

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

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DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L005476
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HART 353 NORTH CLARK LLC,)	
)	
Plaintiff/Counter-Defendant)	
)	Case No. 2020-L-005476
v.)	
)	Hon. Jerry A. Esrig
JENNER & BLOCK LLP,)	
)	
Defendant/Counter-Plaintiff)	

**JENNER & BLOCK’S ANSWER,
AFFIRMATIVE AND OTHER DEFENSES, AND COUNTERCLAIMS**

Jenner & Block LLP (“Jenner & Block”) hereby answers the “Complaint” filed against it by Hart 353 North Clark LLC (“Landlord”) and asserts its defenses and counterclaims. Jenner & Block denies any and all liability alleged in the Complaint.

PRELIMINARY STATEMENT

The terms of the Lease—which Landlord fails to even attach to its Complaint but is attached hereto as Exhibit A (the “Lease”)¹—demonstrate that the Complaint is entirely meritless. Jenner & Block paid Landlord everything it owed under the Lease. The Lease contains clear and explicit, hard-negotiated rent abatement provisions which require Landlord to reduce Jenner & Block’s rent whenever, as a result of any “*any event* (Force Majeure or otherwise)” that is not its fault, Jenner & Block reasonably determines that at least 20% of its space “cannot be . . . *used and occupied as intended* by [Jenner & Block] in the normal course of [its] business” and that space is “in fact not being used by [Jenner & Block] for the conduct of its business.” (Ex. A, §§ 5.F, 12.D, the “Abatement Provisions” (emphasis supplied).) Contrary to the Landlord’s

¹ Capitalized terms have the meanings defined in either the Lease or herein. Jenner & Block does not adopt, and expressly denies, all other defined terms in the Complaint.

allegations, once the Abatement Provisions and other credits due to Jenner & Block for overpayments of various expenses are taken into account, it is the *Landlord who owes Jenner & Block* a residual credit of over \$840,000 *after* paying all rent due through June 30, 2020.

Jenner & Block negotiated the Abatement Provisions in 2005 to cover any unforeseen event, such as a pandemic, that could result in Jenner & Block's inability to use and occupy its space in the normal course of business as reasonably determined by Jenner & Block. After a thorough, careful process in early March 2020, Jenner & Block made that determination due to the significant health dangers and consequences of the COVID-19 pandemic, and since March 16, 2020, Jenner & Block has not used at least 89% of its space. On that day, Jenner & Block closed all of its offices. In Chicago, as of March 16, Jenner & Block reduced its workforce at the office to all but a skeleton crew of operational employees: from 579 individuals to, on average, 12 individuals.

Jenner & Block's office shutdown did not mean Jenner & Block stopped remitting the rent due under the Lease. Jenner & Block had already paid its rent in full for March 2020 on the first of the month and is entitled to an abatement credit for the portion of office space it has not been using (no less than 89% of the space) for the period of time the office was closed starting on March 16. On April 3, 2020, Jenner & Block notified the Landlord that it was withholding April rent pursuant to the Abatement Provisions. On May 1, 2020, the Landlord informed Jenner & Block that it was entitled to a separate credit for overpaid 2019 operating expenses and property taxes. Jenner & Block is also entitled to credits for certain reimbursable expenses from calendar year 2017 (a portion of which Landlord has agreed to). The total credits due to Jenner & Block for overpaid March rent (\$694,898), 2017 reimbursable expenses (\$121,557), and 2019 operating expenses and property taxes (\$643,641) is over \$1.4 million. After using those credits to pay the

abated rent which Jenner & Block was required to pay for April, May, and June 2020, it is the *Landlord who owes Jenner & Block* a residual credit of over \$840,000.

Jenner & Block also invited Landlord to discuss any disagreement about the proper level of abatement under the Lease. Landlord refused to acknowledge Jenner & Block's entitlement to rent abatement and instead filed its Complaint, without disclosing to the Court or the public that Jenner & Block had expressly negotiated the Abatement Provisions to cover precisely this type of circumstance. The Landlord's failure to attach a copy of the Lease to its Complaint or even reference the unique provisions that provide for abatement is telling.

Jenner & Block specifically negotiated the Abatement Provisions as part of its critical role in the development of the Building (defined below) itself. In 2004-05, Jenner & Block was uniquely qualified to participate as a sponsor and anchor tenant in a building that the original landlord, 351 Mortgage Borrower LLC, an affiliate of the sophisticated Chicago financial firm Mesirow Financial Real Estate, Inc. (together with all affiliates, "Mesirow"), sought to develop at 351 North Clark Street in Chicago (later given the address 353 North Clark) (the "Building"). Without Jenner & Block's participation, the Building would not have been developed in its current form. With its leverage, in exchange for a variety of concessions from Mesirow that included the Abatement Provisions, Jenner & Block committed to lease one-third of the Building for 15 years, obligating Jenner & Block to pay over \$185 million in base rent plus reimbursement for real estate taxes and certain expenses over the life of the lease. But after hard, arms-length negotiations, Jenner & Block's commitment was expressly and unambiguously conditioned on Jenner & Block's continued ability to use and occupy the Building as intended by Jenner & Block in the normal course of its business.

Mesirow's lead negotiator "across the table" from Jenner & Block in the 2004-05 time frame was the distinguished real estate developer Richard Stein. Mr. Stein confirms that Jenner & Block expressly negotiated for rent reduction as a result of "any event" that "caused Jenner & Block to reasonably determine that it could not use and occupy a material amount of its space as it intended in the normal course of business, regardless of whether that event was the Landlord's responsibility and regardless of whether that event caused physical damage to the building or space." (*See* Ex. B, ¶ 17) Mr. Stein also confirms that COVID-19 is the kind of event from which the Abatement Provisions were designed to protect Jenner & Block. (*Id.* at ¶ 24) Landlord was not a party to those negotiations. (*Id.* at ¶ 25) Landlord, an affiliate of Heitman LLC, an international real estate investment management company with more than \$40 billion in assets, assumed the entire Lease (including its Abatement Provisions) on or around December 4, 2014 and is the successor-in-interest to the original landlord.

There can be no serious dispute that the COVID-19 pandemic is an event that triggers the Abatement Provisions. Globally, there have been over 8 million confirmed cases of COVID-19 and over 450,000 deaths. In Illinois, there have been over 130,000 confirmed cases and over 6,000 deaths. COVID-19 has also caused a shutdown of the worldwide economy, resulting in the closure of businesses large and small, including every major sports league, hotels, and entertainment events, to name just a few. It has also caused courts to close and dramatically altered their operations. COVID-19 has required the closing of schools, parks, and stores, and required businesses to operate remotely whenever possible. It is no overstatement to say that COVID-19 is an event that has transformed life as we know it.

As a result of COVID-19, Jenner & Block has been able to use and has used less than 11% of its space since it determined that it cannot use and occupy its space as intended in the normal

course of its business on March 16, 2020. Given the health risks presented by the pandemic and the fact that every other similarly-sized Chicago law firm has also shut down its offices, the reasonableness of Jenner & Block's determination cannot be legitimately questioned—indeed, a decision to stay open under these circumstances would have been wholly irresponsible and inconsistent with public health and government directives. In its communications with Jenner & Block, the Landlord has not suggested that Jenner & Block's determination was unreasonable, but has focused on Jenner & Block's physical ability to access the Building. But, as the lead negotiator for the original landlord has acknowledged (*see* Ex. B, ¶ 24), the clear language of the Abatement Provisions for which Jenner & Block explicitly bargained does not depend upon a physical inability to access the Building—only a reasonable determination that Jenner & Block cannot use and occupy the premises as intended.

The Court should reject Landlord's claims and enter declaratory judgments that the Abatement Provisions are plain and enforceable as written and have been triggered by Jenner & Block's reasonable determination to close its office based on the COVID-19 pandemic and government dictates.

