**No. 24-CV-1011**

**DISTRICT OF COLUMBIA**
**COURT OF APPEALS**

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CROWELL & MORING LLP,

*Appellant*,

v.

TREA 1001 PENNSYLVANIA TRUST,

*Appellee*.

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

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# RESPONSE BRIEF OF APPELLEE TREA 1001 PENNSYLVANIA TRUST

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Rebecca Woods
*rwoods@seyfarth.com*
Seth J. Fortin
*sfortin@seyfarth.com*
SEYFARTH SHAW LLP
1075 Peachtree Street, N.E.
Suite 2500
Atlanta, Georgia 30309-3958
(404) 885-1500

*Attorneys for Appellee*

## THE PARTIES AND THEIR COUNSEL

Appellee agrees with the statement of the parties and their counsel in Appellant's opening brief.

## RULE 26.1 DISCLOSURE STATEMENT

Teachers Insurance and Annuity Association of America (TIAA) is the sole owner and sole beneficiary of The TREA 1001 Pennsylvania Avenue Trust. TIAA is not a publicly traded corporation.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## ISSUES PRESENTED FOR REVIEW

There is no dispute that Section 13(f) of the Seventeenth Amendment provides for rent abatement only when ***each*** of three conditions are met. Thus, the question for this Court is this: do the undisputed facts show as a matter of law that ***any*** of the following three statements are true:

1) There was no "Interruption" to Tenant's use and enjoyment caused by any failure of Landlord to provide "Essential Building Services";
2) No material portion of the "Premises" was rendered physically "unusable" by any failure by Landlord to provide "Essential Building Services"; or
3) No Interruption and loss of useability due to a failure to provide Essential Building Services resulted from either Landlord's own fault or a "Force Majeure."

## INTRODUCTION

In 2010, Crowell & Moring had a problem. In their main office building in Washington, D.C., "the base building HVAC system serving Crowell's premises was not working adequately." App909. Secretaries were apparently working in winter parkas. Around the same time, Crowell ("Tenant") negotiated for a provision in a new amendment to its Lease (the "Seventeenth Amendment"), and so "[d]uring Seventeenth Amendment negotiations, one key concern was the faulty HVAC system in Crowell's building[.]"). App923. Crowell's landlord, Appellee TREA 1001 Pennsylvania Trust ("Landlord"), agreed to overhaul the HVAC system and provide a guaranteed level of air quality. App679-681 (Section 13, "Utilities," subsections (a)-(b)); *see also* App699 (setting out HVAC standards Landlord covenanted to provide). The same Section 13 also modernized and clarified the electricity provisions of the original Lease. App681 (subsection (c)).

To incentivize Landlord to keep the HVAC and similar systems functioning in the future, one provision of the new amendment, Section 13(f), provided for rent abatement if Landlord failed to provide specified "Essential Building Services." App681-82. In addition to HVAC and electricity, the parties agreed that certain other services the Landlord provided would likewise be considered "Essential Building Services": "elevator and fire and life safety services, secure access to the Building, hot and cold water, and plumbing and sewage services." App682. This is

in contrast to other Landlord-provided services (e.g., trash removal) that were not deemed by the parties to qualify as "Essential Building Services."

Fast-forward a decade. In 2020, 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. Tenant, creatively, dusted off the Seventeenth Amendment and demanded a rent abatement from Landlord on the ground that it had been denied "secure access to the Building" due to the Mayor's stay-at-home orders. Landlord declined: the language of the lease showed that Tenant could obtain abatement only if Landlord failed to provide certain, specified "Essential Business Services" (because of its own fault, or because of a force majeure), and only if the Premises were rendered unusable as a result.

