No. 24-CV-1011

DISTRICT OF COLUMBIA
COURT OF APPEALS

CROWELL & MORING LLP,
Appellant,

v.

TREA 1001 PENNSYLVANIA TRUST,
Appellee.

On Appeal From the Superior Court for the District of Columbia,
Civil Division, Case No. 2023-CAB-001531
The Hon. Donald Tunnage

REPLY BRIEF OF APPELLANT CROWELL & MORING LLP

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

OTHER AUTHORITIES

INTRODUCTION

TREA 1001 Pennsylvania Trust ("TREA" or "Landlord") accuses Crowell & Moring LLP ("Crowell" or "Tenant") of wanting to "renegotiate the deal it made," Resp. Br. at 43, when that is precisely what TREA attempts to do. From the first page of its Response, TREA presents the issues for review as whether three purported factual statements about the pre-conditions to abatement are true. Resp. Br. at 1. But each of the statements revises the language of Section 13(f) to promote TREA's preferred reading, rather than offering an interpretation of the words that are actually in the contract.

First, TREA asserts that "[t]here was no 'Interruption' to Tenant's use and enjoyment caused by any failure of Landlord to provide 'Essential Building Services.'" Resp. Br. at 1. But that is not the question. Condition 1 asks whether "Tenant actually suffer[ed] a material interference . . . of its use and enjoyment of any portion of the Premises by reason of any interruption of any Essential Building Service[.]" App682. Under the plain terms of the contract it simply does not matter whether an interruption of any Essential Building Service was "caused by any failure of Landlord." Resp. Br. at 1. The question is whether Tenant *suffered* an interruption. Crowell inarguably did.

Second, TREA asserts that "[n]o material portion of the 'Premises' was rendered physically 'unusable' by any failure by Landlord to provide 'Essential

Building Services.'" Resp. Br. at 1. Here, again, TREA embroiders the contractual language to add qualifications that are not present in the contract itself. Condition 2 looks at whether the Interference (defined in Condition 1) "render[ed] all or any material part of the Premises unusable for the purpose of conducting Tenant's business in such applicable part of the Premises[.]" App682. The word "physically" does not appear (though it certainly could have been included if the parties had intended that limitation) and TREA conspicuously omits the modifier that the parties did include: that the Premises are unusable *for the purpose of conducting Tenant's business* in the Premises. As with Condition 1, the contract is neutral as to whether the Interference was caused by a failure of Landlord or something else.

Third, TREA's assertion that no qualifying Force Majeure event occurred is little more than a repackaging of its position on Conditions 1 and 2, which TREA had to rewrite to reach its desired outcome. To be sure, TREA also half-heartedly defends the trial court's reading that "orders of government" in the Force Majeure clause is limited to government orders effecting a taking. *See, e.g.*, Resp. Br. at 6. Yet at the same time, TREA concedes "that even Landlord's attorneys" did not interpret the contract as having this limitation before the trial court raised the issue. Resp. Br. at 38 n.8. Where both parties agreed that the Mayor's Orders could be a Force Majeure under the lease until the trial court suggested otherwise *during* litigation, that interpretation is certainly reasonable—if not plainly correct.

Keeping to the language of Section 13(f), and given that TREA concedes that Crowell experienced a reduced use and enjoyment of the Premises, the dispute comes down to this: was there any interruption in any Essential Building Service that rendered the Premises unusable for the purpose of conducting Tenant's business in the Premises? The undisputed facts establish that the answer is yes. Crowell's "secure access" was disrupted because the majority of its employees and invitees were forbidden from accessing the Premises; the interruption made the Premises unusable for the purpose of conducting Crowell's business, that is, practicing law in the Premises; and the interruption was caused by a Force Majeure—an order of government imposing restrictions due to the COVID-19 pandemic. Crowell has thus met each condition and is entitled to abatement.