ANSWER

Jenner & Block will repeat each paragraph of the Complaint with its responses, but does not admit any repeated allegation except as stated in any responsive answer. Jenner & Block has included the Complaint's headings for convenience, but no response to them is required. Any allegations not specifically admitted herein are denied.

1. Plaintiff is a limited liability company, duly organized and existing under and by virtue of the laws of the State of Illinois.

ANSWER: Admitted.

2. Upon information and belief, Defendant is a limited liability partnership, duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal office located at 353 North Clark Street in Chicago, Illinois.

ANSWER: Jenner & Block admits that 353 North Clark Street in Chicago, Illinois is its “principal office,” in the sense that it is the firm’s largest office. Jenner & Block states that it has five offices, located in Chicago, Los Angeles, London, New York, and Washington, D.C. Jenner & Block admits the remaining allegations in Paragraph 2.

3. This Court has personal jurisdiction over the Defendant in this action pursuant to 735 ILCS 5/2-209(a)(1) because the Defendant has engaged in business transactions within the State, and 735 ILCS 5/2-209(a)(7) because the written agreement at issue is a contract which was performed within the State.

ANSWER: Admitted.

4. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 of the Illinois Code of Civil Procedure, in that all the occurrences alleged and complained of herein occurred in Cook County, Illinois.

ANSWER: Admitted.

Factual Allegations

5. On or about June 30, 2006, 351 Mortgage Loan Borrower LLC (“351”) entered into a Lease Agreement with Plaintiff for the premises then known as 351 North Clark Street in Chicago, Illinois, which address subsequently changed to 353 North Clark Street in Chicago, Illinois (the “Building”). Plaintiff took possession of several floors within the Building on or about November 1, 2009 (the ‘Premises”).

ANSWER: Jenner & Block denies the allegations as stated in this paragraph. It appears that the paragraph contains a drafting error that substituted the word “Defendant” for the word “Plaintiff.” On that assumption, Jenner admits that it entered into a Lease for the Premises in the Building with 351 Mortgage Loan Borrower LLC on or about June 30, 2006. A true and correct copy of that Lease, with its seven amendments, is attached to this pleading as Exhibit A. Jenner & Block admits it moved into its space at 353 North Clark in Chicago on or around November 1, 2009. As noted, the Lease contains the Abatement Provisions which Plaintiff has ignored.

Section 5.F of the Lease provides in relevant part:

Failure or Delay in Furnishing Services. In the event of . . . any **Untenantability** (as hereinafter defined) in the Premises . . . arising out of any event (Force Majeure or otherwise), which persists for a period longer than three (3) consecutive business days, and Tenant is unable to and does not utilize all, or a portion consisting of at least twenty percent (20%) of the Premises, as a result of such interruption or cessation, Tenant shall receive an abatement of all Rent for the portion of the Premises rendered **Untenantable** or inaccessible, from the period following such three (3) business day period until such time as such services or access is restored on a continual basis.

Section 12.D of the Lease provides (emphasis in original):

Untenantability of the Premises. “**Untenantable**” and “**Untenantability**” means that with respect to the Premises, or any portion thereof, the Premises, or any portion thereof, cannot be accessed or used and occupied as intended by Tenant in the normal course of Tenant’s business as reasonably determined by Tenant and in compliance with applicable Laws and is in fact not being used by Tenant for the conduct of its business.

6. On or about December 15, 2010, 351 conveyed or otherwise transferred ownership of the Building, including the Lease to 353 N. Clark, L.P.

ANSWER: Admitted.

7. On or about December 4, 2014, 353 N. Clark, L.P. conveyed or otherwise transferred ownership of the Building, including the Lease to HART 353 North Clark LLC (“Plaintiff”).

ANSWER: Admitted.

8. At all times relevant herein, Plaintiff, as successor-in-interest to 351 Mortgage Loan Borrower LLC, is the holder of the interest of “Landlord” under the Lease. Defendant leases from Landlord, approximately 416,297 square feet of office space in the building commonly known as 353 North Clark Street, Chicago, Illinois 60411, pursuant to the terms of a written Lease Agreement, dated June 30, 2006, as amended by seven amendments dated December 29, 2006, September 2, 2008, January 13, 2009, January 21, 2010, November 1, 2010, July 13, 2011 and August 31, 2012 (collectively, the “Lease”).

ANSWER: Jenner & Block admits that Landlord is “successor-in-interest to 351 Mortgage Loan Borrower LLC.” Jenner & Block admits Plaintiff is the “Landlord” as that term is defined in the Lease. Jenner & Block denies that it currently leases 416,297 square feet of office

space in the Building. Jenner states that it originally leased approximately 416,297 square feet at the Building, but, on or around October 31, 2017, it exercised its contraction rights pursuant to Section 19 of the Lease and contracted its space to 387,904 square feet, which is the current size of Jenner & Block's rented space. Jenner & Block admits it leases office space pursuant to the Lease, which is dated June 30, 2006, and the Lease includes seven amendments dated December 29, 2006, September 2, 2008, January 13, 2009, January 21, 2010, November 1, 2010, July 13, 2011 and August 31, 2012. Jenner & Block denies any remaining allegations in Paragraph 8.

9. Pursuant to 735 ILCS 5/2-606, Plaintiff recites herein the relevant portions of the Lease rather than attaching the entire Lease because of its voluminous nature.

ANSWER: Jenner & Block admits that Landlord did not attach the Lease to the Complaint, but Jenner & Block denies the Lease was too voluminous to attach to the Complaint as an exhibit. Jenner & Block denies that Plaintiff recites all of the relevant portions of the Lease. Jenner & Block further states that Landlord intentionally omitted from the Complaint, including in its reference to specific sections of the Lease, any reference to the Abatement Provisions in the Lease—Section 5.F and 12.D—which provide that Jenner & Block is entitled to rent abatement in the current circumstances.

10. Pursuant to the terms of the Lease, Defendant is obligated to make regular monthly payments of rent and other charges (collectively, the "Rent") to Plaintiff (the "Required Payments"). Section 2 C (ii) of the Lease states, in relevant part, as follows:

(ii) all Rent shall be paid to Landlord without abatement, offset, set-off or deduction (except as otherwise specifically set forth in this Lease), and Tenant's covenant to pay Rent hereunder shall be independent of every other covenant in this Lease (except for abatement, offset, set-off or deduction specifically set forth in this Lease);

ANSWER: Jenner & Block admits that the allegations in Paragraph 10 accurately quote from a portion of the Lease, but denies that the selected language accurately sets forth all the relevant terms of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself,

including Sections 5.F and 12.D, attached hereto as Exhibit A, for its true context and meaning. Jenner & Block denies any remaining allegations in Paragraph 10.

11. Defendant has failed and refused to make the Required Payments on April 1, 2020, and May 1, 2020, (the “Delinquent Payments”).

ANSWER: Denied. Jenner & Block states that it has paid all rent it is obligated to pay under the Lease after accounting for the rent abatement to which Jenner & Block is entitled under the Abatement Provisions. Jenner & Block contacted the Landlord, explained the Abatement Provisions, and remitted what is due under the Lease after taking into account existing, undisputed credits from 2019.

12. As of the date of this Complaint, a total of Three Million Seven Hundred Twenty Six Thousand Four Hundred Fifteen Dollars and Seventy Four Cents (\$3,726,415.74) (the “Delinquent Rent”) in unpaid Rent is due and owing to Plaintiff.

ANSWER: Denied.

13. Plaintiff (through its counsel) sent Defendant a written notice of nonpayment and demand for full payment of the Delinquent Rent within five (5) business days of Tenant’s receipt of the notice (the “Default Notice”).

ANSWER: Jenner & Block admits that it received a letter from Landlord purporting to be a “Default Notice” that is attached to the Complaint as Exhibit A. Jenner & Block denies that the letter was a valid notice of default under the Lease because Jenner & Block was not required to pay the full rent, but was entitled to rent abatement under the Abatement Provisions, and therefore Jenner & Block is not in default. Jenner & Block further states it responded to Landlord’s letter, but Landlord did not change its position and then filed this lawsuit. Jenner & Block denies any remaining allegations in Paragraph 13.

