecast that the cash reserves that are currently keeping the Business afloat will run out by this coming July.

10. By walking away from a binding agreement, Cinemex will be harming not only Khan, but also his more than 1,000 employees and their families, and the community at large.

11. The stakes, therefore, could not be higher for Khan. Accordingly, he seeks the Court's expedited consideration of his forthcoming Motion to compel Cinemex to specifically perform its obligations under the Agreement.

Parties

12. Plaintiff Omar Khan is an individual resident of the State of Texas. Khan holds all of the equity interests in: S.C.G.C. Inc. (“SCGC”), S.C.G.M. Inc. (“SCGM”), SCG-B Inc. (“SCG-B”), SCG-VP Inc. (“SCG-VP”), District Theaters Inc. (“District Theaters”), SCG-WR LLC. (“SCG-WR”), SCG-CS Inc. (“SCG-CS”), SCGK Inc. (“SCGK”), SCG-SW Inc. (“SCG-SW”), SCGWL Inc. (“SCGWL”), and SCG-N Inc., (“SCG-N,” together with SCGC, SCGM, SCG-B, SCG-VP, District Theaters, SCG-WR, SCG-CS, SCGK, SCG-SW, and SCGWL, each a “Company” and, collectively, the “Companies”).

13. The Companies together comprise Star Cinema Grill—the subject of the Transaction. Star Cinema Grill (the “Business”) is a Houston-based dine-in theater concept that offers guests first-run film releases, extensive food offerings, and a full service bar with a wide selection of beer, wine, and spirits. Khan is also the President and CEO of the Business.

14. Defendants Cinemex Holdings USA, Inc. (“Parent”) and Cinemex USA Real Estate Holdings, Inc. (“Buyer”) are both Delaware corporations and holding companies held by their parent, Grupo Cinemex S.A., a Mexican company (Parent and Buyer together, unless otherwise indicated, “Cinemex”) financed by a multi-billionaire based in Mexico. Cinemex owns and operates one of the largest cinema chains in the world, including 41 theaters in the U.S.

15. Under the terms of the Agreement, Buyer sought to acquire from Khan all of his equity interests in the Companies. Parent guaranteed Buyer's payment of consideration, as well as Buyer's performance of all covenants, agreements, and obligations under the Agreement. (*See* Ex. A, Agreement, at § 12.14.)

Jurisdiction, Venue, and Governing Law

16. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) on the basis of diversity because:
A. Plaintiff Omar Khan is a resident of Texas;

B. All of the Companies are Texas corporations, except for SCG-WR, which is a Texas LLC;

C. SCG-WR's sole member is Omar Khan;

D. Defendants are both Delaware corporations; and

E. The amount in controversy, exclusive of interest and costs, exceeds $75,000.

17. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims occurred here and because the parties are subject to an Equity Purchase Agreement that specifically provides for the laying of venue in this district.

18. Section 12.7 of the Agreement provides that it is governed by, and must be construed in accordance with, the laws of the State of Delaware.

Relevant Facts

A. The Parties' Initial Negotiations

19. On December 3, 2019, Khan engaged an investment bank, PJ Solomon, to assist with the potential sale of his Companies.

20. On December 19, 2019, PJ Solomon circulated an initial process letter (the “Phase I Letter”) to all potential bidders for the Companies, including Cinemex. (*See* Ex. B, Phase I Letter.)

21. On January 14, 2020, Cinemex sent a letter of interest (“IOI”) to PJ Solomon, which contained an initial non-binding offer to purchase the Companies for $[Text redacted in copy.]

22. On February 11, 2020, PJ Solomon circulated a second process letter (the “Phase II Letter”) to all potential bidders, including Cinemex. (*See id.*) The Phase II Letter set forth certain guidelines and requirements for submitting a formal bid to purchase the Companies. For example, it set March 3, 2020 as the deadline for final bids and made clear Khan's requirement that any offer be able to close by no later than March 31, 2020. (*See* Ex. C, Phase II Letter at 3.)

23. The parties began discussing a potential purchase of the Companies by Cinemex after it had affirmed its ability to close any potential deal by March 31, 2020. Cinemex's professed ability to close by that date was critical to Khan's decision to select Cinemex as the buyer of the Companies.

24. On March 3, 2020, Cinemex submitted a formal bid (the "Offer Letter") to acquire the stock and membership interests in the Companies for an all-cash purchase price of $[Text redacted in copy.]. (*See* Ex. D, Offer Letter.) The proposed purchase price in the Offer Letter reflected a discount from the amount in the IOI, based on the impact of the Coronavirus. Although Khan did not accept the offer in the Offer Letter, he continued to negotiate a potential purchase with Cinemex.

25. In light of these ongoing negotiations, on March 6, 2020, the parties executed an exclusivity letter (the "Exclusivity Letter") whereby Khan agreed to continue discussing a potential purchase with Cinemex, on an exclusive basis, and on the terms outlined in the Offer Letter and the then-current form of the Agreement attached to it. (*See* Ex. E, Exclusivity Letter.)

B. The Parties Execute the Agreement as the Coronavirus Outbreak Worsens

26. The Coronavirus loomed over the parties' negotiations nearly every step of the way. On January 20, a week after Cinemex sent the IOI, the first case of Coronavirus in the U.S. was reported in Washington. [2] Ten days later, on January 30, the World Health Organization (WHO) declared a global health emergency. [3]

27. During the last week of February alone, less than two weeks before Cinemex sent its Offer Letter, Italy was locking down entire towns, the President requested funding from Congress for a response, and the U.S. recorded its first Coronavirus-related death. [4]

28. On March 5, 2020—the day before the parties executed the Exclusivity Letter—major U.S. news outlets reported warnings from health officials that the Coronavirus was on the verge of becoming a pandemic, and that a slew of new U.S. cases had been confirmed in the days preceding those reports. [5]

29. That same day, the U.S. Senate passed a multibillion-dollar emergency spending package to combat the spread of the deadly virus. (*Id*.) The bill had passed in the House of Representatives the previous day, just hours after appropriations leaders introduced it. (*Id*.)

30. Indeed, the parties were well aware of the specter of the Coronavirus in the days leading up to their execution of the Agreement and explicitly addressed the outbreak and its potential financial impact during negotiations. Cinemex received a reduction of the purchase price in recognition of that potential impact, including explicitly discussing that Star Cinema Grill could potentially shut down for months.

31. Eventually, the parties agreed on the terms of the Transaction, and on March 10, 2020, they executed the Agreement, which provided for Cinemex's purchase of the Companies for a total enterprise price of $[Text redacted in copy.]. [6] This amount, along with other adjustments in the Agreement, included an almost 10% discount from the parties' initial discussions during the IOI stage. The discounted purchase price was agreed upon by the parties in consideration of the Coronavirus threat.

32. As contemplated by the parties, the WHO designated the Coronavirus outbreak as a global pandemic shortly thereafter. [7]

33. After the Coronavirus' designation as a global pandemic, Cinemex made several press releases to announce the Transaction. [8]

C. Relevant Provisions of the Agreement

34. Discussed below are the sections of the Agreement that are most relevant to the parties' dispute.

35. ***Closing***. Section 3.1 of the Agreement outlines the process of closing the Transaction (the "Closing") by a certain date (the "Closing Date") that coincides with the parties' satisfaction of all conditions to the Closing (the "Closing Conditions"). The

Agreement states that the Closing "shall be no later than the second Business Day after satisfaction (or waiver) of the conditions set forth in Article 8 (not including conditions which are to be satisfied by actions taken at the Closing)." (*See* Ex. A at § 3.1.) [9]

36. ***Closing Conditions***. Article 8 sets forth the conditions to each party's obligation to close the Transaction. These include such customary conditions as:
A. Each party's representations and warranties must be true as of the time of the Closing (or if untrue, does not rise to the level of being a Material Adverse Effect) (*see id*. at §§ 8.1(A), 8.2(A));

B. Each party will have performed and complied with all covenants as of the time of the Closing (*see id*. at §§ 8.1(B), 8.2(B));

C. There are no actions or proceedings in which an unfavorable resolution would prevent the Transaction from closing (*see id*. at §§ 8.1(C), 8.2(C));

D. The parties will provide certain deliverables on or prior to the Closing Date (*see id*. at §§ 8.1(D), 8.2(D));

E. Cinemex will have delivered all cash amounts to Khan (*see id*. at § 8.2(E)); and

F. Since the parties' execution of the Agreement, no "Material Adverse Effect" shall have occurred (*see id*. at § 8.1(E)).

37. ***Material Adverse Effect***. The Agreement includes a detailed definition of Material Adverse Effect ("MAE"). That definition contemplates certain changes or events on or after the date of the Agreement, the occurrence of which would result in a failure of a Closing Condition. (*Id*. at § 1.1.)

38. Importantly, the Agreement specifically excludes from the definition of MAE certain circumstances and events. Among those excluded items are conditions generally affecting the United States economy, the regulatory environment or credit, securities, currency, financial, banking or capital markets (including any disruption thereof and any decline in the price of any security or any market index or any changes in interest rates or exchange rates) in the United States or elsewhere in the world, … **any epidemics, pandemics, outbreaks, earthquakes, hurricanes, tornadoes or any other natural disasters (whether or not caused by any Person or any force majeure event) or any other national or international calamity or crisis[,] … [or] any change that is generally applicable to the industries or markets in which any member of the Company Group operates or in which products or services of any [Company] are produced, distributed or sold[.]**

(*Id*. (emphasis added)).

39. In other words, none of the above-listed items—including pandemics like the Coronavirus—may be considered when determining whether an MAE has occurred.

40. ***Remedies for Breach***. Section 12.11 provides that a party will suffer irreparable harm if the other party fails to perform its obligations under the Agreement, and that the aggrieved party "shall be entitled to an injunction or injunctions, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement." (*Id.* at § 12.11.)

41. More specifically, the Agreement gives Khan the right to such relief in order to force Cinemex "to cause the transactions contemplated by this Agreement to be consummated, in each case, if the [Closing Conditions] set forth in Section 8.1 have been satisfied or waived." (*Id*.)

42. Cinemex further agreed that it would "not oppose the granting of an injunction, specific performance and other equitable relief when expressly available pursuant to the terms of this Agreement on the basis that [Khan] [has] an adequate remedy at law or an award of specific performance is not an appropriate remedy for any reason at law or equity." (*Id*.)

43. ***Good Faith***. The Agreement specifically requires the parties to use commercially reasonable efforts to cause the Closing to occur. (*See id*. at §§ 7.4, 8.3.)

D. Cinemex Breaches the Agreement

44. On March 24, Khan's counsel emailed Cinemex's counsel to deliver all required closing deliverables, including payoff letters and third-party consents. That email also served to notify Cinemex that Khan had satisfied all of the Closing Conditions as of that date and, pursuant to the Agreement, that Closing must take place within two business days—*i.e.*, by March 26 (or April 10 as to SCG-N). Khan's counsel sought confirmation that Cinemex would be proceeding to close the initial Transaction by that date. (*See* Ex. H, 3/24/20 email thread.)

45. Cinemex's counsel responded later that day, claiming that "in light of COVID-19 related fallout, Cinemex will not and is not obligated to close this transaction. Among other things, Cinemex's operations and finance teams lack pre-Closing access to Star Cinema theaters and the Corporate Employees managing those theaters. Attempting to close under these circumstances would imperil Cinemex personnel. Moreover, key personnel are located in Mexico City and cannot get to Houston regardless because the US/Mexico border is closed." (*Id*.)

46. The next day, Khan, through his counsel, replied with a written demand that Cinemex reverse its position and proceed to the Closing in accordance with the Agreement. (*See* Ex. I, 3/25/20 Letter from N. Gorga to J. Mercado.)

47. Cinemex's counsel responded to the demand letter on March 26, again claiming generally that, "in light of the current situation relating to the Coronavirus pandemic (COVID-19), Cinemex is not required to close the transaction at this time." (*See* Ex. J, 3/26/20 Letter from J. Mercado to N. Gorga.) Cinemex's response sought to justify its breach further by claiming that the Closing must physically occur in Houston, Texas, that Cinemex is entitled to perform a physical inspection of the theaters upon Closing, and that the Coronavirus pandemic triggered the equitable doctrines of impossibility, impracticability, illegality, frustration of purpose, and commercial frustration, which further excused Cinemex from performing its obligations.

48. In all communications with Khan to date, Cinemex has never alleged that Khan is in breach or has failed to perform any of his obligations under the Agreement.

E. Cinemex Cites No Valid Basis for Failing to Perform Under the Agreement

49. None of Cinemex's cited grounds has any basis in the Agreement or otherwise justifies Cinemex's breach. The parties specifically and extensively discussed the potential for harm posed by the Coronavirus pandemic prior to executing the Agreement—including the possibility of the subject theaters being forced to close indefinitely.

50. Indeed, Cinemex even received a multi-million dollar reduction of the purchase price for this very reason.

51. The Agreement itself specifically addresses the possibility of "epidemics, pandemics, outbreaks, … any other natural disasters (whether or not caused by any Person or any force majeure event) or any other national or international calamity or crisis," and prohibits Cinemex from claiming that any such occurrence constitutes a failure of a Closing Condition to justify Cinemex's non-performance. (*See* Ex. A at § 1.1.)

52. There is nothing in the Agreement that requires that the Closing physically occur in Houston or at the premises of any of the Companies, or that guarantees Cinemex's ability to physically inspect the theaters and access employees at the time of Closing. [10] Sections 7.2 and 7.9 of the Agreement require only that Khan provide Cinemex with "reasonable access to and the right to inspect all of the properties, assets, premises, books and records, contracts, agreements and other documents and data related to the Company Group" and with "reasonable access to each Corporate Employee."

53. Additionally, Cinemex's claim that an in-person Closing is required to allow Cinemex to inspect the Companies' property is debunked by the terms of the SCG-N agreement discussed above. That agreement also includes a situs provision that specifies Houston as the place of closing—despite SCG-N being located in Illinois. Cinemex offers this sham argument for the sole purpose of shirking its obligation to close the Transaction.

54. On the other hand, Khan made every effort to cooperate with Cinemex and eventually close the transaction. He tried to accommodate Cinemex's concerns by offering things like price concessions and service agreements. He even offered to push back the closing for *months* (so long as Cinemax provided a reasonable deposit) until Cinemex was willing and able to travel to Houston as it purportedly desired to do.

55. Khan also made clear to Cinemex, on several occasions, that he would provide full and unfettered access as required by the Agreement. For weeks, Cinemex had the opportunity to physically access the Companies and the relevant premises and employees, yet chose not to do so. Khan further offered to provide transition services at no cost to Cinemex (and to make his team available, at cost) to oversee and manage the assets of the Business until such time that Cinemex could travel to the U.S.

56. Even with the travel restrictions that were enacted in response to the Coronavirus, Khan remained willing to make any relevant documents or personnel available to Cinemex via videoconferencing and other electronic/virtual means. Again, however, Cinemex elected not to do so. Cinemex cannot now use this as an excuse to try to evade its obligations under the Agreement.

F. Cinemex's Breach Will Cause Khan to Suffer Irreparable Harm

57. In addition to monetary damages stemming from losing the proceeds of the Transaction, Khan and the Companies will suffer additional, irreparable harm because of Cinemex's breach—including a demised reputation and loss of goodwill in the marketplace.

58. By executing the Agreement, Khan believed that he was entering into a transaction with a billionaire-backed company that would make a large cash payment, which would in turn provide him with the liquidity to make certain other investments.

59. If Cinemex is not compelled to honor the Agreement, Khan will retain possession of the Companies, but with the added burden of dealing with the significant harm inflicted on the Business by Cinemex's decision to back out of the deal. Khan's relationships with vendors, service providers, lenders, landlords and the like will suffer, as will the Business' goodwill and standing in the marketplace. Coupled with the lack of operational cash, these factors—all caused by Cinemex's refusal—threaten to irreparably harm the Business and create problems where none existed prior to the Transaction. This is precisely why Khan insisted on, and Cinemex agreed to, a provision in the Agreement that requires specific performance of Cinemex's obligation to close on the Transaction.

60. The resulting damages are impossible to quantify and show that Khan will undoubtedly suffer irreparable harm if Cinemex is able to evade its contractual obligations. The calculated decision being made by this billionaire-backed company to evade its contractual obligations could lead to the total loss of a Texas-based business and more than 1,000 jobs primarily in the Houston area.

61. There is no valid basis for Cinemex to avoid performing its obligations under the Agreement. Cinemex's improper actions have left Khan with no choice but to seek expedited and emergency relief from this Court, including specific performance.

Count I – Breach of Contract

62. Khan repeats and re-alleges the allegations set forth in the preceding paragraphs as if fully set forth herein.

63. The Agreement is a valid contract that is binding on the parties.

64. Khan has fulfilled all of his obligations under the Agreement and has not otherwise breached any of its provisions.

65. Section 3.1 of the Agreement obligates Cinemex to proceed to Closing within two business days of the satisfaction of all conditions to Closing.

66. Khan satisfied all applicable Closing Conditions as of March 24, 2020. Accordingly, the Agreement required Cinemex to close the initial Transaction by March 26 (and on April 10 with respect to Cinemex's acquisition of SCG-N).

67. Cinemex has refused to comply with its contractual obligations and proceed to the Closing.

68. In Section 12.11 of the Agreement, Cinemex expressly agreed to the remedy of specific performance in the event of its breach of the Agreement.

69. Cinemex's breaches will deprive Khan of the benefit of his bargain, cause him monetary damages, and inflict additional harm for which Khan has no adequate remedy at law.

70. Khan is thus entitled to an Order from this Court that directs Cinemex to specifically perform their obligations under the Agreement and close the Transaction.

Prayer for Relief

WHEREFORE, Khan respectfully requests judgment and relief against Cinemex as follows:
A. Ordering Cinemex to specifically perform their obligations under Sections 3.1 and 12.11 of the Agreement and proceed to the Closing of the Transaction;

B. Granting preliminary and permanent injunctive relief requiring Cinemex to close the Transaction as set forth in the Agreement;

C. Ordering Cinemex to pay any additional damages suffered by Khan as a result of Cinemex's breach of the Agreement, in an amount to be determined at trial;

D. Awarding Khan his costs and attorneys' fees incurred in connection with Cinemex's breach of its covenants, as contemplated under the Agreement; and

E. Granting Khan such other and further relief as the Court deems just and proper.

April 1, 2020

Respectfully submitted,

/s/ Jeff M. Golub

Jeff M. Golub

(attorney in charge)

State Bar No. 00793823

Federal Bar No. 21606

BECK REDDEN LLP

1221 McKinney Street, Suite 4500

Houston, TX 77010

(713) 951-6281

(713) 951-3720

jgolub@beckredden.com

OF COUNSEL:

Nick Gorga (*pro hac vice* pending)

Mohamed Awan (*pro hac vice* pending)

HONIGMAN LLP

2290 First National Building

660 Woodward Avenue

Detroit, MI 48226-3506

(313) 465-7000

ngorga@honigman.com

mawan@honigman.com

Footnotes

1 Indeed, Khan has already been denied financing by one particular lender who had expressed concern over the uncertainty surrounding the Transaction.

2 "A TIMELINE OF THE CORONAVIRUS PANDEMIC," *available at https://www.nytimes.com/article/coronavirus-timeline.html* (last accessed March 31, 2020).

3 *Id*.

4 *Id*.

5 "SENATE PASSES $8.3 BILLION EMERGENCY CORONAVIRUS PACKAGE, SENDING BILL TO TRUMP'S DESK" *available at https://www.cnbc.com/2020/03/05/senate-passes-8point3-billion-coronavirus-bill-sending-it-to-trumps-desk.html* (last accessed March 31, 2020).

6 The parties' final Agreement actually comprises two separate agreements, which together reflect the total purchase price of $[Text redacted in copy.]. The first agreement (attached as Exhibit A) was for Cinemex's purchase of all of the Companies, other than SCG-N, for $[Text redacted in copy.]. Cinemex purchased SCG-N pursuant to the second agreement (portions attached as Exhibit F) for $[Text redacted in copy.]. Aside from their respective purchase prices, both agreements contain similar terms, except that the SCG-N agreement included an additional term in Section 3.1 ("Closing Date") that required that closing take place no earlier than April 10, 2020. Both of the agreements will herein continue to be referred to collectively as the "Agreement."

7 *Id*.

8 *See, e.g.*, Ex. G (3/11/20 Press Release); *see also https://www.prnewswire.com/news-releases/cmx-cinemas-to-acquire-star-cinema-grill-301024969.html* (last accessed March 31, 2020).

9 Additionally, with respect to the SCG-N agreement discussed in n. 6, the Closing must occur on or after April 10, 2020.

10 Indeed, not all of the theaters are even located in Houston.

End of Document

Comtech agrees to settle COVID-19 merger suit for $70 million on eve of trial

(October 6, 2020) - Comtech Telecommunications Corp. and Gilat Satellite Networks Ltd. have terminated their $532 million merger agreement and settled a Delaware Chancery Court lawsuit seeking interpretation of the deal's "**material** **adverse** effect" clause in the wake of the **COVID**-19 **pandemic**.

In re Comtech/Gilat Merger Litigation, No. 2020-0605, *settlement announced* (Oct. 5, 2020).

The settlement calls for Comtech to pay $70 million to Gilat, the companies said in a joint statement attached to a Form 8-K filed with the Securities and Exchange Commission on Oct. 5, the day their trial was supposed to begin. *Comtech Telecommunications Corp. Form 8-K*, 2020 WL 05885057 (Oct. 5, 2020).

With the trial and merger canceled, the companies said they have agreed to dismiss the litigation with prejudice.

Merger dispute

Comtech and Gilat announced Jan. 29 that they had reached a definitive agreement for Comtech to pay $10.25 per share to acquire Gilat, with 70% of the purchase price to be paid in cash and the other 30% in Comtech common shares.

At the time of the announcement, the companies expected to close the transaction by early fall, but the deal turned contentious over the summer.

Comtech filed a lawsuit in July seeking a declaratory judgment that it no longer had to complete the acquisition because the **pandemic** had caused a **material** **adverse** effect to Gilat's business.

Gilat countered that Comtech was using the **pandemic** as an excuse to skirt its contractual obligation to close.

The lawsuit was part of a wave of litigation over whether businesses that inked merger deals prior to widespread coronavirus-related shutdowns must close their transactions despite the pandemic's impact on subject businesses.

Comtech CEO Fred Kornberg and Gilat Chairman Dov Baharav said in the joint statement that the companies believed their combination represented a "perfect marriage" but that COVID-19 made the timing of the deal "particularly challenging."

Comtech's and Gilat's boards each approved the settlement, which takes effect immediately, the companies said.

By Daniel Rice

Related Articles

Related Articles from Westlaw Mergers & Acquisitions Daily Briefing
Article: Comtech, Gilat dispute COVID-19's impact on pending $532 million merger 2020 MERACDBRF 0106
Date: July 14, 2020
The fate of the $532 million merger agreement between communication technology companies Comtech Telecommunications Corp. and Gilat Satellite Networks Ltd. likely hinges on a new lawsuit filed in Delaware state court.

End of Document

2020-5 Construction Briefings NL 1

Construction Briefings May 2020

Construction Briefings
by Thomas Marcey

COULD COVID-19 SERVE AS THE GROUNDS FOR A *FORCE MAJEURE* DEFENSE TO CONTRACTUAL NONCOMPLIANCE?

I. INTRODUCTION

At the time of writing, everyone engaged in any form of economic activity (which is nearly everyone), in the US and worldwide, is being forced to confront covid-19's effects both on our health, and on those activities. That includes those who work in the construction arena. At this moment, predicting the final outcome of the disease in terms of its duration as well as its human and economic cost is unclear. What is clear is that very uncertainty of its effects on human health, and in turn on the global economy, have already been jarring in the extreme, and that their reverberations will not fully fade for an indeterminate period.

Thus, the question within construction circles has to be, what effect will the pandemic have on the performance of existing contracts, and what provision should be made in the language of contracts that might be in the negotiation stage? A key query is will certainly be whether a contractor will be able raise the defense of *force majeure* to a termination for failure to perform because of covid-19's effects on workers and employers alike? Or, in the federal contractual context, is there likely to be relief in the form of an excusable delay for a contractor whose contractual performance schedule was upended by the impact of the pandemic, under one of the relevant Federal Acquisition Regulation (FAR) clauses: ("Excusable Delays" (FAR 52.249.14), and Default Fixed Price Construction (FAR 52.249-8))? In the alternative, if the federal government proactively suspends performance due to a pandemic, will the contractor be able to recover its costs under either the mandatory Suspension of Work (FAR 52.242-14) or the non-mandatory Stop-Work Order clause (FAR 52.242-15)?

The general issue of the legal effect on contract performance of extraordinary, unforeseen events has been explored in these pages before, [1] but never in the context of a catastrophic, worldwide illness such as covid-19. This pandemic has the unfortunately unique feature of a delayed onset of symptoms and numerous consequent instances in many countries of "community spread," which enable it to apparently "jump" borders and reach widely diverse locations nearly simultaneously. Also, effects on those afflicted can be crippling, with a morbidity rate that appears to be higher than seasonal flu and has the consequent ability to fully commandeer the personnel and resources of medical institutions. Because of the (one hopes) unique nature of these issues, the topic of *force majeure* in the current pandemic situation is what we consider in this month's *Briefings*. Due to the unique nature of federal contract practice, governed as it is by the FAR and the associated regulatory framework, the author will explore the issues raised in the context of the above-noted FAR clauses in a separate future issue.

II. THE *FORCE MAJEURE* DEFENSE AND WHAT IT MIGHT INCLUDE [2]

The failure of a party to a contract to perform because it encountered unanticipated obstacles which were beyond its reasonable control, and which it could not have reasonably avoided or mitigated, is the core concept of the doctrine of *force majeure*. [3] It originated in the French legal system as a product of the Code Napoleon. [4] Carried over into American jurisprudence as a contractual defense that was based on a showing of the "physical impossibility" of performance, it has since evolved into a "commercial impracticability" of performance standard. That general standard, of which *force majeure* is an example, now appears in the Restatement (Second) of Contracts: [5]

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Note, however, that an additional element more in line with the "physical impossibility" standard is expressed in the definition of commercial impracticability in the Uniform Commercial Code (UCC): [6]

> Except so far as a seller may have assumed a greater obligation [for] substituted performance:
>
> Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

1. Event Specified in the Clause

The first and most basic inquiry concerning *force majeure* is whether the "event" is one which is included in a specified list of occurrences in the contract clause. That should generally represent a relatively simple task. [7]

A different scenario involves the clause in which the drafters instead left open the definition of *force majeure,* i.e., by using language such as "any event arising from causes beyond the control" of the party seeking to raise the defense. That phraseology allows for a broad interpretation, and courts have tended to follow that lead. In *U.S. v. Hampton Roads Sanitation Department,* a consent decree between U.S. EPA and a regional sanitation department ("HRSD") required the department to make equipment upgrades and perform related construction work in the wake of storm-related sanitary sewer discharges. The decree included a *force majeure* definition applicable to "any event arising from causes beyond the control of HRSD ... that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's ... best efforts to fulfill the obligation." The Eastern District of Virginia found that language to be inclusionary in nature and thus *force majeure* could be raised as a defense to claims arising from the alleged discharges. [8]

2. Foreseeability

Assuming an event or occurrence falls within the coverage of the clause, the Restatement language "the non-occurrence of which was a basic assumption" of the contract drafters then allows the court to make a further inquiry: was the event foreseeable by the party raising the defense? In *Hampton Roads*, the district court resolved that question by focusing on the phrase "despite HRSD's ... best efforts to fulfill that obligation." The court interpreted the phrase to include "using [its] best efforts to anticipate any potential force majeure event and [its] best efforts to address the effects of any such event both during and after its occurrence to prevent or minimize any resulting delay 'to the greatest extent possible.' " [9] That interpretation incorporates both a foreseeability requirement and a duty to mitigate, which is discussed further below.

The issue of foreseeability might not arise, however, if a court follows a different line of analysis. Thus, even assuming an occurrence falls within the coverage of the clause, it still might not rise to the level of a *force majeure* event unless it actually bars the physical performance of the contract. Stated differently, the original physical impossibility standard may have to be met in certain situations. In *Beardslee v. Inflection Energy, LLC,* [10] Inflection held oil and natural gas drilling contracts with various landowners in upstate New York allowing it drilling and production rights on their properties, in return for the payment of royalties to the owners. Each lease was for a five-year period, as long as the lessor was engaged in using the property for

oil or gas production. The last renewal being in 2005. [11] The *force majeure* clauses in the leases listed an extensive number of potential occurrences which could trigger its application, including "some order, rule, regulation, requisition or necessity of the government," assuming "drilling or other operations hereunder are delayed or interrupted." [12]

The state's Environmental Quality Act had required a generic environmental impact statement beginning in 1992 applicable to leases to exploration and production companies using the then-common oil and gas exploration and drilling procedures. In 2008, those companies began switching their operations to using horizontal drilling and high-volume hydraulic fracturing techniques. In response, the governor requested a review of fracking issues, which led to a moratorium on their use. [13] Inflection sought renewal of the leases in 2010, saying that the moratorium constituted an event that was covered by the lease *force majeure* clauses (and adopting the broader UCC view of commercial impracticability). The owners sued for a declaratory judgment that the moratorium prevented leases from being extended under the *force majeure* clauses. [14]

The federal district court agreed with the plaintiffs, finding that the leases were barred from any possibility of renewal in 2010 because of the intervening issuance of the moratorium. The court concluded that the leases could grant their holders the right to drill but imposed no obligation on them to do so. The lack of such a requirement meant that the moratorium did not actually prevent the performance of the respective contracts, and thus that it was not necessary to consider *force majeure* issues. [15] Nor did it frustrate their purpose, i.e., to drill and produce gas, as the moratorium on fracking did not bar the use of alternative techniques to extract the oil and gas, even though their commercial viability might be questionable.

3. Mitigation

The third and final judicial inquiry to determine whether a *force majeure* defense is available is whether the party invoking it has taken the necessary action to mitigate the effects of the event on its performance. The Kentucky Court of Appeals ruled that the contractor attempting to assert the defense in *Kentucky Natural Gas Corporation v. City of Leitch ex rel. Its Utility Commission* failed to make that showing and consequently upheld the termination of a contract to purchase gas by the municipality from the contractor ("KNG"). [16] The 2000 contract stated the city would finance the development of a neighboring gas field ("Leitchfield") for KNG, and KNG would in turn use that field to provide 80% of the municipality's gas requirements for 20 years. Under the contract, KNG had 12 months to develop the gas field and start delivering a minimum of 60,000 cubic feet per month; if it failed to complete the required construction, the contract would be null and void. If KNG failed to deliver the minimum required amount of gas during the 20-year period for non-*force majeure* reasons, the city could cancel the contract without notifying KNG. [17]

The contract included an extensive laundry list of enumerated grounds for *force majeure*, including the following which were relevant to the facts of this case:

> breakage or accidents to machinery or lines of pipe ... partial or entire failure of wells or sources of supply of gas, and other causes, whether the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome ... . [18]

The city granted KNG approval 10 days before the end of the 12-month period to tie into a separate gas field the contractor owned ("Shrewsbury") to deliver the contractually required amounts, but it still had to complete construction on Leitchfield, within a 60-day extension period. When that construction was completed and deliveries began from there, the city found a gas leak. The city notified KNG, but it failed to perform repairs, causing the city instead to shut off the gas valve. KNG then attempted to meet the city's requirements from Shrewsbury. [19] The city cancelled the contract for failure to deliver from the agreed-upon source, sued to declare the contract null and void, and the court awarded it summary judgment.

KNG appealed, arguing *force majeure*, i.e., the city shut the delivery valve, effectively barring KNG's production there. [20] However, court of appeals disagreed, pointing out that KNG in fact examined the Leitchfield leak after being notified by the city and discovered the problem, which required nothing more than 30 minutes of labor to correct. But, KNG refused to take that course of action. KNG had instead opted to meet the city's gas demands from the Shrewsbury field, which did not comply with the contract. Therefore, as KNG did not exercise due diligence to overcome the problem, it could not assert force majeure

defense based on one or more of the clauses enumerated causes, or as one of the "other causes," which otherwise would have been available to it under the clause.

4. Considerations of Timing

Central to any legal analysis of covid-19-related litigation (which could arise anew in future viral outbreaks where the date of infection may occur well before the onset of symptoms) are likely to be numerous general fact questions related to time. The window of time during which a pandemic such as this operates in a given location may have rather uncertain beginning and/or end dates. Applicable to key project personnel, did the pandemic start when the first identifiable case was detected? When the first fatality was recorded? When the relevant political authorities publicly declare that it has arrived? If there is a lockdown, suspension of work, or stop-work order issued, those issues might be resolved with reasonable objectivity. If not, even if the affected personnel are not considered key individuals, the possible presence of asymptomatic carriers creates its own risks, e.g., how does one take into account the time lag between infection and the possible development of symptoms, either in the carrier, people he/she contacted—or both? Is the effect the pandemic has on subcontractors/suppliers based in other communities' municipalities a valid basis for a defense, when the pandemic has yet to reach the prime's work site?

In resolving these questions, courts will likely scrutinize closely the job functions of infected individuals within prime and/or subcontractor organizations to determine how significant they are to organizational operations, how long their incapacitation was, and were they replaceable or did they have irreplaceable special expertise.[21] Another concern will no doubt be if the organization in fact made efforts to perform the necessary workarounds. Could the contractual parties have located substitute subcontractors, negotiated interim agreements to freeze the work or to stretch the performance schedule, and did they in fact attempt that course, even if they were unsuccessful?[22]

Then, assuming the pandemic ends when the markers of identifiable cases and deaths end (presumably in reverse order), how certain is it that there will not be a recurrence of cases within a relatively short time frame, based on prior asymptomatic carriers already at the work site, or transmissions from new hires or other personnel arriving from other parts of the U.S.? Looking ahead, in the context of a long-term project, if the medical data suggests that the virus will be a seasonally recurrent one (spring/fall/winter), how does one calculate the expected impact on work site personnel, allowing for those who previously contracted the virus but are now recovered?

All of these could be vexing fact questions, certainly more so than in cases of wars or storms or other, visually undeniable, catastrophic events.

III. PRACTICE POINTERS

The doctrine of *force majeure* exists as a defense available to contractors faced with the necessity of contract nonperformance in the face of covid-19 or related viral pandemics, either because of their own decisions to cease the work or due to government-declared lockdowns. However, depending on the wording of the operational contract clause, the contractor will have to hurdle several issues for the defense to be successful:

- Is "pandemic" or at least "epidemic" specified in the clause as one of the grounds for raising the defense?
- In lieu neither such term is an enumerated cause, is there language clause referencing an "event arising from causes beyond the control" of the party raising it? If so, that wording should be sufficient to permit the raising of the defense.
- Next, was the event "foreseeable" to the party invoking force majeure, following the "economic impracticability" standard set forth in the Restatement of Contracts?
- In the alternative, does a pandemic which leads to a government-issued suspension of work or stop-work order qualify as grounds for force majeure as a government order, regulation or directive that bars contract performance, in line with the UCC's "physical impossibility" standard?
- Then, did the party invoking force majeure act with due diligence to try to mitigate the effects of the virus? Here, fact questions will be paramount, as: what personnel were affected, were the key workers irreplaceable because of their experience and expertise, and how long were they incapacitated? Similarly, if the pandemic's effect on subcontractors or suppliers is the focus of the defense, could and did the prime contractor attempt to work around the problem by securing replacement subcontractors or suppliers?

IV. UPCOMING TRAINING OPPORTUNITIES

Due to the covid-19 outbreak, there are currently no live training courses or seminars to report. The following Federal Publications Live Virtual Course is available:

Service Contract Act

April 21-22, 2020

10:00-1:00

2:00-5:00 (each day)

$995 individual fee

Registration available at https://www.fedpubseminars.com/Order/?step=course

Footnotes

1 Thomas Marcey, *Would Force Majeure Clauses Serve as Contractual Defenses In the Event of a Nuclear or Cyberattack?*, 2017-10 Construction Briefings NL 1 (October 2017) (hereinafter "Marcey 1"); Thomas Marcey, Are *Force Majeure Clauses Effective in Limiting Contractual Risks?*, 2014-7 Construction Briefings NL 1 (July 2014).

2 Note: large parts of what the author presents in this section are a brief summarization of the *force majeure* analysis set forth in Marcey 1, which has hopefully become more precise and finely tuned in its retelling.

3 Mark Augenblick and Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility* (first appeared in the Journal of World Investment and Trade 12, 2012), available at http://www.pillsburylaw.com/sitefiles/publications/by;inedarticleforcemajeureintumultuoustimesjournalofworldinvestmenttrade031312.pdf.

4 French Civil Code, Articles 1147, 1148 (Inner Temple translation) (William Benning, London 1827).

5 § 265(a) (1981).

6 UCC § 2-615(a).

7 In fact, epidemics are an enumerated event in some clauses (note, however, that the term "pandemics" will likely not appear—an oversight which one suspects will be corrected in contracts going forward). *See, e.g.*, Kentucky Natural Gas Corp. v. City of Leitchfield ex rel. Its Utility Com'n, 2011 WL 4501976 (Ky. Ct. App. 2011), where "epidemic" was one of numerous listed potential events in the clause, although an epidemic was not actually at issue in that case.

8 U.S. v. Hampton Roads Sanitation Dept., 75 Env't. Rep. Cas. (BNA) 1842, 2012 WL 1109030, *6 (E.D. Va. 2012).

9 2012 WL 1109030 at *7.

10 Beardslee v. Inflection Energy, LLC, 904 F. Supp. 2d 213 (N.D. N.Y. 2012), judgment aff'd, 798 F.3d 90 (2d Cir. 2015).

11 904 F.Supp.2d at 217.

12 904 F.Supp.2d at 218.

13 904 F.Supp.2d at 215-17.

14 904 F.Supp.2d at 219-20.

15 904 F.Supp.2d at 220, citing Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319, 41 U.C.C. Rep. Serv. 1678 (2d Cir. 1985); *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 318, 10 U.C.C. Rep. Serv. 2d 130 (S.D. N.Y. 1989)*.

16 Kentucky Natural Gas Corp. v. City of Leitchfield ex rel. Its Utility Com'n, 2011 WL 4501976 (Ky. Ct. App. 2011).

17 2011 WL 4501976 at *2.

18 2011 WL 4501976 at *6.

19 2011 WL 4501976 at *2.

20 2011 WL 4501976 at *2.

21 *See* *Ace Electronics Associates, Inc.*, ASBCA No. 11496 (July 18, 1967); *Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 06-95 (Aug. 29, 1995), *see also* Hayley Hoffman, Steven Neeley, Hal Perloff, Brian Waagman, *Is Coronavirus an Excusable Delay*, Husch Blackwell LLP (March 9, 2020), available at https://www.jdsupra.com/legalnews/is-coronavirus-an-excusable-delay-52166/ (hereinafter "Hoffman *et al.*").

22 Jennie-O Foods, Inc. v. U. S., 217 Ct. Cl. 314, 580 F.2d 400 (1978); *see also* Hoffman *et al.*

End of Document

2020 WL 3971012
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Re: FORESCOUT TECHNOLOGIES, INC.
v.
FERRARI GROUP HOLDINGS, L.P. & Ferrari Merger Sub, Inc.

C.A. No. 2020-0385-SG
|
Date Submitted: July 14, 2020
|
Date Decided: July 14, 2020

Attorneys and Law Firms

William B. Chandler III, Esq., Lori W. Will, Esq., Shannon E. German, Esq., Jessica A. Hartwell, Esq., Jeremy W. Gagas, Esq., WILSON SONSINI GOODRICH & ROSATI, P.C., 222 Delaware Avenue, Suite 800 Wilmington, Delaware 19801

Kenneth J. Nachbar, Esq., William M. Lafferty, Esq., Ryan D. Stottmann, Esq., Sara Toscano, Esq., Sarah P. Kaboly, Esq., MORRIS, NICHOLS, ARSHT & TUNNELL LLP, 1201 N. Market Street, Suite 2100, Wilmington, Delaware 19801

Opinion

Sam Glasscock III, Vice Chancellor

***1** Dear Counsel:
I have reviewed the Defendants' request that I certify an interlocutory appeal of my rulings of July 10, 2020 and July 13, 2020, and the Plaintiff's opposition. An Order consistent with Supreme Court Rule 42 is attached, certifying in part the interlocutory appeal. This brief Letter Opinion supports that Order.

In this Action, Plaintiff Forescout Technologies, Inc. ("Forescout") seeks injunctive relief to compel the Defendants to consummate a merger. The matter has been expedited to accommodate this request. There are, unsurprisingly, numerous issues, but as the Defendants point out in their memorandum seeking interlocutory appeal, primary is whether Forescout has suffered a **material** adverse effect ("MAE") under the terms of the merger agreement. The parties appear to have negotiated the merger agreement in light of the pending **COVID**-19 pandemic, and agreed to limit—but not eliminate—the extent to which a pandemic could constitute a MAE. A trial is set for Monday–Saturday, beginning July 20, 2020. According to Forescout, to preserve the possibility of equitable relief, an opinion must issue by August 6, 2020. [1]

The trial date was imposed on May 28, 2020. [2] At that point, I was hopeful that viral conditions would abate by July 20. Manifestly, that hope has proved misplaced. On July 7, 2020, I held a teleconference with the parties and encouraged them to conduct as much of the trial as possible remotely, to limit potential COVID-19 exposure. The parties agreed to discuss the matter. At a telephone conference on July 10, 2020, counsel for the Defendants raised a specific concern about travel to Georgetown—a COVID-19 "hot spot." [3] In a letter submitted in advance of that telephone conference the Defendants also sought to continue the trial. [4]

At that point—absent a continuance of the trial—the Defendants sought two to three days of live trial testimony, with the remainder of trial occurring remotely. [5] The Plaintiffs were content to conduct the entirety of the trial remotely via Zoom. Upon hearing the Defendants' Georgetown-specific concerns, I offered the parties the option of as much live trial time as they desired (again, at that point, the Defendants sought two to three days) [6] in Georgetown or a single day of live trial in Wilmington—with the remainder of the trial to be conducted remotely via Zoom—but I declined to continue the trial. In refusing to continue the trial, I noted that doing so would render the equitable relief sought by Forescout practically unattainable. [7]

***2** Also during the Friday, July 10 teleconference, I directed the parties to inform me early on Monday, July 13 how much testimony could be submitted remotely, via Zoom, and their election regarding live trial in Wilmington or Georgetown. Instead, yesterday afternoon the Defendants filed a motion to require one of the Plaintiff's witnesses—Christopher Harms, Forescout's Chief Financial Officer—to travel to Wilmington for live cross-examination. [8] Per Forescout, Mr. Harms is unwilling to travel from California to Delaware due to health concerns. [9]

In the current health environment, I found Forescout's reasoning persuasive. While the Defendants insist that cross-examination of Mr. Harms is necessary to their case, on balance I determined that justice would best be served with a remote presentation of Mr. Harms' cross-examination. I made it clear that the Defendants could have counsel in California cross-examine Mr. Harms in person (with appropriate precautions in place) but that I would preside remotely. I note that the Defendants have failed to identify any reason why such a cross-examination of Mr. Harms would not be sufficient to the administration of justice.

I perceive the questions presented by the Defendants that I hereby certify for interlocutory appeal as twofold. First is a broader question: given the current public health situation may I rightly decide to accept trial testimony remotely? Second is a question specific to Mr. Harms: was my denial of the Defendants' request to compel Mr. Harms to travel from California to Delaware so that Mr. Harms may be cross-examined live in court within this Court's discretion?

"[A]n interlocutory appeal will not be certified 'unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.' " [10] "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources. Therefore, parties should only ask for the right to seek interlocutory review if they believe in good faith that there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal." [11] I am to consider eight criteria in deciding whether to certify an interlocutory appeal. [12]

Among these eight criteria is whether "[t]he interlocutory order involves a question of law resolved for the first time in this State." [13] The COVID-19 pandemic has presented unprecedented challenges for our State and Nation, and our Court has not escaped such difficulties. Even so, this Court has proceeded to conduct business virtually throughout the pandemic, principally over telephone and Zoom. We remain in Phase II of our Supreme Court's reopening plan for Delaware's courts. [14] During Phase II, the Supreme Court's current order extending the judicial emergency owing to the COVID-19 pandemic permits "[c]ivil hearings that require the participation of witnesses or clients," but concurrently "encourage[s] ... the use of video and audio conferences whenever possible." [15] Consequently, while the Supreme Court's current order allows me to hold this trial live should I determine to do so, it also encourages the use of virtual means "whenever possible." [16]

***3** Whether trial testimony may be taken virtually consistent with the Defendants' due process rights is a question of law that, to this point, has yet to be resolved in this State. It is a question that, having considered Supreme Court Rule 42(b)(iii)'s criteria is, in my view, proper for interlocutory review by the Delaware Supreme Court.

Likewise, whether Mr. Harms may be compelled to testify live presents many of the same issues as the general question, and for the same reasons I also certify the question as applied to Mr. Harms for interlocutory review. The burden for a witness compelled to testify live has necessarily risen to a greater magnitude in the current public health climate, particularly where such live testimony would require cross-country travel.

Because the Defendants have raised due process concerns regarding the right to live cross-examination, because Mr. Harms is a key Plaintiff witness, and because the overarching issue presented—whether a decision to take trial testimony remotely is consistent with due process and within the trial court's discretion—is one of first impression, [17] I find that the "likely benefits of interlocutory review outweigh the probable costs," [18] and the interest of justice supports interlocutory review. [19]

To the extent the Defendants seek review of my decision to deny their request to continue the trial, that is a matter within the discretion of the trial court, [20] and does not meet Supreme Court Rule 42(b)(iii)'s criteria. That decision, therefore, does not merit interlocutory review under Supreme Court Rule 42. [21]

To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III
Sam Glasscock III

All Citations

Not Reported in Atl. Rptr., 2020 WL 3971012

Footnotes

1 The Termination Date as set forth in Section 8.1(c) of the merger agreement was extended to 11:59 p.m. on August 6, 2020 as the result of the entry of a stipulated order for entry of a temporary restraining order. Order, D.I. 17, at 4.

2 Tr., D.I. 100, at 7:16–8:10; *see* Stip. and Order Governing Case Schedule, D.I. 51.

3 Application For Certification Of Interlocutory Appeal, D.I. 155, Ex. A ("Application"), at 11:17–12:2.

4 Letter, D.I. 139.

5 Application, Ex. A, at 12:6–12:16.

6 Necessarily, such live trial time would only be applicable to witnesses who agreed to attend trial in person, as I noted that given the public health crisis I was "not going to force anybody to come here." *Id.* at 13:24–14:1.

7 *Id.* at 12:23–13:7 ("I appreciate the defendants' offer to extend the closing date, but it is a reality—and I think we're all aware of it—that the longer this plays out, the lower the chances that this deal can go through. That's just practical. The initial terms will be so stale after a trial in October that I think the likelihood is practically zero that the type of relief that the plaintiff is seeking here can be achieved.").

8 This was, I infer, Defendants' election of Wilmington as the live trial situs, but with the condition that Mr. Harms be compelled to appear in Wilmington in person.

9 Application, Ex. B, at 3:19–4:8.

10 *JPMorgan Chase Bank, N.A. v. Ballard*, 214 A.3d 449, 451 (Del. Ch. 2019) (quoting Supr. Ct. R. 42(b)(i)).

11 Supr. Ct. R. 42(b)(ii).

12 Supr. Ct. R. 42(b)(iii).

13 Supr. Ct. R. 42(b)(iii)(A).

14 Administrative Order No. 8, In re: COVID-19 Precautionary Measures (Del. July 6, 2020).

15 Administrative Order No. 7, In re: COVID-19 Precautionary Measures (Del. June 5, 2020), at 5–6; *see id.* The Supreme Court's authorization of the use of audiovisual devices for court proceedings is permitted by statute, as 10 *Del. C.* § 2008 provides that "[d]uring a judicial emergency, the Chief Justice is authorized to permit, by order, the use of audiovisual devices for all civil and criminal proceedings except trial by jury, whether or not such use is currently permitted by statute or court rule."

16 The Supreme Court's latest order extending the judicial emergency states: "In light of the continuing threat COVID-19 poses to public health, all courts in the State are authorized, to the greatest extent possible under 10 *Del. C.* § 2008, to continue to utilize audiovisual devices at their facilities and remotely to conduct proceedings (except for jury trials) for the duration of this order." Administrative Order No. 8, In re: COVID-19 Precautionary Measures (Del. July 6, 2020), at 3.

17 Supr. Ct. R. 42(b)(iii)(A).

18 Supr. Ct. R. 42(b).

19 Supr. Ct. R. 42(b)(iii)(H). I note that, though the Defendants urge me to do so, I decline to find the criterion in Rule 42(b)(iii)(B), that "[t]he decisions of the trial courts are conflicting upon the question of law," has been met here, because this Court has not previously encountered the precise circumstances presented here.

20 *Valentine v. Mark*, 873 A.2d 1099 (Del. 2005) (TABLE); *see In re Asbestos Litig.*, 2020 WL 1465924 (Del. Mar. 24, 2020).

21 Consequently, should the Supreme Court determine that the trial must be held live to comport with the Defendants' due process rights, the Court is prepared to do so in Georgetown on the dates scheduled.

End of Document

2020 WL 4366097 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

REALOGY HOLDINGS CORP., Plaintiff,
v.
SIRVA WORLDWIDE, INC., North American Van Lines, Inc., Madison Dearborn Capital Partners Vii-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P., Defendants.

No. 2020-0311-MTZ.
July 27, 2020.

Plaintiff's Application for Certification of Interlocutory Appeal

Robert S. Saunders (ID No. 3027), Edward B. Micheletti (ID No. 3794), Cliff C. Gardner (ID No. 5295), Jessica R. Kunz (ID No. 5698), Bonnie W. David (ID No. 5964), Rupal K. Joshi (ID No. 6293), Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, P.O. Box 636, Wilmington, Delaware 19899-0636, Tel.: (302) 651-3000, Fax: (302) 651-3001, for plaintiff Realogy Holdings Corp.

William M. Lafferty (ID No. 2755), Kevin M. Coen (ID No. 4775), Adam T. Nyenhuis (ID No. 4775), Sarah P. Kaboly (ID No. 6673), Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, Suite 1600, Wilmington, Delaware 19801, Tel.: (302) 658-9200, for defendants.

Plaintiff Realogy Holdings Corp. ("Realogy") respectfully requests that the Court certify an interlocutory appeal from its July 17, 2020 oral ruling and implementing order (Ex. 1 & Dkt. 74, the "Order") [1] adopting Defendants' arguments without further explanation and dismissing Realogy's requests for specific performance. Realogy and its counsel have determined in good faith that this Application meets the criteria in Rule 42(b)(iii).