ARGUMENT

TREA concedes, as it did before the trial court, that the COVID-19 pandemic and the Mayor's Orders in response to the pandemic materially reduced Crowell's use and enjoyment of the Premises. As TREA puts it, "the Covid pandemic caused many local governments, including D.C., to issue a variety of health orders, including, in some cases, ordering certain businesses to cease certain kinds of operations in their usual facilities." Resp. Br. at 3. As is pertinent here, in DC, the Mayor ordered "[a]ll businesses with a facility in Washington, DC, except Essential Business" to "cease all activities at those facilities, except Minimum Basic

Operations." App739. Professional legal services like Crowell's were essential only to the extent "necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Government Functions." App743. And even as restrictions lessened over time, professional services were "nonessential businesses that remain closed except for minimum basic operations," *e.g.*, App766, or were "[b]usinesses [that] shall continue to have employees telework to the greatest extent consistent with their business operations," *e.g.*, App773. Although Crowell operated remotely during the pandemic, because of the Mayor's Orders its employees and invitees suffered an interruption in secure access into the office space, so Crowell could not conduct its business *in the Premises* that it leased from TREA. Those conditions trigger abatement under the terms of the Lease.

Although it purports to defend its position based on the contractual language alone, Resp. Br. at 23 n.5, TREA quickly falls back to relying on extrinsic evidence of the parties' understanding of Section 13(f), noting that an inadequate HVAC system was the impetus for the Seventeenth Lease Amendment (the "Amendment"). Specifically, "[i]n 2010, Crowell & Moring had a problem[,]" TREA explains, that "the base building HVAC system . . . was not working adequately" and "[s]ecretaries were apparently working in winter parkas." Resp. Br. at 2 (citing App909). But if Section 13(f) was intended to remedy problems like this, the provision is significantly more tenant-favorable than TREA would like to admit.

An HVAC system that is "not working adequately" satisfies Condition 1 even if *Landlord* did not fail to provide a working HVAC system, because regardless of the cause Tenant suffered an interruption that impacted its use and enjoyment of the Premises. Condition 2 is likewise satisfied because it is unreasonable and impractical to expect secretaries and lawyers to practice law in winter coats—even if the building is technically, physically, usable. And if the impact of the inadequate HVAC system was only felt because of an unusually harsh and prolonged winter storm, that Act of God would satisfy Condition 3 even if *Crowell* made the ultimate determination that it would not force its employees to work in a cold building. The inadequate HVAC example therefore exposes the weakness of TREA's contract interpretation argument. Even if Crowell's employees could physically enter the building (had they been allowed) during the COVID-19 pandemic, they were functionally prohibited from accessing it. That was an interruption of secure access that rendered the Premises unusable for the purpose of Crowell's business.

Moreover, Section 13(f) was not written with a focus on what Essential Building Service *Landlord* did or did not provide; it focuses on the interruption that *Tenant* experienced in an Essential Building Service, whether or not that interruption was something tangible or physical in the Premises. Given that the parties meant to provide Tenant a benefit when cold weather impacted the quality of heating, rendering the Premises uncomfortable but not impossible to use, the parties certainly

intended the Amendment to cover an interruption in access into the Premises—secure access, including access generally. None of this reasoning requires manipulating the language of the lease as TREA does repeatedly in its Response.

I. Condition 1 Is Not Limited To Physical Services That The Landlord Fails To Provide

TREA's reading of Condition 1 misconstrues Section 13(f) in at least three ways: (1) it asks the Court to focus on what Landlord provided rather than what Tenant suffered; (2) it asks the Court to limit Section 13(f) to tangible and physical services; and (3) it tells the Court that orders of government are covered *only* under Article 10 of the lease. *See, e.g.*, Resp. Br. at 5 ("Landlord indisputably provided all these things throughout the pandemic."); *id*. at 10 (Essential Building Services must be "something that is tangible and is physically provided by Landlord."); *id*. at 13 ("Article 10 of the Lease shifted to *Tenant* the risk of government regulation[.]"). TREA is wrong on all three points.