14. A true, accurate and authentic copy of the Default Notice is attached hereto and incorporated herein as Exhibit A.

ANSWER: Jenner & Block admits that Exhibit A is a letter that Landlord describes as “the Default Notice.” Jenner & Block denies that Exhibit A is a valid notice of default under the Lease because Jenner & Block was not required to pay the full rent, but was entitled to rent abatement under the Abatement Provisions, and therefore Jenner & Block is not in default. Jenner & Block further states that it contacted the Landlord, explained the Abatement Provisions, and remitted what is due under the Lease. Jenner & Block denies any remaining allegations in Paragraph 14.

15. Defendant failed and refused to pay fully the Delinquent Rent within five (5) business days of its receipt of the Default Notice.

ANSWER: Denied. Jenner & Block states it has paid all rent it is obligated to pay under the Lease after accounting for the rent abatement to which Jenner & Block is entitled under the Abatement Provisions.

16. Defendant’s failure and refusal to pay fully the Delinquent Rent within such five (5) business days period constitutes a “Default” by Tenant under the Lease. *See Section 16 A (i) of the Lease.* Section 16 A (i) of the Lease provides, in relevant part, as follows:

TENANT DEFAULTS AND LANDLORD REMEDIES.

- A. Default. The occurrence of any of the following shall constitute a default (a “**Default**”) by Tenant under this Lease: (i) Tenant fails to pay any Rent when due and such failure is not cured within five (5) business days after receipt of written notice from Landlord to Tenant that such Rent is past due;

ANSWER: Jenner & Block admits that the allegations in Paragraph 16 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, for its true context and meaning. Jenner & Block denies any remaining allegations in Paragraph 16.

17. The Lease provides, among other things, that upon the occurrence of any Default, Plaintiff is entitled to enforce the provisions of the Lease by a suit or suits in equity or at law, for

the recovery of all monies due, or to become due, from Defendant under any of the provisions of the Lease. *See Section 16 B (iii) of the Lease.* Section 16 (B) (iii) of the Lease provides, in relevant part, as follows:

- B. Rights and Remedies of Landlord. Upon the occurrence of any Default, Landlord may, with or without notice or demand of any kind to Tenant or any other person, have any one or more of the following described remedies in addition to all other rights and remedies provided at law or in equity or otherwise or elsewhere herein:

* * *

(iii) Landlord may enforce the provisions of this Lease and may enforce and protect the rights of Landlord hereunder by a suit or suits in equity or at law for the specific performance of any covenant of agreement contained herein; and for the enforcement of any other appropriate legal or equitable remedy, including without limitation: (a) injunctive relief, (b) recovery of all monies due or to become due from Tenant under any of the provisions of this Lease, and (c) any other damage (excluding consequential, indirect and punitive damages) incurred by Landlord by reason of Tenant's Default under this Lease. For purposes hereof, damages arising out of (x) Landlord's loss of a tenant or a default of Landlord caused by Tenant's holding over for a period in excess of one hundred twenty (120) days, and (y) Landlord's default or failure of a condition under a financing commitment by reason of Tenant's wrongful failure to deliver an estoppel letter for any reason other than *bona fide* disagreement as to a factual or legal issue required to be set forth therein within the time periods required under Sections 16A and 21C of this Lease, shall not be considered consequential or indirect damages, either for purposes of this Section 16B or for purposes of Section 18 below.

ANSWER: Jenner & Block admits that the allegations in Paragraph 17 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, including Sections 5.F and 12.D, for its true context and meaning. Jenner & Block denies Landlord is entitled to any of the remedies provided in Section 16 of the Lease. Jenner & Block denies any remaining allegations in Paragraph 17.

18. Section 2 C (iv) provides that Defendant is entitled to interest and late fees as a result of Defendant's Default under the Lease. Section 2 C (iv) provides, in relevant part, as follows:

2 C. Payment of Rent. "(iv) any sum due from Tenant to Landlord, or from Landlord to Tenant, which is not paid within five (5) days of when due shall bear interest from the date due until the date paid at the annual interest rate of the Interest Rate (as defined hereinafter) plus three percent (3%) per annum, but in no event higher than the maximum rate permitted by law (such lesser rate, the "Default Rate"), and, in addition, Tenant shall pay Landlord a late charge for

the second and each subsequent Rent payment which is paid more than ten (10) business days after its due date in any calendar year equal to two percent (2%) of such payment;

ANSWER: Jenner & Block admits that the allegations in Paragraph 18 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, including Sections 5.F and 12.D, for its true context and meaning. Jenner & Block denies it is in default under the Lease and denies it has breached any of its obligations under the Lease. Jenner & Block denies Landlord is entitled to interest or late fees. Jenner & Block denies any remaining allegations in Paragraph 18.

19. The Default Rate of interest under the Lease is 6.25% based upon the formula provided in Section 2 of the Lease. The relevant provision provides as follows:

For the purposes of this Lease, the term “Interest Rate” shall mean a rate equal to the corporate base rate announced from time to time by JPMorgan Chase Bank, NA (“JPMC”), at its principal office in New York, New York. The Interest Rate shall change on the same day as any change in the corporate base rate occurs. The corporate base rate shall be the rate “announced” notwithstanding that other rates may actually be charged. The written statement or notice from JPMC as to what the corporate base rate was on any given day shall be conclusive, and, in the event that JPMC should cease to publish a corporate base rate, the corporate base rate (or the prime rate) announced by a major bank with a Chicago presence, selected by Landlord, with notice of such selection given to Tenant, shall be an acceptable substitute therefor.

ANSWER: Jenner & Block admits that the allegations in Paragraph 19 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, for its true context and meaning. Jenner & Block denies it is in default under the Lease and denies it has breached any of its obligations under the Lease. Jenner & Block denies Landlord is entitled to interest. Jenner & Block denies any remaining allegations in Paragraph 19.

20. Defendant is entitled to Late Payments under the Lease. Section 16 G provides, in relevant part, as follows:

16 G. Late Payments. (i) All payments becoming due from Tenant to Landlord under this Lease and remaining unpaid as and when due shall bear interest until paid at the Interest Rate, and from and after written notice from Landlord to Tenant that such payments are due and payable and after the expiration of any grace period provided for herein, at the Default Rate.

(ii) The provisions of this Section 16 shall in no way relieve Tenant of the obligation to pay Base Rent, Adjustment Rent or other amounts due and owing by Tenant under this Lease on or before the date on which they are due, nor shall the collection by Landlord of any amount under this Section 16 impair (a) the ability of Landlord to collect any other amount charged under this Section 16 or (b) Landlord's remedies set forth in this Section 16.

ANSWER: Jenner & Block denies Landlord is entitled to Late Payments under the Lease. Jenner & Block admits that the allegations in Paragraph 20 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, for its true context and meaning. Jenner & Block denies Landlord is entitled to Late Payments under the Lease. Jenner & Block denies any remaining allegations in Paragraph 20.

21. Defendant is entitled to reasonable attorneys' fees and court costs if it prevails in any litigation in connection with the Lease. Section 25 G provides, in relevant part, as follows:

25 G. Attorneys' Fees. The losing party shall pay to the prevailing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in connection with any action between Landlord and Tenant arising out of this Lease or incurred by the prevailing party as a result of any litigation to which the prevailing party becomes a party as a result of this Lease or Tenant's use and occupancy of the Premises or any portion thereof.

ANSWER: Jenner & Block admits that the allegations in Paragraph 21 accurately quote from a portion of the Lease, but denies that the selected language accurately captures the full context and meaning of the Lease. Jenner & Block refers to the relevant provisions of the Lease itself, attached hereto as Exhibit A, for its true context and meaning. Jenner & Block denies Landlord is entitled to "reasonable attorneys' fees and court costs if it prevails in any litigation in connection with the Lease." Jenner & Block denies any remaining allegations in Paragraph 21.