Distilled to its essence, the parties' dispute is this: **was it the parties' intent, in drafting Section 13(f), to shift from Tenant to Landlord the risk that something might happen that would affect the Tenant's ability use the Premises, *even if* the Landlord continued to provide, without interruption, each of the specified Essential Building Services in Section 13(f)?**

Ordinary contract interpretation principles and common sense both confirm that the answer is no. There could be myriad reasons Tenant cannot or does not make full use of the Premises—not just public health orders, but zoning decisions,

fire codes, professional regulations, lateral moves by attorneys, strikes by staff, natural disasters, loss of business, changes in business plan, post-Covid changes in attendance, and so on. And as to government orders and regulations specifically, Article 10 of the Lease indicates that the parties expressly allocated the risk of any such regulation of its business activities to *Tenant*.

All this comports with the standard commercial landlord-tenant relationship. Landlord agreed to passively provide space—certain square feet within a shell of a building, outfitted with bathrooms, kitchens, conference rooms, and offices—and certain appurtenant physical services that it could provide within the building, like HVAC, electricity, sanitation, and security. Nowhere in the Lease did Landlord warranty how much Tenant could use the space. And whether Tenant ran a law firm or a government contracting company or did nothing but kept the space empty and paid rent, Landlord was agnostic. The terms of the Lease reflect that, and the Seventeenth Amendment was not intended to alter that basic arrangement.

## SUMMARY OF ARGUMENT

Thus, turning to the three-prong test for rent abatement in Section 13(f), Tenant's claim fails at the first prong, that "Tenant actually suffers 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.[1] When 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. Landlord undisputedly provided all these things throughout the pandemic.

There is likewise no dispute that throughout the pandemic every part of the Premises was physically accessible, functional, and provided with the agreed-to services. Thus, Tenant's claim likewise fails at the second prong, "such Interference shall render 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.

And because there was never a disruption of Landlord's services, and no part of the Premises was ever rendered physically unusable, Plaintiff's claim likewise fails at the third prong: "such Interference arises from (I) reasons within the control of Landlord . . . or (II) a Force Majeure." No act by Landlord, and no "Force Majeure," ever caused a disruption of Essential Building Services that rendered some part of the Premises unusable. In any event, the government's orders cannot

[1] Tenant conceded its "money had and received" claim in the trial court. App36. Thus, the contract claim is the sole claim at issue.

plausibly be considered a Force Majeure given that the number of employees who could enter the Premises was always within Tenant's discretion.

The trial court also found that the definition of Force Majeure did not include the kind of public health orders at issue here, but rather was limited to government orders effecting a taking. Landlord agrees with this reading, and it provides yet another reason to affirm, but in the end it is not necessary to the decision, given all the other ways in which Tenant fails to meet the criteria for rent abatement laid out in the Lease. Tenant must satisfy all three prongs of the abatement provision, and it can't.

Because Tenant's claims fail at every turn, on a plain reading of the Lease, summary judgment must be affirmed.

## STATEMENT OF FACTS

The material facts of this case are not disputed. Tenant entered into an "Office Lease Agreement" with Landlord's predecessor on March 29, 1985 (the "Lease") to rent space within the building located at 1001 Pennsylvania Avenue, N.W. (the building as a whole, the "Building," and the premises specifically leased by Tenant, the "Premises"). App513 *et seq*. The Lease has been amended 19 times since then—including a "Seventeenth Amendment" executed in July 2010, which contains Section 13(f), the key provision at issue in this dispute. App664 *et seq*.

Section 13(f) contains two complementary provisions. App681-82. It starts with a lengthy provision outlining that Landlord will *not* be liable to Tenant (for abatement or otherwise) "by reason of any failure to furnish any services or utilities described herein." App681.

Then it moves on to provide a specific test for the limited circumstances that would warrant abatement:

> (1) in the event that Tenant actually suffers 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 (defined below) (collectively, "Interference"), (2) such Interference shall render all or any material part of the Premises unusable for the purpose of conducting Tenant's business in such applicable part of the Premises as permitted under this Lease and (3) either such Interference arises from (I) reasons within the control of Landlord . . . or (II) a Force Majeure (as defined below) event and such Interference shall continue for more than seven (7) consecutive business days after Landlord has been given written notice by Tenant of the Interference . . . .

App682. Each prong of this test must be met. If Tenant fails the first one, the inquiry stops and there is no abatement. The same is true of the second, and then the third.