1. This Application arises from the Court's unprecedented decision to dismiss, under Rule 12(b)(6), equitable remedies for Realogy's well-pled breach of contract claims based upon SIRVA's secret scheme to fabricate an "MAE" and repudiate a Purchase Agreement days before the scheduled Closing. At the height of the COVID-19 outbreak, Realogy scrambled in 48 hours to file a 45-page complaint seeking equitable relief. In the first 111 paragraphs of its Initial Complaint, Realogy clearly alleged that SIRVA - *not* MDP - was a party to, breached and must perform under the Purchase Agreement; MDP was sued *only* to recover a Termination Fee as an alternative to specific performance. However, in two subparts of the last numbered paragraph and one prayer for relief, the Initial Complaint inadvertently contained four references to "Defendants." SIRVA and MDP seized on these four typographical errors, arguing that Realogy had sued MDP for breach of the Purchase Agreement, excusing MDP from its contractual promise to provide Equity Financing for the deal. In a seven-sentence transcript ruling, the Court agreed, unjustly concluding that Realogy asserted "non-Retained Claims" against MDP. The Court impermissibly adopted SIRVA's argument as its reasoning; misinterpreted the Transaction documents; improperly resolved factual disputes (contrary to facts pled); and ignored well-pled facts of SIRVA's bad faith conduct and settled Delaware law. As a result, a *court of equity* erroneously eliminated Realogy's right to specific performance of both SIRVA's obligation to consummate the Closing *and* its interim reasonable best efforts obligations, based on the most extraordinary of technicalities resulting from the time pressures Defendants intentionally created.

2. On November 6, 2019, Realogy and SIRVA entered into the Purchase Agreement, pursuant to which SIRVA agreed to acquire Cartus, Realogy's subsidiary, for $400 million. If the deal was terminated, SIRVA agreed to pay a $30 million Termination Fee. MDP, SIRVA's parent, guaranteed that payment. (Compl. ¶¶ 42, 94, 100)

3. Without warning, on Saturday morning, April 25, 2020, four calendar days before the scheduled Closing and after Realogy had notified SIRVA that all conditions to Closing were satisfied, SIRVA repudiated the Purchase Agreement, contending Cartus had incurably suffered an MAE. (Compl. ¶¶ 155, 159, 184)

4. Defendants schemed for weeks to falsely declare an MAE and scuttle the Transaction, but ambushed Realogy at the eleventh hour to undermine its ability to obtain specific performance. (Compl. ¶¶ 160-162) This scheme breached SIRVA's obligation to act in good faith, resolve problems and consummate the Transaction. (AB 1-2, 5, 56-59)

5. Faced with the rapidly approaching Outside Date, Realogy was forced to move expeditiously to protect its rights. On Monday morning - barely 48 hours after SIRVA's Saturday morning repudiation, and just three business days before the Outside Date [2] - Realogy filed its Initial Complaint to specifically enforce the Purchase Agreement. (Dkt. 1)

6. Realogy sued MDP only to recover the Termination Fee, which is a "Retained Claim." (*Id.* ¶¶ 4, 55, 103, 105; OB 7) Realogy's Initial Complaint repeatedly alleged that SIRVA, *not* MDP, is a party to the Purchase Agreement. (Dkt. 1 ¶ 34 ("Realogy and SIRVA entered into the Purchase Agreement"); *id.* ¶¶ 5, 15, 43, 49, 51, 83, 88, 93-94, 100) SIRVA, *not* MDP, breached its obligations thereunder. (*Id.* ¶ 95 ("SIRVA has materially breached the Purchase Agreement"); *id.* ¶¶ 8, 20, 69, 104) And SIRVA, *not* MDP, must perform the Purchase Agreement. (*Id.* ¶ 7 ("SIRVA is obligated to consummate the Transaction"); *id.* ¶¶ 10, 23, 70, 91, 110; *see also* OB 11; Exhibit 2) Realogy's Supplemental Information Statement stated that Realogy sought "equitable relief for SIRVA's breaches." (Dkt. 1)

7. On May 17, Realogy amended its pleading, adding new allegations detailing Defendants' bad faith scheme. (Dkt. 32, the "Complaint")

8. On June 9, Defendants moved to dismiss the specific performance remedies in Counts I and II of the Complaint. (Dkts. 45-46 (the "Motion")) Raising a hyper-technicality unworthy of a court of equity, Defendants argued that Realogy could not obtain specific performance because its use of four "s"s in the Initial Complaint trumped the more-than-100 detailed paragraphs that came before them, and demonstrated Realogy's "intent" to bring a "non-Retained Claim" against MDP under the Purchase Agreement.

9. Defendants then argued that these four extra letters triggered a cascade of consequences sanctioning their bad faith conduct: The four letters meant that Realogy had filed a non-Retained Claim; which meant that MDP's ECL (to which Realogy was not a party) "automatically and immediately" terminated; which meant that a condition of the DCL failed; which meant that a condition to Realogy's right to specifically enforce SIRVA's obligation to "consummate the Closing" failed; which meant that ordering SIRVA to comply with its unconditional reasonable best efforts obligations leading up to Closing was "futile." [3]

10. This argument was meritless and not properly determined on the pleadings. *First,* Realogy never asserted a non-Retained Claim. The four disputed "s"s in a more than 10,000-word pleading were absolutely unintended. In connection with its motion to expedite, Realogy immediately reassured Defendants that "Realogy is not asserting a claim against MDP under the [Purchase Agreement]." (Dkt. 16 ¶ 10 & n.6) Realogy also represented to the Court that "Realogy is not asserting a claim against MDP under the purchase agreement." (Dkt. 34 at 61) [4] Moreover, when Realogy amended its pleading, it removed the four errant "s"s and alleged that it never intended to pursue non-Retained Claims and the four letters were *at most* a scrivener's error resulting from expedited drafting over a weekend. (Compl. ¶ 164)

11. Even though use of "Defendants" was unintended, the simple fact is the Limited Guaranty is incorporated into the Purchase Agreement. (*See id.* ¶ 96) The obligation of a guaranty can only be triggered when the obligation it guarantees is triggered. Thus, stating that MDP had obligations under the Purchase Agreement, in the Initial Complaint or in a press release *outside the record,* accurately describes MDP's obligation to guarantee the Termination Fee. Read in their entirety, these documents do not support Defendants' arguments.

12. *Second,* no defendant who was actually concerned about whether it faced additional liability, as opposed to looking to scuttle the deal, would conclude the Initial Complaint asserted a non-Retained Claim. Realogy never pled that MDP was party to the Purchase Agreement. Instead, it pled that "[t]he Purchase Agreement is a valid and binding contract among Realogy and SIRVA." (Dkt. 1 ¶¶ 93, 100) Additionally, a complaint must be read *as a whole* and construed "to do substantial justice." (AB 45) Defendants' arguments violated these requirements. Unsurprisingly, Defendants cited no authority supporting such a hyper-technical pleading regime.

13. *Third,* Defendants' argument that Realogy "intentionally" asserted non-Retained Claims required factual findings the Court cannot make on a Rule 12(b)(6) motion. (*Id.* at 48)

14. *Finally,* even if Realogy had asserted a non-Retained Claim, precisely to avoid inequitable outcomes, the Limited Guaranty contains a "cure," providing ten business days after receipt of written demand to dismiss any non-Retained Claim. (Compl. ¶ 103) The ECL expressly incorporates the Limited Guaranty's definition of Retained Claims and its cure provision, adopting "Retained Claims (*as defined in,* and *to the extent permitted under,* the Limited Guaranty), in each case, *subject to all of the terms, conditions and limitations herein and therein.*" (*Id.* ¶ 55 (emphasis added)) Defendants never made a written demand for cure, but Realogy cured any purported breach anyway. (*Id.* ¶ 104; Ex. 1 at 23-24)

15. On July 17, the Court held a virtual hearing on the Motion, at which it "adopt[ed]" wholesale Defendants' hyper-technical, wrong-on-the-law arguments and improper factual assertions. (Ex. 1 at 98-99)

16. The implications of the Order have potential consequences beyond the Motion. In addition to eliminating specific performance, Defendants have boasted to the press that *fact* issues improperly decided in the Order could preclude Realogy's ability to recover the Termination Fee, even though the Order provides no guidance on that issue.

ARGUMENT

17. Delaware Supreme Court Rule 42(b) authorizes interlocutory appeals for orders deciding "a substantial issue of material importance that merits appellate review before a final judgment." Supr. Ct. R. 42(b). Rule 42(b) requires, as relevant here, consideration of whether the order "involves a question of law resolved for the first time in this State," "[t]he decisions of the trial courts are conflicting upon the question of law" or "[r]eview of the interlocutory order may serve considerations of justice." Supr. Ct. R. 42(b)(iii)(A), (B), (H). The Application satisfies this standard.

I. THE ORDER DETERMINED A SUBSTANTIAL ISSUE OF MATERIAL IMPORTANCE.

18. "A 'substantial issue of material importance' is one that addresses the merits of the case, not merely collateral matters." *Solera Holdings, Inc. v. XL Specialty Ins. Co.,* 2019 WL 4733431, at *3 (Del. Super. Ct. Sept. 26,2019) (citation omitted).

19. The Supreme Court frequently accepts interlocutory appeals from the pre-trial denial of equitable remedies. *See, e.g., Lawson v. Meconi,* 897 A.2d 740 (Del. 2006) (accepting interlocutory appeal from denial of injunctive relief); *Omnicare, Inc. v. NCS Healthcare, Inc.,* 818 A.2d 914 (Del. 2003) (same); *Mills Acquisition Co. v. Macmillan, Inc.,* 559 A.2d 1261 (Del. 1989) (same).

20. Here, without considering any evidence and ignoring SIRVA's extreme bad faith alleged in Realogy's Complaint, the Order wrongly excised from the case Delaware's core remedial tool for a falsely declared MAE. *See Channel Medsystems, Inc. v. Bos. Sci. Corp.,* 2019 WL 6896462, at *37 (Del. Ch. Dec. 18, 2019) (awarding specific performance where MAE was claimed in bad faith); *Hexion Specialty Chems., Inc. v. Huntsman Corp.,* 965 A.2d 715, 762-63 (Del. Ch. 2008) (same).

21. Without interlocutory review, the Order likely will become unreviewable, as the mere passage of time may deprive Realogy of a specific performance remedy, and may have serious implications for the remaining issues for trial. This is precisely the type of substantial issue that warrants interlocutory review.

II. THE ORDER INVOLVES A QUESTION OF LAW RESOLVED FOR THE FIRST TIME IN THIS STATE.

22. No-recourse provisions, like the one here prohibiting non-Retained Claims, are common. (Exhibit 3 at 3 (stating no-recourse provisions are "commonly used")) But no Delaware authority supports the notion that even the slightest pleading imprecision can cause the avalanche of dire consequences Defendants argue here. Transaction participants should know whether Delaware law endorses the hyper-technical pleading standard adopted by the Court here. If it does, Delaware law will signal to corporate America - particularly, private equity sponsors - that buyers can willfully breach best efforts obligations with impunity, and be absolved for such misconduct, based on hyper-technical readings of pleadings seeking *redress* for such misconduct. SIRVA's counsel agrees that the Order has implications beyond this case. (*Id.*) The Order rewards bad faith conduct and gamesmanship designed to deprive counterparties of their contract rights.

23. Dealmakers also should know how a cure provision, like the one in the Limited Guaranty, is properly incorporated into other agreements. Like many similar provisions, the Limited Guaranty includes a ten business day cure provision to avoid inequity resulting from minor pleading imprecisions accidentally triggering a non-Retained Claim.

24. The cure was expressly incorporated into the ECL, which borrowed the definition of Retained Claims from the Limited Guaranty, "subject to" the "terms, conditions and limitations" in the Limited Guaranty. (Compl. ¶¶ 55, 103-104) To the extent Realogy asserted a non-Retained Claim, the Order ignored the cure *and* incorporation language entirely, adopting Defendants' plainly wrong position that "[t]here's no incorporation language spelled out anywhere in the ECL." (Ex. 1 at 20)

III. THE ORDER CONFLICTS WITH EXISTING AUTHORITY.

25. The Order conflicts with Delaware law. *First,* "[a]n opinion, in which the Court merely adopts and incorporates by reference the brief of one of the parties, is inadequate and unacceptable." *B.E. T., Inc. v. Bd. of Adjustment of Sussex Cnty.,* 499 A.2d 811, 811 (Del. 1985); *see also Talmo v. Union Park Auto.,* 16 A.3d 938, 2011 WL 1528786, at *2 (Del. 2011) (TABLE) ("judicial 'short cut' ... by the mere incorporation by reference of a party's brief as the Court's opinion, may not be countenanced by this Court") (citation omitted); *Ball v. Div. of Child Support Enf't,* 780 A.2d 1101, 1104 (Del. 2001) (same).

26. *Second,* the Court failed to read the Initial Complaint "as a whole" or " 'to do substantial justice.' " *KnighTek, LLC v. Jive Commc'ns, Inc.,* 225 A.3d 343, 351, 352 n.42 (Del. 2020) (citation omitted) (reversing dismissal); Ct. Ch. R. 1, 8(f). It is manifestly erroneous and unjust to hold that four letters override a well-pled complaint's actual claims (comprising 45 pages and more than 10,000 words) and deprive a plaintiff of a remedy authorized by judicial precedent and the governing contract. (AB 42-48)

27. *Third,* the Order misapplied the pleading standard and made impermissible fact findings. A trial court must "accept all well-pleaded factual allegations in the Complaint as true" and "*draw all reasonable inferences in favor of the plaintiff.*" *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC,* 27 A.3d 531, 536 (Del. 2011) (emphasis added). Rather than apply this standard, the Order improperly adopted disputed facts in Defendants' favor, even when they contradicted the Complaint.

28. Realogy pled that the four "s"s were unintended. (Compl. ¶¶ 104 n.7, 164) But the Court adopted Defendants' fact-based argument that Realogy "deliberate[ly]" "intended" to assert a non-Retained Claim. (*See, e.g.,* OB 13; *id.* at 23 ("this was no inadvertent 'technical error' "); RB 10 (citing "proof" that "Realogy did not add MDP by accident"); Ex. 1 at 16 ("That's deliberate."); *id.* at 17) In so doing, the Court found facts, without evidence, directly contrary to Realogy's pleading. *Eagle*

Force Holdings, LLC v. Campbell, 187 A.3d 1209, 1213, 1230 n. 146 (Del. 2018) (intent is a " 'question of fact' " (citation omitted)); *Bryant v. Way,* 2011 WL 2163606, at *5 (Del. Super. Ct. May 25, 2011) (scrivener's error "is a factual issue that may not be resolved on a motion to dismiss").

29. The Court similarly engaged in fact-finding on causation. Realogy pled that SIRVA's last-minute ambush caused the Financing to fail, if it in fact failed. (Compl. ¶¶ 8, 158, 160-162, 184) Because causation is a fact question, the Court could not properly determine that "Realogy, and not SIRVA, caused the conditions to fail by filing the Non-Retained Claims." (Ex. 1 at 99) *See, e.g., Lupinacci v. The Med. Ctr. of Del.,* 805 A.2d 867, 870 (Del. 2002) (causation is "a question of fact"); *Duphily v. Del. Elec. Coop., Inc.,* 662 A.2d 821, 830-31 (Del. 1995) (superseding causation cannot be determined as a matter of law). Defendants admit that the Court made factual findings in deciding the Motion. (*See* Exhibit 4 ("As the Court concluded, Realogy - not SIRVA - caused the transaction to fail and nothing about SIRVA's business or financial position factored into the Court's determination ....")

30. *Finally,* the Court rendered SIRVA's numerous "reasonable best efforts" obligations meaningless. Under Delaware law, these obligations are enforceable. *See, e.g., Williams,* 159 A.3d at 272. Yet, the Court agreed with Defendants that if it could not order SIRVA to close, ordering SIRVA to perform its obligations would be "futile."[5] That is not the law.

31. In *Hexion,* the Court enforced reasonable best efforts obligations even though the agreement at issue, unlike here, entirely precluded specific performance of the obligation to close. 965 A.2d at 722. The Court, after trial, issued an order "requiring [the buyer] to perform all of its covenants and obligations (other than the ultimate obligation to close)," recognizing the importance of holding a party to its reasonable best efforts obligations. *Id.* The Court should have done the same here, rather than conclude that Realogy's contract rights were "futile."[6]

32. The Order calls into question Delaware law on the enforceability of reasonable best efforts provisions and casts doubt on Delaware's strong public policy in favor of enforcing such rights, in direct conflict with *Hexion* and the settled assumptions of the M&A market.

IV. CERTIFICATION WOULD SERVE CONSIDERATIONS OF JUSTICE.

33. The Order results in substantial injustice by applying a new, hyper-technical pleading standard to a complaint drafted over a weekend in the middle of a pandemic, while parties and counsel operated under mandatory stay-at-home orders. Without immediate appellate review, this injustice likely will become unreviewable merely by the passage of time. The unique circumstances here overwhelmingly support interlocutory review, and the benefits to be achieved far outweigh litigation costs. Supr. Ct. R. 42(b)(ii).

CONCLUSION

34. Realogy respectfully requests that the Court grant the Application.

Respectfully submitted,

/s/ Edward B. Micheletti

Robert S. Saunders (ID No. 3027)

Edward B. Micheletti (ID No. 3794)

Cliff C. Gardner (ID No. 5295)

Jessica R. Kunz (ID No. 5698)

Bonnie W. David (ID No. 5964)

Rupal K. Joshi (ID No. 6293)

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

One Rodney Square

P.O. Box 636

Wilmington, Delaware 19899-0636

Tel.: (302) 651-3000

Fax: (302) 651-3001

Attorneys for Plaintiff Realogy Holdings Corp.

DATED: July 27, 2020

Footnotes

1 The transcript of the ruling is attached as Exhibit 1. Undefined capitalized terms are defined in Realogy's Answering Brief. (Dkt. 57) Citations to "Exhibit ___" reference the exhibits attached hereto.

2 This Court instructs parties seeking specific performance to act expeditiously. *See Juweel Inv'rs, Ltd. v. Carlyle Roundtrip, L.P.,* C.A. No. 2020-0338-JRS, at 90-91 (Del. Ch. May 14, 2020) (TRANSCRIPT).

3 Section 13.8(b) of the Purchase Agreement permits Realogy to bring an action to enforce SIRVA's "obligation to consummate the Closing" if four conditions are satisfied, including the funding or irrevocable commitment of Debt Financing. Realogy has alleged that all conditions were satisfied or failed due to SIRVA's wrongful actions. *See* *Williams Cos. v. Energy Transfer Equity,* 159 A.3d 264, 277-78 & n.56 (Del. 2017).

4 Realogy repeatedly disclaimed the assertion of a non-Retained Claim prior to the Order. (*See, e.g.,* Dkt. 34 at 11, 55-56; Compl. ¶ 104 & n.7; Compl. Ex. J at 2; AB 41-48)

5 SIRVA must use its reasonable best efforts, including through litigation, to "maintain in effect" the ECL. (Compl. ¶ 72) Instead, SIRVA joins MDP hand-in-hand, arguing that the ECL terminated.

6 Delaware law also enforces promises, like SIRVA's here, not to oppose specific performance as "futile." (Compl. ¶¶ 83-84) *See 24 Hour Fitness USA, Inc. v. Genesis Health Clubs of Midwest LLC,* C.A. No. 2017-0730-AGB, at 17-18 (Del. Ch. Oct. 23, 2017) (TRANSCRIPT).

2020 WL 6038813
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. New York.

IN RE: CONDADO PLAZA ACQUISITION LLC, et al., Debtors.

Case No. 20-12094 (MEW) Jointly Administered

Signed October 9, 2020

Synopsis

Background: Allegedly former seller of Puerto Rico hotel that was subject to a purportedly terminated purchase agreement moved to dismiss allegedly former buyers' chapter 11 bankruptcy petitions or, alternatively, for relief from the automatic stay.

Holdings: The Bankruptcy Court, Michael E. Wiles, J., held that:

[1] purchase agreement did not require seller, under New York law, to deliver an "operating" hotel;

[2] seller's termination notice to buyer did not, under New York law, repudiate purchase agreement;

[3] buyers expressly waived, under New York law, any and all conditions to closing contained in purchase agreement;

[4] termination of purchase agreement was sole remedy available to buyers; and

[5] neither frustration of purpose, frustration of consideration, nor impossibility was a reason under New York law to find that buyers could extend closing date called for in purchase agreement.

Ordered accordingly.

Procedural Posture(s): Motion to Convert or Dismiss Case; Motion for Relief from the Automatic Stay.

West Headnotes (22)

[1] Contracts

Under New York law, contracts are interpreted and enforced in accordance with their plain meaning and their clear and unambiguous terms.

[2] Contracts

Under New York law, a court will not abandon a common-sense interpretation of a contract on the mere assertion by one party that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract.

[3] Contracts

Under New York law, a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract.

[4] Bankruptcy

Purchase agreement regarding hotel that later had to shut down temporarily due to Puerto Rico's COVID-19 restrictions did not require, under New York law, hotel seller to deliver an "operating" hotel, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend the closing deadline; despite argument that agreement stated that seller would use commercially reasonable efforts to cause property manager to operate and maintain hotel in manner substantially consistent with operation and maintenance of hotel over previous three months, agreement stated explicitly that seller, notwithstanding anything to the contrary contained in the agreement, was not required to

maintain operations at the hotel. 11 U.S.C.A. §§ 108(b), 362, 365.

[5] Bankruptcy

Purchase agreement's provision that seller of hotel, which later had to shut down temporarily due to Puerto Rico's COVID-19 restrictions, would transfer "goodwill" did not, under New York law, require seller to deliver an "operating" hotel, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend closing deadline; agreement stated explicitly that seller, notwithstanding anything to the contrary contained in the agreement, was not required to maintain operations at the hotel, there was no representation or warranty as to what the value of such "goodwill" would be, and agreement stated in clearest possible terms that sellers was making no representations or warranties as to the assets or their value. 11 U.S.C.A. §§ 108(b), 362, 365.

[6] Bankruptcy

Hotel seller's termination notice to buyer did not, under New York law, repudiate purchase agreement, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend closing deadline; termination notice was not sent until after buyer had failed to complete the purchase by the specified closing deadline. 11 U.S.C.A. §§ 108(b), 362, 365.

[7] Bankruptcy

Hotel seller's demand for a closing by a particular date did not, under New York law, violate purchase agreement's implied "good faith" obligations, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend closing deadline; seller merely scheduled a closing using the procedure to which seller and buyers had previously agreed. 11 U.S.C.A. §§ 108(b), 362, 365.

[8] Contracts

Under New York law, contractual "good faith" obligations cannot be invoked to change the explicit terms of an agreement.

[9] Bankruptcy

Hotel buyers expressly waived, under New York law, any and all conditions to closing contained in purchase agreement, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend closing deadline; in an amendment to the agreement, buyers agreed that the escrowed deposit would be payable to seller if the closing did not occur on the newly scheduled closing date and that buyers did not have any right to object to release of earnest money to seller. 11 U.S.C.A. §§ 108(b), 362, 365.

[10] Contracts

Under New York law, when a contract states that time is of the essence, the parties are obligated to comply strictly with its terms.

[11] Bankruptcy

Termination of purchase agreement was sole remedy available to buyers of hotel over any failure by hotel seller to fulfill purchase agreement's conditions for closing, and thus hotel seller's alleged failure did not entitle buyers to a postponement of the closing date under New York law, as relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude

buyers from using Bankruptcy Code to extend closing deadline; purchase agreement stated that time was of the essence as to closing, and although purchase agreement allowed specific performance as a remedy within a 30-day time limit, buyers failed to meet that time limit, and Puerto Rico's COVID-19 restrictions prevented seller from delivering hotel to buyers in the alleged "operating" condition that buyers claimed was required by the purchase agreement. 11 U.S.C.A. §§ 108(b), 362, 365.

[12] Bankruptcy

Hotel buyers' counterclaim for specific performance of purchase agreement, which was made in seller's New York state court action to enforce purchase agreement's forum-selection clause, did not "relate back" to date of that action's filing, as relevant to determining if request for specific performance was made within the 30-day time limit specified in the agreement, as in turn was relevant to determining if purchase agreement had terminated prior to buyers' bankruptcy filing so as to preclude buyers from using Bankruptcy Code to extend closing deadline; buyers relied on a New York statute of limitations for their "relate back" argument, but purchase agreement's 30-day limit was a time limit on asserting specific performance as a remedy and not a limit on a breach-of-contract claim. 11 U.S.C.A. §§ 108(b), 362, 365; N.Y. CPLR § 203(d).

[13] Contracts

New York courts may not look beyond the agreed-upon remedies to award the buyer specific performance in circumstances other than those in which the parties agreed it would be available.

[14] Contracts

It is permissible under New York law to do away with specific performance as a remedy in its entirety.

[15] Contracts

Any unreasonableness in the length of hotel purchase agreement's 30-day limit for asserting specific performance as a remedy did not render the 30-day limit unenforceable under New York law; it was permissible in New York to do away with the specific-performance remedy in its entirety.

[16] Contracts

Hotel seller's sending of a notice of termination of purchase agreement did not relieve buyers of obligation to comply with purchase agreement's 30-day time limit for asserting specific performance as a remedy under New York law; whole basis for buyers' contention that they were entitled to specific performance was that the termination notice was without effect and that the purchase agreement was still in force.

[17] Contracts

Under New York law, "frustration of purpose" is a doctrine that offers a defense to the enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract, and in order to be invoked, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, the transaction would have made little sense; it is not enough that the transaction will be less profitable for an affected party or even that the party will sustain a loss, nor is the defense available if the terms of the contract impose the relevant risks on one of the parties.

[18] Contracts

Frustration of purpose was not a reason under New York law to find that hotel buyers could extend closing date called for in purchase agreement, despite argument that the effects of the COVID-19 pandemic on hotel's operations,

which had to be shut down temporarily pursuant to Puerto Rico's pandemic-related restrictions, were unforeseeable; purchase agreement was reaffirmed after pandemic had begun and after Puerto Rico's governor had first issued shutdown orders, purchase agreement stated that time was of the essence as to closing, and purchase agreement expressly disclaimed any obligation on part of seller to maintain operations at the hotel.

[19] Contracts

Under New York law, "failure of consideration" is a doctrine that permits rescission of a contract if a party receives little or nothing of value, but the doctrine does not apply if the alleged failure of consideration is a risk that the party took under the terms of the contract.

[20] Contracts

Failure of consideration was not a reason under New York law to find that hotel buyers could extend closing date called for in purchase agreement, despite argument that the effects of the COVID-19 pandemic on hotel's operations, which had to be shut down temporarily pursuant to Puerto Rico's pandemic-related restrictions, were unforeseeable; purchase agreement provided that time was of the essence as to the closing date.

[21] Contracts

New York law excuses a party from performing contractual obligations that are impossible to perform, but impossibility does not excuse performance of a contract merely because the performance would be burdensome or unprofitable; instead, performance is excused only when there has been a destruction of the subject matter of the contract or the means of performance such that performance is objectively impossible.

[22] Contracts

Performance of purchase agreement regarding hotel was, under New York law, neither impossible nor commercially impracticable, to the extent that commercial impracticability was a separate contract defense under New York law outside the context of the Uniform Commercial Code (UCC), and thus such impossibility or impracticability was not a basis to extend the closing date called for in purchase agreement, even though hotel had to shut down temporarily due to Puerto Rico's COVID-19 restrictions; purchase agreement provided that time was of the essence as to the closing date. N.Y. Uniform Commercial Code § 2-615(a).

Attorneys and Law Firms

TARTER KRINSKY & DROGIN, Proposed Attorneys for Debtors, By: Scott S. Markowitz, Anthony Dougherty, Jonathan E. Temchin

KIRKLAND & ELLIS LLP, KIRKLAND & ELLIS INTERNATIONAL LLP, Attorneys for Posadas de Puerto Rico Associates, L.L.C., By: Aaron Marks, P.C., Joseph M. Sanderson, Kimberly Pageau, Jace A. Cearley, Chad J. Husnick, P.C., Richard U.S. Howell, P.C.

AMENDED DECISION HOLDING THAT PURCHASE AND SALE AGREEMENT TERMINATED PRIOR TO THE PETITION DATE AND TERMINATING TEMPORARY RESTRAINING ORDER IN REMOVED ACTION

***1** HONORABLE MICHAEL E. WILES, UNITED STATES BANKRUPTCY JUDGE

The Debtors in these cases are Condado Plaza Acquisition LLC ("**Condado**"), Condado Plaza Acquisition Lagoon LLC, and Condado Plaza Acquisition Ocean LLC. They are special purpose entities that are affiliated with Platinum Capital Partners and that were formed for the purpose of buying the Condado Plaza Hilton Hotel in San Juan, Puerto Rico. The current owner of the hotel is Posadas de Puerto Rico Associates, L.L.C. ("**Posadas**").

The parties entered into a Purchase and Sale Agreement dated November 20, 2019 (the "**PSA**"). The PSA calls for a purchase at a price of $31 million and Condado paid an initial deposit of $3.1 million into escrow. The closing was to occur by December 31, 2019 but the agreement gave the parties with the right to extend the Closing Date to February 28, 2020 under certain circumstances. Otherwise, the contract stated that "time is of the essence." PSA §§ 2.3(a), 14.21. The parties later agreed to several extensions of the Closing Date, and in connection with those extensions the deposits were increased to $5.1 million.

Posadas notified Condado by letter dated May 4, 2020 that the transaction was ready to close and that under the parties' prior agreements the Closing Date would be May 11, 2020. However, the closing did not occur. Posadas then issued a notice dated May 11, 2020, stating that Condado's failure to close was a default and that the PSA therefore was being terminated. The Debtors sent a letter disputing the purported termination and contending that the contract was still in force.

The gist of the parties' dispute relates to the effects of the Covid-19 pandemic on the operations of the hotel. The Debtors argue that they had agreed to buy a viable and operational hotel with employees and with substantial goodwill, and that Posadas was not ready to deliver that consideration in May 2020, as the hotel had been closed and layoffs had occurred due to the pandemic. At a hearing before this Court on September 22, 2020, Condado's counsel argued that Condado agreed to purchase property with a positive "goodwill" and that there was no positive "goodwill" to be transferred at the proposed closing in May. Posadas contends that Condado had agreed to buy the hotel "as is" and with no covenants as to its operating condition, that time was of the essence, that Condado had waived any closing conditions in a contract amendment executed in March 2020, and that Condado had no excuse for refusing to close.

The parties' disputes led to two separate litigations. On May 8, 2020, Condado filed suit in Puerto Rico and asked the court to modify the Closing Date requirements of the PSA. *See* Declaration of Aaron Marks [ECF No. 12] (the "**Marks Decl.**"), Ex. 38, at 5-7. Condado argued that it was legally impossible for Posadas to deliver an operational hotel in light of Covid-19 quarantine rules and that the closing date should be postponed until Posadas could do so. *Id.* Condado also obtained, on an *ex parte* basis, a *lis pendens* order that was conditioned on the filing of a $5 million bond and that, upon the filing of such a bond, would put a cloud on any sale of the property to another buyer. However, the Puerto Rico court declined to enter an injunction against a sale of the property.

***2** On May 18, 2020, Posadas filed an action in the Supreme Court for the State of New York in Monroe County, which is located in western New York. Posadas asked the state court to enjoin Condado from continuing its Puerto Rico action on the ground that doing so was in violation of forum selection clauses in the PSA. The New York state court issued the anti-suit injunction in an order that was dated July 16, 2020 and entered on July 17, 2020. The New York court also denied a request by Condado for a stay pending appeal.

The court in Puerto Rico also separately considered, and approved, a motion to enforce the forum selection clause, and dismissed the action that had been filed in Puerto Rico after finding the forum selection clause was enforceable. Condado filed an appeal in Puerto Rico without first getting relief from the injunction that the New York state court had entered. The New York state court issued an Order on August 28, 2020 that directed Condado to show cause as to why it should not be held in contempt for violation of the anti-suit injunction. *See* Marks Decl., Ex. 43.

Meanwhile, Condado asked the New York state court for a temporary restraining order against a sale of the hotel, contending that Condado wished to obtain specific performance of the contract of sale. The state court issued an Order to Show Cause with a temporary restraining order on August 14, 2020. *Id.,* Ex. 16. On August 28, 2020 the state court directed Condado to show cause as to why the restraining order should not be vacated and required Condado to file an undertaking in the amount of $9,200,590 in support of the restraining order that was then in effect. *Id.*, Ex. 42. Condado informed the state court on September 2, 2020 that it was having trouble making arrangements for an undertaking but that it was working on getting a bond. On September 8, 2020, after no bond had been filed, the state court advised the parties that an amendment to the temporary restraining order would be filed on September 10, 2020 if a bond were not posted by then. *Id.*, Ex. 47.

Debtors filed their chapter 11 bankruptcy petitions on September 9, 2020, one day before the deadline for the filing of an undertaking in the state court. The Debtors stated that they intended to remove the Monroe County state court case to this Court and they have since filed a notice of removal, which I will discuss after I address other issues. The Debtors also stated their intent to use section 108(b) of the Bankruptcy

Code to extend the deadline for closing on a purchase of the hotel, assuming the seller could deliver the hotel in the condition that the Debtors contended was required by the PSA.

Posadas promptly filed a motion to dismiss the bankruptcy petitions or, alternatively, for relief from the automatic stay. Posadas claims it is incurring expenses of $1,314,370 per month as a result of delays in the sale, which are made up of operating losses of $401,000 per month and financing costs of $913,370 per month. I agreed to shorten notice for consideration of the motion to dismiss and scheduled it for a hearing on September 16, 2020.

At the September 16 hearing I noted that section 108(b) of the Bankruptcy Code would only apply if the PSA had not already terminated prior to the filing of the bankruptcy petitions. Similarly, sections 362 and 365 of the Bankruptcy Code would not be relevant to the hotel if the PSA (and the Debtors' rights thereunder) had already terminated. Posadas claimed that the contract terminated as a matter of law, and I suggested that the Court make a prompt determination as to whether the issue could be resolved as a matter of law. The parties agreed, and I directed that they make further submissions. They made their respective filings on September 21, 2020, and after hearing argument on September 22, 2020 I directed them to make additional submissions on an issue that arose at the hearing. The parties made those additional submissions on September 24, 2020.

***3** I have reviewed the PSA, the amendments thereto, and the parties' submissions, and this Decision sets forth my rulings on the legal issues. For the reasons set forth below, I hold that the Purchase and Sale Agreement terminated prior to the filing of the bankruptcy petitions.

The Purchase and Sale Agreement

The Purchase and Sale Agreement is dated November 20, 2019. It is governed by New York law. PSA § 14.13. Condado Plaza Acquisition LLC was named as the buyer; the other two debtors were formed to participate in the sale and to take assignments of some of Condado's rights regarding portions of the hotel.

Under the PSA, Posadas agreed to sell the Condado Plaza Hilton Hotel and the land on which it is situated, together with an interest in a lease of certain land that apparently was used for parking. The Buyer also agreed to assume certain contracts, including a union contract that covered hotel employees. The assets to be purchased included additional items that were defined in the agreement as "Asset-Related Property." *Id.* § 2.1(b). "Asset-Related Property" included "to the extent assignable without consent, all other intangibles associated with the Properties, including, without limitation, goodwill ..." *Id.* § 2.1(b)(x).

The agreed purchase price was $31,000,000. *Id.* § 2.2(a). Article X of the PSA described certain adjustments to the Purchase Price that would be made as of the day preceding the Closing Date; those adjustments essentially involved the proration of taxes, customer revenues, and other expenses and revenues with the effect that such items would be allocated to the Seller for periods prior to Closing and allocated to the Buyer for periods after the Closing. Section 2.2(d) of the PSA stated explicitly that "[n]o adjustment shall be made to the Purchase Price except as explicitly set forth in this Agreement." *Id.* § 2.2(d).

The PSA required Condado to make a deposit in the amount of $3.1 million, which was to be held in escrow pending the closing. *Id.* § 2.2(b) and (c). The parties agreed that the Closing would take place on December 31, 2019. However, under certain conditions Posadas had the right to adjourn the closing to a date no later than February 28, 2020, which was defined as the "Outside Closing Date." Condado similarly had a "one-time right" to adjourn the closing until February 28, 2020, which was defined as the "Buyer's Outside Closing Date." *Id.* § 2.3(a). Section 2.3 stated in bold-faced capital letters that "**TIME SHALL BE OF THE ESSENCE WITH RESPECT TO BUYER'S AND SELLER'S OBLIGATIONS UNDER THIS AGREEMENT**." *Id.* It further stated that "[t]he Closing Date shall in no event occur later than the later of (i) the Outside Closing Date and (ii) the Buyer's Outside Closing Date, as applicable, unless agreed in writing by the parties hereto." *Id.* Section 14.21 of the PSA reiterated that "Seller and Buyer agree that time is of the essence with respect to the obligations of Seller and Buyer under this Agreement." *Id.* § 14.21.

Section 5.2 of the PSA listed conditions precedent to the performance of the Buyer's obligations. One such condition was that the Seller's representations and warranties would be true and correct at Closing. *See id.* § 5.2(a). Another was that the Seller complied with all of its obligations and covenants. *Id.* § 5.2(b). There were no specific conditions listed in Article

V as to the condition of the hotel, its operating results, or its operating status at the time of closing, but some other provisions of the PSA discussed such matters.

***4** First, Posadas covenanted and agreed in section 3.4 of the PSA that Posadas would "[u]se commercially reasonable efforts to cause Property Manager to operate and maintain the Property substantially consistent with the operation and maintenance of the Property over the previous three (3) month period." *Id.* § 3.4(a)(i). However, that provision went on to say that "[n]otwithstanding anything to the contrary contained herein, Seller shall not be required ... to maintain operations at the hotel." *Id.*

Second, section 6.2 of the PSA listed items that Posadas was required to deliver at closing, including titles to various assets. Section 6.2(b) stated, however, that "[n]otwithstanding anything to the contrary contained herein, with respect to the Asset-Related Property, Seller shall use commercially reasonable efforts to transfer such Asset-Related Property at Closing, but the failure of any or all of such Asset-Related Property to be transferred and the applicable closing deliveries with respect thereto to be delivered by Seller at Closing shall not be deemed a failure of a condition precedent to Buyer's obligations to consummate the Closing." *Id.* § 6.2(b).

Third, section 7.3 of the PSA set forth a bold-faced "Disclaimer" in capital letters. It disclaimed any representation or warranty as to the accuracy or completeness of any information that had been provided to Condado and disclaimed all representations except as stated otherwise in the PSA.

Fourth, section 7.4(a) stated, in bold-faced capital letters, that "**EXCEPT AS EXPRESSLY SET FORTH HEREIN, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER, WHETHER EXPRESS OR IMPLIED OR ARISING BY OPERATION OF LAW, WITH RESPECT TO THE ASSETS OR THE CONDITION OF THE ASSETS.**" *Id.* § 7.4(a). It further provided that Condado would purchase the Assets at Closing "**IN THE THEN EXISTING CONDITION OF THE ASSETS, AS IS, WHERE IS, WITH ALL FAULTS, AND WITHOUT ANY WRITTEN OR VERBAL REPRESENTATIONS OR WARRANTIES WHATSOEVER ... OTHER THAN AS EXPRESSLY SET FORTH IN THIS AGREEMENT.**" *Id.* Condado confirmed that its obligations "**SHALL NOT BE SUBJECT TO ANY CONTINGENCIES, DILIGENCE OR CONDITIONS EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT.**" *Id.*

Section 7.4(b) of the PSA defined the term "Condition of the Assets" as used in Section 7.4(a). Among other things, "Condition of the assets" included "**THE ECONOMIC FEASIBILITY, CASH FLOW AND EXPENSES OF THE ASSETS, AND HABITABILITY, MERCHANTABILITY, FITNESS, SUITABILITY AND ADEQUACY OF THE PROPERTY FOR ANY PARTICULAR USE OR PURPOSE (INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO ANY RENOVATION OR REDEVELOPMENT OF THE PROPERTY.)**" *Id.* § 7.4(b).

Fifth, section 13.1 of the PSA addressed certain "Employee Matters." Section 13.1(a) stated that "[t]he parties intend that there will be continuity of employment with respect to all of the Employees" and that in furtherance of that purpose "the Buyer shall take no action to cause the Seller or Property Manager to terminate the employment of any Employee, and neither the Seller nor Property Manager shall be under any obligation to terminate any Employee prior to or on the Closing Date." *Id.* § 13(a). Condado was also obligated to offer employment "to all Employees who remain employed on the day immediately preceding the Closing Date ..." *Id.*

Article XII of the PSA described the circumstances under which the PSA would terminate and the consequences of a termination. Section 12.1(a) of the PSA permitted Posadas to terminate the agreement in the event of a material breach or default by Condado in the performance of any of its obligations. Condado was entitled to fifteen (15) business days' notice of such termination except in the case of a failure to make a required deposit, or a failure to pay the Purchase Price, a failure to deliver certain documents, or a failure to "acquire the Assets on the Closing Date." *Id.* § 12.1(a). The PSA provided that in the event of such a termination by Posadas the agreement "shall be null and void" and neither party would have further rights against the other, with the exception of provisions in the PSA that expressly survived termination. *Id.* § 12.1(b). In addition, if Posadas terminated the agreement under section 12.1(a), the Earnest Money deposit was to be paid to Posadas as liquidated damages for Condado's breach. *Id.* § 12.1(c) and (d). The receipt of such Earnest Money deposit was to constitute Posadas' sole and exclusive remedy, except that such provision "shall not limit Buyer's obligation to pay to Seller all attorney's fees and costs

of Seller to enforce the provisions of this Section 12.1." *Id.* § 12.1(d).

***5** Section 12.2(a) of the PSA permitted Buyer to terminate the agreement "prior to the Closing" if any conditions precedent to Buyer's obligations were not satisfied "on or prior to the Closing Date" or if Posadas committed a material breach of its obligations. *Id.* § 12.2(a). Upon a termination on account of Posadas' failure to satisfy a condition precedent, Condado's "sole and exclusive remedy" was to receive a return of its Earnest Money deposit. *Id.* § 12.2(b). However, section 12.2(c) also gave Condado the right to pursue specific performance remedies in certain circumstances and under certain conditions. It stated:

> In the event of a material breach by Seller as described in Section 12.2(a)(ii) beyond applicable cure periods, Buyer, at its option, as its sole and exclusive remedy, may either (i) terminate this Agreement, direct the Escrow Agent to deliver and the Escrow Agent shall, subject to Section 14.5, disburse the Earnest Money to Buyer, at which time this Agreement shall be terminated and of no further force and effect except for the provisions which explicitly survive such termination or (ii) seek to specifically enforce the terms and conditions of this Agreement; provided that such specific enforcement action must be initiated no later than thirty (30) days following such default by Seller.

Id. § 12.2(c).

In the event of a dispute as to the distribution of the Earnest Money deposit following a termination, the Escrow Agent was directed to hold the escrowed funds until the receipt of a joint written direction from the parties or the receipt of a final judgment of a court of competent jurisdiction. *Id.* § 14.5(b).

Section 14.10 of the PSA provided that the agreement "contains all of the terms agreed upon between the parties hereto with respect to the subject matter hereof, and all understandings and agreements heretofore had or made among the parties hereto are merged in this Agreement which alone fully and completely expresses the agreement of the parties hereto." *Id.* § 14.10.

Subsequent Events and Amendments to the PSA

On December 18, 2019, Condado exercised its option to delay the Closing Date until February 28, 2020, and paid an additional $1 million in Earnest Money at the time it did so, raising the escrowed total to $4.1 million. The parties later agreed to three amendments to the PSA. It is useful to discuss these amendments in chronological order and in the context of other undisputed events.

1. The United States Secretary of Health and Human Services declared the Covid-19 pandemic to be a public health emergency on January 31, 2020. *See* Marks Decl., Ex. 7.

2. The Centers for Disease Control and Prevention confirmed on February 26, 2020 that Covid-19 had been diagnosed in a patient in the United States. *Id.*, Ex. 8.

3. The parties entered into the First Amendment to the PSA as of February 28, 2020. They agreed that March 6, 2020 would be the "New Scheduled Closing Date" and that "Closing shall be scheduled to occur on the New Scheduled Closing Date in accordance with the Purchase Agreement." *See* Marks Decl., Ex. 21, Recital C and § 1. The parties also agreed to the forms of the documents that would be exchanged at the Closing. *Id.* § 2. All other provisions of the PSA were ratified and remained in effect without modification. *Id.* § 6.

5. The parties entered into a Second Amendment to the PSA as of March 5, 2020. It stated that "Buyer has informed Seller that it will not be prepared to close on March 6, 2020 (the 'Scheduled Closing Date')" while at the same time confirming that "Buyer has no rights under the Existing Purchase Agreement to extend the Scheduled Closing Date." *See* Marks Decl., Ex. 22, Recital B. However, Posadas agreed to a further extension of the Closing Date to March 17, 2020 in exchange for the deposit of an additional $1 million, raising the escrowed deposit to $5.1 million. *Id.* § 1. Condado also "waived all conditions precedent to Closing" and further agreed that, "notwithstanding anything to the contrary contained in the Purchase Agreement," the escrowed deposit would be payable to Posadas if the Closing did not occur on the New Scheduled Closing Date, and that Condado

"shall not have any right to object to the release of the Earnest Money to Seller." *Id.* § 2. In all other respects the provisions of the PSA were ratified. *Id.* § 6.

***6** 6. The World Health Organization declared on March 11, 2020 that Covid-19 constituted a global pandemic. *See* Marks Decl., Ex. 9.

7. On March 11, 2020, the Governor of Puerto Rico declared a state of emergency in Puerto Rico due to the imminent spread of Covid-19. Marks Decl., Ex. 32. On March 15, 2020, the Governor issued an Order that required the closure of all governmental operations (except for those related to essential services) and that required the closure of all businesses until March 30, 2020, with certain exceptions that did not relate to the hotel. Marks Decl., Ex. 33.

8. The parties entered into a Third Amendment to the PSA dated as of March 17, 2020. The recitals noted that in light of the actions of governmental authorities in response to the Covid-19 pandemic, the Closing would not occur on March 17, 2020. *See* Marks Decl., Ex. 23, Recital B. Instead, the new scheduled Closing Date would be as follows:

> Upon the execution of this Amendment, the New Scheduled Closing Date for the Closing shall be the later to occur of (x) April 17, 2020 and (y) date that is five (5) Business Days following the applicable Governmental Authority permitting the operations of the Registry of Property, law firm offices and notary public in San Juan, Puerto Rico in accordance with the Purchase Agreement, provided that in no event shall the New Scheduled Closing Date be later than July 31, 2020 (the "Outside Date").

Id. § 1. The parties again ratified all other terms of the PSA. *Id.* § 4.

9. The closure of governmental offices and businesses in Puerto Rico was extended to May 3, 2020 and a series of additional restrictions were imposed. *See* Marks Decl., Ex. 34.

10. On May 4, 2020, Posadas notified Condado that the Governor of Puerto Rico had authorized notaries and law offices to resume operations on May 4, which meant that the Closing Date would be five business days later, or May 11, 2020. Marks Decl., Ex. 25. Condado initially took issue with the calculation (asserting that the Closing Date should be May 8 rather than May 11) *see* Marks Decl., Ex. 26, but at the hearing on September 22 Condado's counsel agreed that the May 11 Closing Date had been calculated correctly under the terms of the Third Amendment to the PSA. In addition to its initial complaints about the date calculation, Condado objected to the Closing Date in light of the continued pandemic and the risks of travel. *Id.* Finally, Condado declared that it intended to comply with the PSA but that in light of the Covid-19 restrictions and their effects on "the Seller's ability to deliver the benefit that Buyer has bargained for and that Seller has agreed to deliver" Condado rejected the proposal that a closing occur on May 11. *Id.*

11. Posadas responded by letter dated May 7, 2020 that the parties had already agreed to the closing documents and that it was a simple matter for Condado to give its Puerto Rico counsel the authority to complete the closing without the need for anyone else to travel. Marks Decl., Ex. 28. Posadas' counsel also rejected Condado's arguments about the Closing Date, arguing that nothing in the PSA required the delivery of a "going concern hotel" and that "time is of the essence" with respect to the completion of the sale. *Id.*

***7** 12. Condado did not appear at the scheduled May 11 Closing. Posadas issued a notice of termination (Marks Decl., Ex. 29), which Condado disputed as noted above. Various litigations then ensued as described above.

New York Contract Interpretation Standards

[1] Under New York law, contracts are interpreted and enforced in accordance with their plain meaning and their clear and unambiguous terms. *See Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 634 N.Y.S.2d 669, 658 N.E.2d 715, 717 (1995); *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639, 642 (1990); *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 562 N.Y.S.2d 613, 614 (1st Dep't 1990), *appeal denied* 77 N.Y.2d 807, 569 N.Y.S.2d 611, 572 N.E.2d 52 (1991); *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 468 N.Y.S.2d 649, 654 (2d Dep't

1983); *Rowe v. Great Atl. & Pac. Tea Co., Inc.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566, 569-70 (1978).

[2] **[3]** Accordingly, a court will not abandon a common-sense interpretation of a contract on the "[m]ere assertion by one [party] that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract ..." *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 193, 626 N.Y.S.2d 174 (1st Dep't 1995) (citation and internal quotations omitted). "[T]he rule is well settled that a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract." *Rodolitz v. Neptune Paper Prods.*, 22 N.Y.2d 383, 292 N.Y.S.2d 878, 239 N.E.2d 628, 630 (1968) (reversing a "strained and untenable" interpretation that contradicted the plain language of a tax apportionment clause in a contract between a lessor and lessee).

Furthermore, the only "intent" or "purpose" that is relevant in the interpretation of a contract is the mutual intent that is discernible from the words that the parties actually used in their agreement. *See* *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650, 764 N.E.2d 950, 952-53 (2001) ("[A]s with all contracts, we assume a deliberately prepared and executed agreement reflects the intention of the parties. Further, while we must be concerned with what the parties intended, we generally may consider their intent only to the extent that it is evidenced by their writing."); *Porter v. Commercial Cas. Ins. Co.,* 292 N.Y. 176, 54 N.E.2d 353, 356 (1944), *reargument denied*, 292 N.Y. 717, 56 N.E.2d 122 (1944) ("What is in the mind of parties to a contract is evidenced by word or deed and must be determined therefrom"); *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N.Y. 545, 104 N.E.2d 898, 907 (1952), *aff'd*, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395 (1953) ("[It] is well-established contract law that in determining whether the parties possessed the necessary intention to contract, an objective test is generally to be applied. That means, simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling.") As Judge Easterbrook explained in *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987):

> "[I]ntent" does not invite a tour through [a party's] cranium, with [the party] as the guide ... The intent of the parties to be bound must necessarily be derived from a consideration of their words, written and oral, and their actions.