22. All conditions precedent to Plaintiff's enforcement of the Lease have been performed by Plaintiff or have been excused by Defendant.

ANSWER: Denied.

23. As of the date of this Complaint, Defendant has failed to cure, and Plaintiff has not excused Defendant from, its Default under the Lease.

ANSWER: Denied.

24. Plaintiff brings this action to recover the Delinquent Rent, and any and all other unpaid sums that become due and owing to Plaintiff under the Lease through the date of judgment.

ANSWER: Jenner & Block admits Landlord's Complaint includes allegations seeking alleged rent. Jenner & Block denies Landlord is entitled to the relief requested. Jenner & Block denies any remaining allegations in Paragraph 24.

25. As of the date of this Complaint, there is currently due and owing to Plaintiff by Defendant under the Lease:

- a. Rent for the months of April, 2020, and May, 2020 in the amount of
\$3,726,415.74;
- b. \$67,719.89 in unpaid reconciliations from 2018;
- c. \$92,293.34 in unpaid café charges;
- d. Late fees and interest to be proven at trial; and
- e. Reasonable attorneys' fees and court costs incurred by Plaintiff in this action.

ANSWER: Denied. Jenner & Block further states that the \$3,726,415.74 claimed in Paragraph 25(a) does not account for the rent abatement to which Jenner & Block is entitled under the Abatement Provisions, the \$643,460.90 credit for taxes and other expenses that Landlord identified in a May 1, 2020 letter as being due to Jenner & Block, or the credit of \$121,557 for a true-up of certain reimbursable expenses from 2017 (\$42,965 of which Landlord has admitted is due to Jenner & Block). When the credits are applied and rent is abated for April, May, June, and

the portion of March for which Jenner & Block is entitled to rent abatement, it is the *Landlord who owes Jenner & Block* a residual credit of \$845,498.78.

Jenner & Block further denies that it owes any money as alleged in Paragraph 25(b). The Complaint fails to allege any facts to support the conclusory claim that this money is owed, because, in fact, it is not. Pursuant to the terms of the Lease, Jenner & Block has engaged an auditor, and Jenner & Block is not required to pay the amount claimed by Landlord while that audit is still pending.

Jenner & Block further denies that it owes any money as alleged in Paragraph 25(c). The Complaint fails to allege any facts to support the conclusory claim that this money is owed, because, in fact, it is not. Pursuant to the “Cafeteria Agreement,” which Jenner & Block and Mesirov executed concurrently with the Lease on June 30, 2006 and attached to the Lease, Landlord is required to prepare a budget for the Cafeteria that shall “reflect no Facility Loss.” Landlord must provide the budget to Jenner & Block annually, but Landlord has never provided Jenner & Block with any budget, let alone a budget that breaks even. Given Landlord’s ongoing failure to provide a budget as required by the Cafeteria Agreement, let alone a budget that reflects no “Facility Loss.” Jenner & Block has no obligation to pay any amounts under the Cafeteria Agreement.

AFFIRMATIVE AND OTHER DEFENSES²

Having answered the allegations in the Complaint, and having denied any liability whatsoever, Jenner & Block asserts the following affirmative and other defenses. Jenner & Block’s answers to Landlord’s allegations set forth above are incorporated herein by reference.

² Jenner & Block has not asserted any common law defenses because Jenner & Block maintains that the parties’ relationship is entirely governed by the Lease.

First Defense

(Rent Abatement Under the Abatement Provisions)

1. Landlord's claim to recover purportedly delinquent rent is barred because, pursuant to the Lease, Jenner & Block is entitled to rent abatement for the portion of its space that it is not using after Jenner & Block reasonably determined the space cannot be used and occupied as intended by Jenner & Block in the normal course of its business as a result of the COVID-19 pandemic.

2. Landlord omitted from the Complaint, including in its reference to specific sections of the Lease, any reference to the Abatement Provisions in the Lease—Sections 5.F and 12.D—which provide that Jenner & Block is entitled to rent abatement in the current circumstances, as explained below. They are thus provisions to the Lease that affirmatively defeat Landlord's claims in this case.

3. As a result of the spread of COVID-19, Jenner & Block stopped using at least 89% of its space. Jenner & Block's determination was reasonable and made only after a responsible and reasonable process. The determination was informed by and consistent with the Governor's order and directives. Every other law firm of comparable size in Chicago came to the same conclusion, as did nearly every other comparably sized law firm across the country. Jenner & Block's determination was plainly reasonable. Indeed, a decision to stay open under these circumstances would have been wholly irresponsible, inconsistent with public health and government directives, and triggered widespread condemnation.

4. Moreover, Jenner & Block's inability to use more than 11% of its space due to the COVID-19 pandemic and related health concerns is precisely the type of circumstance in which, as a result of an "event," Jenner & Block cannot "us[e] and occup[y]" the space "as intended by

Tenant in the normal course of Tenant's business." Jenner & Block's intended usage in the normal course of its business is to have a fully staffed law office where colleagues can use all of the office's resources to perform their work and to work together in person. Jenner & Block has reasonably determined that usage is not possible due to the COVID-19 pandemic and related health concerns.

5. Given that by no later than March 16, 2020 Jenner & Block had reasonably determined that it could not use at least 89% of its office space as a result of COVID-19, by no later than March 19, 2020, Jenner & Block's space had become Untenantable under Lease Section 12.D for at least three business days, and it has remained Untenantable since that time. Jenner & Block has not been using the Untenantable portion of its space since at least March 16, 2020.

6. Accordingly, Lease Section 5.F has applied since March 16, 2020 because Jenner & Block has reasonably determined the space cannot be used and occupied as intended by Jenner & Block in the normal course of its business and Jenner & Block has not in fact used the space since that time.

7. Jenner & Block is entitled to rent abatement for the percentage of space it has not been using for all or part of March, April, May, and June 2020, and any additional period during which these conditions persist, and Jenner & Block reasonably determines it cannot use a portion of its offices in the normal course of business as intended.

Second Defense

(Setoff)

8. Jenner & Block paid the full rent for March 2020 on March 2, 2020. At the time of that payment, Jenner & Block had not yet made the reasonable determination that, as a result of COVID-19, it could not use and occupy its space as it intended in the normal course of its business.

9. By no later than March 16, 2020, Jenner & Block had reasonably determined that at least 89% of its space could not be used and occupied as intended in the normal course of its business. Jenner & Block had stopped using that portion of its space after March 16, 2020.

10. Under the Lease, Jenner & Block is entitled to rent abatement for the portion of its space that it was not using starting no later than March 19, 2020, which was three business days after the date on which it reasonably determined it could no longer use and occupy its space.

11. Therefore, Jenner & Block is entitled to a setoff of not less than \$694,898.41 for Jenner & Block's overpayment of rent in March 2020.

JENNER & BLOCK'S COUNTERCLAIMS AGAINST LANDLORD

Jenner & Block states the following Counterclaims against Landlord:

Introduction

1. Jenner & Block brings these Counterclaims because Landlord refuses to recognize that the plain language of the Lease entitles Jenner & Block to rent abatement for the portion of its space that it is not using as a result of COVID-19.

2. The Lease's Abatement Provisions entitle Jenner & Block to rent reduction whenever Jenner & Block reasonably determines that any event prevents Jenner & Block's from using and occupying at least 20% of its space as intended by Jenner & Block in the normal course of its business. (Ex. A, §§ 5.F, 12.D.) On March 16, 2020, when the dangers of COVID-19 had become apparent in both Chicago and around the country, Jenner & Block came to the reasonable and responsible determination that it needed to close all five of its offices, including the Chicago office, and direct its personnel to begin working from home whenever possible. Jenner & Block arrived at that determination following a responsible internal evaluation that included collecting available data, reviewing the guidance of numerous health experts and government agencies, and careful internal deliberation. Every other law firm of comparable size in Chicago came to the same conclusion, as did nearly every other comparably sized law firm across the country.