First, Condition 1 asks whether Tenant suffered "a material interference, interruption, curtailment, stoppage or suspension of its use and enjoyment of any portion of the Premises by reason of any interruption of any Essential Building Service." App682. The plain language encompasses *any* interruption of any Essential Building Service, not just interruptions caused by Landlord. And the inclusion of "a material interference" or "curtailment" of Tenant's use and enjoyment, in addition to "stoppage" or "suspension," demonstrates that the parties

intended to include partial or incomplete interruptions to the Essential Building Services. The restrictions on who could access the building, and how, were an interruption of the secure access that Crowell contracted for its employees and invitees—even if not imposed by Landlord, and even if a tiny subset of Crowell's employees could still enter into the Premises.

Contrary to TREA's suggestion, Resp. Br. at 19 n.4, Crowell has never contended that it suffered an interruption of an Essential Building Service because of a failure of Landlord. In the trial court and in this Court, Crowell repeatedly emphasized that it was the Mayor's Orders, not the Landlord, that caused the interruption of an Essential Building Service. *See, e.g.*, Opening Br. at 26 (citing App122). The point is that in the most challenging phases of the COVID-19 pandemic, everyone (including TREA) understood the Mayor's Orders to be mandatory restrictions on access into the Premises—even if Landlord did not have to force Crowell to comply. TREA acknowledged (through its building manager) that "for everyone's safety and well-being" tenants needed to "continue to comply with the Mayor's Executive Order." App991. To do that, the building "operate[d] in weekend mode" meaning that "essential employees" could "gain access with a valid I.D./access card" but TREA would not "provide individual access to tenants' spaces for third-party vendors or employees." *Id*. Moreover, prior to this litigation, TREA (via the attorney who negotiated the Seventeenth Lease Amendment) "[did]

not debate that D.C. COVID restrictions forced closure of non-essential businesses, such as Tenant's, beginning on March 25, 2020" and that "limits regarding the number of on-site employees or clients" were not lifted until May 21, 2021. App987. Those facts were uncontroversial prior to litigation.

Second, TREA adds a "tangible" and "physical" requirement to Condition 1 that does not exist in the text. It asserts that the restrictions on who was granted secure access into the Premises did not reduce Essential Building Services because "such services must be specific to the 'Building,'" Resp. Br. at 10-11, somehow missing that the interruption in Crowell's secure access *was* specific to the Building. The Mayor's Orders did not require Crowell to stop practicing law during the COVID-19 pandemic. They required Crowell to stop "the *on-site* operation of all non-essential business[]" and to "cease all activities *at those facilities*" in DC. App735, 739 (emphasis added). Because the Mayor's Orders were plainly directed at what Crowell could do *in the Building*, they curtailed the secure access Crowell's employees and invitees had into the Building and the Premises. Furthermore, just as Condition 1's reference to "any interruption" includes interruptions beyond the fault or failure of Landlord, "any interruption" also includes non-physical interruptions like restrictions on who can enter into the Premises. Nothing in the language of Section 13(f) suggests otherwise.

Presumably because the text of Section 13(f) contains no "tangible" or

"physical" limitation on what qualifies as an interruption in Essential Building Services, TREA looks elsewhere for a limitation on the definition of "secure access." But its attempts are unavailing. TREA claims that "[w]hen Landlord agreed to provide the *service* of 'secure access to the Building,' it was agreeing to the standard and customary set of things a landlord provides in regard to secure access: a security guard, controlled ingress, electronic keycards, and 24/7 entrance through the lobby." Resp. Br. at 5. But that is not how the contract defines "secure access." Section 13(f) defines "Essential Building Services" to include "secure access to the Building (including the requirements set forth in Section 4.02 of the Lease)." App682. Section 4.02, in turn, provides some minimum requirements to be included in "secure access," *see* App525, but the basic point remains that if most employees had *no* access, they did not have secure access.