***8** *Id.* at 814-15 (internal quotations and citations omitted).

Discussion

The essence of the Debtors' argument is that Posadas was not ready and able to deliver, at the scheduled May 11 Closing, an operating hotel (or, as Condado's counsel more recently put it, a hotel that had a positive "goodwill"), and that as a result the Closing Date was extended indefinitely and the PSA was still in force at the time these bankruptcy cases were filed. Condado's arguments are wrong as a matter of law for a number of independent reasons.

I. Condado's Contentions About the Required Operating Condition of the Hotel and About the Transfer of "Goodwill" Are Contrary to the Plain Language of the PSA.

[4] Condado expressly agreed to purchase the hotel and related assets at the scheduled Closing "in the then existing condition of the Assets, as is, where is, with all faults, and without any written or verbal representations or warranties whatsoever ... other than as expressly set forth in" the PSA. *See* PSA, § 7.4(a). Condado alleges that Posadas failed to comply with conditions in the PSA regarding the operating condition of the hotel, or regarding the "goodwill" associated with the property, but those contentions are contrary to the plain language of the PSA.

Section 3.4 of the PSA stated explicitly that "[n]otwithstanding anything to the contrary contained herein, Seller shall not be required ... to maintain operations at the hotel." *Id.* § 3.4(a)(i). Condado's contention that Posadas was obligated to deliver an "operating" hotel at Closing is belied by this clear and unambiguous language. In an effort to evade that language, Condado focuses on the

separate agreement in section 3.4 that Posadas would "[u]se commercially reasonable efforts to cause Property Manager to operate and maintain the Property substantially consistent with the operation and maintenance of the Property over the previous three (3) month period." *Id.* However, Condado acknowledges that the Covid-19 restrictions prevented Posadas from maintaining normal operations. At the hearing on September 22, Condado's counsel even conceded that the failure to maintain operations was due to regulatory restrictions and was not due to any fault on the part of Posadas.

Condado nevertheless continues to argue that Posadas' failure to maintain operations (through no fault of its own) nevertheless violated section 3.4. Its argument goes something like this: (a) section 3.4 required Posadas to use "commercially reasonable efforts" to maintain operations; (b) the orders issued by the Puerto Rico authorities prevented Posadas from maintaining operations and thereby prevented Condado from using "commercially reasonable efforts" to keep the hotel open; and (c) therefore Posadas did not make "commercially reasonable efforts" to maintain operations and was in breach of the PSA. This tortured interpretation of the "commercially reasonable efforts" provision is utterly preposterous. If Condado were right, the provision would have contractually bound Posadas to maintain operations no matter what obstacles came in its way, including governmental shutdown orders. Interpreting the provision in that manner would be contrary to the plain statement that "notwithstanding" any other provision in the PSA, Posadas would "not be required" to maintain operations.

***9** The words "commercially reasonable efforts" plainly are limitations on what Posadas was required to do. *See* *Holland Loader Co., LLC v. FLSmidth A/S*, 313 F. Supp. 3d 447, 471 (S.D.N.Y. 2018), *aff'd*, 769 F. App'x 40 (2d Cir. 2019). Those words amounted to an agreement that Posadas was not required to do things that it was unable to do or that it would not have made commercial sense to do. It plainly would not have been "commercially reasonable" for Posadas to conduct operations in defiance of governmental shutdown orders. As a matter of law, the failure to offer a hotel in "operating condition" on May 11 – which Condado concedes was due to external regulations – did not constitute a failure by Posadas to use "commercially reasonable efforts" to maintain operations.

[5] Condado's other effort to evade its obligation to purchase the Assets at Closing in their "then existing condition," without representations or warranties, is its contention that the agreement to purchase "goodwill" also required the delivery of a hotel in operating condition. More specifically, Condado's counsel took the position at the September 22 hearing that Posadas was required to offer a property with at least some employees and some current customers. But if "goodwill" were to be interpreted in this manner it would run afoul of the plain statement in section 3.4 that, "notwithstanding" any other provision of the PSA, Posadas was not required to maintain operations at the hotel.

The "goodwill" argument is contrary to the terms of the agreement in other ways as well. The PSA provided that Posadas would transfer "goodwill," but there was no representation or warranty as to what the value of such "goodwill" would be, and the parties agreed that assets would be transferred without any representation or warranty unless otherwise explicitly stated in the PSA. Condado now wants to interpret the obligation to transfer "goodwill" as an agreement to transfer assets of a particular value, or in a particular operating condition, or with a certain number of customers or employees, but all of those arguments are just attempts to impose an obligation to deliver Assets having a particular value, and section 7.4 of the PSA stated in the clearest possible terms that Posadas was making no representations or warranties as to the Assets or as to the value of the Assets. [1]

Furthermore, "goodwill" is listed as an "intangible" asset in the PSA and as an "Asset-Related Property." Condado contends that Posadas was unable to offer a hotel with a "positive" goodwill on May 11 (while again acknowledging that this was not due to any fault on Posadas' part). But in that case, the PSA states explicitly that Condado was still obligated to close. Section 6.2 of the PSA made clear that Posadas would use "commercially reasonable efforts" to transfer Asset-Related Property (including goodwill) at Closing, but that the failure to transfer "any or all" of such Asset Related Property "shall not be deemed a failure of a condition precedent to Buyer's obligations to consummate the Closing." *Id.* § 6.2(b). Even if there were any merit to Condado's suggestion that Posadas was not able to transfer a positive goodwill on the Closing Date, the PSA made clear that Condado was obligated to proceed.

***10** **[6]** Condado contends that Posadas repudiated and thereby breached the contract by sending a termination notice. However, the termination notice was not sent until after Condado failed to complete the purchase of the hotel by the specified Closing deadline. Condado's own failure to close cannot be excused unless there was a breach that preceded

the scheduled closing. If Posadas was not itself in breach at the time of closing, then Condado's failure to close by the "time of the essence" Closing Date was a material breach that entitled Posadas to terminate the PSA. *See* PSA § 12.1; *see also* *In re New Breed Realty Enters.,* 278 B.R. 314, 322 (Bankr. E.D.N.Y. 2002) (a failure to close by a "time of the essence" closing date is a material breach). Posadas' issuance of a termination notice was just an exercise of contractual rights, not a breach or repudiation of contractual obligations.

[7] **[8]** Condado has also argued at times that Posadas violated implied contractual obligations of "good faith" by demanding a Closing in May. However, Posadas merely scheduled a Closing using the procedure to which the parties had previously agreed. Contractual "good faith" obligations cannot be invoked to change the explicit terms of an agreement and thereby to impose an obligation on Posadas to delay a Closing notwithstanding the "time of the essence" provisions in the PSA. *Nynex Corp. v. Shared Resources Exch.*, No. 14577/89, 1990 WL 605347, at *6 (Sup. Ct. Westchester Cnty., Sept. 10, 1990) ("[T]he implied covenant of good faith and fair dealing does not provide a court carte blanche to rewrite the parties' agreement. Thus, a court cannot imply a covenant inconsistent with terms expressly set forth in the contract. Nor can a court imply a covenant to supply additional terms for which the parties did not bargain"); *Sterbenz v. Attina*, 205 F. Supp. 2d 65, 70 (E.D.N.Y. 2002) ("[A] party that has acted in compliance with the rights expressly provided in the governing contract cannot be held liable for breaching an implied covenant of good faith"); *Fordham Paradise, LLC v. ABI Property Partners, LP XXVI*, 306 A.D.2d 178, 179, 763 N.Y.S.2d 547 (2003) (affirming lower court decision which held, as a matter of law, that defendant-seller of property did not violate covenant of good faith and fair dealing when it negotiated with other prospective purchasers after the plaintiff failed to timely exercise option to purchase property under a time-of-the-essence contract.) That is especially true since the formula for calculating the Closing Date had been negotiated and agreed to in a contract amendment that was executed at a time when the Covid-19 shutdowns were already in place.

Accordingly, there was no failure by Posadas to comply with the terms of the PSA. It was Condado who failed to complete the transaction by the required "time of the essence" date.

II. Condado Waived All Conditions to Closing.

[9] Even if there were any merit to Condado's suggestions that Posadas did not comply with contractual conditions regarding the operating condition of the hotel at Closing or regarding the value of "goodwill" at Closing, Condado expressly waived any and all "conditions" to closing in the Second Amendment to the PSA. Marks Decl., Ex. 22 § 2. Condado further agreed in that Amendment that the escrowed deposit would be payable to Posadas if the Closing did not occur on the New Scheduled Closing Date, and that Condado "shall not have any right to object to the release of the Earnest Money to Seller." *Id.* The Second Amendment was dated as of March 5, 2020, but it was ratified by the Third Amendment on March 17, 2020 – which occurred after the Governor of Puerto Rico had issued the first shutdown order on March 11, 2020. So even if the delivery of a hotel in "operating" status or the delivery of a "positive" goodwill were conditions to Condado's obligations to close the transaction, those conditions were waived.

III. Even if Condado Were Right, Termination Is Its Only Available Remedy.

***11** **[10]** **[11]** Even if Condado were right about the condition of the Assets and the requirements of the PSA, that would not have entitled Condado to a postponement of the Closing Date. The PSA was subject to "time of the essence" provisions. "When a contract states that time is of the essence, the parties are obligated to comply strictly with its terms." *New Colony Homes, Inc. v. Long Island Prop. Grp., LLC,* 21 A.D.3d 1072, 1072-73, 803 N.Y.S.2d 615 (2d Dep't 2005). After several extensions the Closing was to be on May 11, and the Closing did not occur.

If (as Condado contends) Posadas failed to comply with the PSA, then Condado's "sole and exclusive" options were (a) to terminate the PSA, or (b) to seek specific performance within thirty days. *See* PSA § 12.2(c). Condado has purported to seek "specific performance" in a counterclaim that it filed in the state court in August 2020, but Condado actually has sought no such thing.

Specific performance is a remedy that is only available if, among other things, (1) Posadas was "able but unwilling" to convey the property on the terms set forth in the contract on the "time of the essence" Closing Date, and (2) Condado was ready, willing and able to accept the conveyance on that date. *See Fallati v. Mackey*, 31 A.D.3d 879, 880, 818 N.Y.S.2d 341 (3d Dep't 2006), *denying leave to appeal*, 7 N.Y.3d 711, 824 N.Y.S.2d 603, 857 N.E.2d 1134 (2006); *Consol. Edison Co. of N.Y. v. Cantor*, 18-cv-02267 (NSR), 2019 U.S. Dist. LEXIS

148643 *15-16, 2019 WL 4142064, at *6 (S.D.N.Y Aug. 30, 2019); *No. 1 Funding Ctr. v. H & G Operating Corp.*, 48 A.D.3d 908, 853 N.Y.S.2d 178, 180–81 3d Dep't 2008) (holding that defendant was entitled to summary judgment dismissing action for specific performance where, on a time-of-the-essence contract, defendant was able to close on the law date but plaintiff was not). In fact, however, it was Condado (not Posadas) that refused to proceed on May 11. Furthermore, Condado's counsel conceded on September 22 that the events that gave Condado pause about the May 11 closing (the Covid-19 pandemic and related governmental actions) were beyond the control of Posadas, and that Posadas was not capable of delivering what Condado wanted on May 11 (namely, a hotel in an operating condition). *See Calligar v. Fradkoff*, 154 A.D.2d 495, 498, 546 N.Y.S.2d 121 (2d Dep't 1989) (specific performance was not available to a purchaser where the seller was "unable" to convey property in accordance with contract terms due to events beyond the control of the seller). In short, Condado does *not* contend that Posadas failed to deliver something that Posadas actually had the power to deliver on May 11, or that Condado actually wanted to purchase the property that Posadas was able to convey on that date.

What Condado has actually sought, in the guise of its nominal request for "specific performance," is an extension of time with which to evaluate the hotel's prospects in light of the continued Covid-19 pandemic, and in which to determine whether Condado can (or desires) to complete the purchase. That extension of time runs counter to the explicit "time of the essence" provisions in the PSA. Condado's professed request for "specific performance" has at all times been contingent on receiving a hotel in an "operating condition" that Condado determines to be satisfactory. Condado's professed readiness, willingness and ability to complete the purchase on May 11 is in reality nothing more than a statement of confidence that Condado *would have been* willing and able to finance and to complete the agreed-upon deal on May 11 *if* the Covid-19 pandemic had not intervened. [2] Similarly, Condado's counsel acknowledged during the hearing that Condado could not complete a purchase now or in the reasonable future without arranging financing that Condado does not presently have. As a result, Condado's contentions that it is ready, willing and able to close are in reality just a statement of confidence that Condado *would* be willing and able to close the transaction in the future *if* circumstances change dramatically from what they presently are.

***12** The fact that Condado has attached such conditions to its willingness to proceed is inconsistent with a request for specific performance. *See M & E 73-75, LLC v. 57 Fusion, LLC*, 153655/12, 11156, 2020 N.Y. App. Div. LEXIS 4459, at *8-10 (1st Dept. July 30, 2020) (purchaser of real property not entitled to specific performance where it claimed that it was ready, willing and able to close but only on the condition that seller cure defect in title and remedy other alleged deficiencies). There is no assurance that events will change to Condado's satisfaction or that Condado will have either the desire or the ability to complete the purchase at any time in the reasonably near future. There is no commitment by Condado to close the transaction if circumstances do not change or if Condado's contract claims about the required "operating condition" of the hotel and about "goodwill" are rejected. Condado wants Posadas to bear the operating losses, taxes and financing expenses of ownership while everyone waits to see if things change. But in light of those costs, even a belated purchase would hardly put Posadas in the position that it would have occupied if the closing had occurred in May 2020 as agreed.

In short, Condado seeks to change the "time of the essence" provisions of the contract (not to enforce them), and to change its commitment to buy the property into a prolonged option to do so. Its purported request for "specific performance" is a hollow invocation of words and a thin disguise for a request that (as Condado itself acknowledged in its papers in the Puerto Rico action) is actually a request to modify the PSA rather than to enforce it.

[12] Furthermore, even if Condado's nominal request for specific performance were to be treated as an actual request for specific performance, the request was not made within the thirty-day time limit specified in the PSA. The only action that Condado filed within the relevant thirty-day period was an action in Puerto Rico. Condado admittedly sought to modify the contract in that action and did not seek specific enforcement. The purported "specific enforcement" counterclaim that Condado filed in New York state court on August 7, 2020 was filed long after the thirty-day period had expired.

Condado argues that its specific performance counterclaim "relates back" to the date of filing of the state court action (May 18, 2020) pursuant to CPLR § 203(d) and that the request for specific performance therefore was timely. CPLR § 203 prescribes the method in which time is calculated for

purposes of applying a statute of limitation. *See* N.Y.C.P.L.R. § 203. It states:

> (d) Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

The problem with Condado's argument is that section 203(d) of the CPLR deals with the timeliness of a "claim" under applicable statute of limitations periods. "Specific performance" is not a standalone "claim." Instead, specific performance is a potential remedy for a breach of contract. *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 86, 973 N.Y.S.2d 187 (1st Dep't 2013). Nobody is contending that Condado is time barred from arguing that Posadas allegedly breached the PSA. The time limits set forth in the PSA were not time limits on breach of contract "claims," but instead were time limits on the assertion of specific performance as a *remedy*.

[13] **[14]** New York courts have consistently held that contractual limitations on available remedies are enforceable as they are written. *See* *Mehlman v. 592-600 Union Avenue Corp.,* 46 A.D.3d 338, 343, 847 N.Y.S.2d 547 (1st Dep't 2007). Accordingly, courts "may not look beyond the agreed-upon remedies to award the buyer specific performance in circumstances other than those in which the parties agreed it would be available." *Highbridge House Ogden LLC v. Highbridge Entities LLC*, 145 A.D.3d 487, 487, 43 N.Y.S.3d 291 (1st Dep't 2016); *see also* *101123 LLC v. Solis Realty LLC*, 23 A.D.3d 107, 113, 801 N.Y.S.2d 31 (1st Dep't 2005). In fact, it is permissible in New York to do away with "specific performance" as a remedy in its entirety. *See* *In re Delphi Corp.*, Case No. 05-44481 (RDD), Adv. Procs. 08-01232-rdd, 08-1233-rdd, 2008 WL 3486615, at *12 (Bankr. S.D.N.Y. Aug. 11, 2008), *modifying opinion*, 2008 WL 5155561 (Bankr. S.D.N.Y. Nov. 7, 2008), citing *Deutsche Lufthansa AG v. The Boeing Co.*, No. 06 CV 7667 (LBS), 2006 WL 3155273, at *4 (S.D.N.Y. Oct. 30, 2006), quoting *Rubinstein v. Rubinstein*, 23 N.Y.2d 293, 298, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968) (recognizing long standing rule in New York that a contract may preclude the remedy of specific performance if it provides that a specific damage remedy is the sole and exclusive remedy). Treating CPLR § 203(d) as though it invalidates contractual limitations on *remedies* would be contrary to this repeatedly enforced New York contract principle. Condado has not cited any decisions in which a New York court has held that CPLR § 203(d) invalidates (or has any bearing upon) a contractual limit on a particular remedy. The better view is that while a "claim" may not be barred under the circumstances set forth in CPLR § 203(d), a contractual limit on particular remedies is nevertheless enforceable as written.

***13** **[15]** Condado has argued that the thirty-day limit on specific performance is unenforceable because the time limit was unreasonably short. But as noted above it is permissible in New York to do away with the specific performance remedy in its entirety. A time limit upon such a remedy is a lesser imposition and is not inherently unreasonable, particularly when agreed to by sophisticated entities with capable and sophisticated counsel. In *Highbridge House*, for example, the Appellate Division affirmed the enforcement of a contractual provision that stated that specific enforcement could only be sought within forty-five days after an alleged breach. 145 A.D.3d at 487, 43 N.Y.S.3d 291; *see also SDK Prop. One, LLC v. QPI-XXXII, LLC*, 143 A.D.3d 800, 801-802, 39 N.Y.S.3d 60 (2d Dep't 2016) (enforcing 120-day deadline to commence action for specific performance). Condado had the knowledge, means and ability to pursue litigation almost immediately, and certainly it had the ability to comply with the thirty-day time limit if "specific performance" had really been what Condado wanted.

[16] Condado also argued in its September 24 submission that Posadas sent a notice of termination on May 11, 2020 and that Condado's obligation to comply with the time limit in section 12.2(c) of the PSA did not survive that termination. However, the whole basis for Condado's "specific performance" argument is Condado's contention that the termination notice was without effect and that the

contract is still in force. Posadas cannot have it both ways. Either the termination was not effective (in which case the time limit for seeking specific performance as a remedy is applicable), or the termination notice was effective, in which case "specific performance" no longer is available. *See Frey v. Rose,* 51 A.D.3d 859, 861, 859 N.Y.S.2d 219 (2d Dep't 2008) (if a contract has terminated, specific performance is no longer available).

In the absence of a timely and proper request for specific performance, Condado's only remedy for the alleged breaches by Posadas is termination of the PSA. *See* PSA § 12(c). Accordingly, even if Condado were right about Posadas' alleged breaches of contract, that would not entitle Condado to an extension of the "time of the essence" Closing Date.

IV. Condado's Arguments About "Frustration of Purpose," "Failure of Consideration" and "Impossibility" or "Commercial Impracticability" Do Not Support An Extension of the Time-of-the Essence Closing Date.

Condado has contended at various points in its battles with Posadas (including, for example, in papers it filed with the New York state court) that Posadas could not convey "the benefit of the bargain" on May 11, 2020 and as a result there was a "failure of consideration," "commercial impracticability" and a "frustration of purpose" that relieved Condado of its obligation to close. *See, e.g.,* "Defendants-Appellants' Memorandum of Law in Support of Their Emergency Application for Interim Stay and To Modify, Limit, Vacate or Stay the Preliminary Injunction," submitted as Marks Decl. Ex. 11, at 4. But even if those legal doctrines were applicable here, and even if they would support a rescission or a termination of the PSA, they would not support the postponement of the Closing Date that Condado seeks.

[17] "Frustration of purpose" is a doctrine that offers a defense to the enforcement of a contract when "the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." *See Structure Tone v. Universal Servs. Grp., Ltd.*, 87 A.D.3d 909, 929 N.Y.S.2d 242, 246 (1st Dep't 2011). In order to be invoked, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, the transaction would have made little sense. It is not enough that the transaction will be less profitable for an affected party or even that the party will sustain a loss. *Rockland Dev. Assocs. v. Richlou Auto Body*, 173 A.D.2d 690, 570 N.Y.S.2d 343, 344 (2d Dep't 1991). Nor is the defense available if the terms of the contract impose the relevant risks on one of the parties. *Strauss v. Long Island Sports, Inc.*, 60 A.D.2d 501, 401 N.Y.S.2d 233, 238 (2d Dep't 1978). There must be a showing that a circumstance that induced the contract no longer exists, and that circumstance must be the very foundation of the contract. *Pettinelli Elec. Co., Inc. v. Bd. of Ed. Of City of New York*, 56 A.D.2d 520, 391 N.Y.S.2d 118, 119 (1st Dep't 1977).

***14** **[18]** There is good reason to be skeptical about Condado's argument. Condado contends that its receipt of an "operating hotel" was the "very foundation of the contract," even though the PSA itself expressly disclaimed any obligation to maintain operations at the hotel. Condado also claims that the effects of the Covid-19 pandemic on the hotel's operations were unforeseeable, even though the entire PSA was reaffirmed in mid-March 2020, after the pandemic had begun and after the first shutdown orders had been issued by the Governor of Puerto Rico. But I need not decide those issues, for Condado has identified no support for the proposition that "frustration of purpose" arguments can be used to extend a Closing Date in the face of express "time of the essence" clauses. Either the purpose was completely frustrated as of the scheduled closing in May 2020, or it was not. If the purpose was not frustrated, then Condado was obligated to close. If the purpose was frustrated, then Condado has a defense to enforcement of the PSA and an argument as to the recovery of the escrowed deposit. But the Closing Date deadline still applied. Either way the contract came to an end because the Closing did not occur.

[19] **[20]** "Failure of consideration" is a doctrine that permits rescission of a contract if a party receives little or nothing of value. *Faunus Grp. Int'l, Inc. v. Ramsoondar*, No. 13 Civ. 6927 (HB), 2014 WL 2038884, at *3 (S.D.N.Y. May 16, 2014). The doctrine does not apply if the alleged failure of consideration is a risk that the party took under the terms of the contract. *Cobalt Multifamily Investors I, LLC v. Bridge Capital (USVI), LLC*, No. 06 Civ. 5738 (KMW)(MHD), 2007 WL 2584926, at *7 (S.D.N.Y. Sept. 7, 2007). Again, there is good reason to be skeptical of Condado's argument that a large ocean-front hotel had "little" or "no" value just because it was temporarily closed. In April 2020, Condado itself expressed a willingness to complete the purchase at a reduced price of $16 million. But I need not decide that issue, because once again I know of no authority for the proposition that "failure of consideration" can be invoked as a reason to extend a time-of-the-essence closing date. Either the consideration to be delivered on May 11 was sufficient (in which case Condado was obligated to close), or it was not (in which case Condado's

remedy was to argue that the PSA was at an end.) Either way the Closing Date was not extended and the contract came to an end.

[21] **[22]** New York courts excuse a party from performing obligations that are "impossible" to perform, but "impossibility" does not excuse performance of a contract merely because the performance would be burdensome or unprofitable. *See* *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987); *see also* *407 East 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968). Instead, performance is excused only when there has been a destruction of "the subject matter of the contract or the means of performance" such that performance is "objectively impossible." *Kel Kim Corp.,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295. Condado has also argued that the performance of the PSA was "impracticable." "Impracticability" is a test that is used in the Uniform Commercial Code as a substitute for the traditional contract defense of "impossibility." *See* N.Y.U.C.C. § 2-615(a). It is not so clear whether "commercial impracticability," as opposed to traditional notions of "impossibility," is really a separate contract defense under New York law outside the context of the Uniform Commercial Code. *See* *Kel Kim Corp.*, 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295 (referring to commercial impracticability defenses generally but discussing the defense in New York solely in terms of common law "impossibility" doctrines); *Clarex Ltd. v. Natixis Sec. Ams., LLC*, No. 1:12-cv-7908-GHW, 2014 WL 4276481, at *11, 2014 U.S. Dist. LEXIS 121335 at *31 (S.D.N.Y. Aug. 29, 2014) ("New York courts do not appear to recognize commercial impracticability as a separate defense to the doctrine of impossibility; rather, impracticability is treated as a type of impossibility and construed in the same restricted manner.") There is also reason to be skeptical of Condado's arguments about "impossibility" or "impracticability." Condado contends that the pandemic reduced the value of the hotel and that the effect was unforeseeable, but Condado reaffirmed the contract in mid-March, when the pandemic was underway and the order closing the hotel was already in effect. I need not reach those issues, however. As with the "frustration of purpose" and "failure of consideration" arguments, there is no support for the proposition that "impossibility" or "impracticability" arguments can be invoked to provide an extension of a time-of-the-essence Closing Date. The Closing Date deadline was itself a material provision of the contract. Either the contract could be performed on the Closing Date (in which case Condado was obligated to close), or it could not be performed on that date (in which case the parties were excused from their respective obligations). In either case the "time of the essence" Closing Date was not extended.

***15** * * *

For each of the foregoing reasons, I hold that the PSA terminated as of May 11, 2020. Condado may argue that "frustration of purpose," "impossibility/impracticability" and/or "failure of consideration" doctrines excused its performance, and it may argue that the provisions of the PSA that call for Posadas to retain the escrow deposit should not be enforced on those grounds. As a matter of law, however, there is no merit to Condado's contentions that those doctrines can be invoked to provide an extension of the time-of-the-essence deadline for closing. Similarly, as a matter of law there is no merit to Condado's contentions that Posadas breached the PSA, or (even if Posadas did so) that Condado preserved any remedy for those alleged breaches other than termination of the PSA.

Since the PSA terminated long before the filing of the bankruptcy petitions, sections 108(b) and 365 are not applicable. In addition, section 362 of the Bankruptcy Code is not applicable to the Assets or to a sale of the Assets by Posadas to another buyer. Section 362 does, however, apply to the escrowed deposit, which shall remain in escrow pending a determination of the issues set forth above.

One other matter needs to be addressed. The underlying state court action was filed in Monroe County, New York. Monroe County is part of the Western District of New York. *See* 28 U.S.C. § 112(d). If a federal court has jurisdiction of a state court case under section 1334 of Title 28 (*i.e.,* if the case arises under the Bankruptcy Code, or if it arises "in" a bankruptcy case, or if it is "related to" a bankruptcy case), then section 1452 of Title 28 permits a party to remove the action "to the district court for the district where such civil action is pending." 28 U.S.C. § 1452. The removal petition must be filed with the district court "within which such action is pending." 28 U.S.C. § 1446. By their terms, sections 1446 and 1452 authorized a removal to the United States District Court for the Western District of New York. However, Condado filed a removal petition that purported to remove the

case from Monroe County directly to the District Court for the Southern District of New York. The SDNY District Court then referred the purportedly removed action to me pursuant to ordinary practices.

The removal procedure was improper. If Condado wanted the action to be transferred to this Court, the proper procedure would have been to remove the action to the District Court for the Western District of New York and then to ask that court to transfer the case to the District Court for the Southern District of New York, which then could refer the matter to this Court.

In an earlier version of this Decision I ruled that I do not properly have jurisdiction of the state court action because the removal procedure was unauthorized and therefore ineffective. However, I was not aware at the time of that Decision that Posadas had formally waived any defects in the removal procedure. Posadas has also now brought to my attention decisions holding that a removal to the wrong district is a procedural defect that is waivable. *See Cardona v. Mohabir*, No. 14 Civ. 1596 (PKC), 2014 WL 1088103, at *1 (S.D.N.Y. Mar. 18, 2014) (citing cases); *Port Auth. of N.Y. & N.J. v. Am. Warehousing of N.Y., Inc.*, No. 04 Civ. 6092 (GEL), 2004 WL 2584886, at *1 (S.D.N.Y. Nov. 10, 2004). During a conference on October 8, 2020 Condado's counsel acknowledged that the defects in the removal procedure had been waived and that the state court action was properly before this Court.

***16** I therefore retract the portion of the prior Decision that held that I did not have jurisdiction over the removed state court action. That removed action is now before me. The parties acknowledged during the conference yesterday that the existing temporary restraining order serves no proper purpose in light of my rulings, and I will therefore enter an amended order that also terminates the existing temporary restraining order.

The parties also indicated on October 8, 2020 that in light of my rulings they believed the bankruptcy case should be dismissed and the state court action should then be remanded to the state court to decide the issues that I left open regarding the parties' rights to the deposit that is held in escrow. Condado stated that it did not intend to appeal from my rulings that the contract terminated in May 2020. Condado also agreed that any dismissal order would provide that my rulings and orders would survive the dismissal. *See* 11 U.S.C. § 349(b). I will grant such relief upon the consent of the parties.

Separate Orders will be entered that reflect the rulings set forth in this Amended Decision.

All Citations

--- B.R. ----, 2020 WL 6038813

Footnotes

1 During the hearing on September 22, 2020, Condado's counsel acknowledged that the PSA contained no representations or warranties as to the value of “goodwill,” and conceded that Condado would have been obligated to close if “goodwill” had any positive value at all, no matter how small. The idea that the delivery of a hotel with a goodwill of one dollar would have complied fully with the PSA, but that the delivery of a hotel that allegedly had a goodwill of zero was somehow a material breach of Posadas' obligations, is absurd. Counsel also conceded that Condado would have been obligated to close if the hotel had any employees or guests, but Condado's own May 6, 2020 letter conceded that the hotel still had approximately 20 employees and occupancy in 7-10 rooms of the Ocean Tower. *See* Marks Decl, Ex. 26.

2 Notably, Condado stated in an email dated April 8, 2020 that “credit has dried up” and that a reduced price of $16 million “is what we can accomplish in these unfortunate times.” *See* Marks Decl., Ex. 24.

2020 WL 2557148 (Del.Ch.) (Trial Pleading)
Chancery Court of Delaware.

FORESCOUT TECHNOLOGIES, INC., Plaintiff,
v.
FERRARI GROUP HOLDINGS, L.P., and Ferrari Merger Sub, Inc., Defendants.

No. 2020-0385.
May 19, 2020.

Verified Complaint

William B. Chandler III (#116), Lori W. Will (#5402), Shannon E. German (#5172), Jessica A. Hartwell (#5645), Jeremy W. Gagas (#6602), Wilson Sonsini Goodrich & Rosati, P.C., 222 Delaware Avenue, Suite 800, Wilmington, Delaware 19801, (302) 304-7600, for Forescout Technologies, Inc.

Of Counsel: Ignacio E. Salceda, Boris Feldman, Steven Guggenheim, Rebecca Epstein, Wilson Sonsini Goodrich & Rosati, P.C., 650 Page Mill Road, Palo Alto, CA 94304-1050.

Plaintiff Forescout Technologies, Inc. ("Forescout" or the "Company"), by and through its undersigned counsel, for its verified complaint against Defendants Ferrari Group Holdings, L.P. ("Parent" or "Ferrari Group") and Ferrari Merger Sub, Inc. ("Merger Sub" and, together with Parent, "Advent" or "Defendants"), upon knowledge as to itself and information and belief as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. Forescout brings this action for specific performance of Defendants'— affiliates of Advent International Corporation— obligation to close the acquisition of Forescout, in a transaction valued at approximately $1.9 billion. This busted deal is unlike most others. Rather than containing a standard material adverse effect provision, the merger agreement here—executed after COVID-19 was declared a global public health emergency—specifically allocated the risk of any impact from a pandemic to Advent. Lest the Court have any doubt about Advent's motivations in trying to walk away from the deal, just days before the merger was set to close, Advent's representative admitted to Forescout's CEO that its new distaste for the merger was all "COVID-related." Advent's breach of its merger agreement with a public company, whose stockholders voted heavily in favor of the transaction, requires prompt judicial intervention. The Court should not allow a private equity buyer to walk away from the binding deal it struck because it will no longer make a profit as quickly as it had hoped.

2. Rather than proceed with the scheduled May 18, 2020 closing of the merger of Merger Sub with and into Forescout, as required under the February 6, 2020 Agreement and Plan of Merger (the "Merger Agreement") [1] (together with the other transactions contemplated by the Merger Agreement and transaction documents, the "Merger"), Advent told Forescout on the afternoon of Friday, May 15, that it would not consummate the deal on Monday, May 18, 2020. Advent falsely claimed that Forescout was in breach of various covenants in the Merger Agreement and that a material adverse effect had occurred and was continuing due to COVID-19—despite a carveout for pandemics in the Merger Agreement.

3. Forescout remains a willing deal partner and has satisfied all conditions precedent to closing. Forescout has delivered all required financial deliverables and other information required for Advent to secure its financing and the lenders are fully committed and contractually obligated to fund the transaction. Defendants cannot avoid closing the Merger because—as Advent

conceded—the COVID-19 outbreak caused a change of heart, particularly given that they expressly agreed to bear the risk of adverse impacts on the Company from a "pandemic."

4. From the time of signing of the Merger Agreement throughout the spring of 2020, Forescout worked diligently toward closing. As the COVID-19 pandemic spread and its global impact increased, Forescout repeatedly assured Advent that it had satisfied or would be able to satisfy at closing the various conditions in the Merger Agreement. Forescout, working in collaboration with Advent, confirmed that it had taken multiple steps to protect against the impacts of COVID-19, including with regard to cash flow management and the implementation of expense reduction measures, and that it stood ready to proceed with the Merger as soon as possible. Forescout has been responsive to every request for additional information from Advent, has sought Advent's approval where appropriate, and has taken all steps necessary under the Merger Agreement to close the Merger as planned.

5. Only two things changed between the execution of the Merger Agreement and now. First, the COVID-19 pandemic—already declared a global health emergency at the time of signing—spread and worsened, causing market-wide volatility. Second, the pending Merger created uncertainty for Forescout's customer base, which was skeptical of Forescout becoming a privately held company owned by a private equity firm following the Merger. Knowing that neither situation gave it a contractual basis to back out of the deal, Advent began to take a series of contradictory and unreasonable positions in April 2020 as the Merger began to appear less economically attractive to Advent.

6. Advent first pressured Forescout to create a new set of projections for the Company accounting for COVID-19, different from the financial plan its Board of Directors (the "Board") had approved in February 2020—though nothing in the Merger Agreement required Forescout to do so. When Forescout declined, on April 14, 2020, Advent provided Forescout with a top-line "revised base case" financial analysis. Forescout later learned that Advent concocted that analysis based on questionable assumptions to create an unrealistically negative outlook for Forescout for fiscal 2020 and 2021. Advent's overly pessimistic modeling assumed an unrealistic decline in revenue while excluding expense reductions, including those that would be inherent in decreased revenue such as lower sales commissions. As became clear later, Advent's scenarios were prepared to create an imagined insolvency of Forescout post-closing of the Merger.

7. Advent followed up with a series of letters to Forescout expressing concern about the effects of COVID-19 on the Company and requesting a slew of additional financial information—including information that Forescout was not obligated to provide under the Merger Agreement. Nonetheless, Forescout made every effort to respond to those requests and provided Advent with all of the information that Advent desired. Forescout expended substantial time and resources to work cooperatively with Advent toward the planned consummation of the Merger, while paying heightened attention to its business because of COVID-19 and the announcement of the Merger.

8. On May 8, 2020, a representative of Advent contacted Forescout's Chief Executive Officer and said that Advent was considering not closing. Advent's representative said that they could not "make the numbers work" and that their position was "100% COVID related." But the potential effects of COVID-19 on the global economy—including on Forescout—were well known prior to signing and were expressly accounted for in the Merger Agreement. Advent, like the rest of the world, was aware of the threat of COVID-19 before the parties signed the Merger Agreement on February 6, 2020. In fact, Advent International Corporation ("Advent International") has a well-established presence throughout Asia—particularly in China, the region initially affected by COVID-19 in early January 2020.

9. At first, it seemed that Advent was testing Forescout's appetite to reprice the deal because COVID-19 had made it less profitable to Advent International—a private equity firm. On May 14, 2020, Advent sent Forescout a set of "Financial Analysis" slides it had concocted to support a lower price. The "Financial Analysis" summarized two, speculative scenarios Advent created—a "revised base case" scenario and a "downside case" scenario—which contained unreasonably pessimistic and baseless projections for Forescout that would never play out as modeled. Tellingly, however, the slides showed Advent expected the effects of COVID-19 on Forescout's business would end with a return to business as usual in fiscal 2021.[2]

10. One day later, on May 15, 2020, Ferrari Group's President and General Counsel, an officer of Advent International, delivered a letter to Forescout that revealed Advent's true intentions for sharing its "Financial Analysis" the day before.[3] Advent's letter asserted that—based on its own ginned-up scenarios— Forescout "will be insolvent at the time of Closing," such that a closing condition to the debt financing for the Merger could not be satisfied, even though no such condition to closing the Merger exists. But a buyer cannot imagine its way into a debt financing failure. The Merger Agreement obligated Advent to use its reasonable best efforts to "consummate the Debt Financing" and to find alternative financing if "any portion of the Debt Financing [became] unavailable."[4] Advent made no such efforts. Advent also falsely asserted that a material adverse effect had occurred and that Forescout was in breach of various covenants in the Merger Agreement. Advent stated that Parent would "not be proceeding to consummate the [Merger] on May 18, 2020 as scheduled."[5]

11. Contrary to that letter, all closing conditions have been satisfied and the parties are required to close the Merger as scheduled. Advent's purported bases for avoiding the May 18, 2020 planned closing are a pretext to get out of a deal it no longer finds attractive. Because Forescout has fully complied with its obligations under the Merger Agreement and stands ready to close, Advent's refusal to close is a breach of Section 2.3 of the Merger Agreement and its obligations under Section 6.1(a) to use reasonable best efforts to take all steps necessary to effect a prompt closing. Advent's actions also trigger Forescout's right to terminate under Section 8.1(i).

12. None of Advent's purported reasons for refusing to consummate the Merger is credible. To start, Advent's claim that a material adverse effect has occurred finds no support in the Merger Agreement. The definition of "Company Material Adverse Effect" in the Merger Agreement expressly excludes any effects on the Company resulting from "epidemics" and "pandemics," barring a materially disproportionate impact on the Company, and—even then—only to the extent the Company experiences an incremental disproportionate impact. The Merger Agreement only permits Defendants to claim a Company Material Adverse Effect if it occurs *after* the date of signing of the Merger Agreement, but COVID-19 clearly existed prior to signing.

13. Advent's assertions that Forescout has "material[ly] breach[ed]" the operating covenants in the Merger Agreement and that the post-Merger entity will somehow not be "solvent" are equally baseless. Forescout sought Advent's approval (even where not required) before taking any actions regarding its operations following the signing of the Merger Agreement. Advent approved Forescout's actions every step of the way, with the exception of a personnel hire and planned annual executive equity grants —neither of which were subsequently pursued by Forescout. From signing until Advent said they were unwilling to close, Advent International personnel were in multiple meetings with Forescout to discuss Forescout's business and guidance. Under the terms of the Merger Agreement, Advent's knowledge and approval forecloses any claim that Forescout breached interim operating covenants. Separately, despite the circumstances created by COVID-19, Forescout's operations fully complied with the Merger Agreement's "ordinary course" covenants. Finally, the alleged insolvency of the post-closing entity is not only completely manufactured, but there is no such condition to the Merger.

14. The COVID-19 pandemic has created a challenging time for all businesses—including Forescout. Advent may regret that it did not negotiate the allocation of risk in the event of a pandemic such as COVID-19 differently in the Merger Agreement. But Advent is bound to abide by the contract it signed: a Merger Agreement that expressly allocated the risk of negative events such as a pandemic on Defendants and that contains a customary material adverse effect clause with no application here.

15. Forescout therefore seeks specific performance of Defendants' contractual obligations to close the Merger, including by taking ***all necessary steps*** to effect the closing promptly, but in no event later than the June 6 Termination Date. Forescout also seeks specific performance of Defendants' obligations under the Merger Agreement and related "Transaction Documents" (as defined in the Merger Agreement) to take all necessary steps to obtain the required financing for the Merger, including by enforcing Defendants' rights under (a) an equity commitment letter (the "Equity Commitment Letter")[6] that requires affiliates and investors of Advent International (the "Advent Funds") to fund $1.341 billion of the aggregate value of the Merger, (b) an amended and restated commitment letter (the "Debt Commitment Letter")[7] that requires certain financial institutions (the "Lenders") to provide senior secured term loans in an aggregate principal amount of $400 million and, following closing, a

revolving credit facility in an aggregate principal amount of $40 million, and (c) a limited guarantee (the "Guarantee")[8] in favor of Forescout, in which the Advent Funds guaranteed certain obligations of Defendants in connection with the Merger Agreement, including payment of the "Parent Termination Fee" of more than $111 million. Forescout has told Advent it is willing to accept a note (a so-called "seller note") in lieu of the cash that would come from the Debt Commitment Letter financing, which would immediately resolve any purported issues with Advent's ability to secure debt financing.

16. The Merger Agreement is not subject to a financing condition and Advent is obligated to use its reasonable best efforts to take all steps necessary to close the Merger expeditiously. In addition, under the terms of the Merger Agreement, the closing should have occurred yesterday, but Advent refused to close. Advent should be compelled to comply with its contractual obligations.

17. Finally, in the alternative (only if specific performance is not available), Forescout seeks damages arising from Defendants' breach of the Merger Agreement in the form of payment of the Parent Termination Fee, backed by the Guarantee.

THE PARTIES

18. Plaintiff Forescout Technologies, Inc. is a Delaware corporation headquartered in San Jose, California. Forescout provides "security at first sight" by delivering software that enables device visibility and control that enables enterprises and government agencies to gain complete situational awareness of their environment (devices on their networks) and orchestrate actions to reduce cyber and operational risk. As of December 31, 2019, more than 3,700 customers in over 90 countries relied on Forescout's solutions to reduce the risk of business disruption from security incidents or breaches, ensure and demonstrate security compliance, and increase security operations productivity. Forescout's common stock is listed on NASDAQ under the symbol "FSCT."

19. Defendant Ferrari Group Holdings, L.P. is a Delaware limited partnership that was formed on January 31, 2020 solely for the purpose of engaging in the transactions contemplated by the Merger Agreement. It is affiliated with funds managed or advised by Advent International.

20. Defendant Ferrari Merger Sub, Inc. is a Delaware corporation and a wholly-owned subsidiary of Ferrari Group. It was formed on January 31, 2020 solely for the purpose of engaging in the transactions contemplated by the Merger Agreement. It is affiliated with funds managed or advised by Advent International.

21. Non-party Advent International is a Delaware corporation headquartered in Boston. It describes itself as one of the largest and most experienced global private equity firms, with 15 offices in 12 countries and hundreds of investment professionals across North America, Europe, Latin America, and Asia. It has invested $48 billion in over 350 private equity investments across 41 countries since 1989 and, as of December 31, 2019, managed $57 billion in assets. Pursuant to the Equity Commitment Letter referenced in the Merger Agreement, Advent International, through the Advent Funds, committed to capitalize Ferrari Group with $1.341 billion to effect the Merger, representing a significant portion of the aggregate purchase price to be paid to Forescout's stockholders. In addition, pursuant to the Guarantee referenced in the Merger Agreement, the Advent Funds committed to guarantee certain obligations of Ferrari Group under the Merger Agreement, including the obligation to pay the Parent Termination Fee capped at more than $111 million.

JURISDICTION AND VENUE

22. The Court has subject matter jurisdiction over this action pursuant to 10 *Del. C.* § 6501 to declare the rights, status, and legal obligations of the parties to the Merger Agreement, as well as under 10 *Del. C.* § 341, which gives the Court jurisdiction "to hear and determine all matters and causes in equity" where, as here, Plaintiff lacks an adequate remedy at law.

23. The Court has personal jurisdiction over Ferrari Group, a Delaware limited partnership, pursuant to 6 *Del. C.* § 17-105 and Sections 9.12(a)(ii) and (iii) of the Merger Agreement.

24. This Court has jurisdiction over Merger Sub, a Delaware corporation, pursuant to 8 *Del. C.* § 111 and Section 9.12(a)(ii) and (iii) of the Agreement.

25. Venue before this Court is proper pursuant to Section 9.12(a)(iv) of the Merger Agreement, which provides that: "any Legal Proceeding arising in connection with this Agreement, the Guarantee or the Merger will be brought, tried and determined in the [Delaware Court of Chancery]."

FACTUAL ALLEGATIONS

I. BACKGROUND OF THE MERGER AGREEMENT

A. Forescout's Sale Process

26. Before choosing Advent as its merger partner, Forescout conducted a careful sale process assisted by financial advisor Morgan Stanley & Co. LLC ("Morgan Stanley") and overseen by a committee (the "Strategic Committee") of the Forescout Board.

27. Forescout began the process of exploring strategic and financial alternatives, including a potential sale of the Company, in the second half of 2019. On October 10, 2019, the Company announced that it did not expect to meet prior guidance on total revenue and non-GAAP operating loss for the third quarter of 2019 ("Q3 2019"). Subsequently, on October 28, 2019, the Board determined—for a variety of reasons—to retain Morgan Stanley and establish the Strategic Committee to oversee a review of strategic alternatives.

28. On November 6, 2019, Forescout publicly announced its final results for Q3 2019—disclosing both total revenue and non-GAAP operating loss below Forescout's prior public guidance. At the same time, Forescout provided its guidance for the fourth quarter of 2019 ("Q4 2019"). After that announcement, Morgan Stanley began contacting potential acquirers. Forescout received various indications of interest from multiple parties during the following three months.

29. Potential acquirers, including Advent International, were given access to extensive due diligence on Forescout's financial condition and Board-approved operating plans for 2020. On November 19 and 20, 2019, the Board (after discussion with Forescout management) reviewed preliminary drafts of two operating plans prepared by Company management on a top-down basis (the "Target Plan" and the "Preliminary Alternate Plan"). The Board's consideration of a preliminary, top-down analysis at its November meeting followed the same procedure the Board had undertaken in the previous five years. The Target Plan and the Preliminary Alternate Plan were developed to highlight the range of possible business outcomes resulting from factors such as bottoms-up analyses of Forescout's sales pipeline and expenses (which were in process in November 2019 and expected to be completed in January 2020) and Forescout's results for Q4 2019.

30. By December 18, 2019, Forescout had received preliminary, non-binding written indications of interest from four different potential financial acquirers concerning their respective interest in pursuing an acquisition of Forescout. Advent International proposed an acquisition of Forescout for $38.00 to $41.00 in cash per share of Forescout common stock.

31. Forescout's results for Q4 2019 reflected revenue below Forescout's public guidance caused by, among other things, a greater-than-expected shift away from perpetual licenses and towards term-based licenses (where customers commit to shorter license periods up front but are expected to renew their licenses in future periods) and, to a lesser degree, continued sales weakness. The Strategic Committee directed Morgan Stanley to provide a summary of the Q4 2019 preliminary results to Advent International and other potential acquirers. Morgan Stanley subsequently provided this information.

32. Forescout recognized that the trends affecting its results for Q4 2019 would likely lower its expected results for fiscal 2020. Forescout's sales pipeline for 2020 also appeared weaker than originally projected. Forescout anticipated releasing public guidance for the first quarter of 2020 and fiscal 2020 that would be less optimistic than Forescout had hoped.

33. On January 27, 2020, after consulting with Company management and Morgan Stanley, the Strategic Committee approved an "Alternate Plan" for Forescout on January 27, 2020 that—unlike the Target Plan and Preliminary Alternate Plan—was prepared on a bottoms-up basis and also reflected the disappointing results for Q4 2019 as well as recently lowered expectations for 2020. The Alternate Plan was provided to Advent International and the only other remaining interested potential acquirer at that point. The Alternate Plan was subsequently adopted by the Board on February 5, 2020.

34. Meanwhile, the world began to experience the effects of COVID-19. In early January 2020, while the parties were negotiating the Merger Agreement, news reports emerged of a novel coronavirus (COVID-19) spreading in Wuhan, China. [9] By January 21, 2020, Japan, South Korea, Thailand, and the United States all had reported cases. With the virus quickly spreading throughout the world, on January 30, 2020, the World Health Organization declared COVID-19 a global public health emergency. [10] On January 31, 2020, the United States began restricting travel into the country by any foreign nationals who had recently been in China. [11]

35. On February 3, 2020, Advent International provided a revised proposal to acquire Forescout for $32.00 per share. This was down from the proposal of $38.00 to $41.00 per share that Advent International had made around December 18, 2019.

36. On February 4, 2020, Forescout made a counterproposal to Advent International for $34.00 per share. The parties negotiated throughout that day and Advent International increased its acquisition proposal to $33.00 per share.

37. Throughout this entire period, Forescout and Advent International, through outside counsel, engaged in arms'-length negotiations of the terms of the Merger Agreement and the related disclosure letter, Guarantee, Equity Commitment Letter, and Debt Commitment Letter.

38. On February 5, 2020, Forescout accepted Advent International's acquisition proposal at a price of $33.00 per share in cash. The parties went on to finalize the terms of the Merger Agreement and related transaction documents following extensive negotiations during which all parties were represented by sophisticated and experienced legal counsel and financial advisors.

B. The Parties Execute the Merger Agreement, the Go-Shop Period Expires, and the Stockholders Approve the Merger.

39. On February 6, 2020, Advent and Forescout signed the Merger Agreement after Advent delivered to Forescout the Equity Commitment Letter and the initial Debt Commitment Letter (later amended and restated), along with the Guarantee to "induce" the Company's "willingness" to enter into the Merger Agreement. [12] Pursuant to the Merger Agreement, Merger Sub will be merged with and into Forescout, with Forescout continuing as the surviving entity and a wholly-owned subsidiary of Ferrari Group. Advent will purchase all of the outstanding shares of Forescout's common stock for $33.00 in cash per share, for a total transaction value of approximately $1.9 billion.

40. The purchase price represents a premium of approximately 30% over the Company's closing stock price of $25.45 on October 18, 2019, the last full trading day before the release of two Schedule 13-D filings by activist investors on October 21, 2019, disclosing they had formed a partnership to approach Forescout and had accumulated a combined 14.5% ownership in the Company. Under the Merger Agreement and the Equity Commitment Letter, the Advent Funds will contribute $1.341 billion to Ferrari Group to fund a significant portion of the aggregate purchase price to be paid to the Forescout stockholders at closing.