3. Since making that reasonable determination, Jenner & Block has paid rent as set forth in the Lease, through credits owed to it by Landlord in accordance with Section 2.B(iii) of the Lease, and has agreed to pay the rent for the portion of the space it is using on a pro rata basis as required by the Lease. Landlord denies that Jenner & Block is entitled to rent abatement under the Abatement Provisions and has demanded payment of rent in full, creating a concrete, present dispute that is amenable to resolution by a judicial determination.

4. Jenner & Block seeks declarations that:
a. the Abatement Provisions are clear and unambiguous on their face, and Jenner & Block is entitled to rent abatement for the portion of its space that it is not using based on its reasonable determination that it cannot use and occupy that space as it intended in the normal course of its business;

b. Jenner & Block is entitled to rent abatement because, under the Abatement Provisions, Jenner & Block has reasonably determined that it cannot use and occupy at least 20% of its space as it intended in the normal course of its business as a result of COVID-19, and Jenner & Block has not been using that portion of its space for that time.

5. Accordingly, Jenner & Block is entitled to rent abatement for the percentage of space it has not been using for March, April, May, and June 2020 and any additional months prospectively. Jenner & Block is also entitled to a credit for Jenner & Block's overpayment of rent in March 2020 because it was entitled to rent abatement for the portion of space it did not use as a result of COVID-19, but had already prepaid its rent at the beginning of March.

6. Additionally, Jenner & Block seeks a declaration that it is entitled to a credit of \$121,557 for its portion of allocated expenses under Section 2 of the Lease.

Jurisdiction and Venue

7. This Court has personal jurisdiction over Landlord pursuant to 735 ILCS 5/2-209(a)(1) because Landlord has engaged in business transactions within the State. This Court also has personal jurisdiction over Landlord pursuant to 735 ILCS 5/2-209(a)(7) because the written agreement at issue is a contract which was performed within the State. This Court also has personal jurisdiction over Landlord pursuant to 735 ILCS 5/2-608(b) because Jenner & Block is asserting these Counterclaims as part of its Answer to the Complaint.

8. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 of the Illinois Code of Civil Procedure because all the occurrences alleged and complained of herein occurred in Cook County, Illinois.

The Parties

9. Jenner & Block is a premiere law firm of international reach with more than 500 lawyers in five offices, including Chicago, London, Los Angeles, New York, and Washington, D.C. Jenner & Block has world class litigation and transactional departments, representing companies and individuals on their most sensitive and consequential matters. Jenner & Block's clients range from the top ranks of the Fortune 500, large privately held corporations and financial services institutions to emerging companies, family-run businesses and individuals. Jenner & Block has been the number one provider of pro bono legal services in the country year after year.

10. Landlord is an affiliate of Heitman LLC, which is a global real estate investment company with over \$40 billion in assets under management. Landlord serves as the landlord of the Building.

Factual Background

I. Jenner & Block and Mesirow Agree to Include in the Lease the Abatement Provisions Entitling Jenner & Block to Rent Abatement for the Portion of Untenantable Space It is Not Using.

A. Jenner & Block Holds a Competitive Bidding with Four Landlords for its New Office Space, Ultimately Selecting a Site that Became 353 North Clark.

11. Before it leased office space at the Building, Jenner & Block leased office space at 330 North Wabash Avenue in Chicago. In the 2004-2005 timeframe, Jenner & Block began considering moving to a new location where it could enjoy state-of-the-art office space and amenities not available at its then-current location without substantially modifying the space.

12. Jenner & Block retained Colliers Bennett & Kahnweiler as its real estate broker to assist in finding space and negotiating a lease. Jenner & Block surveyed the many options in downtown Chicago, narrowing the list of possible targets to four: (1) a not-yet constructed building at 155 North Wacker Drive that was owned by the John Buck Company; (2) an existing building at 191 North Wacker Drive that was owned by Hines Interests LP; (3) the Building, which, at the time, was a not-yet-constructed building that was contemplated by Mesirow; and (4) its then-current location with improvements and a more favorable lease. Jenner & Block requested proposals from all four potential landlords, including the submission of letters of intent (“LOIs”) for all four locations.

13. Following a competitive bidding process with the four landlords, Jenner & Block negotiated a final lease with Mesirow for what would become the Building. Mesirow served both as the developer of the Building and as a potential tenant because it was contemplated that Mesirow would be leasing the bottom floors, while Jenner & Block would lease the top floors. Mesirow envisioned that Jenner & Block would be the anchor tenant in the Building, and Jenner & Block’s participation permitted Mesirow to develop a much larger (and potentially more lucrative) building. Jenner & Block ultimately signed a 15-year lease of 416,297 square feet, amounting to about one-third of the Building. The Lease called for Jenner & Block to pay during the life of the Lease over \$185 million in base rent plus reimbursement for real estate taxes and certain expenses, if the Premises remained tenantable for the entire life of the Lease. (Ex. B, ¶ 10.)

14. Mesirow placed a very high value on Jenner & Block’s potential participation in the development of the Building, particularly given the dollar value and length of the potential lease which Jenner & Block was contemplating, as well as Jenner & Block’s creditworthiness and prestige. (Ex. B, ¶ 9.) Mesirow’s development plan depended on Jenner & Block’s participation

to obtain financing for the construction. (*Id.* at ¶ 10.) At the time, most other large law firms were locked into long-term leases, and there were few, if any, anchor-quality tenants that would take the top third of a new construction office tower in downtown Chicago. (*Id.* at ¶¶ 8-10.) Accordingly, the Building likely would not have been constructed in its current form without Jenner & Block's participation. (*Id.* at ¶ 13.) Additionally, having Jenner & Block as a tenant facilitated Mesirow's ability to sell the building following its development and helped attract other high quality tenants to the Building. (*Id.* at ¶ 10.)

15. Jenner & Block used its favorable bargaining position to negotiate several favorable lease terms. Some examples include that Jenner & Block received: broad rights to sublease its space, including the right to sublease two entire floors without Landlord's permission; contraction rights to decrease the amount of space it rented; a right of first refusal to lease additional space; a rent schedule with increases of \$0.50 per square foot annually, as opposed to the customary 2-3% increases; and the right to approve any changes to the management company. Jenner & Block also was entitled to overrule changes to the appearance of the Building, and Jenner & Block in fact exercised that entitlement by objecting to various changes during the construction of the Building. Finally, Jenner & Block obtained a subordinated equity position in the Building—a rare benefit few tenants receive.

B. Mesirow and Jenner & Block Agree to Key Rent Abatement Provisions to Protect Jenner & Block if Jenner & Block Reasonably Determines it Cannot Use and Occupy its Space.

16. Jenner & Block also negotiated for a valuable right to rent abatement to protect Jenner & Block if the space would ever become unusable as a result of events beyond its control.

17. Jenner & Block bargained for protection in the form of rent abatement rights (what became the Abatement Provisions of the Lease) to protect Jenner & Block in the event that an unexpected event, such as a pandemic, would prevent Jenner & Block from using its office space

in the manner in which it intended for the operation of its business—even where the landlord is not at fault. The intent of the Abatement Provisions—which is clear on their face—is that the landlord, not Jenner & Block, will bear the risk if Jenner & Block reasonably determines that any event, not caused by Jenner & Block’s misconduct, has prevented Jenner & Block from using its offices as intended in the normal course of its business even if the landlord is not at fault.

18. Given its bargaining position, Jenner & Block demanded this protection before it would agree to a 15-year lease of 416,297 square feet or one-third of the Building. Jenner & Block included this right to rent abatement in the proposals it submitted to each of the four potential landlords (not just Mesirow) with which Jenner & Block negotiated in the 2004-05 time frame.