Crowell does not argue, and has not argued, that Section 13(f) applies to "'all interruptions,' period" simply because the definition of Essential Building Services uses the word "including." *See* Resp. Br. at 21 (citing Opening Br. at 28). Rather, the fact that "secure access" includes the requirements of Section 4.02 demonstrates that "secure access" is something more than what Section 4.02 provides for. Otherwise, instead of referencing "secure access," the definition of Essential Building Services would have referenced only "~~secure access to the Building (including~~ the requirements set forth in Section 4.02 of the Lease)." *See also*

Opening Br. at 28 ("Rather than read Section 13(f) as redundant, interpreting an interruption in Essential Building Services to include all interruptions, not just physical inaccessibility, 'giv[es] a reasonable, lawful, and effective meaning to all [the lease's] terms.") (citing *District of Columbia v. District of Columbia Public Service Commission*, 963 A.2d 1144, 1155 (D.C. 2009)).

Importantly, Section 4.02 also expressly required a more expansive definition of access than most commercial leases: that Landlord must "provide Tenant, its employees and invitees prompt access" into the Building and the Premises. App525. Even TREA's expert, hired to opine on industry standards for commercial leases, admitted that this aspect of Crowell's lease was unique. He could not recall "any lease other than the one at issue here where the language provided that access was to the company or law firm[,] its employees[,] and invitees into the premises." App822. Moreover, the same expert explained that security and access "are two different concepts." App840. In other words, providing a security system for accessing the building is necessary but not sufficient for "secure access" into the Building and the Premises, and in this Lease "secure access" also includes "prompt access" for *all* of Crowell's employees and invitees.

Third, TREA points to Article 10 of the Lease, arguing it "clearly supports a read[ing] of Section 13(f) as applying, at most, to government actions that impact Landlord's ability to provide Essential Building Services." Resp. Br. at 17. But

neither the text of Article 10 nor Section 13(f) support that interpretation. Article 10 provides that "Tenant shall, at its sole expense, (i) comply with all laws, orders, ordinances, and regulations relating to Tenant's use of the Premises . . . (ii) comply with any direction made pursuant to law . . . and (iii) indemnify Landlord and hold Landlord harmless from any loss, cost, claim, or expense which Landlord may incur or suffer by reason of Tenant's failure to comply[.]" App541-42. But Crowell never asked TREA to compensate it for the cost of compliance with the Mayor's Orders, for example, implementing procedures for social distancing, or providing employees with the technology necessary for telework. And because Crowell complied with the law, TREA suffered no harm by reason of Crowell's failure to comply. Consequently, Crowell agrees with TREA that "there is a natural, plain-language meaning of the abatement provision that is easily harmonized with Article 10." *See* Resp. Br. at 16. Article 10 does not conflict with Section 13(f) because the expense of complying with the Mayor's Orders is a question entirely separate from whether an interruption in Essential Building Services meets the conditions for abatement.

And even if Article 10 were inconsistent with Section 13(f), Section 13(f) applies "[n]otwithstanding any provision of the Lease to the contrary," so Section 13(f) takes precedence over other provisions of the Lease. App681-82. Although TREA claims there is "no textual evidence that the Seventeenth Amendment was intended to amend or modify Article 10," even TREA's expert agreed that in

commercial leases the term "notwithstanding" is "common" and "a very broad term" that "provides a method to distinguish whatever you're trying to accomplish in that 'notwithstanding' clause from other provisions in the lease that might be inconsistent." App834. And just as TREA's expert suggested, Section 13(f) makes clear that it supersedes "any provision *of the Lease* to the contrary," which necessarily includes Article 10. App681-82 (emphasis added).

Separately, TREA's position that "Article 10 of the Lease shifted to *Tenant* the risk of government regulation," Resp. Br. at 13, does not even logically limit Section 13(f) to certain types of government orders; it would *erase* orders of government from Section 13(f). The more natural reading is that the provisions do not conflict, and that Section 13(f) provides for abatement when an order of government causes an interruption of Essential Building Services (and meets the other conditions of Section 13(f)) even if Crowell otherwise bears the cost of compliance, because here compliance triggered a right to abatement.