41. The Merger Agreement provided for a "go-shop" period of approximately a month after signing, during which Forescout could consider alternative acquisition proposals. [13] The go-shop period expired on March 8, 2020 and Forescout received no other offers. Forescout subsequently filed its Definitive Proxy Statement with the Securities and Exchange Commission on March 24, 2020 and noticed a Special Meeting of Stockholders to vote on the Merger. Stockholders were told in that proxy statement that the Merger consideration was $33 in cash per share of Forescout common stock. On April 23, 2020, the proposed Merger was approved by Forescout stockholders, with the holders of more than 99% of the shares of Forescout common stock present at the meeting voting in favor of the Merger.

42. On February 25, 2020, Advent delivered an Amended and Restated Commitment Letter (defined above as the Debt Commitment Letter) to Forescout. The Debt Commitment Letter provides that the Lenders would provide $400 million in term loans to close the Merger and $40 million in revolving loans for operations post-closing.

II. THE MERGER AGREEMENT

A. The Transaction Documents

43. During the negotiation process, Advent provided Forescout with multiple assurances that it had the financing necessary to close the Merger. In the Equity Commitment Letter executed by Advent on February 6, 2020 to induce Forescout to enter into the Merger Agreement, [14] the Advent Funds committed to capitalize Ferrari Group on the date of closing of the Merger with an aggregate equity contribution of up to $1.341 billion.

44. In addition, in the Debt Commitment Letter, which was first delivered along with the executed Merger Agreement and subsequently amended and restated as of February 25, 2020, a number of financial institutions committed to provide Advent with senior secured term loans in the aggregate principal amount of $400 million on the date of closing of the Merger as well as with secured revolving loans in the aggregate principal amount of $40 million to be made available to the surviving entity in the Merger after closing. [15]

45. To further induce Forescout to enter the Merger Agreement, Advent also agreed to use its "reasonable best efforts" to consummate both the equity and debt financing for the Merger. [16]

46. Under Section 6.5(b)(ii)(v) of the Merger Agreement, Advent agreed to use its reasonable best efforts to "consummate the Debt Financing at the Closing, including causing the Financing Sources to fund the Debt Financing at the Closing" so long as all of the conditions to closing (other than those conditions to be satisfied at closing) the Merger are satisfied. In Section 6.5(b)(ii)(vi), Advent agreed to use its reasonable best efforts to "enforce its rights pursuant to the Debt Commitment Letters." In Section 6.5(d), Advent agreed to use its reasonable best efforts to arrange and obtain alternative financing "if any portion of the Debt Financing becomes unavailable." [17]

47. The Merger is not subject to a financing condition. Advent is obligated to consummate the Merger even if the requisite equity or debt financing is not obtained prior to closing, subject to the satisfaction or waiver of the conditions in Article VII of the Merger Agreement. Section 6.6(h) of the Merger Agreement provides:

> Parent and Merger Sub each acknowledge and agree that obtaining the ***Financing is not a condition to the Closing***. Subject to Section 9.10(b)(ii), ***if the Financing has not been obtained, Parent and Merger Sub will each continue to be obligated***, subject to the satisfaction or waiver of the conditions set forth in Article VII, ***to consummate the Merger***. [18]

48. Finally, the Advent Funds executed the Guarantee on February 6, 2020, "as a condition and inducement to the Company's willingness to enter into th[e] [Merger] Agreement."[19] Pursuant to the Guarantee, the Advent Funds guaranteed certain obligations of Ferrari Group in connection with the Merger Agreement, including payment of the "Parent Termination Fee" (defined in the Merger Agreement), capped at $111,664,539.00.[20]

B. The Operating Covenants

49. The parties also agreed to various provisions regarding the operation of Forescout's business between the time of signing of the Merger Agreement and closing of the Merger.

50. Section 5.1 of the Merger Agreement provides that, unless Parent approves otherwise, Forescout will use "reasonable best efforts" to preserve the business and operate in the ordinary course. Section 5.1 of the Merger Agreement states in relevant part that:

> Except (a) as expressly contemplated by this Agreement; (b) as set forth in Section 5.1 or Section 5.2 of the Company Disclosure Letter [delivered by Forescout to Ferrari on the date of signing of the Agreement]; (c) as contemplated by Section 5.2; or (d) as approved by [Ferrari Group] (which approval will not be unreasonably withheld, conditioned or delayed), during the Pre-Closing Period, the Company will … (i) use its respective reasonable best efforts to maintain its existence in good standing pursuant to applicable Law; (ii) subject to the restrictions and exceptions set forth in Section 5.2 or elsewhere in this Agreement, conduct its business and operations in the ordinary course of business; and (iii) use its respective reasonable best efforts to (a) preserve intact its material assets, properties, Contracts and business organizations; (b) keep available the services of its current officers and key employees; and (c) preserve the current relationships with material customers, suppliers, distributors, [etc.], in each case solely to the extent that (A) the Company has not, as of the date of this Agreement, already notified such third Person of its intent to terminate those relations and (B) provided notice thereof to Parent prior to the date of this Agreement.[21]

51. Section 5.2 of the Merger Agreement contains forbearance covenants that preclude Forescout from taking certain actions between the time of signing of the Merger Agreement and closing unless "approved by [Ferrari Group] (which approval will not be unreasonably withheld, conditioned or delayed)," as "expressly contemplated in the terms of the [Merger] Agreement," or "as set forth in Section 5.2 of the Company Disclosure Letter."[22] The Merger Agreement does not require such approval to be in writing. Relevant actions requiring Advent's approval under Section 5.2 include communications to Forescout's employees "with respect to the compensation, benefits or other treatment they will receive [post-closing]."[23]

52. The parties further agreed that, before the Merger becomes effective, the Merger Agreement's restrictions "are not intended to give [Advent], on the one hand, or [Forescout] on the other hand, directly or indirectly, the right to control or direct the business or operations of the other," and that Forescout and Ferrari Group "will exercise, consistent with the terms, conditions and restrictions of this Agreement, complete control and supervision over their respective businesses and operations."[24]

C. Closing Conditions

53. Section 6.1(a) of the Merger Agreement provides that the parties will use "their respective reasonable best efforts" to cause the conditions to the Merger to be satisfied and for closing to occur. Section 6.1(a) states, in relevant part, that:

> [Advent], on the one hand, and the [Forescout], on the other hand, will use their respective best efforts to (A) take (or cause to be taken) all actions; (B) do (or cause to be done) all things; and (C) assist and cooperate with the other Parties in doing (or causing to be done) all things, in each case as are necessary, proper or advisable pursuant to applicable Law or otherwise to consummate and make effective, in the most expeditious manner practicable, the Merger, including by using ***reasonable best efforts*** to[, among other things,] ***cause the conditions to the Merger set forth in Article VII to be satisfied*** .... [25]

54. The Merger Agreement expressly sets forth the conditions to Advent's obligations to close the Merger. One closing condition is that, unless waived by Ferrari Group, Forescout "will have performed and complied in all material respects with all covenants and obligations in this Agreement required to be performed and complied with by it at or prior to the Closing." [26]

55. Another condition for Advent's obligation to close is that Forescout's representations and warranties in specific parts of Article III of the Merger Agreement, including Section 3.12(b), which "are not qualified by Company Material Adverse Effect or other materiality qualifications," must be "true and correct in all material respects as of the Closing Date." [27] Section 3.12(b) provides that "[s]ince the date of the Audited Company Balance Sheet [for the fiscal year ended December 31, 2018], through the date of this Agreement, there has not occurred a Company Material Adverse Effect." [28]

56. Section 7.2(b) of the Merger Agreement provides that Advent's obligation to close is conditioned upon Forescout having satisfied "in all material respects" the "covenants and obligations in th[e] [Merger] Agreement required to be performed and complied with by it at or prior to the Closing." [29] Section 7.2(d) provides that another condition to Advent's obligation to close is the satisfaction (or waiver by Ferrari Group) of the condition that "[n]o Company Material Adverse Effect will have occurred after the date of th[e] [Merger] Agreement that is continuing." [30]

57. Company Material Adverse Effect (or "MAE") is defined in Section 1.1 of the Merger Agreement as follows:
"Company Material Adverse Effect" means any change, event, violation, inaccuracy, effect or circumstance (each, an "Effect") that, individually or taken together with all other Effects that exist or have occurred prior to the date of determination of the occurrence of the Company Material Adverse Effect, (A) has had or would reasonably be expected to have a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole; or (B) would reasonably be expected to prevent or materially impair or delay the consummation of the Merger, it being understood that, in the case of clause (A) or clause (B), none of the following (by itself or when aggregated) will be deemed to be or constitute a Company Material Adverse Effect or will be taken into account when determining whether a Company Material Adverse Effect has occurred or may, would or could occur (subject to the limitations set forth below):

(i) ***changes in general economic conditions*** in the United States or any other country or region in the world, or changes in conditions in the global economy generally (***except to the extent that such Effect has had a materially disproportionate adverse effect on the Company relative to other companies of a similar size operating in the industries in which the Company and its Subsidiaries conduct business, in which case only the incremental disproportionate adverse impact may be taken into account*** in determining whether there has occurred a Company Material Adverse Effect); …

(vi) earthquakes, hurricanes, tsunamis, tornadoes, floods, mudslides, wild fires or other natural disasters, weather conditions, ***epidemics, pandemics and other force majeure events*** in the United States or any other country or region in the world (***except to***

the extent that such Effect has had a materially disproportionate adverse effect on the Company relative to other companies of similar size operating in the industries in which the Company and its Subsidiaries conduct business, in which case only the incremental disproportionate adverse impact may be taken into account in determining whether there has occurred a Company Material Adverse Effect);

(vii) any ***Effect resulting from the announcement of this Agreement or the pendency of the Merger***, including the impact thereof on the relationships, contractual or otherwise, of the Company and its Subsidiaries with employees, suppliers, customers, partners, vendors, Governmental Authorities or any other third Person .... [31]

58. At the time the parties were negotiating the terms of the Merger Agreement, COVID-19 had already begun to spread beyond China and throughout the world. The World Health Organization declared COVID-19 a global public health emergency the week before the Merger Agreement was signed. [32]

59. Accordingly, the parties expressly allocated to Advent the risks of an epidemic or pandemic such as COVID-19 or changes in general economic conditions affecting the financial performance of Forescout. Under the Merger Agreement, Advent would bear all of the risk unless an epidemic or pandemic occurred ***after*** the date of signing of the Merger Agreement, only if it had a "materially disproportionate adverse effect" on Forescout compared to peer companies and—even then—only the incrementally disproportionate impact on Forescout can be considered.

D. Required Time of Closing

60. Pursuant to Section 2.3 of the Merger Agreement, closing of the Merger is to occur no later than the second business day after the Marketing Period ends if all specific conditions to closing are satisfied or waived. Section 2.3 provides that:

> [t]he second Business Day after the satisfaction or waiver (to the extent permitted under this Agreement) of the last to be satisfied or waived of the conditions set forth in Article VII (other than those conditions that by their terms are to be satisfied at the Closing, but subject to the satisfaction or waiver (to the extent permitted under this Agreement) of such conditions); or (b) such other time, location and date as Parent, Merger Sub and the Company mutually agree in writing. Notwithstanding the foregoing, if the Marketing Period has not ended at the time of the satisfaction or waiver (to the extent permitted under this Agreement) of the last to be satisfied or waived of the conditions set forth in Article VII (other than those conditions that by their terms are to be satisfied at the Closing), then the Closing will occur on the earlier of … (ii) the second Business Day after the final day of the Marketing Period (subject … to the satisfaction or waiver (to the extent permitted under this Agreement) of all of the conditions set forth in Article VII, other than those conditions that by their terms are to be satisfied at the Closing, but subject to the satisfaction or waiver (to the extent permitted under this Agreement) of such conditions). [33]

E. Termination and Remedies for Breach

61. The parties to the Merger Agreement agreed that specific performance is an appropriate remedy if any party does not perform its obligations under the Merger Agreement, including any actions required to consummate the Merger. Section 8.3(h) of the Merger Agreement provides that:

> Notwithstanding anything to the contrary in this Agreement, it is acknowledged and agreed that Parent, Merger Sub and the Company will each be entitled to an injunction, specific performance or other equitable relief as provided in Section 9.10(b), except that, although the Company, in its sole discretion, may determine its choice of remedies under this Agreement, including by pursuing specific performance in accordance with, but subject to the limitations of, Section 9.10(b), under no circumstances will the Company, directly or indirectly, be permitted or entitled to receive both specific performance of the type contemplated by Section 9.10(b) and any monetary damages. [34]

In the Equity Commitment Letter, the Advent Funds also agreed to Forescout's choice of remedies. [35]

62. The parties broadly waived objections to the granting of specific performance and other equitable relief in the Merger Agreement. Pursuant to Section 9.10(b)(i) of the Merger Agreement:

> The Parties ***agree that irreparable damage for which monetary damages, even if available, would not be an adequate remedy would occur in the event that the Parties do not perform the provisions of this Agreement*** (including any Party failing to take such actions that are required of it by this Agreement in order to consummate the Merger) in accordance with its specified terms or otherwise breach such provisions. Subject to Section 9.10(b)(ii), the Parties acknowledge and agree that, subject to the penultimate sentence of Section 8.2(b), (A) the Parties will be entitled, in addition to any other remedy to which they are entitled at law or in equity, to an injunction, specific performance and other equitable relief to prevent breaches (or threatened breaches) of this Agreement and to enforce specifically the terms of this Agreement (including, subject to Section 9.10(b)(ii), specific performance or other equitable relief to cause Parent to perform any obligations required of it to enforce its rights under the Equity Commitment Letter); (B) the provisions of Section 8.3 are not intended to and do not adequately compensate the Company, on the one hand, or Parent and Merger Sub, on the other hand, for the harm that would result from a breach of this Agreement, and will not be construed to diminish or otherwise impair in any respect any Party's right to an injunction, specific performance and other equitable relief; and (C) the right of specific enforcement is an integral part of the Merger and without that right, neither the Company nor Parent would have entered into this Agreement. [36]

In addition, Section 9.10(b)(iii) of the Merger Agreement provides that the parties will not:

> raise any objections to (A) the granting of an injunction, specific performance or other equitable relief to prevent or restrain breaches or threatened breaches of this Agreement by the Company, on the one hand, or Parent and Merger Sub, on the other hand; and (B) the specific performance of the terms and provisions of this Agreement to prevent breaches or threatened breaches of, or to enforce compliance with, the covenants, obligations and agreements of the Parties pursuant to this Agreement. Any Party seeking an injunction or injunctions to prevent breaches (or threatened breaches) of this Agreement and to enforce specifically the terms and provisions of this Agreement will not be required to provide any bond or other security in

> connection with such injunction or enforcement, and each Party irrevocably waives any right that it may have to require the obtaining, furnishing or posting of any such bond or other security. [37]

63. Section 8.1(c) of the Merger Agreement sets an outside closing date of June 6, 2020 (the "Termination Date"), which will be automatically extended to August 6, 2020 in certain circumstances. [38] Under the terms of Section 8.1(c), however, Parent is not permitted to terminate the Merger Agreement as a result of the occurrence of the Termination Date "if the Company has the right to terminate this Agreement pursuant to … Section 8.1(i)," or if Parent's "action or failure to act (which action or failure to act constitutes a breach by [Parent]) has been the primary cause of, or primarily resulted in, either (A) the failure to satisfy the conditions to the obligations of the terminating Party to consummate the Merger as set forth in Article VII prior to the Termination Date; or (B) the failure of the Effective Time to have occurred prior to the Termination Date ...." [39]

64. Section 8.1(i) of the Merger Agreement provides that Forescout is entitled to terminate the Merger Agreement if the Merger does not close two days after the Marketing Period ends if all of the specified conditions to closing are satisfied or waived (or can be satisfied or waived at closing) and the Company gives the required notice stating that it is ready, willing, and able to close and that all necessary conditions have been satisfied or waived. Specifically, it provides:

> if (i) the Marketing Period has ended and all of the conditions set forth in Section 7.1 and Section 7.2 have been and continue to be satisfied or waived (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing); (ii) Parent and Merger Sub fail to consummate the Merger on the date required pursuant to Section 2.3; (iii) the Company has notified Parent in writing that (A) it is ready, willing and able to consummate the Closing; and (B) all conditions set forth in Section 7.3 have been satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or that it is willing to waive any unsatisfied conditions set forth in Section 7.3; and (iv) Parent and Merger Sub fail to consummate the Merger by the second Business Day after the delivery of the notice described in clause (iii).

Forescout sent Parent the notice contemplated by clause (iii) of Section 8.1(i) of the Merger Agreement on May 17, 2020. [40]

III. FORESCOUT OPERATES IN THE ORDINARY COURSE AFTER SIGNING THE MERGER AGREEMENT.

A. Forescout, with Advent's Approval, Undertakes Measures to Address the Effects of COVID-19 and Complies with Advent's Repeated Information Requests.

65. COVID-19 is not a valid basis for Advent to refuse to close the Merger. The effects of COVID-19 on Forescout did not create an MAE that "occurred after the date of th[e] [Merger] Agreement that is continuing." [41] The pandemic was known to the world before Defendants executed the Merger Agreement—which expressly allocated the risk of a pandemic to Defendants.

66. While the pandemic deepened after the parties signed the Merger Agreement, Forescout management continued to actively analyze and manage the pandemic's effects on Forescout's business and customer pipeline. Forescout had numerous discussions with Advent about its actions in this regard, explaining Forescout's cost structure and other remedial actions taken to respond to the current environment.

67. Despite the fact that Forescout was ready to close the transaction shortly after the April 23, 2020 stockholder vote on the Merger, Forescout also agreed to Advent's request to implement a marketing period. The Merger Agreement provides for a 15-day "Marketing Period" following stockholder approval of the Merger and Ferrari Group's receipt of "Required Financing Information," as defined in the Merger Agreement. [42] The parties negotiated for the Marketing Period in the Merger Agreement because Advent had initially anticipated needing time before closing for debt syndication. Forescout understood, however, that the debt had been syndicated shortly after the Merger was announced in February 2020. Advent nonetheless insisted on a Marketing Period to cause further delay.

68. Although Forescout—like many businesses in the era of COVID-19— faced challenges, it continued to operate in accordance with the Alternate Plan that the Board had approved and Forescout had disclosed to stockholders throughout the Marketing Period. Forescout repeatedly walked Advent through all of the data underlying the Alternate Plan, giving it full visibility into Forescout's assumptions. In April 2020, however, Advent began to demand that Forescout abandon the Alternate Plan and create a revised forecast addressing the effects of COVID-19. Forescout, in response, created three detailed illustrative alternative scenarios for planning purposes, considering various effects of the pandemic, with Forescout recommending appropriate expense reduction measures. Forescout emphasized that these scenarios were highly speculative given the uncertainty in the global economy, which had caused more than 400 public companies to abandon giving guidance entirely. Advent was made aware of, and did not object to, the cost-reduction measures Forescout proposed, which included a hiring freeze except for certain strategic positions. At one point, Forescout asked Advent whether it could proceed with hiring a new employee in Thailand. Advent questioned whether the decision was consistent with the hiring freeze, and so Forescout did not proceed with the hiring. Advent also objected to Forescout making certain executive equity payments (which would normally be done in the first quarter of the year) and accordingly Forescout did not make the payments.

69. Forescout had no obligation—contractual or otherwise—to create revised forecasts that would deviate from its multi-year standard procedure of having the Board approve a plan once per fiscal year. Nonetheless, Forescout engaged with Advent on scenario planning, taking into account potential expense reductions due to the shortfall of the first quarter of 2020 ("Q1 2020")—including a hiring freeze and delaying planned raises to employees until later in the year. Forescout told Advent that it continued to believe the Alternate Plan was operative, and consistently cooperated with Advent's information requests to ensure that Advent remained fully apprised about Forescout's business and understood that Forescout was well-positioned to close as planned. In each instance where approval was required under Section 5.2 of the Merger Agreement, Forescout kept Advent informed, sought approval, and abided by Advent's guidance.

70. On April 14, 2020, Advent delivered a "revised base case" analysis it concocted based on Advent's own premature assumptions and modeling for Forescout revenue and bookings for fiscal 2020 to 2021 (the "Advent Illustrative Case"). The Advent Illustrative Case presented an overly conservative outlook for bookings and revenue estimates due to COVID-19. The Advent Illustrative Case estimated revenues that were approximately half of the Alternate Plan estimates. Advent never explained the factual basis for those assumed values. Nor could it, since Advent fabricated the projections without the input of Forescout management. Forescout consistently told Advent the cases would never happen as modeled.

71. At midnight on April 19, 2020, Forescout's management received a request from Ferrari Group for sales information specific to Q1 2020, which had just ended March 31, 2020. On April 20, 2020, while the parties were in the midst of working through various items on the closing checklist, Ferrari Group delivered a letter to Forescout expressing concern about the impact of COVID-19 on the Company and requesting a variety of additional financial information. [43] The majority of the information Ferrari Group was requesting fell outside of the Agreement's definition of "Required Financing Information." [44]

72. Within a day of receiving the information requests, Forescout began replying on a response-by-response basis. Forescout provided detailed Q1 2020 renewals information, as well as pipeline data, and provided the rest of the Q1 2020 financial information requested the next day. On April 23, 2020, Forescout sent a letter to Ferrari Group responding in full to the information requests where it could and advising of the status of when further responses would be made or asking

for further clarifications from Ferrari Group.[45] In addition to the written correspondence, members of Forescout's senior management continued to have multiple, lengthy conversations with representatives of Advent to respond to and address Advent's questions and requests. Forescout, at Advent's request, created four operating committees comprised of members of Forescout management and Advent International management to prepare for the company's operations post-closing. Forescout's April 23, 2020 letter states that Advent "now has in its possession all of the historical Forescout financial information required by the initial lenders as a condition precedent to the funding of the Debt Financing," triggering the beginning of the Marketing Period that Advent had insisted upon. Forescout further explained that it "remain[ed] eager to close the Merger and move forward with the next phase of the partnership between Forescout and Parent."[46] Although Forescout explained that the Marketing Period would end on May 13, 2020 under the Merger Agreement, Forescout adopted—at Advent's insistence—a May 14, 2020 end of the Marketing Period, meaning that pursuant to Section 2.3 of the Merger Agreement the Merger was required to close no later than May 18, 2020 if all conditions to closing were satisfied (or ready to be satisfied at closing).

73. Forescout proceeded diligently toward the closing date, expending hundreds of hours engaging in transition planning and information sharing with Advent. At the same time, Forescout continued to operate under the Alternate Plan and expects to have a strong second quarter of 2020 ("Q2 2020")—despite challenges created not only by COVID-19 but also by the looming Merger with Advent. For example, during the week of May 11, 2020, Forescout's head of sales raised his internal best estimate for the quarter as it appeared increasingly likely that Forescout would close in Q2 2020 a very large eight-figure transaction, which it has been working on for some time.

74. At Advent's insistence, Forescout began to work on anticipated personnel reductions that would be implemented immediately after closing. Advent demanded that personnel changes be rolled out by June 1, 2020. Forescout also agreed that it would hire an employee of an Advent International affiliate as its new Chief Operating Officer post-Closing. Advent's selected Chief Operating Officer scheduled multiple discussions with members of the Forescout team who would be reporting to him after the Merger.

B. Advent Signals Its Intention to Renege on the Merger Agreement.

75. Forescout's satisfaction of all conditions to closing, compliance with Advent's hiring and information requests, and encouraging Q2 2020 forecasts were of no matter to Advent. Advent International was singularly focused on the reality that its portfolio was being pummeled by a declining global market. On May 8, 2020, the extent of Advent's buyer's remorse became apparent. During a phone call between Forescout's Chief Executive Officer and Advent's head of technology investment Bryan Taylor, Mr. Taylor told Forescout's CEO that Advent was considering not closing the Merger because of the COVID-19 pandemic. Mr. Taylor emphasized that Advent's decision was entirely "COVID-related."

76. On May 11, 2020, Mr. Taylor told a representative of Morgan Stanley that "we want[ed] to close the deal" but that Advent International had concerns that needed to be addressed during an internal meeting of Advent International principals scheduled for May 13, 2020. Mr. Taylor had previously expressed Advent International's concerns before the signing of the Merger Agreement in view of Forescout's "missed quarters" in 2019. Those concerns were reflected in the negotiated per share price of $33.00 per share.

77. On May 13, 2020 Advent cancelled a previously-scheduled planning meeting of the Forescout and Advent communications teams to coordinate the public announcements of the closing of the Merger, still planned for May 18, 2020. Despite this cancellation, other planning meetings between Advent and Forescout continued. Forescout continued to work in good faith toward a May 18, 2020 closing.

78. On May 14, 2020, Mr. Taylor sent Forescout's CEO a presentation called "Project Ferrari Financial Analysis."[47] That presentation contained a "revised base case" and a new "downside case" that Advent had prepared for Forescout. Advent explained that the scenarios had been created because the Company had declined to create new projections. Forescout had,

instead, chosen to rely on its Board-approved 2020 Alternate Plan and told Advent that revising that plan in the current economic climate (where many public companies are pulling guidance) would be inherently speculative.

79. Advent created that "Financial Analysis" entirely on its own, without input from Forescout management or Morgan Stanley. Both the "revised base case" and "downside case" scenarios contained a variety of assumptions without basis in fact. It soon became clear that these contrived scenarios were ginned up by Advent in bad faith to create an unreasonably pessimistic view of Forescout's business and frustrate the debt financing for the Merger. Even under their unduly negative assumptions, both scenarios predicted that Forescout's business would return to business as usual in fiscal 2021.

IV. DEFENDANTS' REFUSAL TO CLOSE IS INVALID.

80. On May 15, 2020, Ferrari Group, through Advent, sent a letter to Forescout (the "May 15 Letter") stating that Defendants would "not be proceeding to consummate the transaction on May 18, 2020 as scheduled."[48] In the May 15 Letter, Ferrari Group asserted that the Company was "in material breach of various covenants set forth in the Merger Agreement." Ferrari Group claimed that it could not attest to the Lenders that the post-closing entity would be solvent, revealing that it had concocted the May 14, 2020 "Financial Analysis" in a self-serving attempt to foreclose the debt financing for the Merger. Remarkably —despite predicting the prior day that Forescout would return to "business-as-usual"—Ferrari Group now claimed that "a Company Material Adverse Effect has occurred and is continuing."[49] None of the purported grounds Ferrari Group cited in its May 15 Letter provides Defendants with a valid basis to avoid their obligations to consummate the Merger.

A. The Company Has Not Suffered a Material Adverse Effect.

81. The May 15 Letter asserts that Forescout "has suffered a material adverse effect on its business, financial conditions, and results of operations" and that "it is clear that the Company's decline in earnings potential and financial performance will last for a durationally significant period of time."[50] Ferrari Group goes on to claim that:

To the extent the Company has attributed its downturn in financial prospects to the COVID-19 outbreak or any other general economic condition, there has been a materially disproportionate effect on the Company's business relative to other companies of similar size operating in the industries in which the Company and its subsidiaries conduct business. *See* Merger Agreement, Section 1.1(t)(i), (vi). In fact, the financial performance and earnings of the Company's peers have actually improved in this economic environment, while the Company's financial performance and earnings have dramatically declined.

82. The fact that Advent is even claiming an MAE reveals that it is fabricating reasons to avoid closing the Merger. That is clear for several reasons. First, the Merger Agreement expressly provides that COVID-19 and the resulting economic climate cannot create an MAE. The definition of Company Material Adverse Effect ***excludes*** pandemics, epidemics, and changes from general economic conditions.[51] The effects of the announcement of the Merger on Forescout's business are also expressly carved out.[52] Ferrari agreed in the Merger Agreement to bear the risk of any financial impact on the Company resulting from a pandemic or Merger announcement. It must now live with that agreement.

83. Ferrari Group's contention that the "Company's decline" will "last for a durationally significant period of time" is belied by Advent's own presentation from ***one day*** earlier. The May 14, 2020 "Financial Analysis" presentation predicted that Forescout would return to business as usual in fiscal 2021—in both a "base" and "downside" case. That fact alone shows that Advent cannot credibly believe an MAE has occurred.

84. There has been no disproportionate impact of COVID-19 on Forescout that could support Advent's invocation of an MAE. The definition of Company Material Adverse Effect in the Merger Agreement has a specific disproportionality concept: the effect on Forescout must be disproportionate relative to peer companies, and then only "the incremental disproportionate adverse

impact may be taken into account in determining whether" an MAE has occurred.[53] Although many companies, including customers of Forescout, have told employees to shelter in place, Forescout has continued to pursue business opportunities, including the large eight-figure deal it expects to close in the second quarter of 2020. In addition, despite the challenges created by COVID-19 and the announcement of the Merger, Forescout's subscription business was up 11 percent in Q1 2020. Q1 2020 can hardly be seen as indicative of Forescout's (or any company's) long-term financial performance, given the recent COVID-19 outbreak in the United States. There is no evidence of any sustained long-term impact on Forescout's prospects. Advent does not have a crystal ball, and results to date have shown only minor impacts. Forescout's revenues for the first quarter were approximately $57 million—only $5 million lower than the $62 million "Illustrative Guidance" that was communicated to Advent and disclosed to shareholders in the company's proxy issued to shareholders in connection with its stockholder vote. A $5 million revenue shortfall does not constitute an MAE on a $1.9 billion transaction.

85. Finally, Ferrari Group's claim that—as a result of an MAE—a closing condition in Section 7.2(d) of the Merger Agreement cannot be satisfied is not credible.[54] By the time the Merger Agreement was signed on February 6, 2020, COVID-19 had already spread throughout the world and been declared a global public health emergency by the World Health Organization. As a result, even if COVID-19 could create an MAE (and it cannot), it did not "occur after the date of [the Merger] Agreement," as required by Section 7.2(d).[55] Forescout also represented in Section 3.12(b) of the Merger Agreement that no MAE had occurred before the Merger Agreement was signed.[56]

B. Forescout Has Complied with Its Operating Covenants in All Material Respects.

86. Ferrari Group's second basis for claiming that a condition to closing has not been satisfied is that Forescout supposedly failed to operate its business in the ordinary course or failed to obtain Advent's consent to any deviations from ordinary course operations.[57] Each of the four "examples" Ferrari Group gives of Forescout's purported failure to comply with its operating covenants in Section 5.1 or its forbearance covenants in Section 5.2 of the Merger Agreement is pretextual. And none of those "examples" gives it a basis not to consummate the Merger. The only circumstance that will prevent, materially impede, or materially delay Forescout's performance of its obligations under the Agreement and related documents is Advent's improper refusal to close.

87. *First*, Ferrari Group's primary claim is that Forescout "abdicated its ordinary course business planning, budgeting, and financial forecasting responsibilities" by "refus[ing] to produce updated financial forecasts for 2020 or beyond."[58] Ferrari Group reiterated that Forescout "declined to update its business plan or forecasts since January of 2020."[59] That is false. Forescout created—and shared—multiple different scenarios with Advent throughout March 2020 showing projected Q1 2020 performance. Forescout has been diligently iterating with Advent on an ongoing assessment of Forescout's business so that Forescout can provide an updated income statement, cash flow, and liquidity statements. The culmination of those efforts occurred on May 15, 2020, and a summary of that information was provided to Advent on May 18, 2020.

88. As explained above, nothing in the Merger Agreement obligated Forescout to create a new set of forecasts. In fact, creating an entirely new operating plan would be a ***departure*** from the way Forescout has run its business. Forescout followed its normal process where preliminary forecasts were prepared by management and presented to the Board in November, followed by Board approval of a final plan in February.[60] The Alternate Plan approved by the Board on February 5, 2020 accounted for lower anticipated revenues after the Company received its Q4 2019 results. Although Forescout has continually engaged with Advent on scenario planning for 2020 (and beyond), the Alternate Plan remains the operative forecast for the Company—and the plan provided to Advent in advance of signing the Merger Agreement. Advent's self-serving creation of the Advent Illustrative Scenario and the May 14, 2020 "Financial Analysis" does not change that reality.

89. Notably, the morning of May 15, 2020, Mr. Taylor told Forescout's CEO that—despite Forescout continuing to rely on the Board-approved Alternate Plan and explaining that creating new forecasts would be inherently speculative— Advent had

decided to create its own plan using an unreasonably low number for anticipated revenues. But, as Advent knows well, for 2020 alone, Forescout has approximately $100 million worth of maintenance and renewal contracts that show no signs of eroding, a major deal worth tens of millions of dollars expected to close in 2020, and multiple civilian government renewal contracts planned for Q2 2020. Forescout's predicted revenues well surpass what Advent purports to expect. In any event, Forescout's refusal to concoct new financial forecasts in the midst of the ongoing uncertainty created by COVID-19—while hundreds of publicly-traded companies have suspended guidance—neither violates Forescout's operating covenants in Sections 5.1(ii), 5.1(iii)(a) or 5.1(iii)(c) of the Merger Agreement (as Advent claims) nor creates a failed condition to closing.

90. *Second*, Ferrari Group states that Forescout's "sales function has dramatically decreased meaningful interactions with customers" due to the Company's remote work environment. Unspecified "competitors," Ferrari Group asserts, have been better able to "effectively sell [their] product[s] remotely" or by some "other means."[61] Advent's argument that Forescout's sales pipeline suffered due to a shift to a remote working environment comes nowhere close to constituting a failure to "conduct [Forescout's] business and operations in the ordinary course" as the Merger Agreement requires.[62]

91. Despite Ferrari Group's claim to the contrary in the May 15, 2020 Letter, Forescout's switch to a remote working environment came ***after*** making Advent aware, with Advent International itself having ordered employees to work remotely. This was not a choice. Forescout's headquarters are in Santa Clara County, California. On March 16, 2020, Santa Clara County (plus six other counties in the San Francisco Bay Area) issued a shelter-in-place order requiring residents to stay in their homes except for attending to a discrete set of necessities specified in the order.[63] Three days later, the Governor of California ordered all California residents to shelter in place in their homes, except for limited exemptions for essential services, not including Forescout.[64] Many of Forescout's employees, including salespeople, already worked from home before the pandemic. Forescout's shift of all other employees to a remote working environment, in compliance with state and local law, therefore cannot reasonably be construed as a failure to operate in the ordinary course. In any event, that is what companies operating in the ordinary course of business under current trying circumstances have done across industries.[65] Forescout is a software service business and does not have brick and mortar retail stores that rely on customers physically walking in the door or have factories churning out physical goods. Its business easily transitioned to remote work and its employees, including sales personnel, were able to conduct business as usual remotely and engage with Forescout's customers.

92. Forescout's solutions for customers remain as compelling today as before the COVID-19 crisis, or before announcement of the Merger. Forescout's software helps businesses and governments monitor and manage devices that come on to their networks. These devices include mobile phones, laptops, PCs, servers, routers, security cameras, and a multitude of "internet of things" devices that include connected hospital beds, wireless thermostats, webcams, connected watches and other devices. With the global change in work and social habits, there is undoubtedly going to be an increase in remote computing, an increase in personal and business mobile device usage, and increasing activity of these devices across networks. The need for Forescout's security solutions has never been greater. The pipeline of customer opportunities remains strong, Q2 2020 sales activity looks promising, and Forescout's competitive position as the category leader is clear.

93. Any loss in contracts can—in large part—also be attributed to the announcement of the deal with Advent. For example, two multinational professional service companies that were substantial business partners of Forescout terminated their relationships with the Company due to the conflicts created by auditing relationships with Advent's portfolio companies, and a third major partner has also said it could no longer be a go-to market partner for Forescout for similar reasons. That alone has caused tens of millions of dollars of Forescout's pipeline to be deregistered. Other customers have simply expressed their unwillingness to work with a private equity buyer post-closing. Nonetheless, as even Advent's May 14, 2020 Financial Analysis recognized, Forescout has managed to secure large deals and see renewals in 2020.[66]

94. *Third*, Ferrari Group claims that Forescout having "provided and … continuing to provide non-standard discounts" to a "significant number of customers" caused a "material" adverse effect of its "near- and long-term business prospects for the Company."[67] But Forescout maintained each of its "forbearance covenants" in Section 5.2 of the Merger Agreement,

including not giving material discounts, in consultation with Advent. Any discounts Forescout gave were consistent with the way Forescout has operated in the past. In addition, Advent International was a party to many forecast calls where deal specifics were often discussed and reviewed—including discounts.

95. *Fourth*, Parent says that Company management "erroneously" telling "certain employees that they will likely be terminated post-closing" or that "adverse compensation decisions" having been made were "outside the ordinary course" and harmed "employee morale and retention."[68] That is false. Advent, through Mr. Taylor, pressured Forescout to put in place a transition plan for employees by June 1, 2020. That plan required an extensive effort by Forescout. It became obvious to some Forescout executives that Advent would not be retaining them after the Merger closed. Advent also pushed Forescout to announce that a current employee of an Advent International affiliate would become Forescout's COO post-closing. Setting aside that employee morale issues caused by the Merger cannot constitute a failure to comply with Sections 5.1(ii), 5.1(iii)(b), or 5.2(i)(F) of the Merger Agreement— as Ferrari Group claims—any such issues were caused (and necessarily approved) by Advent.

C. Advent's Assertions About Insolvency Are Imagined and Based on the False Projections It Created.

96. Finally, Parent claims that it will be "unable to represent as to, or deliver to" the Lenders a certificate "attesting to[] the solvency of the post-closing entity involving Merger Sub and the Company," as required by the Debt Commitment Letter.[69] As a result, it argues, one of the conditions under the Debt Commitment Letter to the funding of the debt financing cannot be satisfied. Neither the solvency of the post-closing entity, nor the funding of the debt financing, is a condition to the Merger.

97. Rather, Advent is attempting to create an imagined insolvency based upon its own baseless "Financial Analysis" that does not even show Forescout is insolvent. Advent is plainly relying on those scenarios to cast Forescout's financial outlook in an unreasonably negative light for one reason: to fabricate a reason to back out of the Merger. Furthermore, these fictional insolvency conditions for Forescout are solely related to the lending that Advent intends to place on the Company following the consummation of the Merger. As of March 31, 2020, Forescout had $100 million in cash and $22 million in notes payable and a revolving credit facility.

98. In any event, it is the Company, not Advent, that must provide "a customary certificate executed by the chief financial officer of the [post-closing] Company with respect to solvency matters) as may be reasonably requested by Parent or the Financing Sources."[70] The requirement has nothing to do with Forescout's current or future performance but rather is a customary lender requirement designed to remove one of the elements of fraudulent conveyance and ward off suits by existing creditors to the Company that might be subordinated in the Merger. If Advent felt that it could no longer obtain financing through the Debt Commitment Letter, it was obligated under the Merger Agreement to use its reasonable best efforts to arrange alternative financing.[71] To the extent that debt financing became an issue, Forescout indicated that it was prepared to accept a note in lieu of the funding committed under the Debt Commitment Letter.[72]

99. Advent's argument is nothing more than a ploy on its part to disrupt the debt commitment, putting at risk the ability of Parent and Merger Sub to finance the Merger at the $33 per share purchase price Forescout stockholders were promised.

V. DEFENDANTS HAVE BREACHED THEIR OBLIGATIONS UNDER THE MERGER AGREEMENT.

100. Forescout has fully complied with, and stands ready to comply with, all of its obligations under the Merger Agreement, including satisfying all required conditions to closing. Advent is in breach of its obligations under the Merger Agreement, has repudiated the Merger Agreement, and has threatened further breaches. Advent is in material breach of the Merger Agreement through its conduct over the past month, culminating in the May 15 Letter refusing to close the Merger as required on May 18, 2020. None of Advent's purported reasons for refusing to close are credible or valid.

101. In addition to violating the express requirements of Section 2.3, Advent has failed to use reasonable best efforts to consummate the Merger. Under Section 6.1(a)(i) of the Merger Agreement, Defendants are obligated to take or cause to be taken all actions necessary to consummate "in the most expeditious manner practicable, the Merger, including by using reasonable best efforts to: (i) cause the conditions to the Merger set forth in Article VII [the closing conditions] to be satisfied." [73]

102. Despite those obligations, Advent engaged in a course of conduct to try to avoid closing, culminating in the delivery of the May 15 Letter in which Ferrari Group asserted that it "will not be proceeding to consummate the transaction on May 18, 2020 as scheduled" and that "the proposed transaction cannot close." [74] Advent cannot use the effects of COVID-19—or its view that the Merger is no longer in Advent's interest—to avoid its obligations under the Merger Agreement. Rather, Advent should be required to fulfill its contractual obligations to Forescout to close the Merger immediately, but in no event later than the June 6, 2020 Termination Date, and to use is reasonable best efforts to consummate the Merger as "expeditious[ly]" as possible. [75]

103. Further, in refusing to close the Merger under the pretense that certain conditions to the Debt Commitment Letter cannot be satisfied, Defendants have repudiated their obligations to use their "reasonable best efforts" to consummate both the equity and debt financing for the Merger and enforce all of their rights under the Equity Commitment Letter and Debt Commitment Letters. [76] All necessary financing has been secured and was available for the planned closing of the Merger on May 18, 2020.

104. Forescout stood ready, willing, and able to close the Merger as scheduled. It remains ready, willing, and able to close as promptly as possible. Defendants, however, are in material breach of the Merger Agreement.

COUNT I

(Declaratory Judgment Pursuant to 10 *Del. C.* § 6501)

105. Forescout incorporates herein by reference paragraphs 1 through 104 hereof as if fully set forth herein.

106. The Merger Agreement is a valid and enforceable contract.

107. Forescout has substantially performed its obligations to date, has not breached the Merger Agreement, and remains ready, willing, and able to consummate the Merger.

108. Forescout has satisfied all conditions precedent in the Merger Agreement and any other relevant contractual agreements or will be capable of satisfying any remaining closing conditions at or prior to closing of the Merger.

109. Advent has refused to comply with its obligations under and in connection with the Merger Agreement and has unilaterally breached the Agreement by failing to close the Merger as required under Section 2.3 and also by failing to use reasonable best efforts to consummate the Merger as contemplated by Section 6.1(a) of the Merger Agreement.

110. A real and adverse controversy exists between the parties that is ripe for adjudication, including whether Advent is in breach of the Merger Agreement by failing to use reasonable best efforts to consummate the Merger and by improperly refusing to consummate the Merger.

111. Forescout is entitled to a declaration that Advent's refusal to close the Merger is a violation of the Merger Agreement and that Advent has knowingly and willfully breached the Agreement.

112. Plaintiff also is entitled to a declaration that any attempt by Advent to terminate the Merger due to the failure of any conditions to closing set forth in its May 15, 2020 letter, the occurrence of a Company Material Adverse Effect, the passing of the Termination Date, the expiration of the debt commitments or otherwise is invalid.

COUNT II

(Breach of Contract and Specific Performance Against Ferrari Group and Merger Sub)

113. Forescout incorporates herein by reference paragraphs 1 through 112 hereof as if fully set forth herein.

114. The Merger Agreement is a valid and binding contract.

115. Forescout has substantially performed its obligations under the Merger Agreement and remains ready, willing, and able to perform any obligations necessary to close the Merger.

116. Forescout has satisfied all conditions precedent to closing under and in connection with the Merger Agreement or will be capable of satisfying those conditions precedent at or prior to the closing of the Merger.

117. Advent has breached, and intends to breach, the Merger Agreement, without contractual excuse or justification, by, among other things, failing to close the Merger on May 18, 2020, as required under Section 2.3, failing to use reasonable best efforts to consummate the Merger as contemplated by Section 6.1(a) of the Merger Agreement, and refusing to otherwise comply with its contractual obligations to close without any basis for taking such action under the Merger Agreement or applicable law.

118. Forescout will be irreparably harmed if Advent refuses to comply with its contractual obligations under the Merger Agreement, including to close the Merger Agreement promptly, but no later than June 6, 2020, and to use reasonable best efforts to consummate the Merger, as contemplated by Section 9.10(b)(i) of the Merger Agreement, in which the parties "agree[d] that irreparable damage for which monetary damages, even if available, would not be an adequate remedy would occur in the event that the Parties do not perform the provisions of this Agreement (including any Party failing to take such actions that are required of it by this Agreement in order to consummate the Merger) in accordance with its specified terms or otherwise breach such provisions."

119. Advent must abide by its clear contractual obligations under the Merger Agreement and will not be harmed if it is prevented from violating Forescout's clear contractual rights under the Merger Agreement.

120. In contrast, Forescout will be immediately and irreparably harmed if the Merger is not consummated.

121. The balance of the equities weighs in Forescout's favor.

122. Forescout has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Forescout respectfully requests that this Court grant the following relief:
A. Judgment in favor of Forescout on all claims asserted against Defendants;

B. A declaration that Defendants' refusal to close the Merger is a violation of the Merger Agreement and that Defendants have knowingly and willfully breached, repudiated, and further threatened to breach their obligations under the Merger Agreement;

C. An Order requiring Defendants to specifically perform their obligations under and in connection with the Agreement, including the obligations to close the Merger, use reasonable best efforts to consummate the closing of the Merger, pay the purchase price provided for in the Merger Agreement upon the satisfaction of all closing conditions, fund Ferrari Group in accordance with the terms of the Equity Commitment Letter, and take all steps necessary to enforce Defendants' rights under the

Debt Commitment Letter, such that Defendants pay the purchase price of $33.00 per share in cash to Forescout's stockholders as required by the Merger Agreement;

D. A temporary restraining order prohibiting Defendants from terminating the Merger Agreement or otherwise asserting the passing of the Termination Date as a defense to specific performance of their contractual obligations under the Merger Agreement;

E. An Order equitably extending the Termination Date in the Merger Agreement through the later of five business days after a final decision on the merits or the closing of the Merger;

F. An Order, in the alternative, awarding Forescout monetary damages in the form of the Parent Termination Fee, in the event Forescout's request for specific performance of the Merger Agreement is not granted; and

G. An Order awarding Forescout such other relief as the Court deems necessary, equitable, just, and proper under the Transaction Documents.

Dated: May 19, 2020

WILSON SONSINI GOODRICH

& ROSATI, P.C.

/s/ Lori W. Will

William B. Chandler III (#116)

Lori W. Will (#5402)

Shannon E. German (#5172)

Jessica A. Hartwell (#5645)

Jeremy W. Gagas (#6602)

222 Delaware Avenue, Suite 800

Wilmington, Delaware 19801

(302) 304-7600

Attorneys for Forescout Technologies, Inc.

OF COUNSEL:

Ignacio E. Salceda

Boris Feldman

Steven Guggenheim

Rebecca Epstein

WILSON SONSINI GOODRICH

& ROSATI, P.C.

650 Page Mill Road

Palo Alto, CA 94304-1050

Footnotes

1 The Merger Agreement is attached as Exhibit A.
2 Those slides, called Project Ferrari, Financial Analysis (May 14, 2020), are attached as Exhibit B.
3 The May 15, 2020 letter to Forescout is attached as Exhibit C.
4 Ex. A, Merger Agreement §§ 6.5(b)(ii)(v)-(vi), 6.5(d).
5 Ex. C, May 15, 2020 Letter.
6 The Equity Commitment Letter is attached as Exhibit D.
7 The Debt Commitment Letter is attached as Exhibit E.
8 The Guarantee is attached as Exhibit F.
9 *See* WHO Timeline – COVID-19, World Health Organization, April 27, 2020, https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19.
10 *Id.*
11 *See* Derrick Bryson Taylor, A Timeline of the Coronavirus Pandemic, N.Y. Times, Apr. 7, 2020, https://www.nytimes.com/article/coronavirus-timeline.html.
12 Ex. A, Merger Agreement, Recital C; Ex. D, Equity Commitment Letter; Ex. E, Debt Commitment Letter.
13 Ex. A, Merger Agreement § 5.3(a).
14 Ex. D, Equity Commitment Letter, at 1. The Equity Commitment Letter has a closing condition linked to the closing of the debt financing. Compl. Ex. D § 2(v).
15 Ex. E, Debt Commitment Letter, Schedule 1. The Debt Commitment Letter expires five business days after the Termination Date in the Merger Agreement.
16 Ex. A, Merger Agreement § 6.5(b).
17 Ex. A, Merger Agreement §§ 6.5(b)(ii), 6.5(d). The Company is not a party to the DCL or ECL.
18 Ex. A, Merger Agreement § 6.6(h) (emphasis added). "Financing" is defined as the equity financing for the Merger together with the debt financing. *Id.* § 4.10(a). Advent International is not a party to any of the relevant agreements.
19 Ex. A, Merger Agreement Recital C; *see id.* § 4.9.
20 *Id.* § 1.1(kkk); Ex. F, Guarantee § 1(a).
21 Ex. A, Merger Agreement § 5.1.
22 *Id.* § 5.2.
23 *Id.* § 5.2(i)(F).
24 *Id.* § 5.4.
25 *Id.* § 6.1(a).
26 *Id.* § 7.2(b).
27 *Id.* § 7.2(a)(ii).

28 *Id.* §§ 1.1(f), 3.12(b).
29 *Id.* § 7.2(b).
30 *Id.* § 7.2(d).
31 *Id.* § 1.1(t) (emphasis added).
32 *See supra* ¶ 34.
33 Ex. A, Merger Agreement § 2.3. The Marketing Period is defined in Section 1.1(ggg).
34 Ex. A, Merger Agreement § 8.3(h).
35 Ex. B, Equity Commitment Letter § 4.5.
36 Ex. A, Merger Agreement § 9.10(b)(i) (emphasis added).
37 *Id.* § 9.10(b)(iii).
38 *Id.* § 8.1(c).
39 *Id.*
40 The May 17, 2020 letter notice to Parent is attached as Exhibit G.
41 *Id.* § 7.2(d).
42 *Id.* §§ 6.6(a)(v), 1.1(ggg).
43 The April 20, 2020 letter to Forescout is attached as Exhibit H.
44 Ex. A, Merger Agreement § 6.6(a)(v).
45 A copy of Forescout's letter of April 23, 2020 is attached hereto as Exhibit I, along with Forescout's written notice that it had provided the "Required Financing Information" as of April 23, 2020 and that the Marketing Period had commenced as Exhibit J.
46 Ex. I, April 23, 2020 Letter.
47 Ex. B, May 14, 2020 "Financial Analysis."
48 Ex. C, May 15, 2020 Letter.
49 *Id.*
50 *Id.*
51 *See supra* ¶ 57; Ex. A, Merger Agreement §§ 1.1(t)(i), (vi).
52 Ex. A, Merger Agreement §§ 1.1(t)(vii).
53 Ex. A, Merger Agreement § 1.1(t).
54 Ex. C, May 15, 2020 Letter.
55 Ex. A, Merger Agreement § 7.2.
56 *Id.* § 3.12(b).
57 Ex. C, May 15, 2020 Letter.
58 *Id.*
59 *Id.*
60 *See supra* ¶¶ 29, 33, 68.
61 Ex. C, May 15, 2020 Letter.
62 Ex. A, Merger Agreement § 5.1(ii).
63 Order of the Health Officer of the County of Santa Clara, March 16, 2020, https://www.sccgov.org/sites/covid19/Pages/order-health-officer-031620.aspx.
64 CalMatters, Timeline: California Reacts to Coronavirus, https://calmatters.org/health/coronavirus/2020/04/gavin-newsom-coronavirus-updates-timeline/.
65 *See* Ex. A, Merger Agreement §§ 5.1(ii)-(iii). It bears mention that the Merger Agreement required Forescout to represent and warrant that, as of the Closing Date, "the Company and each of its Subsidiaries is in compliance with all Laws that are applicable to the Company and its Subsidiaries or to the conduct of the business or operations of the Company and its Subsidiaries." *Id.* §§ 3.21, 7.2(a)(i). "Law" is defined broadly to include the ordinances or orders of "any federal, national, state, provincial or local, whether domestic or foreign, government." *Id.* § 1.1(yy), 1.1(eee) (definitions of "Government Authority" and "Law").
66 Ex. B, May 14, 2020 "Financial Analysis."
67 Ex. C, May 15, 2020 Letter.