19. When Jenner & Block first proposed the Abatement Provisions during the Lease negotiations, Mesirow objected and attempted to exclude these provisions because they were not provisions Mesirow was used to seeing in leases. (*See* Ex. B, ¶¶ 18-21.) Mesirow pointed out that Jenner & Block and/or the Building would have insurance and protections in the event that any fire, wind, water, casualty, and/or force majeure circumstances precluded Jenner & Block from using the space. (*Id.* at ¶ 19.) But Jenner & Block wanted protections that would be broader than those insurance and other protections could provide, by including *any event* (even ones not yet known or even knowable, or otherwise insurable) where Jenner & Block reasonably determined that its ability to fully use the space had been impaired for reasons that were not Jenner & Block’s fault. (*Id.* ¶ 20.) Jenner & Block made clear it sought protection regardless of whether the event was the Landlord’s responsibility and regardless of whether the event caused physical damage to the building or space. (*Id.*)

20. Jenner & Block insisted on including the abatement provisions in the Lease. (*Id.* at ¶ 22.) In a tenant’s market, with no other major law firm looking for space at the time, and with

Mesirow very desirous of obtaining Jenner & Block as the anchor tenant, Mesirow agreed to include the Abatement Provisions consistent with Jenner & Block's stated purpose of having the Abatement Provisions. (*Id.*)

II. COVID-19 Forces Jenner & Block to Close Nearly All of its Office.

A. COVID-19 Emerges as a Deadly Pandemic.

21. In early 2020, COVID-19 emerged as a novel, severe disease that spreads through respiratory transmissions. On January 30, 2020, the World Health Organization ("WHO") declared COVID-19 a public health emergency of international concern. On that same date, the United States Secretary of Health and Human Services declared that COVID-19 presents a public health emergency. On March 11, 2020, the WHO described COVID-19 as a pandemic.

22. Globally, there have been more than 8 million confirmed cases of COVID-19 and over 450,000 deaths attributable to COVID-19. In the United States, there have been over 2 million confirmed cases and over 100,000 deaths. In Illinois, there have been over 130,000 confirmed cases and over 6,000 deaths. Studies suggest that for every confirmed case there are many more unknown cases, in part because an individual can have the disease, but not exhibit symptoms—meaning that individuals can pose a risk of infecting others without knowing. A vaccine or treatment is not currently available, and there is currently no evidence that people who have recovered from COVID-19 are protected from a second infection.

23. Health organizations, such as the WHO and Centers for Disease Control and Prevention ("CDC"), have recommended that federal and state government take significant steps to prevent the disease from spreading. They have also recommended that individuals take precautions to contain the spread of the disease, including that they stay at home to the maximum extent possible.

B. Jenner & Block Implements Necessary and Appropriate Health Protocols.

1. Jenner & Block Forms a COVID-19 Task Force and Steering Committee to Develop a Strategy to Respond to COVID-19.

24. To protect the health of its employees and the community in general, Jenner & Block began developing plans for dealing with COVID-19 starting in February 2020. Throughout the COVID-19 crisis, Jenner & Block's planning has been a product of careful research and deliberation.

25. To assess the appropriate response to COVID-19's health threat and the government responses, Jenner & Block assembled a COVID-19 "Task Force," headed by a "Steering Committee" to make recommendations to Jenner & Block's management, implement decisions, draft communications, and move quickly to respond to new developments as they arise. The Task Force was comprised of a multi-disciplinary group of individuals, including lawyers, administrators, and personnel in the financial, operations, and technology departments.

26. Before making any recommendations, the Steering Committee carefully researched any options to develop plans that were well informed. It studied the latest guidance from government agencies and public health officials. It monitored and gathered the latest data from sources such as the CDC and WHO. It also conferred with other law firms and businesses that were facing the same challenges and risks as Jenner & Block.

2. Governor Pritzker Orders Businesses to Close and Individuals to Stay at Home to the Maximum Extent Possible.

27. Jenner & Block's response to COVID-19 was also informed by Governor Pritzker's orders and statements regarding COVID-19.

28. On March 9, 2020, Illinois Governor J.B. Pritzker declared a state of emergency as a result of COVID-19. The federal government declared a state of emergency on March 13. By March 24, all 50 states and the District of Columbia had declared a state of emergency.

29. On March 20, 2020, Governor Pritzker directed that, “[i]f you can work from home and aren’t already doing so, now is the time when you must.” He deemed this directive necessary in order to “avoid the loss of potentially tens of thousands of lives.”

30. Governor Pritzker also issued an executive order on March 20, 2020 mandating that all businesses, even those deemed “Essential Businesses” (which include law firms), “must take proactive measures to ensure compliance with Social Distancing Requirements.” The order also dictated: “The intent of this Executive Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform Essential Activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible comply with Social Distancing Requirements. All provisions of this Executive Order should be interpreted to effectuate this intent.” The Governor issued subsequent orders on April 1 and April 30 extending the terms of the March 20 order and repeating these directives.

31. The Governor’s April 30 order additionally stated: “All businesses must evaluate which employees are able to work from home, and are encouraged to facilitate remote work from home when possible.”

3. Jenner & Block Reasonably Determines to Close All Five of Its Offices in New York, Washington, D.C., Los Angeles, London, and Chicago.

32. Initially, in late February or early March 2020, Jenner & Block permitted its employees to come to the office, but imposed travel restrictions and advised personnel to implement good hygiene habits, such as washing hands and covering mouths when coughing or

sneezing. Jenner & Block also increased its sanitization efforts in the office, including cleaning surfaces more frequently and making hand sanitizer more easily available to employees.

33. As the danger of COVID-19 spread and intensified, Jenner & Block developed specific contingency plans for closing all of its five offices in New York, Washington, D.C., Los Angeles, London, and Chicago. On March 16, 2020, after careful consideration by the Steering Committee and firm management, Jenner & Block came to an obvious and commonsense conclusion: consistent with governmental directives, and in light of growing community transmission, the COVID-19 health threat required Jenner & Block to close all of its offices and direct its personnel to begin working from home whenever possible. As a result, on March 16, 2020, Jenner & Block closed all of its offices to all but a skeleton crew of employees to operate the mail room and copy centers, and they remain closed as of today.

34. In Chicago, since March 16, 2020, all but a skeleton crew of operational employees in Jenner & Block's mail room and document center were told to work remotely. That skeleton crew consists of, on average, twelve individuals. They are responsible for ensuring that physical mail and notices are received and sent, and for forwarding materials to attorneys so that they can work remotely. The only portions of the office used by the skeleton crew to perform their work are: the mail room and document center and various common areas such as the kitchen area, elevator lobbies, and connecting hallways. Jenner & Block has also continued to use its data center and storage space for their intended purposes. The total space used by Jenner & Block is at most 30,252 rentable square feet, which calculates as no more 11% of the Premises Jenner & Block occupied before March 16, 2020.³

³ To be conservative, Jenner & Block has not included in its calculation of the amount of space Jenner & Block is currently using certain parts of the Building that it subleases to other tenants. That approach is conservative because Jenner & Block's subtenants are using even less than 11%

35. Jenner & Block's reasonable decision to close its offices was based in substantial part by its determination that it would have been impossible to keep the Chicago office open and ensure the health and safety of Jenner & Block's employees and visitors. In the ordinary course at Jenner & Block's Chicago office, there are 579 individuals who work on 9 floors, consisting of over 270,000 square feet (Jenner & Block subleases the other 4 floors consisting of over 100,000 square feet). Jenner & Block's office layout generally consists of attorney offices around the perimeter of each floor. Inside that perimeter are desks and offices for staff, conference rooms, printer/supplies rooms, a kitchen area, and other common areas. The elevator bank and stairwell run through the center of each floor. Employees often work in close proximity of one another, whether sitting at nearby desks, passing each other in the hallways, or using common areas at the same time. The nature of legal work also involves a high degree of dialogue among attorneys and staff, inevitably leading to close interactions between colleagues.