II. Condition 2 Is Not Limited To Physical Interference

TREA's interpretation of Condition 2 likewise rewrites the language the parties agreed on, adding requirements that do not exist and omitting important text. As TREA presents the issue, the Court would analyze whether the "Interference shall render all or any material part of the Premises physically unusable ~~for the purpose of conducting Tenant's business in such applicable part of the Premises~~ by any

failure of Landlord to provide 'Essential Building Services'." *Compare* App682 *with* Resp. Br. at 1. But the word "physical" does not appear in Section 13(f). The question is whether the Premises are unusable *for the purpose of conducting Tenant's business in the Premises*, and again, it does not matter whether Landlord caused the Interference.

TREA repeatedly asserts that the Premises had to be physically unusable to meet Condition 2, despite the absence of any such requirement in the text. *See, e.g.*, Resp. Br. at 1, 5, 25-27, 30. Also absent from TREA's brief is any reference to *Rose's 1, LLC v. Erie Insurance Exchange*, 290 A.3d 52 (D.C. 2023), despite the trial court's heavy reliance on *Rose's 1* in determining that Section 13(f) required a physical impact on the Premises. TREA doubtless steers clear of this comparison because "direct *physical* loss" was the contract language at issue in *Rose's 1*. 290 A.3d at 55 (emphasis added). In contrast, "physical" impact is irrelevant to TREA and Crowell's lease because the parties' agreement contains no such qualifier.

Indeed, the only text Landlord points to is that "some 'material part' of the Premises is 'rendered' unusable." Resp. Br. at 26. But *all* of the Premises were rendered unusable for the purpose of conducting Crowell's business in the Premises. Contrary to TREA's claim, Crowell's focus is not on "whether the Premises was simply *unused*." *See* Resp. Br. at 25. Crowell's entitlement to abatement is tied to the DC government's restrictions. The actual use levels are relevant to the *measure*

of abatement, but are not the source of Crowell's right to abatement. And it is undisputed that the Mayor's Orders prohibited Crowell from using the Premises to conduct its business.

Again, TREA's own expert confirmed this reading: "[U]se and enjoyment" means "the right to use and enjoy the space that's leased under the contract," and for a law firm like Crowell means "the right to use the space for the operation of its business." App825. When asked whether his law firm "use[d] and enjoy[ed] the premises in the way that it anticipated" under its own lease, TREA's expert pointed out that "nobody used their premises in March of 2020 in ways they anticipated when they signed leases before that." App839. If Condition 2 asked whether the Interference rendered the Premises "physically unusable," the change Crowell experienced in use and enjoyment might not be material without a physical impact on the Building. But because Condition 2 looks at whether the Premises were "unusable for the purpose of conducting Tenant's business," the fact that Crowell could not "use the space for the operation of its business" satisfies this condition. *See also Rose's 1*, 290 A.3d at 58 (noting that the Mayor's Orders "rendered" the facility in that case "temporarily unsuitable for its intended use").

Importantly, acknowledging the connection between "use and enjoyment" and whether the Premises are "unusable for the purpose of conducting Tenant's business" does not "collapse separate provisions" or "do violence to the text." *See*

Resp. Br. at 28. Conditions 1 and 2 are distinct. Use and enjoyment in Condition 1 looks at whether there has been any material Interference with Crowell's right to use the space—a binary yes or no. Condition 2 goes further by considering the impact of the Interference, i.e., whether the degree of Interference is severe enough to render the Premises unusable, given the specific business Tenant conducts in the Premises.