68 *Id.*
69 *Id.*
70 Ex. A § 6.6(a)(iv); *see also* Ex. E, Annex I to Exhibit C thereof (requiring a certificate of "the Borrower," referring to the Company, that applies "after giving effect to the Transactions and the incurrence of the indebtedness and obligations being incurred in connection with the Credit Agreement and the Transactions").
71 *See supra* ¶ 46.
72 A May 19, 2020 letter to Parent discussing that potential financing option is attached as Exhibit K.
73 Ex. A, Merger Agreement § 6.1(a)(i).
74 Ex. C, May 15, 2020 Letter.
75 Ex. A, Merger Agreement § 6.1(a)(i).
76 *Id.* § 6.5(b).

End of Document

2020 WL 2749095 (Del.Ch.) (Trial Pleading)
Chancery Court of Delaware.

REALOGY HOLDINGS CORP., Plaintiff,
v.
SIRVA WORLDWIDE, INC., North American Van Lines, Inc., Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-a, L.P., Defendants.

No. 2020-0311-MTZ.
May 17, 2020.

Verified Amended Complaint

Edward B. Micheletti (ID No. 3794), Cliff C. Gardner (ID No. 5295), Jessica R. Kunz (ID No. 5698), Rupal K. Joshi (ID No. 6293), Skadden, Arps, Slate, Meagher & Flom LLP One Rodney Square, P.O. Box 636, Wilmington, Delaware 19899-0636, Tel.: (302) 651-3000, for plaintiff Realogy Holdings Corp.

William M. Lafferty (ID No. 2755), Kevin M. Coen (ID No. 4775), Adam T. Nyenhuis (ID No. 4775), Sarah P. Kaboly (ID No. 6673), Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, Suite 1600, Wilmington, Delaware 19801, Tel.: (302) 298-0842, for defendants.

Redacted, Public Version

filed on May 22, 2020

Plaintiff Realogy Holdings Corp. ("Realogy," "Seller," or the "Company"), by and through its undersigned counsel, hereby files this Verified Amended Complaint against defendants SIRVA Worldwide, Inc., North American Van Lines, Inc. (together, "SIRVA" or "Buyer"), Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P. (collectively, "Madison Dearborn") and alleges, upon knowledge with respect to its own acts and upon information and belief as to all other matters, as follows:

NATURE OF DISPUTE

1. This dispute arises from the sale of a Delaware company for $400 million and involves the highest corporate stakes: whether the seller, Realogy, is entitled to the remedy of specific performance to force the buyer, SIRVA, to take all steps leading up to closing the Transaction, and to consummate the Closing. [1]

2. As the allegations in this Amended Complaint demonstrate, SIRVA - just four days before the closing was scheduled to occur - executed on a scheme intended to help SIRVA (and indirectly, Madison Dearborn Partners, LLC, its private equity owner) thwart the Transaction and back out of a deal it had come to believe offered Realogy too rich a price.

3. This scheme involved numerous breaches and problematic actions taken by SIRVA. For example, SIRVA falsely claimed that the Material Adverse Effect condition in the Purchase Agreement was not satisfied, and failed to comply with its reasonable best efforts relating to financing and closing the deal. SIRVA also intentionally and willfully repudiated the Purchase Agreement in two separate communications on April 25, 2020.

4. In addition, SIRVA intentionally failed to use its reasonable best efforts to solve alleged problems and consummate the Transaction by waiting to raise for the first time its concerns about a supposed Material Adverse Effect until four days before the scheduled Closing Date. Indeed, the record clearly shows that SIRVA made no reasonable efforts to engage with Realogy or to take other appropriate actions to attempt to keep the deal on track, and utterly failed to make any meaningful attempt to solve, let alone confer with Realogy about, SIRVA's purported concerns. This conduct also breaches the implied covenant of good faith and fair dealing inherent in every Delaware contract.

5. Of course, the true motivation for SIRVA's improper conduct is its remorse over the purchase price and its concerns that the deal no longer satisfied its targeted internal rate of return. The Delaware courts have made clear that this type of misconduct is not permitted under Delaware law. Courts have not hesitated to use the equitable remedy of specific performance to force a buyer like SIRVA to honor the bargain it struck, regardless of how the buyer feels about the price at the time of closing.

6. There can be no dispute that SIRVA's conduct has caused Realogy irreparable harm sufficient to support an order of specific performance. The Purchase Agreement expressly provides that:

> [I]mmediate, extensive and irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that the Parties do not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder to consummate the Transaction) in accordance with its specified terms or otherwise breach such provisions.

(PA § 13.8)

7. It further provides that "the Parties shall be entitled to an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity." *Id.* Thus, Realogy is entitled to specific performance pursuant to the terms of the Purchase Agreement.

8. SIRVA's attempts to avoid Closing and terminate the Purchase Agreement are without merit. Equally baseless is the claim that specific performance is unavailable for the purposes of requiring SIRVA to take the steps it was required to take under the Purchase Agreement, or to consummate the Transaction, on the basis that certain conditions have not been satisfied. As explained further herein, SIRVA cannot breach the Purchase Agreement, act in bad faith in the context of its contractual obligations and then lawfully (under the contract or Delaware law) claim that it is somehow entitled to refuse to close or terminate the deal. Nor can SIRVA claim that conditions to Realogy's use of specific performance to consummate the deal have not been satisfied when SIRVA itself caused them to fail.

9. In short, under the Purchase Agreement, SIRVA is obligated to purchase all of the issued and outstanding shares of common stock of Cartus Corporation ("Cartus"),[2] an indirect, wholly-owned subsidiary of Realogy, after giving effect to certain restructuring steps to separate from Cartus the affinity and broker-to-broker referral businesses that Realogy would retain (the "Transaction"). SIRVA is required to pay to Realogy an aggregate purchase price of $400 million, consisting of $375 million in cash payable at the closing of the Transaction (the "Closing"), subject to certain closing adjustments (the "Closing Date Payment"),[3] and a $25 million deferred payment payable after the Closing.

10. Realogy has fully performed all of its obligations under the Purchase Agreement. All of the Purchase Agreement's conditions to Closing have been fully satisfied (other than those conditions that by their terms or nature are to be satisfied at Closing, each of which is capable of being satisfied at the Closing). Realogy has been and remains ready, willing and able to close the Transaction.

11. For the reasons set forth below, Realogy respectfully requests, among other relief, an order requiring SIRVA to specifically perform its obligations under the Purchase Agreement to take all actions necessary to consummate the Transaction contemplated by the Purchase Agreement and pay the amounts required to be paid thereunder. In the alternative, if specific performance were to prove unavailable for any reason and the Purchase Agreement is deemed terminated, Realogy seeks to require payment of the termination fee contemplated under the Purchase Agreement from SIRVA and, if SIRVA fails to pay, to enforce the Limited Guaranty, dated November 6, 2019, made by Madison Dearborn in favor of Realogy (the "Limited Guaranty"). [4]

THE PARTIES

12. Plaintiff Realogy is a corporation organized and existing under the laws and by virtue of the General Corporation Law of the State of Delaware. Realogy is headquartered in Madison, New Jersey. Realogy is a full-service residential real estate services company, including brokerage, franchising, relocation, mortgage, and title and settlement services. As of November 7, 2019, Realogy's affiliated brokerages operated around the world with approximately 190,000 independent sales agents in the United States, and approximately 110,400 independent sales agents in 112 other countries and territories. Realogy's common stock trades on the NYSE under the ticker symbol "RLGY." As of the date of this Amended Complaint, Realogy had approximately 115.3 million shares outstanding.

13. Non-party Cartus Corporation is an indirect, wholly-owned subsidiary of Realogy. It provides relocation counseling to newly-hired or transferring employees of large corporations, logistical relocation support, international assignment compensation services, intercultural and language training, and consulting solutions. Cartus has approximately 2,000 employees and operates in more than 180 countries.

14. Relevant Non-Party Madison Dearborn Partners, LLC is a Chicago-based private equity firm specializing in leveraged buyouts of privately held or publicly traded companies, or divisions of larger companies; recapitalizations of family-owned or closely held companies; balance sheet restructurings; acquisition financings; and growth capital investments in mature companies. It operates using an industry-focused investment approach and focuses on the following five sectors: basic industries, business & government software and services, financial & transaction services, health care, and telecom, media and technology services. Since 1992, Madison Dearborn Partners, LLC has raised seven funds with aggregate capital of approximately $23 billion, and has completed investments in more than 130 companies. As of December 31, 2019, Madison Dearborn Partners, LLC managed a total of [Text redacted in copy] of client assets, all of which is managed on a discretionary basis.

15. Madison Dearborn Partners, LLC conducts its business through a variety of entities, intermediate holding companies and subsidiaries, including named defendants SIRVA Worldwide, Inc., Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P.

16. Madison Dearborn Partners, LLC provides advisory services, for a fee, to its funds. The advisory services consist of, among other things: (a) identifying and evaluating investment opportunities; (b) structuring, negotiating and consummating investments on behalf of the funds; and (c) managing, monitoring and disposing of such investments. Madison Dearborn Partners, LLC and its active partners also provide additional services, for a fee, to its portfolio companies and other investment vehicles of its various funds. These services include consulting services, transaction-related services, financial advisory services, monitoring services, capital markets services, corporate development services, and operational support and other services.

17. Madison Dearborn Partners, LLC's advisory services to its funds are provided through a limited partnership agreement, other similar organizational document, or a contractual side letter or advisory agreement.

18. Madison Dearborn Partners, LLC personnel often serve on a portfolio company's board of directors or otherwise act to influence, control or manage portfolio companies held by the funds. Madison Dearborn Partners, LLC and its active partners, on behalf of Madison Dearborn Partners, LLC, often receive stock of a portfolio company as a transaction fee in connection

with their service on the board of such portfolio company. Inferably, Madison Dearborn Partners, LLC controls, and causes the actions and inactions of, Madison Dearborn.

19. Madison Dearborn Partners, LLC focuses on investments in North America with a focus on the Midwest. In management buyouts, it seeks to invest between [Text redacted in copy] and [Text redacted in copy]. Madison Dearborn Partners, LLC prefers to invest between [Text redacted in copy] and [Text redacted in copy] in structured transactions and growth equity investments. It seeks to take a majority stake and a board seat in its portfolio companies. Madison Dearborn Partners, LLC generally seeks to exit its investments within a period of five to seven years.

20. Relevant non-party Thomas Souleles is a Managing Director and Co-Head of Madison Dearborn Partners, LLC's basic industries team. In those roles he oversees and controls investments in the basic industries sector. That sector currently includes investments in defendant SIRVA and in U.S. Lumber and Packaging Corporation of America, a leading distributor of specialty building materials.

21. In order to exercise control over the day-to-day business decisions of Madison Dearborn Partners, LLC's investments within the basic industries sector, Mr. Souleles frequently sits on the board of directors of Madison Dearborn Partners, LLC portfolio companies. He is, or has recently been, a director of both SIRVA and U.S. Lumber and Packaging Corporation of America, a former Madison Dearborn Partners, LLC portfolio company. He has formerly been a director of numerous other former Madison Dearborn Partners, LLC portfolio companies, including Boise Cascade Company, BWAY Holding Company, Great Lakes Dredge & Dock Corporation, Multi Packaging Solutions, Nordic Packaging and Container International, Packaging Corporation of America, Schrader International and Smurfit Kappa.

22. Defendant SIRVA is a corporation organized and existing under the laws and by virtue of the General Corporation Law of the State of Delaware. SIRVA is headquartered in Oakbrook Terrace, Illinois. SIRVA is a global relocation and moving service provider, providing integrated business-to-business mobility solutions for corporations, government institutions and consumers. SIRVA provides moving services through its portfolio of owned brands, including well-known names, such as Allied, Allied Pickfords, northAmerican, northAmerican International, Global Van Lines and SMARTBOX. SIRVA operates 75 locations, in addition to over 1,000 franchised and agent locations in 177 countries. SIRVA is the largest player in the moving and relocation industry.

23. SIRVA boasts [Text redacted in copy] relocations a year; outsourced moves, delivered under contract with corporate employers, and government and military customers to transfer personnel, account for the majority of SIRVA's sales. It operates in four segments: Moving Services ([Text redacted in copy] of net sales), Relocation Services ([Text redacted in copy]), Growth Markets ([Text redacted in copy]) and Australia ([Text redacted in copy]). SIRVA aims to grow by selling more relocation and moving service packages to multinational companies and government agencies. Its soup-to-nuts relocation services, delivered through several business units, include help with home sales, purchases, and mortgages, in addition to arranging the transportation of employees' household goods. SIRVA claims to have held a [Text redacted in copy] volume share globally in relocation services in 2018.

24. Today, SIRVA is a Madison Dearborn Partners, LLC portfolio company. Madison Dearborn Partners, LLC acquired SIRVA in 2018. If Madison Dearborn pursues its typical five- to seven-year investment life cycle, it can be expected to seek to exit SIRVA in three to five years. Inferably, therefore, Madison Dearborn's inorganic growth strategy for SIRVA likely prioritizes profitability of SIRVA's acquisition targets in that near-term window, to the exclusion of other concerns.

25. In connection with the Transaction, Madison Dearborn Partners, LLC touted SIRVA as “a leader in a dynamic and highly fragmented industry,” and noted that “SIRVA has a bright future.” Madison Dearborn Partners, LLC further stated, “[w]ith a strong brand, global footprint and impressive track record, SIRVA is well positioned to enter a new phase of growth and continued success.” A representative of Madison Dearborn Partners, LLC also said, “[w]e look forward to bringing to bear our expertise and deep network of resources and contacts to help [the CEO of SIRVA] and his leadership team build on SIRVA's

strong momentum and grow the business by continuing to provide the very best corporate relocation services available in the market."

26. Defendant North American Van Lines, Inc. is a corporation organized and existing under the laws and by virtue of the General Corporation Law of the State of Delaware and is an affiliate of SIRVA. North American Van Lines, Inc. provides moving services under the "northAmerican" brand.

27. On December 2, 2019, SIRVA and its affiliate, North American Van Lines, Inc., entered into an Assignment and Assumption of Agreement, pursuant to which SIRVA assigned its rights under the Purchase Agreement to North American Van Lines, Inc.

JURISDICTION, VENUE AND GOVERNING LAW

28. Each Party to the Purchase Agreement (SIRVA and Realogy):

> (ii) *irrevocably submits itself and its properties and assets to the exclusive jurisdiction of the Court of Chancery of the State of Delaware* (or, if the Court of Chancery of the State of Delaware declines to accept or does not have jurisdiction over a particular matter, the Superior Court of the State of Delaware or any federal court sitting in the State of Delaware) for the purpose of any Action or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the actions of the parties hereto in the negotiation, administration, performance and enforcement of this Agreement and the Transaction; (iii) *consents to submit itself to the personal jurisdiction of the Court of Chancery of the State of Delaware* (or, if the Court of Chancery of the State of Delaware declines to accept or does not have jurisdiction over a particular matter, the Superior Court of the State of Delaware or any federal court sitting in the State of Delaware) for the purpose of any Action or counterclaim...(vi) agrees that it will not bring any Action or counterclaim relating to this Agreement or the Transaction in any court other than the aforesaid courts. Each of the Parties agrees that a final judgment in any action or proceeding in such courts as provided above shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by applicable Law. The Parties hereby further agree that New York state or U.S. Federal courts sitting in New York County, State of New York shall have exclusive jurisdiction over any action (whether at law, in equity, in contract, in tort or otherwise) brought against any Debt Financing Source in connection with the Transaction, including to the extent arising out of or relating in any way to the Debt Commitment Letter.

(PA § 13.10) (emphasis added)

29. Each Party to the Limited Guaranty (Madison Dearborn and Realogy):

> (b) *irrevocably submits itself and its properties and assets to the exclusive jurisdiction of the Court of Chancery of the State of Delaware* (or, if the Court of Chancery of the State of Delaware declines to accept or does not have jurisdiction over a particular matter, the Superior Court of the State of Delaware or any federal court sitting in the State of Delaware) for the purpose of any Action or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Limited Guaranty or the actions of the parties hereto in the negotiation, administration, performance and enforcement of this Limited Guaranty and the transaction contemplated hereby; (c) *consents to submit itself to the personal jurisdiction of the Court of Chancery of the State of Delaware* (or, if the Court of Chancery of the State of Delaware declines to accept or

> does not have jurisdiction over a particular matter, the Superior Court of the State of Delaware or any federal court sitting in the State of Delaware) for the purpose of any Action or counterclaim;...(f) agrees that it will not bring any Action or counterclaim relating to this Limited Guaranty or the transactions contemplated hereby in any court other than the aforesaid courts.....

(LG § 15) (emphasis added)

30. In addition, the Court has jurisdiction over this civil action:
Pursuant to 8 Del. C. § 111(a), which grants to the Court of Chancery jurisdiction over, among other things, "[a]ny civil action to interpret, apply, enforce or determine the validity of ... [a]ny instrument, document or agreement (i) by which a corporation creates or sells, or offers to create or sell, any of its stock, or any rights or options respecting its stock, or (ii) to which a corporation and 1 or more holders of its stock are parties, and pursuant to which any such holder or holders sell or offer to sell any of such stock, or (iii) by which a corporation agrees to sell, lease or exchange any of its property or assets, and which by its terms provides that 1 or more holders of its stock approve of or consent to such sale, lease or exchange...."

Pursuant to 10 Del. C. § 341, which grants to the Court of Chancery jurisdiction "to hear and determine all matters and causes in equity."

31. This civil action is governed by Delaware law. Subject to specified exceptions not applicable here, Section 13.9 of the Purchase Agreement provides that the Purchase Agreement and any action arising out of or relating to the Purchase Agreement, and any of the transactions contemplated by the Purchase Agreement or the Limited Guaranty, among other things, shall be governed by, and construed in accordance with, the laws of the State of Delaware, regardless of the laws that might otherwise govern under any applicable principles of choice or conflicts of laws of the State of Delaware.

32. Similarly, Section 14 of the Limited Guaranty provides that the Limited Guaranty and all actions arising out of or relating thereto, or to the actions of SIRVA or Madison Dearborn in the performance thereof, are governed by the laws of the State of Delaware.

FACTUAL ALLEGATIONS

33. Cartus and SIRVA are industry competitors in the worldwide moving and relocation industry. A large portion of both the Cartus and SIRVA businesses are corporate-paid relocations. Volumes in that segment of the moving and relocation industry have been flat to declining over the past several years. This general industry trend is caused by, among other things, reduction by large corporations of the number of executives that qualify for such relocation services and pricing pressures across the businesses.

34. As a result, Madison Dearborn and SIRVA recognized that one key way to increase the profitability of the SIRVA business and gain market share was to consolidate with another company within the moving and relocation industry and take advantage of the resulting synergies from the combination. Indeed, SIRVA had a stated [Text redacted in copy] In recent years, other large industry players have exercised the same consolidation strategy.

35. In early to mid-2019, the environment was particularly favorable for consolidation in the moving and relocation industry. For example, during this period the Department of Defense (the "DOD") put out a Request for Proposal ("RFP") for a single third-party provider of relocation services for active service members. According to U.S. Army General Stephen Lyons, commander of the United States Transportation Command, the DOD is the largest consumer of household goods services, such as moving

and relocation services. The DOD wanted to improve the relocation process for service members. It was expected that the DOD would choose a single, third-party provider in late 2019-early 2020, with implementation in late 2020. This single government contract was expected to account for approximately 300,000 to 400,000 household goods shipments *per year,* and to be worth *billions of dollars in revenue.*

36. The potential size of this single contract had many companies scrambling to position themselves for a successful bid. To illustrate, SIRVA completes approximately [Text redacted in copy] relocations a year. [Text redacted in copy] The economic potential from this contract for Madison Dearborn Partners, LLC's portfolio companies (and, thus, Madison Dearborn) was extraordinary because of the importance of household goods shipments in the Madison Dearborn Partners, LLC's portfolio.

37. During 2019, the strategic rationale for combining the SIRVA business with the Cartus business suggested that Madison Dearborn would reap a host of benefits from a SIRVA/Cartus combination. To start, [Text redacted in copy] Next, Realogy (unlike Madison Dearborn Partners, LLC) did not own any van lines or trucking company assets of its own. Instead, Cartus sub-contracted with moving companies to provide those services. Less than [Text redacted in copy] of the Cartus global moving volume was sub-contracted to SIRVA in 2019. If combined with SIRVA, Madison Dearborn expected to capture a much higher share of that Cartus sub-contracting work for its own van line and trucking portfolio companies.

38. Moreover, Cartus had more advanced and sophisticated technology integrated into an Oracle platform that would be valuable to Madison Dearborn and SIRVA, completing the Transaction would relieve them of the difficulty and expense of building a similar platform from scratch.

39. Additionally, the meaningful synergies derived from combining SIRVA and Cartus would quickly increase profits for Madison Dearborn. Indeed, the combined company was expected to yield [Text redacted in copy] a combination of approximately [Text redacted in copy] Finally, combining the two businesses would create sufficient scale to go after larger customer contracts. The combination of two of the largest players in the industry made great sense from SIRVA and Madison Dearborn's perspective.

40. In an investor presentation from April of this year, SIRVA, in fact, touted that it expected "to achieve [Text redacted in copy] and quoted an anonymous customer as predicting that the combined company would be [Text redacted in copy]

41. Realogy also recognized that 2019 was an appropriate time to explore selling the Cartus business.

(a) Negotiation And Signing Of The Agreement

42. Realogy and SIRVA entered into the Purchase Agreement on November 6, 2019, following extensive negotiations and due diligence. In the Purchase Agreement, SIRVA agreed to acquire Cartus for an aggregate purchase price of $400 million, consisting of $375 million in cash payable at the Closing of the Transaction, subject to certain Closing adjustments, [5] and a $25 million deferred payment payable after the Closing.

43. Before the markets opened in the United States on November 7, 2019, Realogy and SIRVA each issued a press release announcing the entry into the Purchase Agreement.

44. In its press release, SIRVA touted the benefits of the proposed Transaction:
The addition of Cartus's Relocation business will expand SIRVA's service and support capability, consistent with the company's strategy to be everywhere their clients want them to be.

"The winners in this transaction are undoubtedly our clients and their employees," said Tom Oberdorf, Chief Executive Officer at SIRVA. "We're excited by the tremendous potential of this highly complementary combination to enhance our capabilities and service for clients. Together, we will have the opportunity to provide our customers with the best that each company has to offer,

including best-in-class technology, a well-established Real Estate Broker network, an integrated household goods capacity and a superior experience for our clients' relocating corporate employees. Cartus' talented relocation professionals are steeped in mobility expertise, and we look forward to welcoming them to the SIRVA family."

Cartus brings to SIRVA a highly talented and experienced employee group and a strong supply chain that promises to enhance SIRVA's exceptional transferee experience. Cartus clients will benefit from having access to SIRVA's integrated household goods capacity and a larger, combined supply chain, whose increased scale should help drive down clients' costs over time.

45. SIRVA's preliminary offering memorandum, dated April 13, 2020, issued in connection with the offering of debt securities to finance the Transaction similarly touted the benefits of the Transaction, stating that it [Text redacted in copy]

46. In a draft April 2020 Investor Presentation ("IP"), SIRVA further detailed the rationale behind the Transaction. SIRVA noted that Cartus is a [Text redacted in copy] SIRVA believed that the Transaction would create a combined business that [Text redacted in copy]

47. The combination would allow [Text redacted in copy] As recently as mid-April, SIRVA estimated that the total opportunity synergies to be borne from the Transaction would be approximately [Text redacted in copy] with approximately [Text redacted in copy] coming from [Text redacted in copy] Furthermore, SIRVA indicated that [Text redacted in copy]

(b) Terms Of The Agreement And Other Related Documents

48. A series of agreements were entered into on November 6, 2019, some of which Realogy was a party to and some of which it was not. Similarly, Madison Dearborn was a party to some of those agreements and not to others. Finally, SIRVA was a party to each of the related agreements executed on November 6, 2019, other than the Limited Guaranty.

(i) The Purchase Agreement

49. The Parties to the Purchase Agreement are Realogy and SIRVA. The Purchase Agreement was negotiated by sophisticated parties with experienced counsel. As is the case for all Delaware contracts, the Parties to the Purchase Agreement are bound by the implied covenant of good faith and fair dealing. Some of the more relevant provisions of the Purchase Agreement are set forth below and the entire Purchase Agreement is attached hereto as Exhibit A.

(1) Financing And Reasonable Best Efforts Obligations

50. Pursuant to the Purchase Agreement, SIRVA has numerous reasonable best efforts obligations with respect to any financing obtained in connection with the Transaction.

(A) The Equity Commitment Letter

51. To assist with funding the Transaction, SIRVA obtained an equity commitment letter (the "ECL") from Madison Dearborn.

52. The parties to the ECL are Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., Madison Dearborn Capital Partners VII Executive-A, L.P., and SIRVA Worldwide, Inc. Realogy is not a party to the ECL. The ECL was negotiated by sophisticated parties with experienced counsel. The ECL is governed by the laws of the state of Delaware, including the implied covenant of good faith and fair dealing. Some of the provisions of the ECL are set forth below, and the entire ECL is attached hereto as Exhibit C.

53. Pursuant to the ECL, Madison Dearborn agrees to purchase up to [Text redacted in copy] of SIRVA equity to fund the Transaction. The ECL further provides that Madison Dearborn's commitment is reduced to the extent that SIRVA is able to fund that portion of the purchase price in the Transaction with other sources, including debt financing.

54. Madison Dearborn's obligations under the ECL are subject to certain enumerated conditions. Specifically, Section 2 states:

> Each Investor's [6] obligations under this letter agreement, including the obligation of each Investor to fund the Commitment, are, in each case, subject to (a) the execution and delivery of the Purchase Agreement by Buyer and Seller, (b) the satisfaction or (to the extent permitted by applicable Law) waiver by Buyer of each of the conditions to Buyer's obligations to consummate the transactions contemplated by the Purchase Agreement other than any conditions that by their nature are to be satisfied at the Closing, but subject to the prior or substantially concurrent satisfaction (or waiver by Buyer) of such conditions, (c) the substantially concurrent consummation of the Acquisition in accordance with the terms of the Purchase Agreement (including to the extent that Seller obtains, in accordance with the terms and subject to the satisfaction of the conditions set forth in Section 13.8 of the Purchase Agreement, an order requiring Buyer to specifically perform its obligations pursuant to the terms of the Purchase Agreement to cause the Commitment to be funded in connection with the consummation of the Transactions) and the contemporaneous issuance of equity securities of Global Relocation and Moving Services, LP to the Investors, directly or indirectly, and (d) the consummation and funding of the Debt Financing on the terms set forth in the Debt Financing Commitments (or, if Alternative Financing is being used in accordance with Section 7.3 of the Purchase Agreement, such Alternative Financing on the terms set forth in the debt commitment letter with respect thereto) prior to or substantially contemporaneously with such funding by the Investors; provided that Investors shall not be permitted to assert a failure of conditions (b) and (c) above if the Investors' failure to fund the Commitment when required hereunder shall have been the sole cause of the failure of any such condition.

(ECL § 2)

55. Madison Dearborn's obligations under the ECL terminate under certain enumerated conditions. Specifically, Section 3 states:

> The obligation of the Investors to fund the Commitment shall, in each case, automatically and immediately terminate upon the earliest to occur of (a) *the Closing;* provided that the Investors shall prior thereto have fully funded and paid the Commitment (as such amount may be reduced as expressly provided herein) to Buyer, directly or indirectly, (b) *the valid termination of the Purchase Agreement* in accordance with its terms, (c) Seller or any of its Representatives *asserting,* filing or otherwise commencing any Action against, any Investor Affiliate (as defined below) relating to this letter agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby *other than Retained Claims* (as defined in, and to the extent permitted under, the Limited Guaranty), in each case, subject to all of the terms, conditions and limitations herein and therein or (d) the occurrence of any event (subject to clause (a) of this paragraph in the event of the Closing) which, by the terms of the Limited Guaranty, is an event which terminates or satisfies in full all Guarantors' obligations and liabilities under the Limited Guaranty.

(*Id.* at § 3) (emphasis added)

(B) The Debt Commitment Letter

56. To further fund the Transaction, SIRVA also obtained a debt commitment letter (the "DCL") from a group of lenders including Barclays Bank PLC ("Barclays"), Deutsche Bank AG New York Branch, Deutsche Bank Securities Inc., Bank of America, N.A., BofA Securities, Inc. (or any of its designated affiliates), Canadian Imperial Bank of Commerce, New York Branch, CIBC Bank USA, Sumitomo Mitsui Banking Corporation and CBAM Partners, LLC (the "Lenders").

57. The parties to the DCL are SIRVA, Inc., SIRVA Worldwide, Inc., North American Van Lines, Inc., Allied Van Lines, Inc., Allied International N.A., Inc. and the Lenders. Realogy is not a party to the DCL. The DCL was negotiated by sophisticated parties with experienced counsel. The DCL is governed by the laws of the state of New York, except to the extent that it relies on certain terms or conditions of the Purchase Agreement, enumerated in Section 10 of the DCL, to which Delaware law applies. Some of the provisions of the DCL are set forth below and the entire DCL is attached hereto as Exhibit D.

58. Pursuant to the DCL, the Lenders agree to fund Incremental Credit Facilities, consisting of a [Text redacted in copy] Incremental Term Facility and a [Text redacted in copy] Incremental Revolving Facility. Section 3 of the DCL further contemplates that certain of the Lenders will have the opportunity to syndicate the Incremental Credit Facilities to a group of banks, financial institutions and other lenders. In effect, the Lenders commit to fund the Incremental Credit Facilities up to $[Text redacted in copy], to the extent that they are not able to syndicate the Incremental Credit Facilities. Syndication of the Incremental Credit Facilities is not, therefore, a condition to financing the Transaction.

59. The Lenders' obligations to fund the Incremental Credit Facilities are subject to certain enumerated conditions, described in detail in Section 6 and at Exhibit C to the DCL, including, *inter alia,* that SIRVA raise at least [Text redacted in copy] in equity and that Cartus not have experienced a Material Adverse Effect. The DCL contemplated that SIRVA would raise the [Text redacted in copy] in equity pursuant to Madison Dearborn's obligations under the ECL.

60. With respect to termination, the DCL provides, in Section 10, that it

> shall automatically terminate in the event that (a) in respect of the Incremental Credit Facilities, if the initial borrowing thereunder does not occur on or before 11:59 p.m., New York City time, on the date that is five business days after the Outside Date (as defined in the Purchase Agreement as in effect on the Original Commitment Letter Date, including any extension of the Outside Date pursuant to the provisio [*sic*] of Section 11.1(a)) thereof (as in effect on the Original Commitment Letter Date), (b) the Acquisition closes with or without the use of the Incremental Credit Facilities, or (c) after execution of the Purchase Agreement and prior to the consummation of the Acquisition, the termination of the Purchase Agreement by you (or your affiliates) or with your (or your affiliates') written consent or otherwise in accordance with its terms (other than with respect to provisions therein that expressly survive termination)....

(DCL § 10)

(C) The Securitization Facility Amendment Commitment Letter

61. SIRVA additionally obtained a Securitization Facility Amendment Commitment Letter (the "SFCL") in connection with the Transaction, amending SIRVA's existing receivables purchase facility with Wells Fargo Bank, National Association ("Wells Fargo Bank") and Wells Fargo Bank, N.A., London Branch ("Wells Fargo UK"). The SFCL contemplated the amendment of the receivables purchase facility to change its termination date, increase the commitment of Wells Fargo Bank and Wells Fargo UK by [Text redacted in copy], and join Cartus to the underlying Receivables Sale Agreement and Purchase and Sale Agreement. Similar to the DCL, the SFCL conditioned these amendments on SIRVA raising at least [Text redacted in copy] in equity and the non-occurrence of a Material Adverse Effect. Implicit in the SFCL was that SIRVA would raise the [Text redacted in copy] in equity pursuant to Madison Dearborn's obligations under the ECL.

(2) No Financing Out

62. Although SIRVA obtained financing to assist it with funding the Transaction, the Purchase Agreement makes crystal clear that SIRVA's obligations under the Purchase Agreement - including its obligations to use reasonable best efforts to satisfy the conditions to closing as soon as practicable and its obligations to consummate the Transaction - are not conditioned on its ability to obtain financing to fund the Transaction. Specifically, Section 7.3(f) states:

> Notwithstanding anything in this Agreement to the contrary, but without limiting or amending the provisions of Article XI or Section 13.8, *Buyer acknowledges and agrees that its obligations set forth in this Agreement are not contingent or conditioned upon any Person's ability to obtain financing for or in connection with the Transaction.*

(PA § 7.3(f)) (emphasis added)

63. Likewise, Section 6.6 provides:

> *Buyer acknowledges that,* subject in all respects to Article XI and Section 13.8(b), *its obligations set forth in this Agreement are not contingent or conditioned upon Buyer's, its Affiliate's or any other Person's ability to obtain financing* (including the Financing or any Alternative Financing)for *or in connection with the Transaction.*

(*Id.* at § 6.6) (emphasis added)

(3) Reasonable Best Efforts To Obtain And Maintain Financing

64. While SIRVA's obligations under the Purchase Agreement are not *conditioned* on its ability to obtain financing, Section 7.3 of the Purchase Agreement sets forth SIRVA's various obligations with respect to any financing it obtained or obtains to assist with funding the Transaction.

65. Section 7.3(a) of the Purchase Agreement requires SIRVA to use its "reasonable best efforts" to take all actions and do all things necessary and proper to "consummate and obtain the Debt Financing." Section 7.3(a) further obligates SIRVA to use its reasonable best efforts to "comply with" and "maintain in effect" the Debt Financing Commitments until "the Transaction is consummated" or the Purchase Agreement "is terminated in accordance with its terms." Section 7.3(a) also obligates SIRVA

to "satisfy or obtain a waiver of all conditions applicable to [SIRVA] and its Affiliates in the Debt Financing Commitments that are within its or its Affiliates' control."

66. Specifically, Section 7.3(a) states:

> (a) Buyer shall, and shall cause its Subsidiaries to, use its reasonable best efforts to cause its Representatives to, use their respective reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable to consummate and obtain the Debt Financing on the terms and subject only to the conditions (including the market flex provisions) expressly set forth in the Debt Financing Commitment, including using their respective reasonable best efforts to (i) comply with and maintain in effect the Debt Financing Commitments in accordance with the terms and subject to the conditions thereof until the Transaction is consummated or this Agreement is terminated in accordance with its terms, (ii) satisfy or obtain a waiver of all conditions applicable to Buyer and its Affiliates in the Debt Financing Commitments that are within its or its Affiliates' control, (iii) negotiate and enter into definitive agreements with respect to the Debt Financing on the terms and subject only to the conditions (including the market flex provisions) set forth in the Debt Financing Commitments, (iv) consummate the Debt Financing on or prior to the Closing Date; and (v) enforce its rights under the Debt Financing Commitments; provided that the foregoing shall not require Buyer or any of its Subsidiaries to institute an Action or other legal proceeding ....

(PA § 7.3(a))

67. Thus, under Section 7.3(a), SIRVA is required to use its reasonable best efforts to, among other things, *maintain in effect* the Debt Financing Commitments until the Transaction is consummated or the Purchase Agreement is validly terminated, including, if necessary, by *satisfying or obtaining a waiver of any condition applicable to SIR VA* in the Debt Financing Commitments if within its control.

68. Under Section 7.3(c), if SIRVA becomes aware of any termination of any Debt Financing Commitments, any actual or threatened breach, default, termination, or repudiation of any provisions in the Debt Financing Commitments, or the occurrence of any event or development that would reasonably be expected to "adversely impact the ability of [SIRVA] to obtain all or any portion of the Debt Financing contemplated in the Debt Financing Commitments," then SIRVA is required to provide Realogy with prompt written notice within two business days after becoming aware of such event.

69. Specifically, Section 7.3(c) provides:

> Buyer shall give Seller prompt written notice (and, in any event, within two (2) Business Days after becoming aware) of: (i) any termination of any Debt Financing Commitments; (ii) any actual or threatened breach, default, termination or repudiation of any provisions of the Debt Financing Commitments, in each case, by any party thereto, of which Buyer becomes aware; and (iii) the occurrence of any event or development that would reasonably be expected to adversely impact the ability of Buyer to obtain all or any portion of the Debt Financing contemplated by the Debt Financing Commitments on the terms and conditions, in the manner or from the sources contemplated by any of the Debt Financing Commitments.

(PA § 7.3(c))

70. Section 7.3(c) further provides that if "any portion of the Debt Financing becomes *unavailable on the terms and conditions ... thereof* or from the Debt Financing Sources contemplated in the Debt Financing Commitments" *or if any of the Debt Financing Commitments "expire, or [are] withdrawn, terminated, repudiated or rescinded, in whole or in part, for any reason"* then SIRVA is required to use its reasonable best efforts to arrange and obtain Alternative Financing.

> Specifically, Section 7.3(c) provides, If any portion of the Debt Financing becomes unavailable on the terms and conditions (including any market flex provisions) thereof or from the Debt Financing Sources contemplated in the Debt Financing Commitments or any of the Debt Financing or Debt Financing Commitments (or any definitive financing agreement relating thereto) shall expire or be withdrawn, terminated, repudiated or rescinded, in whole or in part, for any reason (but without limiting the obligations of Buyer in this Section 7.3(a)) (unless such portion of the Debt Financing is not reasonably required to consummate the Transaction), Buyer shall use its reasonable best efforts to (x) arrange and obtain, as promptly as practicable following the occurrence of such event, alternative financing from the same or alternative sources (the "Alternative Financing") in an amount sufficient to consummate the Transaction with terms and conditions not materially less favorable in the aggregate to Buyer than those set forth in the Debt Financing Commitments (or replace any unavailable portion of the Financing) and (y) obtain a debt financing commitment letter (including any associated fee letter) with respect to such Alternative Financing, true, accurate and complete copies of which shall be promptly provided to Seller upon execution thereof (which fee letters may be redacted with respect to any interest rates, fee amounts, pricing caps and other similar economic terms (including flex terms) set forth therein).

(PA § 7.3(c))

71. Although the Debt Financing was available throughout the period leading up to the scheduled Closing Date and thereafter, if either the Debt Financing in the DCL becomes unavailable or the Debt Financing *expires or is terminated for any reason, including by its terms,* then SIRVA is required to use its reasonable best efforts to arrange and obtain, *as promptly as practicable,* Alternative Financing and a debt financing commitment letter with respect to such Alternative Financing.

72. Similar to its obligations with respect to Debt Financing, Section 7.3(d) requires SIRVA to use its "reasonable best efforts" to take all actions and do all things necessary to obtain the Equity Financing and maintain in effect the Equity Financing Commitments. This includes taking all actions to "consummate the Equity Financing at or prior to Closing" and "enforc[ing] its rights (*including through litigation*) under the Equity Financing Commitments, *including seeking any specific performance of the parties' obligations thereunder*" and causing the Equity Financing Sources to fund the Equity Financing no later than the Closing.

73. Furthermore, while Section 7.4(a) provides that Realogy must reasonably cooperate in connection with the arrangement of Debt Financing, the Purchase Agreement provides that Realogy's obligation in this regard is deemed satisfied *unless* Debt Financing has not been obtained as a result of Realogy's breach of its obligations under Section 7.4(a) and such breach remains uncured ten days after Realogy has received written notice of such breach by SIRVA.

74. The provisions set forth above show that, although SIRVA's obligations under the Purchase Agreement are in no way contingent or conditioned on its ability to obtain financing, SIRVA must nonetheless use its reasonable best efforts to consummate and maintain any financing obtained in connection with the Transaction, and, if any such financing is lost, to obtain, *as promptly as practicable,* Alternative Financing.

(4) Reasonable Best Efforts To Satisfy Closing Conditions And Cause The Closing To Occur

75. The Purchase Agreement also includes an overall reasonable best efforts obligation. Specifically, under Section 7.6(a) of the Purchase Agreement, the parties agreed to use "reasonable best efforts" to cause the conditions to Closing to be satisfied "and to cause the Closing to occur":

> In accordance with the terms and subject to the conditions of this Agreement, each Party *shall use their respective reasonable best efforts to cause the conditions set forth in Article X to be satisfied as soon as practicable* following the date of this Agreement (giving effect, among other things, to the remaining provisions of this Section 7.6 (including the last sentence of this Section 7.6(a) and Section 7.6(b)) and in any event on or prior to the Outside Date (as the same may be extended in accordance with this Agreement) *and to cause the Closing to occur* on the terms and (unless otherwise validly waived by a Party) subject to the conditions specified in this Agreement as soon as practicable after the Required Financial Information has been delivered (giving effect to the provisions of the Marketing Period and Section 2.3))....

(PA § 7.6(a)) (emphasis added)

(ii) Material Adverse Effect

76. Article X of the Purchase Agreement sets forth the conditions to Closing. Those conditions include, as provided at Section 10.2(c), that "[s]ince the date of this Agreement, no events or circumstances shall have occurred that, individually or in the aggregate, have had a Material Adverse Effect."

77. A "*Material Adverse Effect,*" as defined in the Purchase Agreement in Section 1.1, generally:

> means (a) any change, event, occurrence, circumstance or effect that, individually or in the aggregate with all other changes, events, occurrences, circumstances or effects, has, or would reasonably be expected to have, a material adverse effect on the results of operations or financial condition of [Cartus], or (b) any change, event, occurrence, circumstance or effect that would or would reasonably be expected to prevent or materially impair or materially delay the ability of [Realogy] to consummate the Transaction....

(PA § 1.1)

78. However, excepted from the definition of Material Adverse Effect for purposes of clause (a) are, among other things, "any change, event, occurrence, circumstance or effect to the extent resulting from, relating to or arising out of":

- "(i) general economic, legal, tax, political or regulatory conditions that, in each case, generally affect any of the geographic regions or industries in which such Person or any of its Affiliates, as applicable, conducts its business;"

- "(ii) any change in the financial, banking, credit, currency or capital markets in general (whether in the U.S. or any other country or in any international market), including changes in interest rates, commodity prices or raw material prices;"

- "(iii) conditions generally affecting any industry in which the Acquired Companies operate;"

• "(iv) acts of God, natural disasters, national or international political or social conditions, including the engagement in hostilities by any country in which an Acquired Company is located or operates, whether commenced before or after the date of this Agreement, and whether or not pursuant to the declaration of a national emergency or war (including any escalation or worsening of war), or the occurrence of any military or terrorist attack; ..."

• "(ix) any failure by Seller or its Affiliates (including the Acquired Companies) to meet internal or other earnings estimates or financial projections (but the underlying causes thereof are not excluded);"

• "or (x) changes in credit ratings or the stock price or trading volume of Seller ..."

(PA § 1.1)

79. Exclusions "(i)-(iv) and (vii) shall not apply to the extent that Cartus is disproportionately adversely affected by any change, event, occurrence, circumstance or effect in such clauses relative to other similarly situated participants in industries in which the Business operates." (PA § 1.1)

80. The definition of Material Adverse Effect reads in full as follows:

> "Material Adverse Effect" means (a) any change, event, occurrence, circumstance or effect that, individually or in the aggregate with all other changes, events, occurrences, circumstances or effects, has, or would reasonably be expected to have, a material adverse effect on the results of operations or financial condition of the Business, or (b) any change, event, occurrence, circumstance or effect that would or would reasonably be expected to prevent or materially impair or materially delay the ability of Seller to consummate the Transaction; *provided* that Material Adverse Effect shall not include, solely in the case of clause (a), any change, event, occurrence, circumstance or effect to the extent resulting from, relating to or arising out of (i) general economic, legal, tax, political or regulatory conditions that, in each case, generally affect any of the geographic regions or industries in which such Person or any of its Affiliates, as applicable, conducts its business; (ii) any change in the financial, banking, credit, currency or capital markets in general (whether in the U.S. or any other country or in any international market), including changes in interest rates, commodity prices or raw material prices; (iii) conditions generally affecting any industry in which the Acquired Companies operate; (iv) acts of God, natural disasters, national or international political or social conditions, including the engagement in hostilities by any country in which an Acquired Company is located or operates, whether commenced before or after the date of this Agreement, and whether or not pursuant to the declaration of a national emergency or war (including any escalation or worsening of war), or the occurrence of any military or terrorist attack; (v) any action taken by Buyer or any of its Affiliates in violation of this Agreement; (vi) other than with respect to representations and warranties set forth in *Section 4.3* and *Section 5.3(b),* the negotiation, announcement, pendency, execution, delivery or performance of this Agreement or the consummation of the Transaction, the disclosure of the fact that Buyer is the prospective acquirer of the Business; or any communication by Buyer or any of its Affiliates regarding plans or intentions of Buyer with respect to the Acquired Companies or the Business (including the impact of any of the foregoing on relationships with customers, suppliers, employees or regulators, and any suit, action or proceeding arising therefrom or in connection therewith); (vii) any changes or proposed changes in GAAP (or other applicable accounting regulations) or any change (or proposed change) in applicable Laws or the interpretation thereof; (viii) compliance with the terms of, or the taking of any action required or expressly contemplated by, this Agreement or any of the other Transaction Documents or any action taken, or failure to take action, to which Buyer has given its prior written consent; (ix) any failure by Seller or its Affiliates (including the Acquired Companies) to meet internal or other earnings estimates or financial

> projections (but the underlying causes thereof are not excluded); or (x) changes in credit ratings or the stock price or trading volume of Seller; *provided, however,* that the exclusions in clauses (i)-(iv) and (vii) shall not apply to the extent the Business is disproportionately adversely affected by any change, event, occurrence, circumstance or effect in such clauses relative to other similarly situated participants in industries in which the Business operates.

(iii) Closing Mechanics

81. Article X of the Purchase Agreement sets forth the conditions of the parties' obligations to close the Transaction. Section 10.1 provides, in relevant part:
The respective obligations of [SIRVA] and [Realogy] to consummate, or cause to be consummated, the Transaction pursuant to this Agreement shall be subject to the satisfaction or, to the extent not prohibited by law, waiver by [SIRVA] and [Realogy], at or prior to the Closing, of the conditions set forth in this Section 10.1.

(a) *Government and Regulatory Approvals.* (i) all waiting periods ... under the HSR Act and any agreement between the Parties and a Governmental Entity not to consummate the Transaction agreed to in accordance with the last sentence of Section 7.6(a) shall have expired or been terminated, and (ii) all Consents of the Governmental Entities set forth in Section 10.1(a) of the Seller Disclosure Letter shall have been obtained.

(b) *No Injunctions.* At the Closing Date, there shall not be in effect any preliminary or permanent injunction or other order issued by any Governmental Entity of competent jurisdiction which restrains, prohibits or otherwise makes illegal the consummation of the Transaction, and no Law shall have been enacted, issued, enforced, entered, or promulgated and remains in effect that prohibits or makes illegal the consummation of the Transaction.

(PA § 10.1)

82. Section 10.2 of the Purchase Agreement sets forth the conditions to SIRVA's obligations to close the Transaction. Section 10.2 provides:
The obligations of Buyer to effect the Closing and consummate the Transaction pursuant to this Agreement shall be subject to the satisfaction, at or prior to the Closing, of each of the conditions set forth in this *Section 10.2,* any of which may be, to the extent not prohibited by Law, waived, in writing, exclusively by Buyer in its sole and absolute discretion:

(a) *Representations and Warranties of Seller.* (i) The representations and warranties of Seller set forth in this Agreement (other than Seller Fundamental Representations) shall be true and correct as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a specific date, in which event such representation or warranty shall be true and correct only as of such specific date), except where the failure of any such representation or warranty to be so true and correct ... would not, individually or in the aggregate, have a Material Adverse Effect on the Business, taken as a whole, and (ii) Seller Fundamental Representations shall be true and correct in all material respects ... as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a specific date, in which event such representation or warranty shall be so true and correct only as of such specific date).

(b) *Performance.* Seller shall have performed and complied with, in all material respects, each covenant and obligation required by this Agreement to be so performed or complied with by Seller on or before the Closing.

(c) *No Material Adverse Effect.* Since the date of this Agreement, no events or circumstances shall have occurred that, individually or in the aggregate, have had a Material Adverse Effect.

(d) *Officer's Certificate.* Buyer shall have received a certificate of a duly authorized executive officer of Seller, dated as of the Closing Date, certifying that the conditions set forth in Section 10.2(a), Section 10.2(b), Section 10.2(c) and Section 10.2(e) have been satisfied.

(e) *Restructuring.* The Restructuring shall have been completed in all material respects in accordance with Section 2.2(a) of the Seller Disclosure Letter.

(PA § 10.2)

(iv) Enforcement Provisions

83. Section 13.8(a) of the Purchase Agreement expressly entitles Realogy to an order of specific performance to enforce SIRVA's numerous obligations under the Purchase Agreement, including its obligations to use its reasonable best efforts to cause the conditions to Closing to be satisfied "as soon as practicable" and its obligations to use its reasonable best efforts to consummate and maintain any financing obtained in connection with the Transaction, and, if any such financing is lost, to obtain, *as promptly as practicable,* Alternative Financing.