36. Jenner & Block's office closure was consistent with the practices of every other similarly-sized Chicago-area law firm, as well as with nearly every other similarly-sized law firm across the country. It was also consistent with Landlord's own decision to close many amenities at the Building, including the fitness center, café, shuttle bus, and shoe repair service.

III. The Plain Language of the Lease Entitles Jenner & Block to Rent Abatement for the Portion of Its Space that it is Not Using and Occupying as a Result of COVID-19.

37. The plain language of the Abatement Provisions dictates that Jenner & Block is entitled to rent abatement for the portion of its space that it is not using based on its reasonable determination that it cannot use and occupy that space as it intended in the normal course of its business as a result of COVID-19.

of their space. Including the subleased space would reduce the percentage used by Jenner & Block even further.

38. Section 5.F of the Lease reads as follows (emphasis added):

Failure or Delay in Furnishing Services. In the event of *the interruption of any services critical to Tenant's occupancy or any Untenantability (as hereinafter defined) in the Premises or the Building, or the cessation of access not caused by Tenant to the Premises or Building, arising out of any event (Force Majeure or otherwise)*, which persists for a period longer than three (3) consecutive business days, and Tenant is unable to and does not utilize all, or a portion consisting of at least twenty percent (20%) of the Premises, as a result of such interruption or cessation, Tenant shall receive an abatement of all Rent for the portion of the Premises rendered Untenantable or inaccessible, from the period following such three (3) business day period until such time as such services or access is restored on a continual basis. For purposes of this Section 5F, "continual basis" shall mean restoration for a period exceeding forty-eight (48) hours (including at least one (1) business day) of any service or access which has ceased being furnished. Furthermore, in the event that such interruption or cessation persists for a period longer than two hundred seventy (270) days, Tenant shall have the option thereafter to terminate this Lease upon written notice to Landlord. If the cessation of access, Untenantability or interruption of services is due to the gross negligence or intentional misconduct of Landlord or its employees, agents, contractors or representatives, Tenant shall have all remedies available to it under this Lease; in all other cases, the remedies provided in this Section 5F shall be the sole and exclusive remedies of Tenant against Landlord for such cessation, Untenantability or interruption.

39. The emphasized portion of Section 5.F establishes that there are three independent circumstances in which Jenner & Block is entitled to rent abatement: (1) where there is an "interruption of any *services* critical to Tenant's occupancy"; (2) where there is "any *Untenantability (as hereinafter defined) in the Premises or the Building*"; or (3) where there is a "cessation of *access* not caused by Tenant to the Premises or Building." (*Id.*, emphasis added.) These circumstances are independent and in the disjunctive—that is, only one circumstance is required to trigger an abatement right. Here, it is the second scenario—where there is "any *Untenantability (as hereinafter defined) in the Premises or the Building*"—that establishes Jenner & Block's right to rent abatement as a result of COVID-19. It is not necessary that Jenner & Block be unable to *access* the Building, or suffer an interruption of *services*, to entitle Jenner & Block to

relief under Section 5.F, although such events would independently entitle Jenner & Block to such relief.

40. Section 12.D of the Lease reads as follows (italics added, bolding in original):

Untenantability of the Premises. “**Untenantable**” and “**Untenantability**” means that with respect to the Premises, or any portion thereof, the Premises, or any portion thereof, *cannot be accessed or used and occupied as intended by Tenant in the normal course of Tenant’s business as reasonably determined by Tenant* and in compliance with applicable Laws and is in fact not being used by Tenant for the conduct of its business.

The emphasized language makes clear that the space is considered “untenantable” if Jenner & Block makes a reasonable determination that it cannot use and occupy the space as Jenner & Block intended in the normal course of its business.

41. Significantly, under Section 5.F, Jenner & Block is entitled to rent abatement for untenantability arising out of “any event (Force Majeure or otherwise).” Neither Section 5.F, nor any other provision in the Lease, limits in any way the types of events that would entitle Jenner & Block to rent abatement—rather it refers to “any event (Force Majeure or otherwise).”

42. Here, Jenner & Block made a reasonable determination that, as result of COVID-19, it could not use and occupy its space as it intended in the normal course of its regular business operations. As explained above, Jenner & Block stopped using at least 89% of its space only after a responsible internal evaluation that included collecting available data, reviewing the guidance of numerous health experts and government agencies, and careful internal deliberation. Every other law firm of comparable size in Chicago came to the same conclusion, as did nearly every other comparably sized law firm across the country and countless other businesses. Jenner & Block’s determination was plainly reasonable. Indeed, a decision to stay open under these circumstances would have been wholly irresponsible, inconsistent with public health and government directives, and triggered widespread condemnation.

43. Accordingly, Section 5.F applies to abate Jenner & Block's rent for the portion of the Premises Jenner & Block has determined it cannot use, which calculates into abating rent by at least 89% for the period starting March 19, 2020 (three days after Jenner & Block closed its offices) through the present and so long as the health crisis persists.

IV. The Parties Dispute Jenner & Block's Rent Obligations in Light of COVID-19.

44. On April 3, 2020, Jenner & Block informed Landlord that it was entitled to rent abatement under Section 5.F for the portion of its space that it was not using as a result of COVID-19. Jenner & Block stated that the Premises "cannot be accessed or used and occupied as intended by Tenant in the normal course of Tenant's business as reasonably determined by Tenant and in compliance with applicable Laws and is in fact not being used by Tenant for the conduct of its business." (quoting Section 12.D)

45. Jenner & Block further explained: "Tenant is in fact not conducting its business from the Premises. Not only are the Premises Untenantable because the Governor has directed that personnel work from home, they are Untenantable because community transmission of COVID-19 renders it unsafe for personnel to continue to access or use the premises as intended."

46. Jenner & Block also indicated that it was relying on a credit from 2019 that Landlord had identified as due to Jenner & Block to satisfy its abated rent obligation. Each year, a portion of Jenner & Block's rent that is based on certain Building operational expenses and property taxes is estimated for the upcoming year, and Jenner & Block makes monthly payments based on that estimate during the year. At the end of each year, the Landlord performs a true-up of those expenses for the prior year, requiring an additional payment from Jenner & Block if the budget was less than the actual expenses, or providing a credit to Jenner & Block if the budget exceeded the actual expenses. On May 1, 2020, Landlord informed Jenner & Block that the credit

due Jenner & Block was \$643,460.90. While reserving its rights to audit the amount of that credit, Jenner & Block has applied that amount for rent for April, May and June 2020.

47. Landlord responded by letter dated April 10, 2020, that it disagreed that Section 5.F applied under the circumstances based on its assertion that Jenner & Block had not been “prohibited from freely accessing and using the Premises during this pandemic” and that Jenner & Block was supposedly “freely accessing and using the entirety of the Premises at its pleasure and in its sole discretion.” As already explained, Landlord is wrong because: (a) the health risks of COVID-19 prevented Jenner & Block from “freely accessing and using the Premises,” and (b) Jenner & Block was not “freely accessing and using the entirety of the Premises.”

48. On May 8, 2020, Landlord provided a letter purporting to be a notice of default for Jenner & Block’s non-payment of rent on May 1, 2020. The letter was not a valid notice of default because Jenner & Block was not required to pay the full rent, but was entitled to rent abatement under the Abatement Provisions.

V. Jenner & Block is Entitled to Additional Disputed Credits for Certain Expenses as Provided by the Lease.

49. Under Section 2 of the Lease, Jenner & Block is required to reimburse the Landlord for its proportionate share of certain expenses related to the operation of the Building. At the beginning of each year, Landlord estimates the expenses for the year and sets Jenner & Block’s monthly allocation of those expenses. Each month, Jenner & Block pays that monthly allocation with its monthly rent payments. At year-end, Landlord provides a true-up statement reflecting the difference between the actual expenses and the estimated expenses that Jenner & Block paid throughout the year. Jenner & Block then has a right to audit the true-up statement.