Examples of the difference can be illuminating. A faulty HVAC system might diminish a Tenant's use and enjoyment of the Premises—for instance, if they wish to control the temperature in individual offices to match the preferences of particular people. If Crowell's business were a hot yoga studio, the inability to control specific rooms may render the Premises unusable for the purpose of conducting Tenant's business. But to conduct office work, the lack of HVAC control may not be severe enough to render the Premises unusable. Or perhaps the problem is that the Building endures nightly one-hour power outages. Crowell is entitled to enter into the Premises twenty-four hours a day, seven days a week; so such outages may affect Crowell's use and enjoyment on rare occasions even if they do not render the Premises unusable for practicing law (primarily during business hours). But if instead, Crowell's business includes a night shift for clients in another time zone, such power outages may render the Premises unusable for the purpose of conducting Tenant's business. Crowell's reading does not make either provision superfluous: one looks at whether there is an Interference, and the other at the extent to which the

Interference impacts Crowell's business in the Premises.

III. Condition 3 Is Satisfied By Government Orders And Is Not Limited To Takings

Having met Conditions 1 and 2, it should be uncontroversial that the Mayor's Orders were orders of government that constitute a Force Majeure under Section 13(f). TREA's contrary arguments are red herrings: Crowell agrees that a Force Majeure, without meeting Conditions 1 and 2, is insufficient for abatement; Crowell's discretion to allow its employees to enter the Premises was restricted by the Mayor's Orders; and only a strained reading of the Force Majeure definition limits it to takings.

First, TREA argues that "No act by Landlord, and no 'Force Majeure,' ever caused a disruption of Essential Building Services that rendered some part of the Premises unusable." Resp. Br. at 5. That framing repeats TREA's misconstruction of the earlier conditions—focusing on what Landlord did, and ignoring the impact on Crowell's ability to conduct its business in the Premises. Crowell, of course, agrees that "a Force Majeure event that interrupts Tenant's use and enjoyment of the Premises is not, by itself, sufficient to satisfy the abatement test." *See* Resp. Br. at 32. That depends on whether the Force Majeure event satisfies Conditions 1 and 2. As shown above, it indisputably does.

To support its claim that a Force Majeure by itself cannot trigger abatement, TREA points to examples of Force Majeure events that would diminish the ability

of employees to get to the Building without triggering abatement. But those examples are inapposite. The Mayor's Orders were not about movement of employees in general, but about conducting business *in facilities* in the District. *See* App739. Crowell agrees that "[a] war that conscripts half of Tenant's personnel, a strike that keeps many of Tenant's personnel from traveling to work, and violent protests that scare Tenant's personnel from traveling into the District would not trigger a right of abatement." Resp. Br. at 32. But that is because those hypothetical events do not restrict Crowell's use and enjoyment of the Building or the Premises. In those scenarios, Crowell could replace its workers and continue to operate in the Premises. The Mayor's Orders, in contrast, did impose a limitation on the Premises.

Second, in arguing that there was no Force Majeure because Crowell "retained discretion over staff entry," Resp. Br. at 33, TREA attempts to paper over the very real restrictions that existed during the COVID-19 pandemic. Notably, TREA concedes that there were periods between March 2020 and May 2021 where Crowell was limited to Minimum Basic Operations. *See* Resp. Br. at 33-34. Beyond that, the Mayor's Orders required Crowell to have its employees telework to the extent it was "consistent with their business operations." App773. Even if "the Mayor left it entirely in the hands of firms" to decide precisely who would comprise the small subset of employees who could access the Premises, *see* Resp. Br. at 34, that discretion speaks only to the District's enforcement of the Mayor's Orders. Crowell

was required to comply, and did comply, with the law in good faith. And Crowell could *not* have reasonably determined that its entire workforce could continue working in the Premises. That would have been an obvious violation of the Mayor's Orders and would have subjected Crowell to penalties, in addition to the risk of spreading COVID. Crowell retained discretion only to determine which handful of its hundreds of employees would be allowed into the Premises to facilitate remote work for everyone else, and which other employees could enter the Premises when no alternative existed for getting the work done. TREA should not be permitted to micromanage Crowell's reasonable compliance with the Mayor's Orders; it does not remotely undermine the conclusion that the Mayor's Orders were a Force Majeure.[1]