84. Section 13.8(a) provides:

> The Parties hereby expressly recognize and acknowledge that immediate, extensive and irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that the Parties do not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder to consummate the Transaction) in accordance with its specified terms or otherwise breach such provisions. Accordingly, subject to the terms and conditions in this Section 13.8, the Parties acknowledge and agree that the Parties shall be entitled to an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity. Each of the Parties agrees that it will not oppose the granting of an injunction, specific performance and other equitable relief to any Party that is expressly entitled to bring an action therefor pursuant to the terms of this Agreement on the basis that any other Party has an adequate remedy at law or that any award of specific performance is not an appropriate remedy for any reason at law or in equity. Any Party expressly entitled hereunder to seek an injunction or injunctions or any other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement shall not be required to show proof of actual damages or provide any bond or other security in connection with any such order or injunction.

(PA § 13.8(a))

85. Only two narrow limits exist to Realogy's ability to seek specific performance. Those are set forth in Section 13.8(b) of the Purchase Agreement.

86. The first is contained in Section 13.8(b)(i), which states that "in no event shall Seller ... be entitled to, or permitted to seek, specific performance, against the Debt Financing Sources, except in each case indirectly through the enforcement of Buyer's

obligations hereunder." In other words, although Realogy cannot *directly* force the Debt Financing Sources to perform, it can force SIRVA to comply with its many obligations related to those Debt Financing Sources, including, but not limited to, its obligations under Section 7.3(a) of the Purchase Agreement to procure, maintain, and substitute Debt Financing as necessary to enable SIRVA to close the Transaction, as described *supra.* Thus, Realogy can "indirectly" compel such performance.

87. The second is contained in Section 13.8(b)(ii), which states that Realogy "*shall be entitled to bring an Action to specifically enforce Buyer's obligation to consummate the Closing* and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded" if four conditions are satisfied: (A) the conditions to Closing must be satisfied; (B) the proceeds of the Debt Financing have been funded or irrevocably committed; (C) Realogy has not terminated and has irrevocably confirmed that all conditions to Closing are satisfied (or waived, except those that by their nature are to be satisfied by actions to be taken at the Closing, each of which shall then be capable of being satisfied at the Closing), and, once the funding occurs, commits to Closing; and (D) Buyer fails to consummate the Closing.

88. *These conditions do not apply to any other order of specific performance - they only apply to an order of specific performance to force consummation.* In other words, Realogy does not have to satisfy these conditions in order to seek or receive specific performance of any other obligation in the Purchase Agreement, such as SIRVA's obligations to procure and maintain the Debt Financing, as described above, and (under Section 7.6 of the Purchase Agreement) "use [its] reasonable best efforts to cause the conditions set forth in Article X to be satisfied" and to "use [its] reasonable best efforts to ... cause the Closing to occur on the terms and ... subject to the conditions specified in this agreement as soon as practicable after the Required Financial Information has been delivered," among numerous other obligations.

89. Section 13.8(b)(ii) reads in full:

> (ii) Seller shall be entitled to bring an Action to specifically enforce Buyer's obligation to consummate the Closing and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded if (and only if and for so long as) (A) all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied at the Closing, each of which shall then be capable of being satisfied at the Closing and the date of termination) and Buyer fails to consummate the Closing on the date required pursuant to the terms of Section 2.3, (B) the proceeds of the Debt Financing (or any alternative debt financing) have been funded to Buyer or the agent for the Debt Financing Sources under the Debt Financing Commitments (or any definitive agreements executed pursuant thereto) has irrevocably confirmed in writing to Buyer that the Debt Financing will be funded subject only to the funding of the Equity Financing, (C) Seller has not terminated this Agreement in accordance with Article XI and has irrevocably confirmed to Buyer in writing that all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied by actions to be taken at the Closing, each of which shall then be capable of being satisfied at the Closing) and that if the Debt Financing and Equity Financing are funded, then Seller will consummate the Closing in accordance with the terms of this Agreement, and (D) Buyer has failed to consummate the Closing within three (3) Business Days after receipt of such irrevocable confirmation. For the avoidance of doubt, (a) in no event shall Seller be entitled to specifically enforce (or to bring any Action in equity seeking to specifically enforce) Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded other than as expressly provided in the immediately preceding sentence, and (b) in no event shall Seller be entitled to seek to specifically enforce any provision of this Agreement or to obtain an injunction or injunctions, or to bring any other Action in equity in connection with the transactions contemplated by this Agreement, against

> Buyer other than against Buyer and, in such case, only under the circumstances expressly set forth in this Section 13.8.

(PA § 13.8(b)(ii))

(v) Termination

90. Article XI sets forth the circumstances under which the Purchase Agreement may be terminated and the effects of such a termination, and the fees owed for terminating under such circumstances. Section 11.1 details the circumstances under which the Purchase Agreement may be terminated, two of which are relevant here.

91. Pursuant to Section 11.1(a), either Seller (Realogy) or Buyer (SIRVA) could terminate at or after the "Outside Date" if the Closing has not yet occurred, *except* Buyer is not entitled to terminate under Section 11.1(a) if its own failure "to take any action required under or breach of this Agreement shall have been the primary cause of, or shall have resulted in, the failure of the Closing to occur by the Outside Date."

92. Pursuant to Section 11.1(c), Buyer (SIRVA) could terminate if Seller's (Realogy's) "representations and warranties ... fail to be true and correct such that the condition set forth in Section 10.2(a) would not be satisfied at the Closing," or if Seller (Realogy) has breached the Agreement in a manner that is not curable or, if curable, has not been cured within "twenty (20) Business Days following receipt by Seller of written notice of such breach or failure from Buyer" or before the Outside Date, *except* that Buyer is not entitled to terminate under Section 11.1(c) if Buyer is itself in material breach of the Purchase Agreement.

93. Pursuant to Section 11.2, in order to effect a termination, a Party must give written notice of such termination to the other Party, "specifying the provisions of this Agreement pursuant to which such termination is made...."

94. Section 11.3 of the Purchase Agreement sets forth the circumstances under which the Termination Fee is owed to Realogy. Summarized, it provides that SIRVA must pay the Termination Fee within two business days if (i) either party terminates the Purchase Agreement because (a) the Outside Date has passed or (b) the Transaction has been prohibited or enjoined (other than under antitrust law), or (ii) if Realogy terminates the Purchase Agreement because of (a) SIRVA's failure to close the Transaction within three business days of being required to do so or (b) SIRVA's breach of the Purchase Agreement or the failure of SIRVA's representations and warranties. It states in full:

> (a) If this Agreement is terminated (i) by either Seller or Buyer pursuant to Section 11.1(a) and all conditions to Closing set forth in Section 10.1 (other than Section 10.1(a)(i) and other than Section 10.1(b) (to the extent arising under Antitrust Laws)) and Section 10.2 are satisfied or capable of being satisfied or are waived (other than those conditions that by their nature are to be satisfied at the Closing, each of which shall be capable of being satisfied at the Closing and the date of termination), (ii) by either Seller or Buyer pursuant to Section 11.1(b) and the applicable injunction or other order giving rise to such termination right arises under Antitrust Laws, or (iii) by Seller pursuant to (x) Section 11.1(d) or (y) Section 11.1(e), then, in each such case, Buyer shall, no later than two (2) Business Days after the date of such termination, pay, or cause to be paid, to Seller or its designee an amount equal to thirty million dollars ($30,000,000) (the "Termination Fee") without deduction or offset of any kind. Notwithstanding anything to the contrary contained in this Agreement, in no event shall Buyer be required to pay the Termination Fee on more than one occasion.

(PA § 11.3(a))

95. Section 11.3(c) contains an exclusive remedy provision. It provides that the Termination Fee "shall constitute the sole and exclusive remedy of Seller ... for all losses and damages suffered as a result of the failure of the Transaction to be consummated or for a breach or failure to perform hereunder..." This exclusive remedy has a critical exception: it expressly allows Realogy to avoid the exclusive remedy of the Termination Fee and seek an order of specific performance "*prior to termination*" of the Purchase Agreement.

(1) The Transaction Documents

96. The Purchase Agreement provides in Section 13.13:

> *Entire Agreement:* The Transaction Documents, the Limited Guaranty and the Confidentiality Agreement constitute the entire agreement of the Parties with respect to the subject matter of this Agreement, and supersede all prior discussions, understandings, agreements and representations and shall not be modified or affected by any offer, proposal, statement or representation, oral or written, made by or for any Party in connection with the negotiation of the terms of this Agreement.

(PA § 13.13)

97. The Purchase Agreement defines "Transaction Documents" in Article I, Section 1.1:

> "Transaction Documents" means this Agreement (including the Seller Disclosure Letter and the Exhibits to this Agreement), the Transition Services Agreement, the Sublease Agreement and the Deferred Payment Amount Agreement.

(PA § 1.1)

(A) The Transition Services Agreement

98. The Parties to the Transition Services Agreement (the "TSA") are Realogy and SIRVA. The TSA was negotiated by sophisticated parties with experienced counsel. As is the case in any Delaware contract, the Parties to the TSA are bound by the implied covenant of good faith and fair dealing. Under the TSA, the Parties agree to provide certain services to each other, either mutually or on a fee-for-service basis, in connection with the separation of Cartus's operations from Realogy. Relevant to certain allegations made by SIRVA in communications with Realogy, described elsewhere in this Amended Complaint, Schedule 2.01-1 to the TSA enumerates "Seller Provided Services" that Realogy agrees to provide to SIRVA. The Seller Provided Services are broadly related to the management of Cartus's human resources, information technology, and finances post-Closing, and are limited to terms of service ranging from three to eighteen months after Closing.

(B) The Limited Guaranty

99. The Limited Guaranty, dated as of November 6, 2019, by Madison Dearborn (that is, by Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P., referred to in the Limited Guaranty as the "Guarantors"), was made in favor of Realogy. The Limited Guaranty was negotiated by sophisticated parties with experienced counsel. Like all Delaware contracts, the parties to the Limited Guaranty are bound by the implied covenant of good faith and fair dealing. Some of the provisions of the Limited Guaranty are set forth below and the entire Limited Guaranty is attached hereto as Exhibit B.

100. Under Section 1 of the Limited Guaranty, Madison Dearborn "irrevocably and unconditionally guarantee[s] to Seller, the due, punctual and complete payment of the Termination Fee, if and when due pursuant to the terms and conditions of Section 11.3 of the Purchase Agreement...."

101. Section 2 of the Limited Guaranty further expressly provides that "[t]his Limited Guaranty is one of payment, not collection, and a separate Action or Actions may be brought and prosecuted against any or all of the Guarantors to enforce this Limited Guaranty, irrespective of whether any Action is brought against Buyer or whether Buyer is joined in any such Action or actions."

102. Under Section 4(c) of the Limited Guaranty, Realogy's legal recourse against Madison Dearborn in connection with the Transaction is limited to enumerated Retained Claims. The Retained Claims include:
(i) claims by Seller against any Guarantor ... under, in accordance with and subject to all limitations of [the] Limited Guaranty

(ii) claims by Seller against Buyer under and in accordance with and subject to all limitations set forth in the Purchase Agreement

(iii) with respect to the Confidentiality Agreement, dated September 15, 2019, between Buyer and Seller (the "NDA"), claims by Seller against Buyer under and in accordance with the NDA (the "Retained NDA Claims")

[and]

(iv) to the extent (but only to the extent) Seller is expressly entitled to enforce the Equity Commitment Letter in accordance with Section 7 of the Equity Commitment Letter and Section 13.8(b) of the Purchase Agreement, and subject to all of the terms, conditions and limitations herein and therein, claims by Seller against Buyer seeking to cause Buyer to enforce the Equity Commitment Letter in accordance with its terms...

(LG § 4(c))

103. Section 6(b) of the Limited Guaranty provides that, if SIRVA believes that Realogy has brought an action against Madison Dearborn other than a Retained Claim, SIRVA may make a written demand on Realogy to have Realogy dismiss such action. If Realogy does not then dismiss the "unauthorized action" within ten business days, Madison Dearborn's obligations under the Limited Guaranty terminate *ab initio* and are null and void.

104. Realogy has never received a written demand from SIRVA that Realogy dismiss this or any other action under Section 6(b) of the Limited Guaranty. Furthermore, and for the avoidance of doubt, Realogy does not assert any claims in this action against Madison Dearborn other than Retained Claims as defined in Section 4(c) of the Limited Guaranty. [7]

(c) From Signing To Closing

(i) COVID-19 Impact And Steps To Mitigate

105. Approximately eight weeks after the Purchase Agreement was executed, on or about December 31, 2019, The People's Republic of China alerted the World Health Organization (WHO) of several flu-like illnesses in Wuhan, the capital of Central China's Hubei province.

106. On January 7, 2020, Chinese authorities identified the virus causing flu-like symptoms in Wuhan as a novel "coronavirus." Coronaviruses are a family of viruses including the viruses that cause the common cold, SARS and MERS. The disease caused by this novel coronavirus, subsequently named "COVID-19," rapidly spread across the world.

107. On March 11, 2020, the Director-General of the WHO described the spread of COVID-19 as a "pandemic," which is the first time that the WHO has referred to an outbreak as a "pandemic" since 2009.

108. As of the date of this filing, there have been approximately 4.5 million confirmed cases of COVID-19 around the world, resulting in over 300,000 deaths. Presently, confirmed cases of COVID-19 have been reported in 188 countries or regions.

109. The coronavirus pandemic has broadly impacted many industries throughout the world. For example, on March 6, 2020, Bloomberg reported:

> The coronavirus is going global, and it could bring the world economy to a standstill. An epidemic that began in the depths of China's Hubei province is spreading rapidly.... The economic fallout could include recessions in the U.S., euro-area and Japan, the slowest growth on record in China, and a total of $2.7 trillion in lost output-equivalent to the entire GDP of the U.K. [8]

110. The industries in which Realogy, Cartus and SIRVA operate have not been spared from this universal impact. To combat COVID-19, governments around the world implemented stay-at-home orders and global restrictions on travel. On March 25, the Director-General of the World Health Organization reported that "many countries have introduced unprecedented measures, at significant social and economic cost ... *asking people to stay home and stay safe.*" [9] On March 31, the Department of State issued a Global Level 4 - *Do Not Travel* alert, advising United States citizens to "*avoid all international travel due to the global impact of COVID-19.*" The alert continued: "[m]any countries are experiencing COVID-19 outbreaks and implementing travel restrictions and mandatory quarantines, closing borders, and prohibiting non-citizens from entry with little advance notice." [10] Given the significant restrictions placed on movement around the globe, it is not surprising that companies who specialize in moving and relocation would feel the impact of the COVID-19 pandemic.

111. In response to the spread of the COVID-19 pandemic, Realogy implemented a series of prudent cost-savings actions, including, among other measures, temporary salary and work-week reductions for a majority of Realogy's employees, and reductions in its marketing expenses. In addition, Realogy's CEO and each of the executive officers who report directly to him agreed to a temporary reduction in base salary, including a 90% reduction for the CEO and a 50% reduction for each of his direct reports.

112. In late March and throughout April, Cartus sought and received SIRVA's consent to take cost mitigation actions in response to COVID-19 in the United States and United Kingdom, where its largest employee bases were located.

113. On March 24,2020, Cartus scheduled a call with SIRVA, during which Cartus provided advance notice to Mr. Souleles that Realogy planned to file a Form 8-K with the SEC the next day, disclosing the mitigation measures it intended to take in response to COVID-19.

114. The following day, March 25, 2020, Cartus sent a letter to Jeff Margolis, Executive VP and General Counsel of SIRVA, stating:

As discussed in a call yesterday with Tom Souleles, Rich Copans, and Tom Oberdorf, Realogy is implementing cost savings mitigation actions given recent developments arising out of the COVID-19 situation. These actions include temporary salary reductions for U.S. based exempt employees and work-week reductions for some U.S. based non-exempt employees. Below the level of CEO and Executive Committee at Realogy, [Text redacted in copy]; the measures will be assessed on an ongoing basis and may be extended or widened to include, for example, temporary employment furloughs...

We believe these actions are necessary and commercially reasonable measures to support the ongoing operation in light of recent developments affecting all of us, including the mandatory work from home requirements imposed by a number of states where our employees are located. *I also appreciated the information provided yesterday about the cost savings initiatives SIR VA is implementing for April through December 2020 in light of the COVID-19 situation...*

While we do not believe that consent of SIR VA is required for these actions pursuant to the Purchase and Sale Agreement, we wanted to confirm for the avoidance of doubt that SIR VA consents to our taking these actions. Please let us know if you would like to discuss further or confirm by responding to this email that SIRVA consents to our taking the foregoing actions for the Cartus Relocation business.

(emphasis added)

115. On March 26, SIRVA replied. SIRVA claimed that Realogy's proposed actions "[Text redacted in copy]" In light of this, SIRVA requested further information from Realogy in order to "consider [Realogy's] request for consent."

116. Cartus promptly replied on March 27, noting, "[w]e disagree with your characterization of our Proposed Actions" and "have operated Cartus and continue to operate Cartus in the best interest of the Business, its employees, clients and customers." Cartus then reiterated that its actions are "in response to the unprecedented Covid-19 pandemic" and that Realogy "strongly believe[s] that the Proposed Actions are commercially reasonable steps to preserve the Business, including its goodwill." Cartus also reminded SIRVA of its obligation under the Purchase Agreement not to unreasonably withhold or delay its consent.

117. On March 30, Margolis consented to Cartus's actions as requested, stating, in relevant part:

> [W]e consent [Text redacted in copy] As discussed, we understand that you have acknowledged that SIRVA may take similar actions in the post-Closing period....

118. On April 5, Cartus requested SIRVA's consent to take additional mitigation actions with respect to its United States employee base. SIRVA replied on April 7, providing its consent and stating, in relevant part:

> [W]e consent [Text redacted in copy] As discussed, we understand that you have acknowledged that SIRVA may take similar actions in the post-Closing period.

119. Having received SIRVA's consent to its mitigation actions in the United States, Cartus promptly began to take comparable mitigation actions in the United Kingdom, where its next largest employee base is located. The next morning, April 8, Cartus

informed SIRVA of its plan to make salary and hour reductions, as well as a few furloughs in the United Kingdom. Along with its request, Cartus provided a spreadsheet containing information concerning its mitigation actions.

120. On April 9, SIRVA again provided consent.

121. Despite the precipitous dip in the world's economies during this time, Cartus [Text redacted in copy] Even in the current environment, Cartus continues to provide its core services to clients over the telephone and through electronic communications (*e.g.,* counseling clients regarding relocation policies, monitoring and managing supply chains, and performing on-the-ground services and expense processing). In the month of March 2020, when Cartus, like most other companies, was working to transition its employees to work-from-home environments, the Cartus client services teams earned higher satisfaction scores from clients relocating employees (measured through surveys) than in March 2019. Moreover, in April 2020, Cartus [Text redacted in copy]

122. SIRVA has also suffered the thus far short-term impact of COVID-19. SIRVA has provided multiple public updates on how COVID-19 has impacted its business and the industry. According to SIRVA, "the rapid spread of the recent coronavirus (COVID-19) is having a significant impact on the global economy and the way in which organizations are adjusting business options in response. *Mobility is no exception.*" [11] Other major relocation and moving services companies have issued similar statements regarding the severe impact of COVID-19.

123. Furthermore, Moody's Investor Services ("Moody's") has indicated that "[c]orporate spending levels on employee relocation are expected to decline near term amid the heightened coronavirus risk ...." (Moody's Rating Action at 1)

124. On March 11, 2020, Moody's downgraded SIRVA's corporate family rating, probability of default rating and instrument ratings on SIRVA's senior secured first lien from B3 to Caal, B3-PD to Caal-PD, and B1 to B3, respectively. The rating downgrades reflect Moody's "expectation of deterioration in [SIRVA's] earnings and credit metrics over the next 12 months because of near-term demand disruptions due to COVID-19, investment needs for the Cartus Integration and increased debt service costs." Specifically, Moody's "expects SIRVA's free cash flow to be weak in 2020, which given the high debt levels could increase default risk."

(ii) Realogy Diligently Moves Toward Closing

125. In the months following execution of the Purchase Agreement, Realogy worked industriously with SIRVA, Madison Dearborn, and each party's respective advisors to move toward closing the Transaction.

126. The ECL, the Securitization Commitment Letter, the Debt Financing Commitments Letter were all executed. On February 28, 2020, in accordance with the requirements of the Purchase Agreement, Cartus provided to SIRVA its audited financial statements for 2018 and unaudited financial statements for the 9-month period ended September 30, 2019. On March 31, 2020, also in accordance with the requirements of the Purchase Agreement, Cartus delivered its audited 2019 financial statements, for the full year, to SIRVA and the Debt Financing Sources. Additionally, from March 16, 2020 onward, Cartus provided "Daily Flash" reports to SIRVA and Madison Dearborn. The flash reports detailed Cartus's [Text redacted in copy].

127. On a March 15 call between Thomas Oberdorf, CEO of SIRVA, and Katrina Helmkamp, CEO of Cartus, Mr. Oberdorf informed Ms. Helmkamp that the financing had shifted from term loan financing to a bond deal. Mr. Oberdorf offered reassurance that the deal was still on track to a closing date of April 20th to end of April, and described the financing as [Text redacted in copy] He added that [Text redacted in copy]

128. By April 2020, pre-Closing actions and events were well under way. Realogy's and SIRVA's respective legal advisors had drafted and were finalizing side letters and other required documents for Closing and were having regular calls to review the closing checklist in preparation for a Closing expected to occur later that month. An estimated closing statement had

been prepared and delivered, and follow-up questions regarding the closing statement were being addressed. A funds flow memorandum was being prepared and termination and formation of various programs and agreements were completed or were near completion. Both SIRVA's and Realogy's closing certificates were drafted and in final form and Realogy provided SIRVA's counsel with its stock certificates for the entities to be sold to hold in escrow.

(iii) SIRVA And Madison Dearborn Execute On A Scheme To Thwart The Transaction

(1) April 14th

129. On April 14, 2020, Cartus and SIRVA each had due diligence calls with the various banks involved in financing for the Transaction. Earlier that day, the Chief Financial Officer of Cartus, Eric Barnes, emailed the Chief Financial Officer of SIRVA, Stephen Cassell, asking to "sync up" before the due diligence calls that evening. Specifically, Mr. Barnes discussed with Mr. Cassell, among other things, (a) [Text redacted in copy].

130. Mr. Cassell also forwarded to Mr. Barnes an internal SIRVA email containing a SIRVA "Flash Report" for the day. The SIRVA "Flash Report" presented similar information about SIRVA's month-to-date performance as the information about Cartus's performance generally contained in the Daily Flash reports that Cartus had been providing to SIRVA. Mr. Cassell commented that [Text redacted in copy] He also observed that, [Text redacted in copy] (emphasis added).

131. On April 14, 2020, in connection with a due diligence call with the banks, Realogy provided high level scenarios or ranges of outcomes by quarter for the balance of 2020 (the "High-Level Sensitivity Analysis"). A representative of Realogy promptly forwarded to representatives of SIRVA and Madison Dearborn the High-Level Sensitivity Analysis and offered a time to discuss in more detail. The representative of Realogy also made clear to SIRVA and Madison Dearborn that [Text redacted in copy]

(2) April 16th And April 17th

132. On Thursday evening, April 16, 2020, and on Friday morning, April 17, 2020, representatives of Realogy and representatives of SIRVA (including Mr. Souleles) held telephone calls to discuss the High-Level Sensitivity Analysis. A representative of Madison Dearborn expressed appreciation for the information that Realogy presented to the banks on the April 14, 2020 due diligence call. Representatives of Madison Dearborn and SIRVA asked representatives of Realogy follow-up questions regarding the High-Level Sensitivity Analysis. A representative of Madison Dearborn also stated that they were moving forward to an April 29, 2020 closing and reminded Realogy representatives that the estimated Closing Statement would be due between April 21 and April 24 to support a closing on April 29 or April 30.

133. Specifically, representatives of Madison Dearborn and SIRVA asked [Text redacted in copy] They requested [Text redacted in copy] Realogy promptly provided the [Text redacted in copy] by April 18, 2020.

134. With regard to SIRVA and Madison Dearborn's other questions from April 16 and 17, Realogy made clear that it was working diligently to address the follow-up questions and focusing on a revised detailed "base case" and a built-from-scratch, detailed "downside case" (the "Base Case and Downside Case"). Realogy further informed SIRVA and Madison Dearborn that it expected to provide the Base Case and Downside Case by late afternoon on April 22, 2020, and offered to discuss them on April 22nd or April 23rd.

135. In response to a follow-up question from Madison Dearborn, a representative of Realogy reiterated that the High-Level Sensitivity Analysis that Realogy sent to the banks in connection with the April 14, 2020 due diligence call was a high level, top-down range built around a single "base case." Now - *per Madison Dearborn and SIR VA's request* - Realogy was updating that base case with information learned in the ensuing period and building a detailed downside case using a bottom-up approach versus a top-down approach.

136. The representative of Realogy further explained that Realogy would be sharing more granularity on each of the cases designed to get SIRVA and Madison Dearborn comfortable with the output. Finally, Realogy's representative noted that the company was developing a detailed “downside case” because that was the focal point in conversations during the previous week. Given the time constraints and the emphasis in conversations on the “downside case,” Realogy did not build a detailed “upside case” by April 24 and pointed out that it would take additional time to build a detailed “upside case.” During the meetings and communications of April 16 and 17, 2020, neither Madison Dearborn nor SIRVA raised any concerns that Cartus had been impacted by COVID-19 adversely as compared to the moving and relocation industry generally. Nor did either SIRVA or Madison Dearborn suggest that the Closing might not occur or might be delayed as a result of anything, including a Material Adverse Effect.

137. Neither SIRVA nor Madison Dearborn ever asked Realogy to provide a more detailed “upside case.” They were not interested. Rather, by this point (as discovery will show), SIRVA and Madison Dearborn had concocted a scheme to cut and run from this Transaction. The apparent plan was to blind themselves to the true state of the Cartus business. And instead, without any discussion with Realogy, point to Cartus's allegedly poor future results as supposedly indicated in the prior-in-time High-Level Sensitivity Analysis to argue that the Cartus business had suffered a Material Adverse Effect.

138. That is because, as discovery will show, Madison Dearborn had already concluded that it did not want to go through with the Transaction. Indeed, because of this new desire not to go through with the Transaction, by mid-March, Madison Dearborn had injected itself into the day-to-day steps leading toward the Closing, with Mr. Souleles taking an increasingly active and aggressive role culminating in the repudiation of the Purchase Agreement. Prior to this time, Mr. Souleles was not an active participant in the day-to-day steps leading toward the Closing.

139. Madison Dearborn's and SIRVA's real motivations to avoid the Transactions were far different than a supposed Material Adverse Effect. Volumes in the corporate-paid relocations segment of the moving and relocation industry - which comprise a large portion of both SIRVA and Cartus's businesses - have been flat to declining over the past several years. As a result, growth is primarily accomplished by consolidations, like the Transaction at issue here. Because of the short-term stress placed on these industries due to COVID-19, inferably, Madison Dearborn's investment thesis - to consolidate two large industry players and exit its investment in SIRVA within the next three to five years with favorable returns - was looking increasingly less certain.

140. With the COVID-19 health crisis came lower volume with the SIRVA business and consequently lower revenue, and lower anticipated synergies as a result of the Transaction. Adding on the higher cost of borrowing also due to the COVID- 19 health crisis, SIRVA and Madison Dearborn were facing the prospect of layering potentially [Text redacted in copy] of debt onto an already highly levered company. These factors created the very real possibility of a *second* SIRVA bankruptcy and further risked Madison Dearborn's [Text redacted in copy] incremental equity investment. [12] Inferably, these changing deal metrics no longer satisfied Madison Dearborn's internal criteria for equity commitments.

141. In order to concoct a supposed Material Adverse Effect for the purpose of trying to avoid closing the Transaction for the above reasons, Madison Dearborn began demanding more detailed *downside* projections from Cartus under the guise of purported “clarification” of Cartus's assumptions and modeling (without any mention of a supposed Material Adverse Effect concern or threat to Closing). Indeed, on April 22, 2020, a representative of Madison Dearborn emailed a representative of Cartus asking [Text redacted in copy]

(3) April 22 nd

142. Realogy, for its part, continued to act in good faith in order to move the deal toward Closing. Thus, as promised, at 4:05 p.m. on April 22, 2020, a representative of Realogy sent the detailed Base Case and Downside Case to the representatives of SIRVA and Madison Dearborn, and scheduled a call at 5:00 p.m. to review and discuss.

143. The parties discussed the Base Case and Downside Case at 5:00 p.m. that day. As discovery will show, SIRVA and Madison Dearborn were not pleased with the bottom-up Base Case and Downside Case. The models made clear that Cartus had not suffered a Material Adverse Effect. Indeed, both the Base Case and Downside Case [Text redacted in copy] As previously described in the bank due diligence call and in the discussions on April 16 and 17 with SIRVA and Madison Dearborn representatives, Cartus also [Text redacted in copy]

144. The SIRVA and Madison Dearborn representatives ignored the Realogy representatives' detailed and thoughtful explanations. Instead, they complained about wanting a “simple” model for a complex business based on assumptions with which Realogy representatives did not agree. Under the guise of “seeking clarification,” SIRVA and Madison Dearborn again poked and prodded at the Base Case and Downside Case trying to set up a story of disproportionate adverse impact. During the meetings and communications of April 22, 2020, neither Madison Dearborn nor SIRVA raised any concerns that Cartus had been impacted by COVID-19 adversely as compared to the larger moving and relocation industry. Nor did either Madison Dearborn or SIRVA suggest that the Closing might not occur or might be delayed as a result of anything, including a Material Adverse Effect.

145. Realogy continued to diligently respond to SIRVA and Madison Dearborn's requests, in an effort to move the parties to the Closing.

146. Also on April 22, 2020, Barclays [Text redacted in copy]

(4) April 23 rd

147. On April 23, 2020, Eric Barnes sent an email to representatives of SIRVA and Madison Dearborn to follow up on the parties' discussion the prior evening regarding the Base Case and Downside Case. Specifically, Mr. Barnes noted that the parties had discussed SIRVA and Madison Dearborn's questions about [Text redacted in copy] Mr. Barnes addressed each question in an email. With respect to question one, he explained [Text redacted in copy] With respect to questions two and three, he explained that [Text redacted in copy] Mr. Barnes suggested that the parties use already scheduled time the following day to discuss, and offered to adjust his schedule if the representatives of SIRVA or Madison Dearborn wanted to discuss further.

(5) April 24 th

148. On April 24, 2020, representatives of SIRVA, Madison Dearborn and Realogy had a call to discuss Realogy's responses to SIRVA and Madison Dearborn's questions. During this call, a Madison Dearborn representative informed Realogy that Madison Dearborn had built a purported “simple model” showing results if “revenues one-to-one fell with initiations” from Q2 to Q3. The representative of Madison Dearborn asked Realogy to build such a model as well. A representative of Realogy replied that Realogy would not send Madison Dearborn and SIRVA something that did not reflect how the Cartus business worked. The representative of Realogy further noted that Madison Dearborn and SIRVA had specifically “asked for [Cartus's] stake in the ground” and that Realogy had provided it. Following that call, a representative of Realogy sent an email to the group:
[Text redacted in copy]

[Text redacted in copy]

(emphasis added)

149. After Realogy sent its detailed and thoughtful follow-up email, Madison Dearborn's Mr. Souleles responded with a curt "[a]llow us to review." But instead of following up with Realogy after such "review," Madison Dearborn and SIRVA never responded. Specifically:

• neither SIRVA nor Madison Dearborn responded to or even acknowledged Realogy's suggestion that one designee of SIRVA or Madison Dearborn [Text redacted in copy] a representative of Cartus;

• neither SIRVA nor Madison Dearborn responded to or even acknowledged Realogy's [Text redacted in copy];

• neither SIRVA nor Madison Dearborn indicated in any way to Realogy that it believed Cartus had suffered a Material Adverse Effect;

• neither SIRVA nor Madison Dearborn discussed or suggested a discussion regarding ways to address its supposed concerns in order to move the Transaction to Closing;

• neither SIRVA nor Madison Dearborn asked Realogy or even opened discussions to extend the Outside Date given its supposed concerns regarding Cartus's modeling; and

• neither SIRVA nor Madison Dearborn expressed to Realogy that its financing may be in jeopardy of expiring given SIRVA and Madison Dearborn's own supposed belief that Cartus had suffered a Material Adverse Effect.

150. Put simply, after April 24, 2020, Madison Dearborn and SIRVA made no effort whatsoever to engage with Realogy regarding any of its purported concerns stemming from the Base Case and Downside Case. That failure violated SIRVA's obligations, and is demonstrative of SIRVA's bad faith refusal to disclose or attempt to solve its purported concerns about a Material Adverse Effect impacting closing.

151. As discovery will show, SIRVA and Madison Dearborn "went dark" and refused to discuss with Realogy the Base Case and Downside Case in any meaningful detail. That is because Cartus's detailed bottom-up analysis wholly contradicted SIRVA and Madison Dearborn's manufactured scheme to get out of the Transaction. Instead, Madison Dearborn and SIRVA decided that it was better for their plan to scuttle the Transaction by clinging to the broader ranges in the rough High-Level Sensitivity Analysis and rejecting Realogy's careful analysis in the Base Case and Downside Case in conclusory fashion as "not credible" and "inaccurate."

152. Indeed, that evening, Mr. Souleles called Ryan Schneider, Realogy's Chief Executive Officer, likely to communicate SIRVA's intent to renege on the deal. Mr. Schneider was unavailable to speak. Mr. Souleles then sent Mr. Schneider a text message, which said "Ryan, please call me at your convenience." Mr. Schneider told Mr. Souleles that he had a commitment and would be unable to speak that evening, but that he could have a telephone call with Mr. Souleles the following morning. Mr. Souleles replied, "Thanks Ryan. Earlier better. 8AM CT/9AM ET?" Mr. Schneider agreed to call at that time.

153. By the end of the day on Friday, April 24, 2020, all conditions to Closing had been satisfied (other than those conditions that by their terms or nature are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing). At 6:52 p.m. on Friday April 24th, Realogy's counsel sent a letter to SIRVA's counsel confirming the satisfaction of conditions and committing to consummate the Transaction on April 29, 2020 (the "Closing Letter"). [13] It stated, in language that tracked the requirements of the Purchase Agreement:

In accordance with Section 11.1(e) of the Purchase Agreement, Seller irrevocably confirms to Buyer that all of the conditions set forth in Section 10.1 and Section 10.2 of the Purchase Agreement have been and continue to be satisfied (other than those conditions that by their terms or nature are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing), and that assuming the Debt Financing and Equity Financing are funded, *Seller will consummate the Closing on April*

29, 2020, the third Business Day following the expiration of the Marketing Period, in accordance with the terms of the Purchase Agreement.

(Closing Letter at 1) (emphasis added)

(6) April 25th

154. At approximately 9 a.m. the following morning, Saturday, April 25th, Mr. Schneider called Mr. Souleles as promised. In that call, Mr. Souleles stated that Madison Dearborn had received Realogy's April 24th Closing Letter. He stated that Madison Dearborn disagreed that Realogy had satisfied all conditions to Closing for the Cartus relocation business sale, and that Madison Dearborn would be sending a letter to Realogy via their law firm asserting as much. Mr. Souleles stated that that there had been a material impact to the Cartus financials and that conditions to Closing were not satisfied. He added that the "forecasts" for the Cartus relocation business were unsupported, neither accurate nor credible, and intuitively did not make sense. He stated that SIRVA would invoke the Material Adverse Effect clause of the Purchase Agreement, on the grounds that there had been a disproportionate impact on business results due to COVID-19 and that Realogy would not be able to provide transition services to SIRVA for 18 months under the TSA. Mr. Souleles claimed that SIRVA could have financed the deal in February but that Realogy denied consent to do so, which was not true. Mr. Souleles then stated unequivocally: "We will not close the transaction."

155. Mr. Schneider responded that he disagreed with Mr. Souleles that the scenarios were not supported and commented that [Text redacted in copy] He added that he understood that the Material Adverse Effect clause did not apply to general business worsening, especially if temporal, and that he found Mr. Souleles' claim to be wrong. He added that he disagreed that Realogy lacked the ability to provide services, and that Realogy's earnings call in 10 days would make clear that Realogy is a going concern. Finally, he told Mr. Souleles that Realogy would be filing a lawsuit. This Saturday morning, April 25, 2020, phone call *was the first time anyone from Madison Dearborn or SIR VA raised the notion that a Material Adverse Effect could occur, had occurred or was expected to occur with Cartus.* In seven short minutes, Mr. Souleles raised the possibility of a Material Adverse Effect *for the first time,* declared one, and then purported to unilaterally end the entire Transaction. That violated SIRVA's "reasonable best efforts" obligations under the Purchase Agreement and all notions of good faith, fair dealing and honest business practices.

156. Later that day, at 4:20 p.m., SIRVA sent a letter to Realogy detailing SIRVA's supposed justifications for refusing to consummate the Closing. (the "April 25th Letter"). [14] In it, plainly drafted for litigation, and the opposite of its reasonable best efforts, SIRVA asserted that Cartus has been disproportionately impacted by COVID-19, triggering clause (a) of the definition of Material Adverse Effect. SIRVA's letter stated:

[W]e believe that the COVID-19 health crisis and other economic and company-specific conditions have had, in the aggregate, a disproportionate adverse effect on the results of operations and financial condition of the Business. Given that Cartus is a relatively low margin business, with a relatively flat cost structure, the health crisis has caused Cartus to experience - and will cause Cartus to continue to experience - devastating financial results that are disproportionate to SIRVA and others in the industry.

(April 25th Letter at 2-3)

157. SIRVA also asserted that Realogy will have solvency issues *in the future,* and thus not be able to perform the post-Closing obligations contemplated by the Purchase Agreement and certain ancillary agreements, such as the TSA, triggering clause (b) of the definition of Material Adverse Effect. SIRVA's letter stated: "we believe that the decline in the solvency of Seller's business would or would reasonably be expected to prevent or materially impair or materially delay the ability of Seller to consummate the Transaction, which includes all transactions contemplated by, among other things, the Transaction Services Agreement, the

Sublease Agreements and post-Closing obligations under the Purchase Agreement." (April 25th Letter at 3) This was the first time SIRVA ever raised such supposed (and unfounded) solvency concerns.

158. SIRVA also alleged in the April 25th Letter - in one conclusory sentence - that Cartus's purported "changing and unsupported forecasts" breached Realogy's financing cooperation obligations under Section 7.4 of the Purchase Agreement. That was complete nonsense, and strong evidence of the pretextual nature of the supposed declaration of a Material Adverse Effect. Section 7.4(e) provides that Realogy's obligation to cooperate "shall be deemed satisfied" unless the Debt Financing has not been obtained as a result of Realogy's breach and such breach remains uncured ten days after Realogy receives written notice of such breach from SIRVA. Realogy had in no way caused any obstacle to the Debt Financing, and [Text redacted in copy] but for SIRVA's intentional, bad faith acts to avoid consummating the Closing.

159. SIRVA further stated that all of the issues outlined in its letter "now incurably prevent[] the deal from closing." (*Id.*)

160. It thus became clear on Saturday, April 25th - a mere four business days before the Outside Date - that Mr. Souleles, Madison Dearborn and SIRVA had planned this cut-and-run, bad faith strategy in secret and well in advance. Inferably, Mr. Souleles and others held numerous meetings with the basic industries team at Madison Dearborn Partners, LLC at which the topic of refusing to close the Transaction was discussed. Inferably, Mr. Souleles and others held numerous meetings with senior leadership at Madison Dearborn during which he discussed the topic of refusing to close the Transaction, sought and received permission and/or consent from senior leadership at Madison Dearborn to refuse to close the Transaction, and planned a strategy to refuse to close the Transaction in a manner and at a time designed to deny Realogy the practical ability to specifically enforce SIRVA's obligations under the Purchase Agreement, including SIRVA's obligations that would lead to Closing and its obligation to consummate the Closing. Inferably, this process took several weeks and involved numerous individuals at Madison Dearborn.

161. Inferably, Mr. Souleles and others took these same steps at SIRVA. Inferably, Mr. Souleles and others held numerous meetings with senior SIRVA management during which he discussed the topic of refusing to close the Transaction, sought and received permission and/or consent from the SIRVA board of directors to refuse to close the Transaction, and planned a strategy to refuse to close the Transaction in a manner and at a time designed to deny Realogy the practical ability to specifically enforce SIRVA's obligations under the Purchase Agreement, including SIRVA's obligations that would lead to Closing and its obligation to consummate the Closing. Inferably, this process took several weeks and involved numerous individuals at SIRVA.

162. Neither Mr. Souleles nor any other individual at Madison Dearborn or SIRVA made any attempt to express to anyone at Realogy that they had developed concerns about a potential Material Adverse Effect or Realogy's solvency, despite near daily conversations for the past approximately six months - indeed sometimes many calls each day - between representatives of Realogy, on the one hand, and representatives of Madison Dearborn and SIRVA, on the other hand. Inferably, Mr. Souleles, individuals at Madison Dearborn and individuals at SIRVA agreed to keep their planning secret from Realogy, instructed others to do so as well, and kept other individuals at Madison Dearborn and at SIRVA in the dark about their plans so as not to alert Realogy. In the meantime, SIRVA continued to schedule and hold detailed meetings with Cartus for "integration purposes," gaining knowledge of Cartus technology and operations in an ever-increasing level of detail.

(iv) Realogy Commences This Action

(1) April 27th

163. On Monday morning at 11:08 a.m. Realogy filed a verified complaint seeking specific performance of SIRVA's obligations to take all steps necessary for closing the Transaction and to consummate the Closing in the Delaware Court of Chancery. The verified complaint alleged generally that SIRVA breached its obligations under the Purchase Agreement by improperly declaring that a Material Adverse Effect had occurred and repudiating its obligations thereunder by refusing to consummate the transactions contemplated in the Purchase Agreement. The Complaint contained three counts: (1) for breach of contract against SIRVA seeking specific performance of SIRVA's obligations under the Purchase Agreement; (2) for breach of contract against

all Defendants seeking, *as an alternative* if the Court were to determine Realogy was not entitled to specific performance of SIRVA's obligation to consummate the Transaction and the Purchase Agreement were deemed terminated, specific performance of SIRVA's and Madison Dearborn's obligations to pay to Realogy a $30 million termination fee; and (3) for declaratory judgment seeking, among other things, a declaration related to the alleged breaches of the Purchase Agreement, including that nothing has had or would reasonably be expected to have a Material Adverse Effect and that no purported terminations of the Purchase Agreement by SIRVA were valid.

164. The verified complaint clearly asserted claims related to the Purchase Agreement against only SIRVA and sought specific performance of SIRVA's obligations under the Purchase Agreement only against SIRVA. (*See, e.g.,* ¶¶ 4-5, 7-10, 15, 20-21, 23, 34, 37, 43, 49, 51, 66, 68-70, 83, 86-88, 90-91, 93-97, 100, 104, 109-110, 112(v)) By contrast, the verified complaint clearly asserted claims against Madison Dearborn only in the alternative and only with respect to the Limited Guaranty. (*See, e.g.,* ¶¶ 55, 101, 103, 105) Due to what at most could constitute a scrivener's error, the defined term "Defendants," which defined term included both SIRVA and Madison Dearborn, was used in subparts (i) and (vi) of paragraph 112 and in Prayer for Relief (a). Notably, the Limited Guaranty and the Purchase Agreement are defined together to constitute a single agreement.

165. Also on April 27, 2020, at 3:00 p.m., a representative of Realogy spoke with a representative of Barclays. Barclays informed Realogy that financing was *not* the issue from Barclays's perspective. Barclays was committed to funding the Transaction.

(2) April 28th

166. On Tuesday, SIRVA sent a purported "Notice of Termination" to Realogy (the "April 28th Letter"). [15] It stated that termination was "[p]ursuant to Section 11.2(c) of the Purchase Agreement." (April 28th Letter at 2) That provision does not provide for termination of the Purchase Agreement and the purported termination was invalid, for that reason, among others. The termination was also invalid because SIRVA was in material breach of its obligations under the Purchase Agreement.

167. SIRVA's letter claimed that Realogy's complaint "falsely allege[d]" that the conditions to proceed with Closing had been satisfied and that Realogy is entitled to specific performance of SIRVA's obligation to close the Transaction. The letter claimed further that "[n]one of the ... conditions to [Realogy's] right to bring the Complaint" allegedly set forth in Section 13.8 of the Purchase Agreement had been met. (April 28th Letter at 1) The letter reiterated that SIRVA "[did] not believe that all conditions to Closing [had] been satisfied," ignored Mr. Souleles' and SIRVA's statements on April 25th that there would be no Closing, and complained that Realogy "did not allow for three Business Days to pass before [Realogy] filed [the] Complaint." (*Id.* at 2) Finally, in furtherance of the bad faith attempts to scuttle the deal, the letter claimed that the filing of Realogy's complaint itself "constitute[d] a breach (moreover, a Willful Breach) of the Purchase Agreement," on which basis SIRVA purported to "terminate[] the Purchase Agreement effective immediately." (*Id.*)

(3) April 30th

168. On Thursday, Realogy responded by letter to SIRVA's April 28, 2020 letter, categorically rejecting the basis and validity of SIRVA's purported termination (the "April 30th Letter"). [16] In it, Realogy stated that it "categorically reject[ed] the asserted basis for the purported termination" set forth in Buyer's April 28 letter, and further disputed the validity of the purported termination. (April 30, 2020 Letter, at 1) The April 30th letter further noted that "Section 11.2(c)" of the Purchase Agreement, pursuant to which Buyer purported to terminate, did not provide for termination of the Purchase Agreement. The April 30th letter also made clear that:

the Complaint was filed to enforce Buyer's obligations *after Tom Souleles of Madison Dearborn Partners informed Realogy's Chief Executive Officer that Buyer would not close the transactions contemplated by the Purchase Agreement* and Realogy had

received a letter from you asserting that the conditions to closing had not been and would not be satisfied by the Outside Date and that the issues raised in your letter incurably prevented the deal from Closing.

(*Id.*) (emphasis added)

(4) May 1st

169. On May 1, 2020, just after midnight and "out of an abundance of caution," SIRVA sent Realogy a second termination letter, this time pointing to Section 11.1(a) of the Purchase Agreement due to the passage of the Outside Date (the "May 1st SIRVA Letter"). [17] This purported termination was also invalid, as the right to terminate under Section 11.1(a) of the Purchase Agreement is not available to a party whose failure to take action required under or in breach of the Purchase Agreement primarily caused, or resulted in, the failure of the Closing to occur by the Outside Date. In this letter, SIRVA also "categorically den[ied]" that it had breached the Purchase Agreement, and reiterated its claims that Realogy's filing of the complaint breached Section 13.8(b). (May 1st SIRVA Letter at 1) In addition, according to SIRVA, Realogy had also breached Section 13.16 of the Purchase Agreement (a non-recourse provision) and Section 11.3 of the Purchase Agreement (a termination fee provision). (*Id.*) In furtherance of its bad faith tactics, SIRVA further claimed that, by filing its claims - which SIRVA asserts are not Retained Claims (as defined in the Limited Guaranty) - Realogy breached the Limited Guaranty and Equity Financing Commitments, and Section 7.4 of the Purchase Agreement (a financing cooperation provision). (*Id.*)

170. SIRVA latched onto this frivolous "Retained Claims" argument for obvious bad faith reasons. Pursuant to the terms of the ECL, Madison Dearborn's equity commitment obligations only terminate in the event of: (a) the Closing, (b) the *valid* termination of the Purchase Agreement, or (c) the assertion of non-Retained Claims. There has been no Closing, and no valid termination. But SIRVA needed to manufacture a way out of the Purchase Agreement, and Madison Dearborn needed a way out of its equity commitment. Desperate to cut off Realogy's ability to specifically enforce the Purchase Agreement, SIRVA went all-in on the silly argument that Realogy has asserted non-Retained Claims.

171. In the May 1st SIRVA Letter, SIRVA also stated, in direct contrast to SIRVA's actual April 25 communications, that "in our letter of April 25, 2020 and in the brief conversation between Tom Souleles and Ryan Schneider on the same day ... we merely stated our belief that certain closing conditions had not been and could not be satisfied, and that in no way constitutes a repudiation of any obligation." (*Id.* at 1) Nonsense.

172. Realogy responded promptly to the May 1st SIRVA Letter later that day (the "May 1st Realogy Letter"), rejecting SIRVA's purported termination as invalid. [18]

(5) May 7th

173. On May 7, 2020, Realogy publicly announced its results for the first quarter of 2020 by holding an earnings call and filing its quarterly report on Form 10-Q. Consistent with its public guidance and its numerous assurances to SIRVA in the course of negotiations, Realogy's Q1 2020 results demonstrated that Realogy is a stable, going concern, despite headwinds in the market as a whole. Realogy's CEO reported that Realogy had "delivered" on "momentum" he had noted in Realogy's Q4 2019 earnings call, "with a very strong Q1, 8% volume growth and a $35 million increase in operating EBITDA." Acknowledging the ongoing COVID-19 pandemic, Mr. Schneider added that "our Q1 results delivery gives me confidence that we can emerge strong from this crisis and resume that momentum." Mr. Schneider also described Realogy's response to COVID-19 and potential opportunities for Realogy under changing market conditions. Realogy's quarterly report noted that the pandemic "has created considerable risks and uncertainties for almost all sectors, including the U.S. real estate services industry, as well as for the Company and its affiliated franchisees" and described Realogy's actions to adapt to market conditions and maintain liquidity during the crisis. (May 7, 2020 Realogy Form 10-Q, at 34-36)

(6) May 8th

174. On May 8, 2020, during the parties' oral argument regarding Realogy's Motion to Expedite Proceedings, SIRVA raised, for the very first time, its theory that the Debt Financing Letter had expired by its terms on May 7, 2020 and therefore specific performance was unavailable as a remedy. If that were true, it would not relieve SIRVA of its obligations to consummate the Closing or deprive Realogy of a specific performance remedy. But it would give rise to SIRVA's obligation to use its reasonable best efforts to secure Alternative Financing and use its reasonable best efforts to consummate the Closing. Inferably, SIRVA took no steps to secure Alternative Financing or consummate the Closing, further breaching the Purchase Agreement, consistent with its bad faith conduct concerning its obligations.

175. The Court found that Realogy had demonstrated a colorable claim under the Purchase Agreement, based on Realogy's allegations that SIRVA breached the agreement by wrongfully refusing to close the transaction because there had been no Material Adverse Effect, and under the Limited Guaranty against Madison Dearborn Partners for the termination fee. The Court further concluded that, "[a]t bottom ... the specific performance claim remains colorable."