50. For calendar year 2017, Jenner & Block paid the monthly allocation amounts that were set by Landlord, and Landlord provided the year-end true-up statement. Jenner & Block

retained PricewaterhouseCoopers (“PWC”) to audit the 2017 true-up statement. PWC advised Jenner & Block that, of the amounts requested by Landlord and paid by Jenner & Block, certain amounts were incorrectly included in the expenses that Jenner & Block had reimbursed, and therefore Jenner & Block was entitled to a credit for those amounts.

51. On February 14, 2019, Jenner & Block informed Landlord of PWC’s findings. The parties then engaged in dialogue, during which time, Landlord agreed that Jenner & Block was in fact entitled to a credit for \$42,965. However, there was an additional \$78,592 for which Jenner & Block maintained it was entitled to a credit, while Landlord maintained Jenner & Block was not entitled to such a credit. That \$78,592 is comprised of the following line items:

a. Gross-Up Calculation (\$34,589): Landlord incorrectly applied the cleaning expense gross-up calculation.

b. Management Fee income (\$33,572): Landlord improperly included termination fees as part of gross income, which is the line item used to calculate the management fee.

c. Miscellaneous Expenses (\$5,608): Landlord improperly included expenses related to Building staff birthdays, gifts, and bonuses.

d. Capital Expenses (\$4,823): Landlord improperly included certain labor expenses associated with elevator repair that should have been capitalized.

52. Thus, Jenner & Block maintains it is entitled to a credit of \$121,557 (\$42,965 + \$78,592), while Landlord maintains that Jenner & Block is only entitled to a credit of \$42,965.

COUNTS

Count I

(Declaratory Judgment Regarding Lease Provisions)

53. Jenner & Block repeats and incorporates by reference the allegations in paragraphs 1 through 52 above.

54. 735 ILCS 5/2-701 authorizes the Court to make binding declarations of rights.

55. An actual, justiciable, and present controversy exists between Jenner & Block and Landlord—Jenner & Block maintains that it is entitled to rent abatement, and Landlord maintains that Jenner & Block is not entitled to rent abatement—that requires an order declaring the rights and duties of the parties, including without limitation a declaration that Jenner & Block is entitled to rent abatement for the portion of its space that it is not using based on its reasonable determination that it cannot use and occupy that space as it intended in the normal course of its business.

56. The Court should declare that Sections 5.F and 12.D of the Lease are clear and unambiguous on their face and entitle Jenner & Block to rent abatement for the portion of its space that it is not using based on Jenner & Block’s reasonable determination that it cannot use and occupy that space as it intended in the normal course of its business.

Count II

(Declaratory Judgment Regarding Application Of Abatement Provisions)

57. Jenner & Block repeats and incorporates by reference the allegations in paragraphs 1 through 56 above.

58. 735 ILCS 5/2-701 authorizes the Court to make binding declarations of rights.

59. An actual, justiciable, and present controversy exists between Jenner & Block and Landlord—Jenner & Block maintains that it is entitled to rent abatement, and Landlord maintains that Jenner & Block is not entitled to rent abatement—that controversy requires an order declaring the rights and duties of the parties, including without limitation a declaration that Jenner & Block is entitled to rent abatement because, as set forth in the Abatement Provisions, Jenner & Block has reasonably determined that it cannot use and occupy at least 20% of its space as it intended in the normal course of its business as a result of COVID-19, and Jenner & Block has not been using that portion of its space for that time.

60. Jenner & Block stopped using at least 89% of its space only after a responsible internal evaluation that included collecting available data, reviewing the guidance of numerous health experts and government agencies, and careful internal deliberation. Every other law firm of comparable size in Chicago came to the same conclusion, as did nearly every other comparably sized law firm across the country. Jenner & Block's determination was plainly reasonable.

61. Moreover, limiting the usage of its space by at least 89% is clearly not Jenner & Block's intended usage of its space in the normal course of its business. Jenner & Block's intended usage in the normal course is to have a fully staffed law office where colleagues can use all of the office's resources to perform their work and to work together in person. That intended usage has been lost.

62. Given that by no later than March 16, 2020 Jenner & Block had reasonably determined that it could not use at least 89% of its office space as a result of COVID-19, by no later than March 19, 2020, Jenner & Block's space had become Untenantable for at least three business days and has remained Untenantable since that time. Jenner & Block has not been using the Untenantable portion of its space since at least March 16.

63. Thus, at least 89% Jenner & Block's space is Untenantable under Section 12.D because Jenner & Block has reasonably determined that it cannot use and occupy it as intended by Tenant in the normal course of Tenant's business.

64. Under Section 5.F of the Lease, Jenner & Block is entitled to rent abatement for the percentage of space it has not been using for March, April and May 2020 and any additional months the Untenantability persists. The specific percentage of space Jenner & Block has not been using will be determined at a later date based on the evidence presented.

65. Jenner & Block is also entitled to a credit for Jenner & Block's overpayment of rent in March 2020 because Jenner & Block's space was Untenantable and unused for a portion of that month. The amount of that credit, 89% of the rent Jenner & Block actually pro-rated for the time March 16, 2020 through March 31, 2020 is \$694,898.41.

Count III

(Declaratory Judgment For Various Lease Credits)

66. Jenner & Block repeats and incorporates by reference the allegations in paragraphs 1 through 65 above.

67. 735 ILCS 5/2-701 authorizes the Court to make binding declarations of rights.

68. An actual, justiciable, and present controversy exists between Jenner & Block and Landlord—Jenner & Block maintains that, for calendar year 2017, it overpaid its portion of allocated expenses under Section 2 of the Lease by \$121,557, while Landlord maintains that Jenner & Block overpaid by only \$42,965. Thus, the parties dispute whether Jenner & Block overpaid the difference between the amounts, which is \$78,592.

69. Jenner & Block is entitled to reimbursement for the \$78,592, in addition to the \$42,965, for the following reasons:

- a. Gross-Up Calculation (\$34,589): Landlord incorrectly applied the cleaning expense gross-up calculation.
 - b. Management Fee income (\$33,572): Landlord improperly included termination fees as part of gross income, which is the line item used to calculate the management fee.
 - c. Miscellaneous Expenses (\$5,608): Landlord improperly included expenses related to Building staff birthdays, gifts, and bonuses.
 - d. Capital Expenses (\$4,823): Landlord improperly included certain labor expenses associated with elevator repair that should have been capitalized.
70. Jenner & Block is entitled to a credit of \$121,557 (\$42,965 + \$78,592).

PRAYER FOR RELIEF

WHEREFORE, Jenner & Block respectfully requests this Court to enter an order granting the following relief:

- A. As to Count I, enter a judgment declaring that the Abatement Provisions are clear on their face, and Jenner & Block is entitled to rent abatement for the portion of its space that it is not using based on its reasonable determination that it cannot use and occupy that space as it intended in the normal course of its business;
- B. As to Count II, enter a judgment declaring that Jenner & Block is entitled to rent abatement here because, as applied under the Abatement Provisions, Jenner & Block has reasonably determined that it cannot use and occupy at least 20% of its space as it intended in the normal course of its business as a result of COVID-19, and Jenner & Block has in fact not been using that portion of its space for that time;

- C. As to Count II, enter a judgment as to the specific amount of rent abatement to which Jenner & Block is entitled;
- D. As to Count II, enter a judgment as to the specific amount of credit to which Jenner & Block is entitled for Jenner & Block's overpayment of March 2020 rent, which is \$694,898.41;
- E. As to Count III, enter a judgment that Jenner & Block is entitled to a credit for \$121,557 for its portion of allocated expenses under Section 2 of the Lease;
- F. Award Jenner & Block attorneys' fees, costs, and expenses under Section 25.G of the Lease; and
- G. Award Jenner & Block such other relief as the Court deems just.

Dated: June 22, 2020

Jenner & Block LLP

By /s/ David J. Bradford
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, David J. Bradford, certify that on June 22, 2020, I caused the foregoing **Answer,**

Affirmative and Defenses, and Counterclaims to be served via electronic mail upon:

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