Third, while TREA retreats from the trial court's conclusion that takings are the only government actions that trigger the Force Majeure clause, TREA does attempt to defend that reading in the alternative. That defense fails. TREA concedes

[1] Moreover, if TREA's argument is that Crowell was really an essential business that never needed to close, that is a disputed factual issue that should be resolved by the trial court. It is inconsistent with TREA's prior admission that Crowell was a non-essential business. App987. And it is inconsistent with how lawyers in DC defined essential business during the pandemic. For example, TREA's expert explained that at his own law firm during the pandemic, he "had to get permission" to go into the office, even to pick up papers, and he noted that all kinds of "policies and procedures were in place" to limit access to the office. App815. Moreover, even the DC Superior Court operated largely remotely during the period for which Crowell seeks abatement. *See, e.g.*, Superior Court COVID-19 Order (Jan. 13, 2021), *available at* https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/Amended-Order-1-13-21_FINAL.PDF. Crowell was not exempt from the Mayor's Orders simply because it does legal work .

it did not originally read the provision this way. *See* Resp. Br. at 38 n.8. TREA describes the trial court's reading as "a tricky endeavor" that requires an assessment of "the surrounding circumstances" because the language of the contract could "have been clearer." Resp. Br. at 37-38. Then TREA attempts to rewrite yet another condition: it claims the clause should be "orders of government or orders of civil, military or naval authorities," adding a second "orders" that is not in the text. *See id*. at 38. In contrast, Crowell's reading is that the clause including "a taking by eminent domain, requisition, laws, orders of government or of civil, military, or naval authorities" is a list of slightly-overlapping governmental acts, just as the other lists within the Force Majeure clause have slightly-overlapping terms. The fact that TREA must try so hard to defend the trial court's conclusion that the Force Majeure clause is limited to takings shows that the trial court's interpretation is incorrect; or at the very least that the language is ambiguous. And to be clear, Crowell argued in the trial court that to the extent it is reasonable to read "a taking by eminent domain" as modifying "orders of government," then "the language must be ambiguous" because it "is not only inconsistent with all of the testimony and evidence in the case, it's inconsistent with the whole procedural history of the case." App354.

Even without finding ambiguity, the trial court should have considered the context in which the Lease and the Amendment were made, including considering evidence "that the terms used have a technical or specialized meaning." *Mamo v.*

Skvirsky, 960 A.2d 595, 600 & n.7 (D.C. 2008). Indeed, where the language in a contract "has a generally prevailing meaning, it is interpreted in accordance with that meaning." *1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n, Inc. v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009) (quoting Restatement (Second) of Contracts § 202(3)(a) (1981)). And here, both parties' experts testified regarding the context of commercial lease agreements and that much of the language used in commercial lease agreements has particular meaning. TREA's expert, for example, explained the meaning of "use and enjoyment," App 825, and that "taking by eminent domain" is used as a "shorthand way of referring to" the "power by which any governmental institution would undertake a taking," App 842. That testimony should have informed the trial court's reading. Moreover, to the extent the Amendment is ambiguous, there is ample evidence that the trial court should have considered in interpreting it: for example, the testimony of the attorneys who negotiated the Amendment; comparisons to model lease language, and documentation of how the parties understood the Mayor's Orders in 2020 and 2021. Such evidence would have led the trial court to the position both parties had at the beginning of litigation: that the Mayor's Orders constitute orders of government that qualify as a Force Majeure.

CONCLUSION

This Court should reverse the trial court's order and grant summary judgment in favor of Crowell or, alternatively, remand this case for further proceedings.

DATED: August 20, 2025 MUNGER, TOLLES & OLSON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2025, a copy of the foregoing Reply Brief of Appellant was served electronically on all counsel of record.

DATED: August 20, 2025 MUNGER, TOLLES & OLSON LLP

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