(d) No Material Adverse Effect Occurred Prior To April 25, 2020

176. Realogy has performed all of its obligations under the Purchase Agreement. Cartus's financial condition, business and results of operations, taken as a whole, have not suffered a Material Adverse Effect, as defined in the Purchase Agreement. And, in any event, under the definition of Material Adverse Effect in Section 1.1 of the Purchase Agreement, "acts of God [or] natural disasters," such as COVID-19, cannot qualify as a Material Adverse Effect, unless Cartus is disproportionately adversely affected by COVID-19 relative to other similarly situated participants in industries in which it operates. Cartus has not been disproportionately adversely affected. [Text redacted in copy]

[Text redacted in copy]

177. [Text redacted in copy]

178. Nor are SIRVA's and Madison Dearborn's arguments regarding Cartus's or Realogy's solvency indicative in any way of a Material Adverse Effect. Nowhere in the Purchase Agreement is Realogy required to prove that it will remain a going concern for the duration of its post-Closing obligations, and in any event, changes in the stock price or trading volume of Realogy are expressly excluded from the definition of a Material Adverse Effect. Moreover, Realogy expects to remain a going concern for the duration of its post-Closing obligations, and none of Realogy's recent public filings, including its May 7, 2020 10-Q, contains any disclosure expressing any doubt about Realogy's ability to continue as a going concern, as would be required if such doubt existed. In fact, as Realogy noted in its first quarter of 2020 earnings call, Realogy had "delivered" on "momentum" it noted in Realogy's Q4 2019 earnings call, "with a very strong Q1, 8% volume growth and a $35 million increase in operating EBITDA."

179. As described above, SIRVA and Madison Dearborn's position that Cartus has suffered a Material Adverse Effect is nothing more than a poorly disguised pretext to renege on a deal they no longer want to go through with for reasons entirely unrelated to Cartus or its actual or projected financial condition.

(e) SIRVA Breached Its Numerous "Reasonable Best Efforts" Obligations And The Implied Covenant Of Good Faith And Fair Dealing

180. The Purchase Agreement requires that SIRVA exercise "reasonable best efforts" to satisfy the conditions to Closing as soon as reasonably practicable. It also requires that SIRVA use its reasonable best efforts with respect to its various obligations with respect to financing. Here, rather than exercising reasonable best efforts, SIRVA, together with Madison Dearborn, concocted a

scheme *specifically designed to scuttle the financing it had obtained in connection with the Transaction and thwart the Closing of the Transaction.*

(f) Realogy Is Entitled To Specific Performance

181. As set forth above, SIRVA has breached, and continues to breach, numerous of SIRVA's obligations under the Purchase Agreement, including, but not limited to, its obligations to: (i) use its reasonable best efforts to obtain and maintain in effect Debt Financing in connection with the Transaction, including using reasonable best efforts to satisfy or obtain a waiver of all conditions applicable to Buyer and its Affiliates in the Debt Financing Commitments (PA § 7.3(a)); (ii) use its reasonable best efforts to arrange and obtain, as promptly as practicable, Alternative Financing if the Debt Financing expires, is terminated, repudiated, withdrawn or rescinded for any reason (*id.*); (iii) use its reasonable best efforts to obtain and maintain in effect the Equity Financing Commitments, including taking all actions to consummate the Equity Financing at or prior to the Closing, enforcing its rights (including seeking specific performance of the parties' obligations) under the Equity Financing Commitments, and causing the Equity Financing Sources to fund the Equity Financing no later than the Closing (PA § 7.3(d)); and (iv) use its reasonable best efforts to cause the conditions to Closing set forth in Article X to be satisfied as soon as practicable (PA § 7.6(a)).

182. Section 13.8 of the Purchase Agreement provides that "the Parties shall be entitled to an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity."

183. *First,* Realogy is entitled to an order requiring SIRVA to specifically perform all of its covenants and obligations under the Purchase Agreement, aside from SIRVA's obligation to consummate the Transaction. The four conditions set forth in Section 13.8(b) have no relevance to an order of specific performance requiring SIRVA to comply with all of its covenants and obligations under the Purchase Agreement, such as the reasonable best efforts obligations set forth in the preceding paragraph, other than an order for specific performance to "consummate the Transaction."

184. *Second,* Realogy is entitled to an order of specific performance requiring SIRVA to consummate the Transaction, notwithstanding the four conditions set forth in Section 13.8(b), because any purported failure of those conditions to be satisfied are a result of SIRVA's own bad faith conduct and breaches of the Purchase Agreement. To the extent *any* condition set forth in Section 13.8(b) has not been or will not be met, those conditions for performance are excused because SIRVA either caused or materially contributed to its failure, through its wrongful conduct, bad faith, and breaches of the Purchase Agreement. Likewise, to the extent any condition to SIRVA's obligation to close the Transaction has not been or will not be satisfied, those conditions cannot provide a basis for SIRVA's refusal to close the Transaction. That is because all conditions to SIRVA's obligation to close the Transaction were satisfied (other than those conditions that by their nature are to be satisfied at the Closing) at the time Realogy's counsel sent the Closing Letter to SIRVA's counsel on April 24, as Realogy irrevocably confirmed in the Closing Letter. SIRVA's wrongful conduct, bad faith, and breaches of the Purchase Agreement either caused or materially contributed to any purported failure of those conditions, including SIRVA's repudiations by phone and letter on April 25 and continuing up to and including SIRVA's conduct in the course of this litigation.

FIRST CAUSE OF ACTION

(Breach Of Contract Against SIRVA)

(Reasonable Best Efforts/Iterative Steps To Close)

185. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

186. The Purchase Agreement is a valid and binding contract between Realogy and SIRVA. Realogy and SIRVA are each sophisticated parties, advised by experienced and reputable legal and financial advisors who bargained at arm's length over the terms and conditions of the Purchase Agreement.

187. Realogy has fully performed all of its obligations under, and has not breached, the provisions of the Purchase Agreement, and all conditions under the Purchase Agreement to closing on the Transaction have been satisfied (other than those conditions that by their nature are to be satisfied at the Closing) or were not satisfied as a result of SIRVA's wrongful conduct. As a result, the Purchase Agreement requires SIRVA to, among other things, use its “reasonable best efforts” to do all things necessary and proper to: (i) to satisfy or obtain a waiver of all conditions applicable to Buyer and its Affiliates in the Debt Financing Commitments pursuant to Section 7.3(a); (ii) arrange and obtain, as promptly as practicable, Alternative Financing if the Debt Financing expires or is terminated, repudiated, withdrawn or rescinded for any reason pursuant to Section 7.3(a); (iii) enter into a definitive debt commitment letter with respect to any Alternative Financing pursuant to Section 7.3(a); (iv) obtain and maintain in effect the Equity Financing Commitments, which, in turn, includes taking all actions to consummate the Equity Financing at or prior to Closing, enforcing its rights (including seeking specific performance of the parties' obligations) under the Equity Financing Commitments, and causing the Equity Financing Sources to fund the Equity Financing no later than the Closing pursuant to Section 7.3(d); and (v) cause the conditions to Closing set forth in Article X to be satisfied as soon as practicable.

188. SIRVA has materially breached the Purchase Agreement and acted in bad faith by refusing to perform the unambiguous contractual obligations thereunder.

189. SIRVA expressly agreed in Section 13.8 of the Purchase Agreement that Realogy is entitled to an injunction requiring SIRVA to specifically perform its obligations under the Purchase Agreement, and that SIRVA's failure to perform its obligations would cause irreparable harm to Realogy.

190. SIRVA's material breaches of the Purchase Agreement threaten to prevent Realogy from receiving the benefit of the parties' bargain, which would result in irreparable harm to Realogy. Consequently, Realogy is entitled to an Order requiring SIRVA to specifically perform its contractual obligations set forth in Sections 7.3 and 7.6 of the Purchase Agreement and prohibiting SIRVA from continuing to breach the Purchase Agreement.

191. Realogy has no adequate remedy at law.

SECOND CAUSE OF ACTION

(Breach Of Contract Against SIRVA)

(Consummation Of Transaction)

192. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

193. The Purchase Agreement is a valid and binding contract between Realogy and SIRVA. Realogy and SIRVA are each sophisticated parties, advised by experienced and reputable legal and financial advisors who bargained at arm's length over the terms and conditions of the Purchase Agreement.

194. Realogy has fully performed all of its obligations under, and has not breached, the provisions of the Purchase Agreement, and all conditions under the Purchase Agreement to closing on the Transaction have been satisfied (other than those conditions that by their nature are to be satisfied at the Closing), or were not satisfied as a result of SIRVA's wrongful conduct. As a result, the Purchase Agreement required SIRVA to, among other things, deliver the Closing Date Payment and consummate the transactions contemplated by the Purchase Agreement no later than April 29, 2020.

195. SIRVA has materially breached the Purchase Agreement by refusing to perform the unambiguous contractual obligations thereunder, and acting in bad faith.

196. SIRVA expressly agreed in Section 13.8 of the Purchase Agreement that Realogy is entitled to an injunction requiring SIRVA to specifically perform its obligations under the Purchase Agreement, and that SIRVA's failure to perform its obligations would cause irreparable harm to Realogy. To the extent they apply, in light of SIRVA's bad faith conduct, all contractual preconditions to specific performance are satisfied or have failed to be satisfied as a result of SIRVA's own conduct.

197. SIRVA's material breaches of the Purchase Agreement threaten to prevent Realogy from receiving the benefit of the parties' bargain, which would result in irreparable harm to Realogy. Consequently, Realogy is entitled to an Order requiring SIRVA to consummate the Closing and prohibiting SIRVA from terminating the Purchase Agreement or taking, causing or permitting any action to prevent or impede consummation of the Transaction or any related transactions required under the Purchase Agreement.

198. Realogy has no adequate remedy at law.

ONLY IN THE ALTERNATIVE, *THIRD CAUSE OF ACTION*

(Breach Of Contract Against SIRVA)

(Termination Fee)

199. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

200. The Purchase Agreement is a valid and binding contract between Realogy and SIRVA. Realogy and SIRVA are each sophisticated parties, advised by experienced and reputable legal and financial advisors who bargained at arm's length over the terms and conditions of the Purchase Agreement.

201. Realogy has fully performed all of its obligations under, and has not breached, the provisions of the Purchase Agreement.

202. SIRVA has materially breached the Purchase Agreement by refusing to perform the unambiguous contractual obligations thereunder, and acting in bad faith.

203. Accordingly, if the Court determines Realogy is not entitled to specific performance of SIRVA's ultimate obligation to consummate the Transaction and the Purchase Agreement is deemed terminated, then *as an alternative* to the specific performance remedy described above, Realogy is entitled to an Order requiring SIRVA to specifically perform its contractual obligation under the Purchase Agreement to pay to Realogy a $30 million termination fee.

FOURTH CAUSE OF ACTION

(Declaratory Judgment Against SIRVA)

204. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

205. No Material Adverse Effect has occurred, and effects caused by the COVID-19 pandemic do not constitute a Material Adverse Effect under the express terms of the Purchase Agreement.

206. Because no Material Adverse Effect has occurred, all conditions precedent to Closing under the Purchase Agreement are fully satisfied (other than those conditions that by their nature are to be satisfied at the Closing), or were not satisfied as a result of SIRVA's wrongful conduct.

207. None of the alleged circumstances concerning the COVID-19 pandemic provide any basis for SIRVA to terminate the Purchase Agreement because such circumstances were expressly agreed to not constitute a Material Adverse Effect as defined in Section 1.1 of the Purchase Agreement. Furthermore, Cartus has not experienced any disproportionately adverse effect from the COVID-19 pandemic.

208. SIRVA had and has no valid basis to terminate the Purchase Agreement, and SIRVA is not excused from performing its obligations under the Purchase Agreement.

209. Realogy has not breached, and has complied in all material respect with, the provisions of the Purchase Agreement.

210. Pursuant to 10 *Del. C.* § 6501 and Court of Chancery Rule 57, Realogy requests a declaratory judgment that: (i) SIRVA has breached its obligations under the Purchase Agreement, specifically including its obligations to take all steps necessary to consummate the Closing and to consummate the Closing; (ii) nothing has had or would reasonably be expected to have a Material Adverse Effect; (iii) Realogy has not breached, and has complied in all material respects with, the provisions of the Purchase Agreement; (iv) all conditions to Closing under the Purchase Agreement have been satisfied, or were not satisfied as a result of SIRVA's wrongful conduct; (v) SIRVA had and has no right to terminate the Purchase Agreement; and (vi) SIRVA is not excused from performing its obligations under the Purchase Agreement.

FIFTH CAUSE OF ACTION

(Good Faith And Fair Dealing Against SIRVA)

211. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

212. SIRVA has breached the implied covenant of good faith and fair dealing.

213. SIRVA's actions were designed to frustrate the overarching purpose of the Purchase Agreement, *i.e.,* consummation of the Transaction itself.

214. SIRVA has acted in bad faith and in an unreasonable manner, and with the intent of preventing Realogy from receiving the benefit of the Purchase Agreement.

ONLY IN THE ALTERNATIVE, *SIXTH CAUSE OF ACTION*

(Breach Of Contract Against Madison Dearborn)

215. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

216. The Limited Guaranty is a valid and binding contract by Madison Dearborn in favor of Realogy. Madison Dearborn and Realogy are each sophisticated parties, advised by experienced and reputable legal and financial advisors who bargained at arm's length over the terns and conditions of the Limited Guaranty.

217. Realogy has fully performed all of its obligations under, and has not breached, the provisions of the Limited Guaranty.

218. The Limited Guaranty requires that Madison Dearborn pay the Termination Fee under the terms and conditions set forth therein.

219. SIRVA has materially breached the Purchase Agreement by refusing to perform the unambiguous contractual obligations thereunder.

220. Accordingly, if (1) the Court determines Realogy is not entitled to specific performance of SIRVA's ultimate obligation to consummate the Transaction and the Purchase Agreement is deemed terminated and (2) SIRVA fails to pay the $30 million termination fee, then *as an alternative,* Realogy is entitled to an Order requiring Madison Dearborn to specifically perform its contractual obligation under the Limited Guaranty to pay to Realogy a $30 million termination fee.

PRAYER FOR RELIEF

WHEREFORE, Realogy respectfully requests that the Court enter an order:
(a) Declaring that the Purchase Agreement remains in full force and effect; that SIRVA had and has no valid basis to terminate the Purchase Agreement and that SIRVA is not excused from performing its obligations under the Purchase Agreement;

(b) Declaring that SIRVA committed material breaches of the Purchase Agreement by declaring its intention to cease performing its obligations without a valid basis, acting in bad faith, and subsequently purporting to terminate the Purchase Agreement;

(c) Declaring that no "Material Adverse Effect" (as defined in the Purchase Agreement) has occurred or would be or would have been reasonably expected to occur;

(d) Declaring that Realogy has complied in all material respects with, its covenants and obligations under the Purchase Agreement;

(e) Declaring that all conditions precedent to Closing under the Purchase Agreement are fully satisfied (other than those conditions that by their nature are to be satisfied at the Closing), or were not satisfied as a result of SIRVA's wrongful conduct;

(f) Declaring that SIRVA breached its obligations and covenants under Sections 7.3 and 7.6(a) of the Purchase Agreement, and the implied covenant of good faith and fair dealing under the Purchase Agreement;

(g) Declaring that SIRVA's purported terminations of the Purchase Agreement were invalid and of no legal consequence;

(h) Ordering SIRVA to specifically perform all of its covenants and obligations under the Purchase Agreement (but not specifically enforcing the consummation of the Transaction itself), including, but not limited to, its obligations to: (i) use its reasonable best efforts to satisfy or obtain a waiver of all conditions applicable to Buyer and its Affiliates in the Debt Financing Commitments pursuant to Section 7.3(a); (ii) use its reasonable best efforts to arrange and obtain, as promptly as practicable, Alternative Financing if the Debt Financing expires or is terminated, repudiated, withdrawn or rescinded for any reason pursuant to Section 7.3(a); (iii) enter into a definitive debt commitment letter with respect to any Alternative Financing pursuant to Section 7.3(a); and (iv) use its reasonable best efforts to obtain and maintain in effect the Equity Financing Commitments, including taking all actions to consummate the Equity Financing at or prior to Closing, enforcing its rights (including seeking specific performance of the parties' obligations) under the Equity Financing Commitments, and causing the Equity Financing Sources to fund the Equity Financing no later than the Closing pursuant to Section 7.3(d);

(i) Ordering SIRVA to specifically perform its covenant under Section 7.6(a) of the Purchase Agreement to use its reasonable best efforts to cause the conditions to Closing set forth in Article X to be satisfied as soon as practicable (but not specifically enforcing the consummation of the Transaction itself);

(j) Ordering SIRVA to specifically perform its obligation to consummate the Transaction;

(k) Prohibiting SIRVA from terminating the Purchase Agreement or taking, causing or permitting any action to prevent or impede consummation of the Transaction or any related transactions required under the Purchase Agreement;

(l) Prohibiting SIRVA from continuing to breach the Purchase Agreement;

(m) In the alternative if the Purchase Agreement is deemed terminated, ordering SIRVA to specifically perform its contractual obligation under the Purchase Agreement to pay to Realogy a $30 million termination fee;

(n) In the alternative if the Purchase Agreement is deemed terminated and if SIRVA does not pay, ordering Madison Dearborn to specifically perform its contractual obligation under the Limited Guaranty to pay Realogy a $30 million termination fee;

(o) Requiring SIRVA to pay Realogy's costs and expenses incurred in connection with this lawsuit, including expert fees and reasonable attorneys' fees; and

(p) Granting Realogy such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

Cliff C. Gardner (ID No. 5295)

Jessica R. Kunz (ID No. 5698)

Rupal K. Joshi (ID No. 6293)

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

One Rodney Square

P.O. Box 636

Wilmington, Delaware 19899-0636

Tel.: (302) 651-3000

Attorneys for Plaintiff Realogy Holdings Corp.

DATED: May 17, 2020

Footnotes

1 Capitalized terms are defined *infra,* or, if not otherwise defined herein, have the meanings set forth in the Purchase and Sale Agreement, dated November 6, 2019, by and between Realogy and SIRVA (the "Purchase Agreement"). A true and correct copy of the Purchase Agreement is attached hereto as Exhibit A and is cited as § ___.

2 "Cartus," as used herein, means the Cartus relocation services business that was to be sold to SIRVA.

3 After giving effect to Realogy's estimated closing adjustments, this amount would be [Text redacted in copy]

4 A true and correct copy of the Limited Guaranty is attached hereto as Exhibit B and is cited as LG § ___.

5 After giving effect to Realogy's estimated closing adjustments, the Closing Date Payment would be [Text redacted in copy]

6 The ECL refers to the entities defined as "Madison Dearborn" in this Amended Complaint as the "Investors."

7 The claims presently asserted and relief presently sought herein are expressly confined to claims and relief permissible without adverse consequences pursuant to the terms of the Purchase Agreement and related Transaction Documents, including, without limitation, the Limited Guaranty, the ECL and the DCL, and in each case subject to the requirements and limitations set forth therein; however, Plaintiff reserves all of its rights, including the right to assert additional claims and seek other, further and different relief as this case progresses.

8 "Coronavirus Could Cost The Global Economy $2.7 Trillion. Here's How," Bloomberg, Mar. 6, 2020, available at https://www.bloomberg.com/graphics/2020-coronavirus-pandemic-global-economic-risk/.

9 "WHO Director-General's opening remarks at the media briefing on COVID-19," WORLD HEALTH ORG., Mar. 25, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefmg-on-covid-19---25-march-2020 (emphasis added).

10 "Global Level 4 Health Advisory - *Do Not Travel,*" U.S. DEPT. OF STATE, Mar. 31, 2020, available at https://travel.state.gov/content/travel/en/traveladvisories/ea/travel-advisory-alert-global-level-4-health-advisory-issue.html (emphasis added).

11 SIRVA Worldwide, Inc., *Mobility Program Considerations for Clients in the World of COVID-19* (Mar. 11, 2020), https://www.sirva.com/docs/default-source/resources-docs/media-publications/2020/managing-the-u-s-level-four-travel-ban.pdf?sfvrsn=96297cd9_12 (emphasis added); *see* SIRVA Worldwide, Inc., *The Changing Impacts of COVID-19 on Household Goods (HHG) Shipments* (Mar. 17, 2020), https://www.sirva.com/docs/default-source/resources-docs/media-publications/2020/the-changing-impacts-of-covid-19-on-household-goods-(hhg)-shipments.pdf?sfvrsn=dc649df8_14 ("[T]he implications of [COVID- 19] outbreak have had *a significant impact on mobility,* including the shipment and delivery of household goods.") (emphasis added).

12 SIRVA previously filed a Chapter 11 bankruptcy petition, along with several affiliates, in February 2008.

13 A true and correct copy of the April 24, 2020 Closing Letter is attached hereto as Exhibit E.

14 A true and correct copy of the April 25th Letter is attached hereto as Exhibit F.

15 A true and correct copy of the April 28th Letter is attached hereto as Exhibit G.

16 A true and correct copy of the April 30th Letter is attached hereto as Exhibit H.

17 A true and correct copy of the May 1st SIRVA Letter is attached hereto as Exhibit I.

18 A true and correct copy of the May 1st Realogy Letter is attached hereto as Exhibit J.

2020 WL 4559519
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Re: REALOGY HOLDINGS CORP.,
v.
SIRVA WORLDWIDE, et al.,

C.A. No. 2020-0311-MTZ
|
August 7, 2020

Attorneys and Law Firms

Robert S. Saunders, Esquire, Edward B. Micheletti, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, 920 North King Street, Wilmington, Delaware 19801

William M. Lafferty, Esquire, Kevin M. Coen, Esquire, Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, Wilmington, Delaware 19801

Opinion

Morgan T. Zurn, Vice Chancellor

***1** Dear Counsel:
Plaintiff Realogy Holdings Corp. ("Realogy" or "Plaintiff") applied for certification of an interlocutory appeal from the bench ruling issued July 17, 2020 (the "Bench Ruling").[1] The Bench Ruling dismissed Realogy's claims for specific performance because under the governing Purchase and Sale Agreement ("Purchase Agreement"), the unambiguous contractual conditions on that remedy failed.[2] For the following reasons, I recommend against certifying an interlocutory appeal.

I. Background

A. The Parties & Procedural History

Plaintiff Realogy is a "full-service residential real estate services company, including brokerage, franchising, relocation, mortgage, and title and settlement services."[3] Non-party Cartus Corporation ("Cartus"), Realogy's indirect, wholly-owned subsidiary, "provides relocation counseling to newly-hired or transferring employees of large corporations, logistical relocation support, international assignment compensation services, intercultural and language training, and consulting solutions."[4]

Defendant SIRVA is a "global relocation and moving service provider, providing integrated business-to-business mobility solutions for corporations, government institutions and consumers."[5] SIRVA is a Madison Dearborn Partners, LLC ("MDP LLC") portfolio company.[6] MDP LLC acquired SIRVA in 2018.[7] Defendants Madison Dearborn Capital Partners VII-A, L.P., Madison Dearborn Capital Partners VII-C, L.P., and Madison Dearborn Capital Partners VII Executive-A, L.P. (collectively, "MDP") are entities through which MDP LLC conducts business.[8] Defendant North American Van Lines, Inc. ("North American," and collectively with SIRVA and MDP, "Defendants") provides moving services and is a SIRVA affiliate.[9]

Under the November 6, 2019, Purchase Agreement between Realogy and SIRVA, SIRVA was to purchase all of Cartus' issued and outstanding shares of common stock for $400 million.[10] MDP provided $125 million in equity financing and a limited guaranty of a termination fee.[11] On December 2, SIRVA and North American entered into an Assignment and Assumption of Agreement, by which SIRVA assigned its rights under the Purchase Agreement to North American.[12] In the context of the COVID-19 pandemic, and as the Purchase Agreement's outside date neared, the relationship between SIRVA and Realogy fractured.[13]

On April 27, 2020, Realogy filed its Verified Complaint for Breach of Contract ("Original Complaint").[14] The Original Complaint contains the following counts: (i) breach of contract against SIRVA, seeking specific performance; (ii) in the alternative, breach of contract against all Defendants, seeking the termination fee; and (iii) declaratory judgment, seeking, *inter alia*, declarations that Defendants breached their obligations under the Purchase Agreement and are not excused from performing thereunder.[15]

***2** The next day, Plaintiff filed a motion to expedite.[16] I heard oral argument on that motion on May 8.[17] I granted the motion in part, expediting Defendants' anticipated motion to dismiss based on the contractual availability of specific

performance to mid-July and expediting trial to November 30 through December 4 of this year. [18]

After the hearing on the motion to expedite, on May 17, Plaintiff filed an Amended Complaint for Breach of Contract ("Amended Complaint"). The Amended Complaint contains the following counts: (i) breach of contract against SIRVA seeking specific performance of its reasonable best efforts and "iterative steps to close"; (ii) breach of contract against SIRVA seeking specific performance consummating the transaction; (iii) in the alternative, breach of contract against SIRVA for the termination fee; (iv) declaratory judgment against SIRVA; (v) breach of the implied covenant of good faith and fair dealing against SIRVA; and (vi) in the alternative, breach of contract against MDP for the termination fee. [19] Notably, the Amended Complaint did not seek any relief against MDP under the Purchase Agreement.

On June 8, Defendants filed an answer to the Amended Complaint and Verified Counterclaim ("Counterclaim"). [20] The next day, Defendants filed a motion to dismiss Counts I and II of the Amended Complaint ("Motion to Dismiss"). [21] Plaintiff answered the Counterclaim on July 10. [22] The parties briefed their positions on the Motion to Dismiss, and I heard argument on July 17. Following argument, I gave the Bench Ruling granting the Motion to Dismiss Counts I and II. Realogy's request for interlocutory appeal followed.

B. The Purchase Agreement

The provisions of the Purchase Agreement most relevant to the Motion to Dismiss follow.

In Section 13.8, entitled "Specific Performance and Other Equitable Relief," SIRVA and Realogy agreed to several limitations on, and conditions for, obtaining the remedy of specific performance of the Purchase Agreement.

> (b) Notwithstanding anything to the contrary set forth in this Agreement, (i) in no event shall Seller or any of its Representatives (including the Acquired Companies prior to the Closing) be entitled to, or permitted to seek, specific performance against the Debt Financing Sources, except in each case indirectly through the enforcement of Buyer's obligations hereunder, and (ii) Seller shall be entitled to bring an Action to specifically enforce Buyer's obligation to consummate the Closing and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded ***if (and only if and for so long as)*** **(A)** ***all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied*** or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied at the Closing, each of which shall then be capable of being satisfied at the Closing and the date of termination) and Buyer fails to consummate the Closing on the date required pursuant to the terms of Section 2.3, **(B)** ***the proceeds of the Debt Financing (or any alternative debt financing) have been funded to Buyer or the agent for the Debt Financing Sources under the Debt Financing Commitments (or any definitive agreements executed pursuant thereto) has irrevocably confirmed in writing to Buyer that the Debt Financing will be funded subject only to the funding of the Equity Financing***, (C) Seller has not terminated this Agreement in accordance with Article XI and has irrevocably confirmed to Buyer in writing that all of the conditions set forth in Section 10.1 and Section 10.2 have been and continue to be satisfied or (to the extent permitted by applicable Law) waived (other than those conditions that by their terms or nature are to be satisfied by actions to be taken at the Closing, each of which shall then be capable of being satisfied at the Closing) and that if the Debt Financing and Equity Financing are funded, then

> Seller will consummate the Closing in accordance with the terms of this Agreement, and (D) Buyer has failed to consummate the Closing within three (3) Business Days after receipt of such irrevocable confirmation. ***For the avoidance of doubt,*** (a) in no event shall Seller be entitled to specifically enforce (or to bring any Action in equity seeking to specifically enforce) Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded other than as expressly provided in the immediately preceding sentence, and (b) ***in no event shall Seller be entitled to seek to specifically enforce any provision of this Agreement or to obtain an injunction or injunctions, or to bring any other Action in equity in connection with the transactions contemplated by this Agreement, against Buyer other than against Buyer and, in such case, only under the circumstances expressly set forth in this Section 13.8.*** [23]

***3** Thus, Realogy is only entitled to seek specific performance against SIRVA; this limitation is reinforced by Section 13.16, which states, "This Agreement may be enforced only against Seller and Buyer." [24] And Realogy may obtain that remedy "if (and only if and for so long as)" under Section 13.8(b)(ii)(A), all closing conditions "have been and continue to be satisfied," and under Section 13.8(b)(ii)(B), the Debt Financing is funded or "irrevocably confirmed in writing." [25]

Article X sets forth the closing conditions. Under Section 10.2(b), which Section 13.8(b)(ii)(A) directs must be satisfied for specific performance, the "Seller shall have performed and complied with, in all material respects, each covenant and obligation required by this Agreement to be so performed or complied with by Seller on or before the Closing." [26]

The Purchase Agreement limits the financing SIRVA must seek and provide. Under Section 6.6(e), "subject in all respects to Article XI and Section 13.8(b), [Buyer's] obligations set forth in this Agreement are not contingent or conditioned upon Buyer's, its Affiliate's or any other Person's ability to obtain financing (including the Financing or any Alternative Financing) for or in connection with the Transaction." [27] Section 7.3(c) compels SIRVA to use its reasonable best efforts to obtain alternative financing if debt financing—but not equity financing—becomes unavailable.

> If any portion of the Debt Financing becomes unavailable on the terms and conditions ... ***Buyer shall use its reasonable best efforts*** to (x) arrange and obtain, as promptly as practicable following the occurrence of such event, alternative financing from the same or alternative sources (the "Alternative Financing") in an amount sufficient to consummate the Transaction with terms and conditions not materially less favorable in the aggregate to Buyer than those set forth in the Debt Financing Commitments (or replace any unavailable portion of the Financing) and (y) obtain a debt financing commitment letter (including any associated fee letter) with respect to such Alternative Financing, true, accurate and complete copies of which shall be promptly provided to Seller upon execution thereof (which fee letters may be redacted with respect to any interest rates, fee amounts, pricing caps and other similar economic terms (including flex terms) set forth therein). The ***Alternative Financing*** (A) ***shall be sufficient to pay, when added to the Equity Financing and the remaining Debt Financing (if any), the Required Amount*** and (B) shall not include conditions or contingencies that could reasonably be expected to materially impair, delay or prevent or make less likely to occur the funding of the Debt Financing (or

> satisfaction of the conditions to the Debt Financing) on the Closing. [28]

Section 7.3(e) further states,

> Notwithstanding anything contained in this Section 7.3 or anything else in this Agreement, in no event shall the reasonable best efforts of Buyer be deemed or construed to required Buyer to, and Buyer shall not be required to, (x) incur or pay any fees to obtain a waiver or amendment of any term of the Debt Financing Commitments or fees (in the aggregate) in excess of those contemplated by the Debt Financing Commitments as of the date hereof, (y) ***agree to conditionality or economic terms of the Debt Financing Commitments that are less favorable than those contemplated by the Debt Financing*** or related fee letter (including any flex provisions therein) as of the date hereof, or (z) ***seek equity financing from a Person other than the Guarantors or in an amount in excess of the Equity Financing Commitments*** as of the date hereof. [29]

***4** Section 11.3 governs termination of the Purchase Agreement and the termination fee.

> (a) If this Agreement is terminated (i) by either Seller or Buyer pursuant to Section 11.1(a) and all conditions to Closing set forth in Section 10.1 (other than Section 10.1(a)(i) and other than Section 10.1(b)(to the extent arising under Antitrust Laws)) and Section 10.2 are satisfied or capable of being satisfied or are waived (other than those conditions that by their nature are to be satisfied at the Closing, each of which shall be capable of being satisfied at the Closing and the date of termination), (ii) by either Seller or Buyer pursuant to Section 11.1(b) and the applicable injunction or other order giving rise to such termination right arises under Antitrust Laws, or (iii) by Seller pursuant to (x) Section 11.1(d) or (y) Section 11.1(e), then, in each such case, Buyer shall, no later than two (2) Business Days after the date of such termination, pay, or cause to be paid, to Seller or its designee an amount equal to thirty million dollars ($30,000,000) (the "Termination Fee") without deduction or offset of any kind. Notwithstanding anything to the contrary contained in this Agreement, in no event shall Buyer be required to pay the Termination Fee on more than one occasion. [30]

The Limited Guaranty between Realogy and MDP conditionally guarantees the Termination Fee. [31]

Lastly, the Purchase Agreement defines a material adverse event ("MAE") and its consequences. [32] While this definition plays a role in Plaintiff's overarching theory of the case, it does not inform the Motion to Dismiss.

C. The Related Agreements

The Limited Guaranty between Realogy and MDP guarantees the payment of the Termination Fee if the terms and conditions in Section 11.3 of the Purchase Agreement are satisfied. [33] The Limited Guaranty limits Realogy's legal recourse against MDP solely and exclusively to "Retained Claims," as defined to include claims for payment of the Termination Fee. [34] A claim against MDP to enforce the Purchase Agreement is a "Non-Retained Claim." [35] While the Limited Guaranty may terminate upon assertion of a Non-Retained Claim, it permits Realogy to cure that assertion by dismissing the action within ten business days of receiving a "written demand for such withdrawal by [SIRVA]" (the "Cure Provision"). [36] In this case, SIRVA never sent Realogy such

a written demand because SIRVA believes any claim against it for the termination fee is not valid. [37]

The Equity Financing Commitment Letter ("ECL") between SIRVA and MDP establishes that MDP conditionally agreed to purchase up to $125 million of SIRVA equity to finance the transaction ("Equity Financing"). [38] MDP's funding obligations terminate "automatically and immediately" upon certain events, including the filing of an action against MDP for anything other than a Retained Claim. Section 3 states:

> The ***obligation of the Investors to fund the Commitment shall, in each case, automatically and immediately terminate upon the earliest to occur*** of (a) the Closing... (b) the valid termination of the Purchase Agreement in accordance with its terms, (c) ***Seller or any of its Representatives asserting, filing or otherwise commencing any Action against, any Investor Affiliate*** (as defined below) relating to this letter agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby ***other than Retained Claims (as defined in, and to the extent permitted under, the Limited Guaranty)***, in each case, subject to all of the terms, conditions and limitations herein and therein[.] [39]

***5** While Realogy is not a party to the ECL, it is explicitly listed as a third-party beneficiary that can enforce the ECL subject to Section 13.8(b) of the Purchase Agreement. [40] The ECL limits Realogy's remedies against MDP to those enumerated in the Limited Guaranty. [41]

Lastly, under the Amended Debt Commitment Letter ("DCL") between SIRVA and various lenders, those lenders agreed to fund up to $285 million of the purchase price ("Debt Financing"). [42] The Debt Financing was conditioned on the Equity Financing. [43] The DCL states that "[p]rior to, or substantially concurrently with," the funding contemplated by the DCL, "[SIRVA] shall have received the Equity Contributions." [44] The DCL further provides that the lenders' obligations to fund the Debt Financing "automatically terminate ... if the initial borrowing thereunder does not occur on or before 11:59 p.m., New York City time, on the date that is five business days after the [April 30, 2020] Outside Date[.]" [45] The DCL terminated under that provision on May 7, 2020.

D. The Timeline of Events

On April 24, 2020, Realogy sent SIRVA a letter stating that "all of the conditions set forth in Sections 10.1 and 10.2 of the Purchase Agreement had been satisfied (with the exception of those conditions that were to be satisfied at closing, all of which are capable of being satisfied)." [46] Realogy also stated "that assuming the Debt Financing and Equity Financing are funded," it would "consummate the Closing on April 29, 2020, the third Business Day following the expiration of the Marketing Period, in accordance with the terms of the Purchase Agreement." [47]

The same day, Thomas Souleles of MDP LLC called Realogy's Chief Executive Officer, Ryan Schneider. [48] Schneider was unable to speak at that time and the two agreed to speak the next morning. [49] When they spoke, Souleles indicated that SIRVA did not agree with Realogy's April 24 letter, and that SIRVA did not believe all of the conditions in Sections 10.1 and 10.2 of the Purchase Agreement had been satisfied. [50] SIRVA sought to invoke the Purchase Agreement's MAE provision, pointing to the impact of COVID-19 on Cartus's business. [51] SIRVA followed this phone call with a letter claiming the Purchase Agreement's MAE provision was triggered because (i) Cartus had been disproportionately impacted by COVID-19 [52] and (ii) Realogy will have solvency issues in the future that will prevent it from performing post-closing obligations. [53]

***6** Realogy filed the Original Complaint two days after receiving that letter. The same day, Realogy released a press release entitled, "Realogy Files Litigation Against Madison Dearborn Partners and SIRVA Worldwide to Enforce Commitments Under Purchase Agreement." [54]

On April 28, SIRVA sent Realogy a termination notice stating the Purchase Agreement was terminated effective immediately.[55] SIRVA claimed Realogy breached the Purchase Agreement by seeking specific performance in the Original Complaint when the conditions under Section 13.8 had not been satisfied. SIRVA explained:

> As a result, your filing of the Complaint on April 27, 2020 and the allegations made therein constitute a breach (moreover, a Willful Breach) of the Purchase Agreement by Seller such that the condition set forth in Section 10.2(b) of the Purchase Agreement would not be satisfied at the Closing. Moreover, in light of that improper, unpermitted filing coupled with your accompanying press release and the incalculable harm to SIRVA caused by the many false statements contained therein, such failure is incapable of being cured.[56]

SIRVA terminated the Purchase Agreement pursuant to Section 11.1(c), which permits the buyer to terminate the Agreement if "Seller has breached or failed to comply with any of its obligations under this Agreement such that the condition set forth in Section 10.2(b) would not be satisfied at the Closing."[57]

April 30 was the Purchase Agreement's Outside Closing Date.[58] On that day, Realogy sent SIRVA a letter claiming the termination notice was invalid.[59] On May 1, SIRVA sent Realogy a supplemental termination notice[60] stating that since the Outside Closing Date had passed, SIRVA was also terminating the Purchase Agreement under Section 11.1(a).[61] This notice once again alleged Realogy breached the Purchase Agreement by asserting a Non-Retained Claim against MDP.[62]

On May 7, the Debt Financing expired by its own terms.[63]

E. The Bench Ruling

I heard argument on the Motion to Dismiss on July 17. Following argument, I entered the Bench Ruling granting the Motion to Dismiss. The Bench Ruling adopted Defendants' reasoning as presented at oral argument, with two exceptions.[64] First, I did not "reach the abstract or doctrinal boundaries of the prevention doctrine because I believe that Realogy, and not SIRVA, caused the conditions to fail by filing the Non-Retained Claims."[65] Second, I elaborated upon Section 13.8's timing provisions:

> ***7** I agree with SIRVA's interpretation of the language "for so long as" and its interpretation of the clause "for the avoidance of doubt" regarding obtaining an injunction. Reading the provision as Realogy suggests would read out the contractual consequences of filing a Non-Retained Claim, which I believe would be an absurd result. And more globally, reading Section 13.8 to have the narrow window of time that Realogy suggests would lead us to the fundamental quandary we discussed at the motion to expedite of ordering specific performance without the contractually requisite equity financing.[66]

The remainder of Defendants' presentation's "exposition, explanation, and reasoning aligned with what I would write in a written opinion."[67] The Motion to Dismiss "turns entirely on the plain text of Section 13.8(b) of the [P]urchase [A]greement, Realogy's [Original Complaint], and the [ECL]... It has nothing to do with the MAE issues in the case."[68] Dismissal here "is a matter-of-law determination for the Court based on an unambiguous contract provision and the direct contractual consequences of what Realogy alleged and requested in its [Original Complaint]."[69]

Section 13.8(b)(ii)(B) precludes specific performance of the Purchase Agreement because the proceeds of the Debt Financing have not been funded or irrevocably confirmed in writing to Buyer.[70] The Debt Financing failed

because Realogy's Original Complaint terminated the Equity Financing; the Debt Financing also expired under the DCL's own terms on May 7th. [71]

Realogy asks for leniency in characterizing the Original Complaint, but to overlook Realogy's filing would be to "eliminate and change direct contract rights for [MDP] regarding its obligation to fund the equity, when that obligation, quote, 'automatically and immediately' terminated with [the Original Complaint]." [72] The Original Complaint defined "Defendants" as SIRVA and MDP. [73] Count III of the Original Complaint set forth six requests for declaratory judgment. [74] The first request seeks a declaration that "Defendants have breached their obligations under the Purchase Agreement;" the fifth request seeks a declaration that "SIRVA has no right to terminate the Purchase Agreement;" and the sixth seeks a declaration that "the Defendants are not excused from performing their obligations under the Purchase Agreement." [75] The first and sixth requests thus seek declarations against MDP under the Purchase Agreement. Additionally, Realogy's prayer for relief asks the Court to declare that "SIRVA has no valid basis to terminate the Purchase Agreement, the Defendants are not excused from performing their obligations under the Purchase Agreement, and that the Defendants committed material breaches of the Purchase Agreement." [76] The Original Complaint's "declaration and requested relief asking ... that MDP committed material breaches of the purchase agreement [is] not a [R]etained [C]laim" [77] as defined by the Limited Guaranty.

Under the ECL, filing a Non-Retained Claim against MDP via the Original Complaint had immediate consequences. The ECL states that MDP's equity funding obligation "automatically and immediately terminate[s]" if and when "Seller or any of its Representatives assert[s], fil[es] or otherwise commenc[es] any Action against, any Investor Affiliate (as defined below) relating to this letter agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby other than Retained Claims." [78] Realogy's allegations and requested relief against MDP automatically and immediately terminated the Equity Financing. [79]

***8** Under the unambiguous terms of the ECL, DCL, and Purchase Agreement, the Equity Financing's termination cascades into precluding specific performance. "Realogy itself acknowledges ... that the lenders' obligations under the [DCL] [are] subject to the condition that SIRVA receives a $125 million equity commitment from MDP." [80] The Debt Financing was conditioned on the Equity Financing, which terminated; and the Debt Financing would have expired on May 7 in any event. Without the Equity and Debt Financing, the conditions required for specific performance under Section 13.8(b)(ii)(B) can never be met.

Realogy's arguments were peripheral to the core contractual terms. Four arguments persist in its request for interlocutory appeal. First, it argued it did not intend to sue MDP under the Purchase Agreement; rather, it simply committed a few scrivener's errors by asserting Purchase Agreement claims against "Defendants." The governing agreements are blind to Realogy's intent. [81] And Realogy's press release precludes a forgiving conclusion that Realogy made a typo.

> [Realogy] meant it because they issued a press release on the very same moment that they filed it, doubling down on exactly what they say is a typographical error. The headline to their press release, issued to the media, put out on a website, says, 'Realogy Files Litigation Against Madison Dearborn Partners And SIRVA Worldwide To Enforce Commitments Under Purchase Agreement.' That's their headline. And in the body of the press release it said exactly what it now tells the Court was a scrivener's error. It said, quote, 'MDP and SIRVA,' leading again with MDP, 'have made false claims in an attempt to avoid their obligations under the purchase agreement.' And they vowed that they will, quote, 'pursue all legal remedies to ensure that SIRVA and MDP honor the commitments made under the purchase agreement.' [82]

Realogy failed to reconcile its purported scrivener's errors with its press release. [83] Realogy's Original Complaint comprised a Non-Retained Claim against MDP. [84]

Second, Realogy argued that the ECL's incorporation of the definition of Retained Claims "as defined in, and to the extent permitted under, the Limited Guaranty" [85] pulls the Limited Guaranty's Cure Provision into the ECL, such that Realogy's amended complaint should obviate its filing of a Non-Retained Claim. But "[t]he notion of a cure provision is directly contrary and inconsistent with the automatic and immediate termination language in the ECL." [86] The ECL "doesn't have a cure provision:" [87] instead, it provides for

"automatic and immediate termination" upon the filing of a Non-Retained Claim. [88]

***9** The language Realogy cites does not support incorporation. [89] The ECL addresses "Retained Claims (as defined in, and to the extent permitted under, the Limited Guaranty), in each case, subject to all of the terms, conditions and limitations herein and therein." [90] This language incorporates only the Limited Guaranty's definition, not the Cure Provision. It does not permit Realogy to file Non-Retained Claims against MDP, and then invoke the Cure Provision from the Limited Guaranty to eliminate the ECL's plain consequence of automatic and immediate termination. [91] Realogy's attempt to incorporate the Cure Provision of the Limited Guaranty into the ECL fails.

Third, Realogy argued that the Equity and Debt Financing failed because SIRVA claimed a MAE in a last-minute ambush a few days prior to closing. [92] But, under the ECL's plain terms, the Equity Financing automatically and immediately terminated upon filing of the Original Complaint. [93]

> [W]hen Realogy filed these nonretained claims against MDP, they did that on their own, and they blew up the equity and they blew up -- which then blew up the debt. And nothing [SIRVA] did caused or prevented that from happening. No action [SIRVA] took dictated Realogy's choice of litigation strategy, deciding who to sue for what. There's no line to be drawn, none, between SIRVA sending Realogy a letter about concerns of the deal on April 25th and Realogy's choice to sue Madison Dearborn Partners to enforce the purchase agreement on April 27th. They promised that they'd never do that ever under any circumstances, and they did. They didn't even have to sue MDP at all. They didn't have to, but they did and they chose that, and that filing had automatic and immediate consequences. [94]

Realogy's filing of the Non-Retained Claim, not SIRVA's purported "last-minute ambush," terminated the Equity Financing, which caused a condition of the Debt Financing to fail, as well as the conditions to specific performance.

Finally, Realogy argued that the Purchase Agreement's reasonable best efforts provisions require SIRVA to perform its financing obligations. [95] Realogy misreads the Purchase Agreement. SIRVA is required to use its reasonable best efforts to arrange and obtain Alternative Financing only in an amount "sufficient to pay ... when added to the Equity Financing and the remaining Debt Financing ... the Required Amount[.]" [96] Because Realogy filed a Non-Retained Claim, "[t]he equity financing is now gone forever... [s]o there's nothing for alternative financing to be additive to." [97] Additionally, under Section 7.3(e), SIRVA is not obligated to obtain new equity financing. [98] The "whole notion of alternative financing... blew up when [Realogy] blew up [the] equity. Once [Realogy] filed [a Non-Retained Claim] against MDP, that eliminated the equity to the deal, and that equity is a condition of the debt." [99] In the absence of Equity Financing, SIRVA has no obligation to seek Alternative Financing.

II. Analysis

***10** Supreme Court Rule 42(b)(i) provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment." [100] "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources." [101] Under Supreme Court Rule 42(b)(iii), this Court's analysis should include whether:

> (A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question

> of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice. [102]

After considering the Supreme Court Rule 42(b)(iii) factors and the Court's "own assessment of the most efficient and just schedule to resolve the case," the Court "should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal." [103]

Here, the Bench Ruling does not present any substantial issue of material importance to merit appellate review before a final judgment. "As a general matter, issues of contract interpretation are not worthy of interlocutory appeal." [104] The Motion to Dismiss required me to interpret the unambiguous provisions of the Purchase Agreement and related agreements. In dismissing Counts I and II, I determined that Realogy's assertion of a Non-Retained Claim in the Original Complaint triggered a series of events culminating in the failure of unambiguous contractual conditions required for specific performance under the Purchase Agreement. Standard contract interpretation issues are not suited for interlocutory appeal. [105] As a "mere contract dispute," that should "end it there." [106] On the threshold requirement of a substantial issue of material importance, alone, I recommend against Plaintiff's application.

***11** For completeness, I also consider the factors set forth in Supreme Court Rule 42(b)(iii). These factors reinforce my recommendation. Plaintiff addresses only Supreme Court Rule 42(b)(iii)(A), (B), and (H) as favoring its application. None of the factors Plaintiff addresses, nor the five others, support an interlocutory appeal. My analysis follows by factor.

A. The appeal does not involve a question of law resolved for the first time in Delaware. The dismissal was based on straightforward interpretations of contractual terms and Realogy's Original Complaint. Realogy argues that no "authority supports the notion that even the slightest pleading imprecision can cause the avalanche of dire consequences" [107] seen here, but this argument misconstrues the issues. Realogy's plain breach of unambiguous contractual language pushed over the first domino in a series of contractual consequences. Additionally, while Realogy argues that its theory incorporating the Cure Provision into the ECL makes this case unique, that argument further demonstrates that this is a straightforward contract interpretation case. [108] When, a "trial court applie[s] well-established principles of contract interpretation," "the case [does] not involve a matter of first impression." [109] This factor weighs against certifying the interlocutory appeal.

B. Trial court decisions do not conflict on the substance of the Bench Ruling. Plaintiff has not identified any Delaware decision to the contrary. The Bench Ruling did not address or rely on Delaware's pleading standards. It traced the direct and immediate contractual consequences of Realogy's Original Complaint. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* does not conflict with the Bench Ruling. [110] In *Hexion*, the financing had not terminated and thus, the transaction could still be consummated. [111] But under the governing merger agreement, even if all "conditions precedent to closing [we]re met, Hexion [would] remain free to choose to refuse to close." [112] Because the seller had agreed to forego specific performance, the Court ordered Hexion "to specifically perform its obligations under the merger agreement, other than the obligation to close." [113] This order placed the parties in the same situation on closing

day as they would have been if all parties had performed and satisfied all of the closing conditions. In *Hexion*, as here, the Court considered the seller's request for specific performance "to the extent permitted by the merger agreement itself." [114]

But here, SIRVA's reasonable best efforts to obtain Alternative Financing would not and could not lead to closing because Alternative Financing alone, without Equity Financing, will not satisfy conditions to closing or to specific performance. The immediate and automatic consequences of filing a Non-Retained Claim cannot be undone. SIRVA and Realogy cannot possibly be placed in the same situation on closing day as they would have been if all parties had performed and satisfied all of the closing conditions.

Plaintiff also takes issue with the form of the Bench Ruling. In resolving a straightforward, but multifaceted, contractual issue, I strove to maintain this Court's commitment to meaningful expedition even during a pandemic. I did so by leveraging, and distinguishing, Defendants' counsel's accurate, organized, and measured explanation. [115] I believe the Bench Ruling "ma[d]e a record to show what factors [I] considered and the reasons for [my] decision." [116] Based on the nuances of Realogy's application, it appears Realogy understands those factors and reasons. For my part, I do not believe the Bench Ruling's form alone warrants interlocutory appeal, particularly where the substance does not.

***12** C. The question of law does not relate to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by the Supreme Court in advance of an appeal from a final order, and Plaintiff identifies none. This factor weighs against certifying the interlocutory appeal.

D. The Bench Ruling does not sustain the controverted jurisdiction of the trial court, and Plaintiff does not argue that it does. [117] This factor weighs against certifying the interlocutory appeal.

E. The Bench Ruling does not reverse or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and review of the interlocutory order will not terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice. Plaintiff does not address this factor. This factor weighs against certifying the interlocutory appeal.

F. The Bench Ruling does not vacate or open a judgment of the trial court. Plaintiff does not address this factor. This factor weighs against certifying the interlocutory appeal.

G. Review of the Bench Ruling will not terminate the litigation. The Bench Ruling disposes of two counts seeking specific performance, but does not address the remaining four counts in the Amended Complaint and six counts in the Counterclaim still pending in this litigation. An interlocutory appeal would not terminate the litigation. This element weighs against certifying the interlocutory appeal.

H. Considerations of justice will not be served by an interlocutory appeal. Contrary to Realogy's argument, I did not apply a "hyper-technical pleading standard" in the midst of a pandemic. [118] I applied well-established principles of contractual interpretation to an unambiguous contract.

Further, Realogy now claims it needs immediate review of the Bench Ruling to avoid injustice from the passage of time. [119] But, in opposing the Motion to Dismiss, Realogy argued that the Court should "defer consideration and determination" of the specific performance issues until after trial to allow discovery on liability. [120] Realogy's new desire for speed rings hollow. The potential efficiencies or benefits of an interlocutory appeal do not outweigh the costs.

Considering all of the factors under Supreme Court Rule 42(b)(iii), I believe the balance weighs against certifying the interlocutory appeal. I recommend against certification.

III. Conclusion

***13** For the following reasons, I recommend against Plaintiff's application for certification of an interlocutory appeal. To the extent an order is required to implement this decision, **IT IS SO ORDERED**.

Sincerely,

/s/ Morgan T. Zurn
Vice Chancellor

All Citations

Not Reported in Atl. Rptr., 2020 WL 4559519

Footnotes

1 Docket Item ("D.I.") 78.
2 D.I. 83 [hereinafter, the "Bench Ruling"].
3 D.I. 32 [hereinafter, "Am. Compl."] ¶ 12.
4 Am. Compl. ¶ 13.
5 *Id.* ¶ 22.
6 *Id.* ¶ 24.
7 *Id.*
8 *Id.* ¶ 15.
9 *Id.* ¶ 26.
10 *Id.* ¶ 9.
11 *Id.* ¶¶ 52–53, 94, 99–100,
12 *Id.* ¶ 27.
13 *See e.g.*, *Id.* ¶¶ 138–141, 148–152.
14 D.I. 1 [hereinafter, "Compl."].
15 Compl. ¶¶ 92—112.
16 D.I. 2.
17 D.I. 34 [hereinafter, the "MTE Transcript"].
18 MTE Transcript at 80—82.
19 Am. Compl. ¶¶ 185—220.
20 D.I. 44.
21 D.I. 45.
22 D.I. 61.
23 Am. Compl. Ex. A [hereinafter, the "Purchase Agreement"] § 13.8(b) (emphasis added).
24 *Id.* §§ 13.8, 13.16.
25 *Id.* §§ 13.8(b)(ii)(A)-(B).
26 *Id.* § 10.2(b).
27 *Id.* § 6.6(e).
28 *Id.* § 7.3(c) (emphasis added).
29 *Id.* § 7.3(e) (emphasis added).
30 *Id.* § 11.3.
31 Am. Compl. Ex. B [hereinafter, the "Limited Guaranty"].
32 Purchase Agreement § 1.1.
33 Limited Guaranty § 1.
34 *Id.* § 4.
35 *Id.* § 4.
36 *Id.* § 6(b).
37 Bench Ruling at 23–24.
38 Am. Compl. Ex. C [hereinafter, the "ECL"].
39 *Id.* § 3 (emphasis added).
40 *Id.* § 7.

41 *Id.* § 8 ("Seller's remedies against the Investors as set forth in Sections 4(c) and 4(d) under the Limited Guaranty shall, and are intended to, be the sole and exclusive remedy available to Seller and its Affiliates against the Investors or any of their respective Affiliates in respect of any liabilities or obligations arising under, or in connection with, the Purchase Agreement or the Transactions from and after termination of the Purchase Agreement.").
42 Am. Compl. Ex. D [hereinafter, the "DCL"].
43 *Id.* ¶ 59.
44 DCL § 6, Ex. C.
45 *Id.* § 10.
46 Am. Compl. ¶ 153 (quoting Am. Compl. Ex. E).
47 *Id.* ¶ 153 (quoting Am. Compl. Ex. E).
48 *Id.* ¶¶ 20, 152, 154.
49 *Id.* ¶¶ 152, 154.
50 *Id.* ¶ 154.
51 *Id.*
52 *Id.* ¶ 156.
53 *Id.* ¶ 157.
54 D.I. 46 at 13, Ex. 5.
55 Am. Compl. ¶ 166.
56 *Id.* Ex. G.
57 Purchase Agreement § 11.1(c).
58 *Id.* § 11.1(a).
59 Am. Compl. ¶ 168.
60 *Id.* ¶ 169, Ex. I.
61 Purchase Agreement § 11.1 ("This Agreement may be terminated at any time prior to the Closing: (a) by either Seller or Buyer at or after 11:59 p.m. Eastern Time, on April 30, 2020 (as may be extended pursuant to the immediately following proviso, the "Outside Date") unless the Closing has occurred on or prior to the Outside Date...").
62 Am. Compl. ¶ 169.
63 DCL at 15 ("This Commitment Letter and the commitments hereunder shall automatically terminate in the event that (a) in respect of the Incremental Credit Facilities, if the initial borrowing thereunder does not occur on or before 11:59 p.m., New York City time, on the date that is five business days after the Outside Date (as defined in the Purchase Agreement as in effect on the Original Commitment Letter Date, including any extension of the Outside Date pursuant to the provisio of Section 11.1(a)) thereof (as in effect on the Original Commitment Letter Date)..."); *see also* MTE Transcript at 79.
64 Bench Ruling at 98–99.
65 *Id.*
66 *Id.* at 99.
67 *Id.* at 98.
68 *Id.* at 4.
69 *Id.*
70 *Id.* at 10–11.
71 *Id.* at 11.
72 *Id.* 14–15.
73 Compl. at 1.
74 *Id.* ¶ 112.
75 *Id.*; Bench Ruling at 15–16.
76 Bench Ruling at 16–17; Compl. at 44–45.
77 Bench Ruling at 19; *see also* ECL § 3.

78 ECL § 3; *see also* Bench Ruling at 19.
79 Bench Ruling at 22–23; *see also* ECL § 3.
80 Bench Ruling at 23 (citing Am. Compl. ¶ 59).
81 *Id.* at 16, 89 ("We think it's crystal-clear from the April 27 complaint. They can say it's a scrivener's error, they can say they really didn't mean it, notwithstanding their -- the fact that they flip back and forth from SIRVA in their press release. Their intent doesn't matter. If they filed it, it blew up the equity.").
82 *Id.* at 17 (quoting D.I. 46 Ex. 5). I took judicial notice of Realogy's press release announcing the filing of this litigation. *See In re Duke Energy Corp. Deriv. Litig.*, 2016 WL 4543788, at *4 n.34 (Del. Ch. Aug. 31, 2016) (taking judicial notice of a corporate press release); *see also Jimenez v. Palacios*, 2019 WL 3526479, at *2 n.3 (Del. Ch. Aug. 2, 2019), *as revised* (Aug. 12, 2019), *aff'd*, *Jimenez v. Palacios*, 2020 WL 4207625 (Del. July 22, 2020) (taking judicial notice of government press statements and releases).
83 Bench Ruling at 18.
84 *See id.* at 22.
85 ECL § 3.
86 Bench Ruling at 20–21; *see also id.* at 90–92.
87 *Id.* at 20.
88 *Id.*
89 *Id.* at 21–22.
90 ECL § 3 (emphasis added).
91 Bench Ruling at 22.
92 Am. Compl. ¶¶ 158, 160-162, 184.
93 Bench Ruling at 7.
94 *Id.* at 27–28.
95 In a footnote, Realogy also hints that SIRVA should not be aligned with MDP in this action because Section 7.3(d) of the Purchase Agreement required SIRVA to use its reasonable best efforts, including through litigation, to maintain the ECL in effect. D.I. 78 at 14 n.5. But the terms of the ECL itself terminated the Equity Financing automatically and immediately. Maintaining the ECL in effect is incongruous with overlooking its plain termination requirements.
96 Bench Ruling at 25 (citing Purchase Agreement § 7.3(c)(A)).
97 *Id.*
98 *Id.* (citing Purchase Agreement § 7.3(e)).
99 *Id.* at 26.
100 Supr. Ct. R. 42(b)(i).
101 Supr. Ct. R. 42(b)(ii).
102 Supr. Ct. R. 42(b)(iii).
103 Supr. Ct. R. 42(b)(iii).
104 *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *3 (Del. Ch. Feb. 28, 2018).
105 *See Lexington Ins. Co. v. Almah LLC*, 167 A.3d 499 (Del. 2016) (TABLE) (denying interlocutory appeal upon noting the "dispute turn[s] on issues of contract interpretation"); *Robino–Bay Court Plaza, LLC v. West Willow–Bay Court, LLC*, 941 A.2d 1019 (Del. 2007) (TABLE) (declining to grant interlocutory appeal of this court's construction of the operative contract); *McKnight v. USAA Cas. Ins. Co.*, 872 A.2d 959 (Del. 2005) (TABLE) (declining interlocutory appeal where "the trial court applied well-established principles of contract interpretation and thus the case did not involve a matter of first impression"); *Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2015 WL 1830476, at *2 n.3 (Del. Ch. Apr. 20, 2015) ("The Court's contract interpretation, even if wrong, would not seem to warrant interlocutory appeal.").
106 *Steadfast Ins. Co. v. DBi Servs., LLC*, 2019 WL 3337127, at *2 (Del. Super. July 25, 2019) (denying application for interlocutory review).
107 D.I. 78 ¶ 22.
108 D.I. 78 ¶ 23.

109 *McKnight v. USAA Cas. Ins. Co.*, 872 A.2d 959 (Del. 2005) (Table).

110 965 A.2d 715 (Del. Ch. 2008).

111 *See id.* at 758 ("Thus, if the other conditions to closing are met, Hexion will be obligated to call upon the lending banks to perform on their funding obligations. In that circumstance, the banks will then have to choose whether to fund on the basis of the solvency letter delivered by Huntsman or, instead, reject that letter as unsatisfactory and refuse to fund. If the lending banks refuse to fund, they will, of course, be opening themselves to the potential for litigation, including a claim for damages for breach of contract.").

112 *Id.* at 761.

113 *Id.* at 761–62 ("The issues in this case relate principally to the cost of the merger and whether the financing structure Apollo and Hexion arranged in July 2007 is adequate to close the deal and fund the operations of the combined enterprise. The order the court is today issuing will afford the parties the opportunity to resolve those issues in an orderly and sensible fashion.").

114 *Id.* at 722, 760.

115 *Compare Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1104 (Del. 2001) (rejecting a trial court order that adopted a brief in fourteen words without comment); *B.E.T., Inc. v. Bd. of Adjustment of Sussex Cty.*, 499 A.2d 811, 811 (Del. 1985) (rejecting a trial court order adopting, without further explanation, a brief "in those portions which are appropriate to adopt").

116 *See B.E.T., Inc.*, 499 A.2d at 811 (quoting *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979); *accord*, *Ball*, 780 A.2d at 1104; *see also B.E.T., Inc.*, 499 A.2d at 811 (citing *Ademski v. Ruth*, 229 A.2d 837, 838 n.1 (Del. 1967)) ("[a] judge may state [her] reasons briefly").

117 Since I have determined the equitable claims for specific performance fail, the only remaining issues are legal in nature, and "either party may elect to transfer this matter back to an appropriate court [*i.e.* Superior Court]." *Draper v. Westwood Development Partners, LLC*, 2010 WL 2432896, at *5 (Del. Ch. June 3, 2010).

118 D.I. 78 ¶ 33.

119 *Id.*

120 D.I. 57 at 28.

KAUFMAN DOLOWICH VOLUCK LLP

Mansfield Rule Certified 2020

Mansfield Rule Certified 2019

Stephen L. Brodsky

Partner

Overview

Stephen L. Brodsky is a partner in the firm's Litigation, Corporate, Financial Services and Construction practice groups. Mr. Brodsky has a broad complex commercial litigation and business counseling practice. For his corporate and individual clients, he litigates on their behalf, resolves their disputes through direct negotiations, advises on their transactions and provides ongoing counsel in connection with their business dealings.

Mr. Brodsky's practice spans industries. For example, he handles matters involving private company disputes (including "business divorces"); unfair competition, fraud and other business torts; restrictive covenant and employment disputes (management-side); claims involving corporate officers and directors; publicly traded and privately offered securities; banking matters; trade secrets; real estate development; public and private construction projects and contract disputes of all types.

Mr. Brodsky represents his clients in federal and state courts, from case inception through trial and appeal. Over his career, he has litigated significant, high-dollar cases in courts throughout the United States. He has argued at the trial and appellate levels and served as trial counsel in both bench and jury trials. He has also managed teams of attorneys and coordinated with other law firms in multi-party, consolidated national litigations. Mr. Brodsky also represents his clients in arbitrations, mediation, administrative proceedings before government agencies and in negotiations that do not involve formal legal process.

Mr. Brodsky additionally advises his clients in connection with their acquisitions, sales and other transactions and on issues that arise related to their business operations.

Mr. Brodsky is rated AV Preeminent by his clients and peers (including former opposing counsel), the highest possible professional rating for attorneys. He is also a member of the Theodore Roosevelt Inn of Court, a society of attorneys, law professors and Judges in New York.

Contact Information

135 Crossways Park Dr., Suite 201
Woodbury, New York 11797
Main: (516) 681-1100
Direct: (516) 283-8725
Cell: (516) 314-1407
Fax: (516) 681-1101
Email: sbrodsky@kdvlaw.com

40 Exchange Place,20th Floor
New York, New York 10005
Phone:(212) 485-9600
Fax:(212) 485-9700

Related Practices

- Commercial Litigation
- Corporate & Intellectual Property
- Shareholder and Partnership Disputes
- Financial Services
- Securities / Broker-Dealers
- Directors & Officers Liability
- Securities Industry Professionals
- Construction Law
- Claims, Litigation, Arbitration and Mediation
- Class Action
- Construction Regulation Compliance (M/W/DBE, OSHA, Safety)
- Directors and Officers (D&O)

In addition to his practice, Mr. Brodsky writes and speaks on legal and business-related issues. He has been published in journals such as the New York Law Journal, American Bar Association Securities Litigation Journal, Law 360, New York Bar Association Journal and Investment Management Weekly. Mr. Brodsky also teaches continuing legal education courses to fellow attorneys and presents seminars to business owners and executives. He also serves in leadership roles in professional associations, such as the American Bar Association, New York State Bar Association and Private Director Association.

Finally, Mr. Brodsky is committed to giving back. He is a Board member of a New York non-profit and active in both national and local organizations.

For the majority of his career prior to joining the firm, Mr. Brodsky practiced in the New York offices of national firms.

Admissions

- New York
- U.S. District Court
    - Southern District of New York
    - Eastern District of New York
- U.S. Court of Appeals
    - Second Circuit
    - Third Circuit
    - Eighth Circuit

Education

- Columbia Law School - J.D.
  Harlan Fiske Stone Scholar
  Member, Journal of Law and Social Problems
- University of Pennsylvania – B.A., *summa cum laude, Phi Beta Kappa, Dean's Honor List, Dean's Board*

Professional Memberships

- American Bar Association
    - Co-Chair, Securities Litigation Subcommittee
    - Practice Points Editor, Commercial & Business Litigation Committee
    - Co-Chair, Alternative Dispute Resolution Subcommittee (2018-2019)
- New York State Bar Association
    - Chair, Business Organizations Law Committee
    - Co-Chair, Committee on Federal Judiciary
    - Member, NYSBA Task Force on COVID-19 Immunity and Liability
- Financial Poise
    - Faculty Member and Presenter

- National Association of Corporate Directors (NACD)
  - Member
- Theodore Roosevelt American Inn of Court
  - Member
- Defense Resource Institute
  - Member

Community Affiliations

Mr. Brodsky is a Board member of and Counsel to Autism Communities, a New York non-profit organization establishing supportive residential housing for adults with autism in the state, with social, educational and employment opportunities.

Mr. Brodsky is actively involved in Autism Speaks, a national non-profit autism advocacy, research and support organization. He is a Volunteer Advocacy Ambassador for the State of New York. In that role, Mr. Brodsky, along with other advocates across the country, works with federal and state government representatives to further Autism Speaks' policy initiatives. He is also a Member of the Autism Speaks Long Island Walk Committee. The Long Island Walk is the second largest fundraising walk event for Autism Speaks in the United States

Experience

Representative Litigation

- *H. Stern Jewelers, Inc. v. International Shoppes, LLC*, N.Y. Sup. Ct., Nassau County, Index No. 602188/2020 (Destefano, J.) (Successfully defended large multi-member limited liability company in special proceeding brought by one of its members; obtained favorable resolution for client).
- *Professional Security Broadband, Inc. v. D. Brent Franklin*, 2:16-CV-02488-FB-GRB (E.D.N.Y.) (Successfully represented an industry-leading company in a federal litigation and related arbitration asserting fiduciary duty, shareholder and employment breaches by the company's former officer, director and shareholder; coordinated the defense of a related Pennsylvania state court action by the former officer asserting wrongful termination, wage statute and defamation claims against the company and its directors).
- *Cityfront Hotel Assocs. Limited Partnership v. Maya Systems, LLC d/b/a Benchmark Furniture Manufacturing*, 1:16-CV-02488-CBA-RLM (E.D.N.Y.) and *Maya Systems, LLC, d/b/a Benchmark Furniture Manufacturing v. THR 43 Land LLC, et al.*, N.Y. Sup. Ct., N.Y. County, Index No. 651670/2014 (James, J.) (Successfully defended a national furniture manufacturing company in related federal and state litigations alleging defective manufacturing and breach of contract claims; co-hearing counsel for the company in week-long private arbitration).
- *In re Kleinberg Electric, Inc.*, N.Y. State Dept. of Economic Development (Final Order 18-15) (Reversing denial of NYS Woman Business Enterprise (WBE) re-certification for a national electrical company; lead appellate brief writer).

- *Bonadio v. Bonadio*, N.Y. Sup. Ct., Queens County, Index No. 710368/2016 (Caloras, J.) (Granting summary judgment in real property dispute, awarding affirmative declaration of an easement and dismissal of all counterclaims).
- *Bank of Communications, New York Branch v. Ocean Development America, Inc., et al.*, 1:07-CV-04628-TPG (S.D.N.Y.) (Awarding judgment in favor of fifth largest bank in China in fraudulent conveyance action against counterparties after their default on a $5 million loan; co-trial counsel for bank).
- *Chen v. Sun, et al.*, 1:13-CV-00280-ALC-KNF, 2016 WL 270869 (S.D.N.Y Jan. 21, 2016) (Dismissing, for lack of subject matter jurisdiction, counterparty's foreign money judgment enforcement action).
- *70 West 45th Street Holding v. Waterscape Resort, LLC*, N.Y. Sup. Ct., N.Y. County, Index No. 651670/2014 (Kornreich, J.) (Granting summary judgment and releasing $500,000 escrow guaranty payment, after counterparty's failures in the development of a high-end, celebrity chef affiliated Manhattan restaurant).
- *Waterscape Resort LLC v. 70 West 45th Street LLC, et al.*, N.Y. Sup. Ct., N.Y. County, Index No. 652124/2014) (Scarpulla, J.) (Denying preliminary injunction in action alleging infringement and misuse of hotel trademark and tradename by client).
- *PCCP Capital II, LLC v. HNA Property Holdings LLC*, N.Y. Sup. Ct., N.Y. County, Index No. 615808/2013 (Ramos, J.) (Denying summary judgment in action seeking payment of an $8.12 million guaranty in connection with New York City development project).
- *Cayuga Indian Nation of New York v. Village of Union Springs, et al.*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) (Granting summary judgment for native American tribe, awarding declaratory judgment allowing the tribe's use of property within municipalities' boundaries; co-hearing counsel).
- *Dubinsky v. American Arbitration Association, et al.*,303 A.D.2d 318, 758 N.Y.S.2d 18 (1st Dept. 2003) (Affirming dismissal, on the pleadings, of breach of contract and tortious interference action brought against largest insurance company in the United States).
- *Freeman v. Sandals Resorts, Int'l, Ltd*, 3:00-CV-01512 (D. Conn. 2003) (Successful defense jury verdict, after week-long trial, of negligence action against international resort company; second chair for resort at jury trial).
- *A&A Assocs. v. Olympic Plumbing & Heating Corp., et. al*,306 A.D.2d 296, 760 N.Y.S.2d 652 (2d Dept. 2003) (Affirming summary judgment, dismissing unfair competition action against plumbing and heating company).
- *Brown v. Sandals Resorts, Int'l, Ltd*, 284 F.3d 949 (8th Cir. 2002) (Upholding jury verdict in favor of defendant international resort company in negligence action).
- *Smith v. S&S Dundalk Engineering Works, Ltd., et al.*,139 F. Supp. 2d 610 (D. N.J. 2001) (Dismissing, for lack of personal jurisdiction, declaratory judgment coverage action against multi-national insurance company).
- *AIU Ins. Co. v. Unicover Managers, Inc., et al.*,282 A.D.2d 260, 724 N.Y.S.2d 147 (1st Dept. 2001) (Affirming dismissal of reinsurance coverage and breach of contract action against managing general underwriter for pool of reinsurers).

Awards

- AV® Preeminent™ Rated by Martindale-Hubbell
- Theodore Roosevelt American Inn of Court Member

Publications

- We are proud to announce that Stephen Brodsky, NY Partner, has been appointed by New York State Bar Association President Karson to serve on the NYSBA Task Force on COVID-19 Immunity and Liability.

- *"Business Divorce In The Time Of COVID-19,"* Law360 - May 8, 2020
- *"FINRA Arbitration of Customer/Broker-Dealer Disputes: An Overview for the Uninitiated,"* American Bar Association, Commercial & Business Litigation Committee Quarterly - Winter 2020
- *"Cross-Border Arbitration: A Beneficial Alternative To Resolving International Commercial Disputes,"* American Bar Association, Commercial & Business Litigation Committee Quarterly - Spring 2019
- *"Restrictive Covenants In Employment and Related Contracts: Key Considerations You Should Know,"* ABA's Commercial & Business Litigation Practice Points - February 9, 2019
- *"Best Practices When Using Term Sheets, Letters of Intent or Memoranda of Understanding in Commercial Finance Transactions,"* TSL Express - October 30, 2018
- *"Protecting Venture Capital Firms Against Securities Litigation,"* ABA Securities Litigation Journal - August 25, 2018
- *"Navigating Federal and State Law in a NY Arbitration,"* New York Law Journal - August 3, 2018
- *"Enforcing Preliminary Agreements Under New York Federal Law,"* New York Law Journal - January 5, 2018
- *"M/WBE Regulatory Compliance - "Make The Effort/ Get The Waiver,"* Client Alert - December 2017

News

- We are proud to announce that Stephen Brodsky, NY Partner, has been appointed by New York State Bar Association President Karson to serve on the NYSBA Task Force on COVID-19 Immunity and Liability.
- *"Why Exit Planning Is Needed – Lessons From COVID-19,"* Webinar Course Presenter – May 21, 2020
- *"Business Divorce In The Time Of COVID-19,"* Law360 - May 8, 2020
- *"FINRA Arbitration of Customer/Broker-Dealer Disputes: An Overview for the Uninitiated,"* American Bar Association, Commercial & Business Litigation Committee Quarterly - Winter 2020
- *"Resolving Shareholder Disputes,"* Webinar Panelist - April 1, 2020

Speaking Engagements

- *"When Preliminary Agreements Are Enforceable: Best Practices When Using MOU's, LOI's and Term Sheets For Commercial Transactions,"* NYSBA CLE Webinar Course Presenter – June 18, 2020
- *"Why Exit Planning Is Needed – Lessons From COVID-19,"* Webinar Course Presenter – May 21, 2020
- *"Taking and Defending 'Winning' Depositions: Secrets for Success,"* NYSBA CLE Webinar - May 14, 2020
- *"Business Disputes in the Time of COVID-19,"* Presenter, Accountants Resource Group - April 28, 2020

- *"Resolving Shareholder Disputes,"* Panelist and Faculty Member, Financial Poise and West Legal (webinar available at WestLegalEdcenter.com) - April 1, 2020
- *"Arbitration – Best Practices, Hot Topics and Insights from the Panel,"* Moderator, Co-Chair of Alternative Dispute Resolution Subcommittee, American Bar Association (Panelists - Hon. Michael H. Dolinger (Ret.), Mr. Theo Cheng and Dr. Patricia D. Galloway) - October 8, 2019
- *"Business Succession Planning and Negotiating Agreements for Your Business,"* Presented with Blue Ocean Wealth Solutions - June 26, 2019
- *"Conducting A Commercial Arbitration In New York: The Interplay of Federal Law, State Law and The Rules of The Arbitration Forum,"* CLE Seminar, Nassau County Bar Association - February 28, 2019
- *"Restrictive Covenants and Confidentiality Agreements: What They Are and What You Need To Know,"* CLE Webinar, The Knowledge Group - September 26, 2018

Michael A. Ciaffa, Esq.
Forchelli Deegan Terrana LLP
333 Earle Ovington Blvd., suite 1010
Uniondale, NY 11553
516-248-1700

Michael A. Ciaffa is Of Counsel in the firm's Litigation Department. He handles a wide variety of complex civil litigation matters, from their inception through appeal, together with select criminal appeals.

Mr. Ciaffa was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar, hearing thousands of no-fault disputes and other civil and criminal cases. During his tenure, he had many “Decisions of Interest” published in the *New York Law Journal*. More than two dozen of his decisions were accepted for publication in the New York Miscellaneous Reports – the most of any District Court Judge during his six years on the bench.

Throughout the course of a legal career spanning more than three decades, Mr. Ciaffa has achieved notable success litigating high profile commercial cases, partnership disputes, insurance coverage issues, and lawsuits challenging illegal or unconstitutional government actions. In McCann v Scaduto, for example, he saved a widow's home after Nassau County sold it to a tax lien speculator because the widow had missed a small tax payment. In a precedent setting ruling by the New York Court of Appeals, it accepted his argument that Nassau County's tax foreclosure law violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Between 1984 and 2008, he worked as a litigator at Meyer, Suozzi, English & Klein, P.C. Before that, he served as the Law Secretary to Justice Jeffrey G. Stark of the Supreme Court, Nassau County. During the first six years of his legal career, he was a member of the Criminal Appeals Bureau of the Legal Aid Society of New York. He obtained his J.D. degree from St. John's Law School in 1977. In 1974, he received a B.A. from Colgate University

Mr. Ciaffa is a member of the New York State and Nassau County Bar Associations. He is admitted to practice law in the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the United States Supreme Court. In 2008, 2014, 2016, and again in 2017, he was found "well qualified" to serve as a District Court Judge by the Nassau County Bar Association.

FORCHELLI DEEGAN TERRANA

Email: dgatto@forchellilaw.com
Phone: (516) 248-1700
Fax: (866) 522-7811

Danielle B. Gatto is a partner in the litigation group, concentrating her practice in the areas of commercial litigation, real property actions, zoning matters, and employment litigation. Ms. Gatto also assists with commencing, and defending Constitutional actions, as well as complex tax certiorari proceedings. She also has extensive experience with adverse possession and prescriptive easement claims.

Ms. Gatto has successfully argued before the Appellate Division, as well as in state and in federal court proceedings. She also has significant experience with motion and trial practice in state and federal courts, representing large and small business, individuals, and municipalities.

Ms. Gatto is approved by the Officer of Court Administration in the State of New York to serve as a Receiver and Counsel to Receiver, and has been appointed by various Justices of the Nassau County Supreme Court to serve in these roles in order to oversee the appropriate and expeditious sale of real property.

In this COVID-19 world, Ms. Gatto has remained up to date on all new developments affecting litigation, including potential insurance coverage issues, the impact of force majeure provisions, and contract obligations generally. She has become particularly well-versed with the impact of COVID-19 on catering halls and potential steps to take to avoid contract issues.

Ms. Gatto has published numerous articles pertaining to COVID-19-related litigation issues, including articles on commercial contract rights and business interruption insurance.

Ms. Gatto has also published the following: “Limiting the Unrestricted Motion in Limine,” in the *New York Law Journal*, which she co-authored; “The Improper Use of Motions in Limine,” in the *Nassau Lawyer*, also co-authored; and authored “New Legislation to Promote a ‘Healthy’ Workplace,” in Hofstra’s *Labor and Employment Law Journal* blog.

She has received the Long Island Young Professionals Award (2013), was named an Outstanding Woman in the Law (2016), and has been selected to *New York Metro Rising Stars* lists in Business Litigation (2015 to 2020).

In her spare time, Ms. Gatto volunteers with various animal rescue groups.

PRACTICE AREAS

- Employment & Labor
- Litigation

EDUCATION

- Hofstra University School of Law, 2009

- Tulane University, B.A., 2006

ADMISSIONS

- New York State Bar
- United States District Court for the Eastern and Southern Districts of New York

PROFESSIONAL AFFILIATIONS AND ACCOMPLISHMENTS

- New York State Bar Association (Federal Procedure Committee of the Commercial and Federal Litigation Section)
- Nassau County Bar Association (Commercial Litigation and Women in Law Committees)
- Suffolk County Bar Association
- Theodore Roosevelt American Inn of Court

Matthew A. Marcucci

Associate

990 Stewart Avenue
Garden City, New York 11530
(516) 592-5908
mmarcucci@msek.com

Practice Areas

Litigation & Dispute Resolution

Education

Fordham University School of Law, J.D., 2014

University of Pennsylvania, B.A., 2009

Memberships

New York State Bar Association

Nassau County Bar Association

Fordham Law Alumni Association

The Penn Club of New York

University Barge Club, Philadelphia, Pennsylvania

Admissions

New York

U.S. District Court, Southern District of New York

U.S. District Court, Eastern District of New York

Matthew A. Marcucci is an Associate in the Litigation and Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C.

Matt is a courtroom-ready commercial litigator who handles complex disputes involving breach of contract, fraud, intellectual property violations, shareholder disputes, and "business divorces," among other things. His clients run the gamut from publicly-traded multinational corporations to middle-market businesses and individual professionals. Matt is also one of a handful of attorneys who have represented Native American tribes, including one of New York State's recognized Indian nations in eastern Long Island.

In 2018 and 2019, Matt was selected as a "Rising Star" by Super Lawyers, a Thomson Reuters publication. He shares this distinction with no more than 2.5 percent of attorneys in each state.

Matt received his J.D., cum laude, from Fordham University School of Law, and his B.A., magna cum laude, from the University of Pennsylvania. While in law school, he served as a judicial intern at the United States District Court for the Southern District of New York. In addition to practicing law, Matt is also an accomplished musician and has proficiency in Mandarin Chinese.

Jeffrey A. Miller is co-chairman of the Litigation Department of Westerman Ball Ederer Miller Zucker and Sharfstein, LLP, and is well known and respected as a successful business and commercial litigator. Jeff has a wide range of experience that includes bench and jury trials and appellate work in connection with corporate and partnership disputes, dissolutions, real estate disputes, securities fraud, antitrust and business torts, insurance law disputes, intellectual property and internet law disputes, shareholder derivative suits, Section 1983 and constitutional torts, products liability litigation, municipal law disputes, tax protests, alternative dispute resolution and contested matters in bankruptcy cases.

Jeff has been particularly successful litigating a wide range of real estate matters, including specific performance issues, purchase/sale issues, broker disputes, and commercial landlord/tenant disputes. He has also had great success litigating corporate and partnership disputes and dissolutions. He is retained by many businesses to counsel them on corporate and other business and legal issues, and has assisted in the expansion of many of his clients' businesses.

Recognized as an expert in business contract and other restrictive covenant and employer/employee issues, Jeff is regularly asked to give seminars for institutional and other clients on these and various other business issues. He has been highly successful in litigating restrictive covenant, non-solicitation agreement and trade secret cases. Jeff also counsels companies of all sizes and their principals on how to obtain expedited relief from the Court, including temporary restraining orders and preliminary injunctions.

In an effort to protect clients and avoid complex and expensive litigations, Jeff counsels business clients on how to prevent competitors and employees from harming their business and stealing customers. This includes:

- Keeping customers, proprietary information and trade secrets confidential;
- Preventing key employees from leaving employment and stealing business;
- Preparing and enforcing restrictive covenants, non-competition and non-solicitation agreements; and
- Protecting businesses from potential buyers and competitors.

Jeff is one of a handful of lawyers in the country selected to represent victims and families of United States citizens killed abroad by foreign governments that sponsor terrorism, or terrorist groups that receive support and resources from such governments. In February 2002, Jeff won a $183.2 Million judgment on behalf of the family of one such victim and was actively involved in the successful enactment of legislation to protect and compensate the families of these victims.

Jeff has been selected as a "*New York Metro Super Lawyer*" for 2009, 2010 and 2013-2020 – earning a 10 year recognition. Only five percent of New York metro attorneys have been named to this prestigious list, which was selected through an extensive process of peer nominations, blue ribbon panel review and independent research. In addition, Jeff received *Long Island Business News'* 2009 "50 Around 50 Award", recognizing him for his achievements, leadership and contributions to Long Island.

Jeff earned his law degree with honors from Touro Law School in 1992 where he served as a Senior Staff Member of the Law Review. During law school, he clerked for Justice Peter Fox Cohalan of the Supreme Court, Suffolk County. Jeff received his Bachelor of Arts degree in Business Management from the University of Massachusetts at Amherst in 1989. He was Chairman of the Commercial Litigation Committee of the Nassau County Bar Association from 2005-2009, and is involved in a number of charitable organizations including being a member of the Advisory Board of The We Care Fund, which is the charitable arm of the Nassau County Bar Association responsible for raising money annually to help those in need in Nassau County. Jeff is a frequent moderator of panel discussions featuring the Justices of the Supreme Court of the State of New York. Jeff has authored a number of articles for national and local publications and at one time was a regular contributor to the *New York Law Journal* in a column entitled "The Litigation Review." That column discussed and commented on significant commercial decisions of the Federal and State Courts in New York.

Gayle A. Rosen
Member of the Firm
Rabinowitz, Galina & Rosen
94 Willis Avenue
Mineola, New York 11501
(516) 739-8222
grosen@randglaw.net

Education
Brooklyn Law School
J.D. 1995

Brooklyn College
City University of New York
B.A. 1992

Admissions
New York State

United States District Court,
Southern and Eastern Districts of New York

Prior to becoming a member of the firm in 2016, Gayle had been attorney with the firm since its formation in 1997. She represents a wide variety of sub-contractors in contract negotiations; corporate and transactional matters; labor and employment issues; and commercial construction litigation involving both private and public projects.

Kevin Schlosser

Member of the Firm

990 Stewart Avenue
Garden City, New York 11530
(516) 592-5709
kschlosser@msek.com

Practice Areas

Litigation & Dispute Resolution

Education

Hofstra University Law School
J.D. with distinction, 1984

John Jay College of Criminal Justice,
City University of New York
B.A., 1981
magna cum laude

Memberships

American Inns of Court Executive Board,
Theodore Roosevelt Chapter,
Past President

National Institute for Trial Advocacy,
Instructor

American Bar Association, Litigation Section

New York State Bar Association, Commercial and Federal Litigation Section

Nassau County Bar Association,
Commercial Litigation Committee

Suffolk County Bar Association, Commercial Division Committee

New York State Bar Foundation Fellow

Admissions

New York State

U.S. Supreme Court

U.S. Court of Appeals for the Second Circuit

U.S. District Court, Eastern and Southern Districts of New York

U.S. District Court, Eastern District of Michigan

U.S. District Court, Eastern District of Wisconsin

Kevin Schlosser is a partner and the Chair of the Litigation and Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. Mr. Schlosser has been involved in all aspects of state and federal litigation since starting his legal career in 1984. An experienced civil litigator, Mr. Schlosser has engineered the legal strategy for a broad range of cases and arbitrations, including complex commercial matters, corporate and partnership disputes, business torts, fraud, breach of fiduciary duty, breach of contract, business valuations, employment and restrictive covenants, intellectual property, trademarks, copyrights, unfair competition, false and misleading advertising, trade secrets, professional liability and malpractice claims, construction law and mechanics liens, real estate, commercial landlord-tenant disputes, ERISA, health law, Federal Fair Debt Collection Practices Act class actions, products liability, insurance coverage, claims and defense, including disability insurance claims, and the prosecution and defense of other tort-related claims. His clients consist of some of the largest companies in the world, as well as local businesses and individuals, including senior law partners, accountants, doctors and others in the professions. A proven appellate lawyer, he is also an accomplished trial attorney, whose victories include million-dollar recoveries and a record-breaking jury verdict.

In addition to his litigation experience, Mr. Schlosser also acts as general outside corporate counsel, advising corporate clients on the full spectrum of legal affairs. Because of his experience in the Commercial Division of the Supreme Court of the State of New York since its inception, Mr. Schlosser is frequently tapped to serve as local Long Island counsel to many other law firms in New York City and out of state, including in Nassau and Suffolk Counties.

Notable experience includes:

- Won a $12.6 million judgment in a jury trial in the Commercial Division, Nassau County, in a breach of contract case involving a stock purchase agreement
- Won at trial in Commercial Division, New York County, defeating $1.2 million commission claim by Trump Securities
- Appeared as litigation counsel to the National Football League and obtained the immediate vacatur of an injunction through an order of the Appellate Division in Long Island, thereby permitting the NFL to pursue its policy of mandatory drug testing of professional football player

Kevin Schlosser

- In a jury trial in the United States District Court for the Eastern District of New York, obtained a verdict entirely rejecting claim for nearly $14 million in alleged lost profits in an international breach of contract case, breaking down plaintiff's financial experts through vigorous cross-examination
- Has appeared as lead counsel in copyright, trademark, Lanham Act, contract and antitrust cases throughout the country, including in United States District Courts in California, Hawaii, Illinois, Michigan, New York, Oklahoma and Wisconsin.
- Successfully defended a $65 million shareholder derivative action alleging breach of fiduciary duties and corporate waste against the former president of a public bank, resulting in the entire action against the president being dismissed with no monetary payment from the president and his counsel fees being reimbursed in their entirety by the bank
- Successfully defended a $25 million action alleging several counts of fraud, breach of contract and business torts against the largest casino operator in the world
- Obtained summary judgment dismissing case and prevailed on appeal to the New York Appellate Division, First Department, and Court of Appeals in an action alleging damages of over $20 million, asserting intentional interference with contract and interference with business relations against largest casino operator in the world
- Prevailed on appeal to the New York Appellate Division, Second Department, to sustain claim of punitive damages in a commercial fraud and breach of fiduciary duty action
- Prevailed in arbitration in dispute between senior law partners concerning the proper method for allocating fees in cases handled by the law firm
- Obtained injunctive relief on behalf of product manufacturer/seller in United States District Court for the Eastern District of New York barring competitors from selling competing, offending product, and prevailed after trial in challenge to the injunction
- Obtained final judgment against large manufacturer's competitor and former employee under restrictive covenants and non-disclosure agreements based upon claims of misappropriation of trade secrets and breach of contract in Commercial Division, Nassau County
- Obtained highest jury award on record for damages in an action for nuisance and interference with real property rights on behalf of property owners in the Supreme Court, Suffolk County
- Obtained jury verdict in Supreme Court, Nassau County, on behalf of international distributor-commercial tenant on the ground of constructive eviction even though tenant continued to remain in the leased premises for lengthy period of time, in which jury awarded tenant significant monetary damages against the landlord and relieved the tenant of any further obligation for rent on remaining lease term after the tenant moved to new space

Mr. Schlosser serves in various teaching capacities: He is a member of the faculty of the National Institute for Trial Advocacy; has chaired the Continuing Legal Education Program on New York Civil Motion Practice at Hofstra Law School; and is a member of the Continuing Legal Education faculty panel of the New York State Bar Association and the Nassau County Bar Association Academy of Law, where he instructs experienced practicing attorneys. He has given CLE seminars and presentations with some of the most prominent judges in the state and federal courts, including Supreme Court Commercial Division Justices Timothy S. Driscoll, Vito M. DeStefano, Stephen Bucaria, Emily Pines, Elizabeth Hazlitt Emerson, Jerry Garguilo, James Hudson, Saliann Scarpulla and Thomas Whelan, Appellate Division Justices Leonard Austin, Karla Moskowitz, Barbara Kapnick and federal judiciary such as U.S. District Court Judges Shira Scheindlin, Richard J. Sullivan and Nicholas G. Garaufis and Magistrate Judges A. Kathleen Tomlinson, Arlene R. Lindsay and William Wall. Many of Mr. Schlosser's activities can be viewed in detail by clicking on the relevant links to the left. Click here to view details from meetings of Nassau County Bar Association's Commercial Litigation Committee, which Mr. Schlosser chaired from 2013-2015. In 2016, Mr. Schlosser served as the President of the Theodore Roosevelt American Inn of Court. Mr. Schlosser is also an active member of the Commercial Division Committee of the Suffolk County Bar Association.

Mr. Schlosser has written extensively on many aspects of the law, publishing numerous articles over thirty years in leading legal publications. He has authored the "Litigation Review" column for the New York Law Journal and served on the Board of Editors of the Nassau Lawyer, which is the official publication of the Nassau County Bar Association. Many of Mr. Schlosser's articles can be viewed by clicking on the "Publications" link to the left. He is also the author of a well-recognized blog, www.nyfraudclaims.com, which covers new developments concerning claims of fraud and misrepresentation under New York law.

Active in charitable organizations, Mr. Schlosser received the 2003 Leadership Award presented by the Long Island Chapter of the National Multiple Sclerosis Society. He has also served as a faculty member of the Construction Management Institute, sponsored by the New York State Chapter of the National Association of Minority Contractors, helping minority-owned contractors enhance their developing businesses.

During law school, Mr. Schlosser was a Member and then Articles Editor of the Hofstra Law Review. In his capacity as Articles Editor, Mr. Schlosser interacted with and edited articles of some of the most prominent and well-respected legal scholars, including law professors, evidence experts and Congressional leaders. He also clerked for the Honorable George C. Pratt, United States Circuit Court Judge, where he drafted several court decisions, including a complex anti-trust ruling. He also obtained valuable trial experience while clerking in the Criminal Division of the United States Attorney's Office for the Eastern District of New York, where he assisted in the prosecution of several major felony cases. Mr. Schlosser graduated law school with the highest honors. Additionally, he was a founding officer of a national criminal justice honor society at John Jay College of Criminal Justice of the City University of New York. At the outset of his career, Mr. Schlosser acquired intensive litigation experience, having been trained at two prominent firms based in New York City: Patterson, Belknap, Webb & Tyler, and Chadbourne & Parke. In 1990, he became associated with one of Long Island's largest law firms, where he rose to the level of a managing partner and head of its litigation department, the largest practice group in the firm. After joining Meyer, Suozzi and becoming a partner in 2002, Mr. Schlosser was appointed Co-Chair of the firm's Litigation Department in November 2002. In 2006, Mr. Schlosser became Chair of the firm's Litigation and Dispute Resolution Department and has held that position through the present. He is also a member of the firm's Management Committee. Mr. Schlosser is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence and ethics. Mr. Schlosser was recognized by Long Island Pulse Magazine in 2010 and 2011 as the region's "Top Legal Eagle for Litigation." Mr. Schlosser has been named to the New York Super Lawyers list as one of the top attorneys in New York from 2012-2019.

Kevin Schlosser Published Articles

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Kevin Schlosser Seminars

Panelist at the New York State Bar Association's Commercial and Federal Litigation Section
Restrictive Covenants: The Good, the Bad and What the Future Holds
June 17, 2020

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 14, 2017

Moderator at the New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 21, 2016

Speaks at the New York County Lawyers' Association CLE Program
Noncompetition and Confidentiality Provisions in Employment Agreements: Current Status of the Law in New York and State and National Trends
November 4, 2015

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 8, 2015

Moderates for American Inns of Court
Litigation Overload Facing Federal and State Courts-Trying to Stem the Tide & What Makes a Great Commercial Court
May 27, 2015

Participates in the State Commercial and Federal Court Round-Up Program
June 4, 2014

Participates on Panel for the Hofstra Law's Moot Court Board
March 13, 2014

Moderates NBI Program
As Judges See It: Top Mistakes Lawyers Make in Civil Litigation
June 7, 2013

Speaks at Nassau Academy of Law Program
Advice from the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts
May 9, 2013

Chairs Civil Action Program at the Theodore Roosevelt American Inn of Court
Strategies and Techniques of Direct and Cross Examination of Witnesses at Trial
February 11, 2013

Participates in the Hofstra Law Intramural Competition
January 24, 2013

Serves as Instructor at the Hofstra Trial Techniques Program
The National Institute of Trial Advocacy and the E. David Woycik, Jr. Intensive Trial Advocacy Program
January 4, 2013

Speaks at Suffolk Academy of Law CLE Program
Strategies and practical advice for maximizing the effectiveness of each stage of the litigation
October 11, 2012

Presents in First Ever Joint Seminar for Appellate Division Justices
April 25, 2012

Presents CLE to Suffolk County Bar Association with the Honorable Emily Pines
The CPLR in Everyday Practice
April 19, 2012

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
A Civil Action - Jury Selection
February 15, 2012

Speaks at the Alexander Hamilton Inn of Court at Touro Law School
Alexander Hamilton Inn of Court Program on Injunctions
January 24, 2012

Presents CLE on Expert Witness Discovery at Nassau County Bar Association
June 2, 2011

Kevin Schlosser Seminars

Speaks at the Nassau County Bar Association
E-Discovery: What the Litigator Needs to Know to Avoid Professional Liability
June 7, 2010

Presents CLE to ACC-GNY Corporate Counsels
June 8, 2011

Achieving 20-20 Hindsight: Practical Solutions to Avoid Rescission, Unenforceability and Misinterpretation of Your Contracts
June 8, 2011

Presents CLE to Inns of Court
April 19, 2010

Presents CLE to Inns of Court
Undoing the Done: Contract? What Contract?
February 3, 2009

Kevin Schlosser Participates as a CLE Instructor at the Annual Meeting at the American Bar Association
Zapped! The New and Complex World of E-Discovery
August 8, 2008

Presents Seminar for the New York State Bonding Initiative
Legal Aspects of Contract Management and Key Issues Regarding Tort Law in the State of New York
May 8, 2008

Lectures at Hofstra Law School
March 20, 2008

Participates at the Federal Civil Practice Update - CLE
May 15, 2007

Speaks at the Theodore Roosevelt American Inn of Court at the NCBA
Inadvertent Waiver of Attorney- Client and Work Product Privileges in the Electronic Age
February 8, 2007

Presents Construction Law Seminar
Construction Management Training Course
July 18, 2006

Presented CLE with the Honorable Leonard B. Austin to the Westchester Women's Bar Association
Electronic Discovery: The New Frontier, An Interactive, Practical Guide to the Latest State and Federal Principles
October 5, 2006

Speaks at First American Title Company
Electronic Evidence in Litigation- the New Frontier
May 17, 2005

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
Electronic Discovery
May 12, 2005

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Super Sunday Civil Litigation CLE Program Segment on Electronic Discovery
January 11, 2004

Speaks at the Nassau County Bar Association
Electronic Discovery
October 27, 2004

Speaks at the New York State CPA Society
What a savvy litigator looks for in a financial expert witness
November 24, 2003

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Mastering Civil Litigation - Electronic Discovery
December 2, 2003

Greg S. Zucker

Greg is a senior partner at Westerman Ball Ederer Miller Zucker & Sharfstein LLP. He is an experienced litigator in all types of commercial and business issues. He regularly practices in state and federal courts throughout the country, as well as alternative dispute proceedings. Greg has a wide range of experience that includes bench and jury trials and appellate work in the areas of corporate and partnership disputes, shareholder derivative actions, dissolutions, real estate disputes, business torts, aviation matters, construction disputes, healthcare, RICO, anti-trust, insurance law disputes, intellectual property disputes (including trademark and patent litigation), internet law disputes, labor and employment law, and other complex commercial and business disputes.

Greg serves as outside general counsel to several domestic and international companies. In that capacity, he has been exposed to the inner workings of those companies, including how they operate and their long term goals. As outside general counsel, Greg works hand-in-hand with the principals and management to spearhead long term projects and achieve strategic goals in a number of different settings. He has taken the lead on significant corporate transactions, including mergers and acquisitions, corporate restructurings, the sale of businesses, joint ventures and licensing relationships.

He also has significant experience with respect to real estate matters, including specific performance issues, purchase and sale issues, leasing issues, brokerage disputes and commercial landlord/tenant disputes. Greg has led the restructuring of major real estate holdings throughout the country, including negotiating with lenders and special servicers. He has "quarter-backed" the development of significant private and public projects.

Greg is an approved Receiver in the State of New York and has been appointed by the Court as a Receiver in connection with real estate and business disputes. He also has been appointed as a special master for discovery purposes. In addition, he has been appointed by the Court to serve as a mediator and has successfully resolved numerous cases in that capacity.

Greg previously served as a Director of the Nassau County Bar Association. He is the past Chairman of the Federal Courts Committee of the Nassau County Bar Association, and the former Chairman of the Commercial Litigation Committee of the Nassau County Bar Association. Greg is an Executive Committee Member of the prestigious The Theodore Roosevelt American Inn of Court, and was awarded a Leadership in Law Award issued by the Long Island Business News. He also received the 2017 President's Award from the Nassau County Bar Association.

He regularly gives seminars and hosts other programs relating to commercial and business issues. Among other things, Greg has lectured on provisional remedies, discovery, trial practice, business divorces, dissolutions of businesses, business and property valuation issues, disputes between shareholders, real estate issues, brokerage issues, e-discovery and expert disclosure.

Together with Jeff Miller, Greg previously wrote a monthly column for the New York Law Journal analyzing court decisions influencing the business community. Greg previously co-authored "Divorcing Your Business Partner" (Long Island Magazine, June 1998), and "Property Insurance May Cover Y2K Costs" (Long Island Magazine, October 1999), and contributed to "Despite ADR Consent, IP Cases End Up In Court" (The National Law Journal, October 20, 1997).

Greg earned his law degree from the University of Pennsylvania Law School in 1997, where he served as a committee chairperson on the Moot Court Board. Greg received his Bachelor of Arts degree from Dartmouth College in 1994, where he graduated *cum laude* and played for the varsity baseball team.

Greg is an officer of the Dartmouth Alumni Club of Long Island, and is a member of the Boards of the Roslyn Little League and Roslyn Booster Basketball.