In March 2020, the Covid-19 pandemic became widespread. The Mayor of Washington, D.C. issued certain orders restricting movement in public places. App735 *et seq*. The Mayor first ordered that certain non-essential business activities cease, and that individuals living in Washington D.C. stay home, with specified exceptions. App735-62. The Orders explained how people could

determine whether and to what extent their business activities qualified as "essential." App735-754.

For professional services firms like law firms, their activities qualified as "Essential Business" to the extent the law firm determined that work their lawyers needed to perform was "necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental Functions." App743 Firms were also allowed to keep staff in the office for specified "minimum basic operations"—how many staff were required to do that work was, again, up to the firm. App739, App744-45. The operation and intent of these orders was to control human movement, not to shutter commercial offices like the Building.

Indeed, commercial offices had to remain accessible to accommodate those workers that business tenants therein deemed to be essential and/or who supported "Minimum Basic Operations." An order from the Mayor said so plainly: "**[y]ou should provide access to offices of your tenants so that they can carry out their own minimum business operations**." App750.

Landlord complied with these orders, keeping the entire Building, and the Premises at issue, operational and securely accessible to anyone that Tenant allowed to go to the Premises. Tenant, for its part, issued a variety of directives to its personnel that managed who could come into the office and when; Landlord took no part in those decisions.

Tenant nonetheless seeks 14 months of rent abatement for the period between the Mayor's first order limiting in-person work in March 2020 through an order in May 2021 that "lift[ed] 'all remaining restrictions for non-essential, non-retail businesses[.]'" AOB at 14. To be sure, between late March 2020 and October 8, 2020, Tenant sharply limited the number of employees who could be present in the office and required most to work from home. But staff designated by Tenant as "Minimum Basic Operations" and others continued to use the office throughout this period. App21-22; App934; *see also* Defendant's Statement of Undisputed Material Facts ("SUMF") ¶¶ 49, 56, 61 (April 25, 2024), and Exs. O, P, R-X, and GG thereto.[2] After October 8, Tenant eased restrictions and generally allowed any of its attorneys and staff who wished to do so to enter the office again, subject to tracking, certain protective measures, and a self-imposed 25% cap on occupancy on each floor. App941; App979-980; App1074-75.[3] Except for a one-month "pause" in late December/early January, for the rest of the claimed abatement period, Tenant continued to allow attorneys and staff to enter as they desired, subject to these self-imposed restrictions. App1077; *see also* SUMF ¶ 58, and Exs. LL-NN thereto.

[2] *See* DCCA Rule 30(a)(2) ("Parts of the record may be relied on by the court or the parties even though not included in the appendix.").

[3] While a committee recommended 25% occupancy during Phase 2 of D.C.'s reopening, *see* App993 *et seq*., it cannot be disputed that the Mayor never adopted those recommendations. *See generally* Orders of the Mayor at App735-805.

## STANDARD OF REVIEW

This Court "review[s] the grant of a motion for summary judgment de novo." *Jaiyeola v. D.C.*, 40 A.3d 356, 361 n.9 (D.C. 2012). While the Court's "standard of review is the same as the trial court's standard in considering the motion for summary judgment," *id.*, "[i]t is a settled rule that in reviewing the decision of a trial court it must be affirmed if the result was correct although the trial court relied upon a wrong ground or gave a wrong reason." *Simpkins v. Brooks*, 49 A.2d 549, 552 (D.C. 1946).

## ARGUMENT

### I. PRONG 1: NO "ESSENTIAL BUILDING SERVICE" WAS INTERRUPTED

The Court can resolve this appeal on the first prong of the abatement provision alone. For the abatement provision to apply, Tenant must lose "use and enjoyment" of some "portion of the Premises" due to an "**interruption of any Essential Building Service**." App682 (emphasis added). Where, as here, there has been no interruption of an Essential Building Service, there is no abatement.

#### A. The Plain Meaning of "Essential Building Services": Services that the Landlord Provides

The plain meaning of the phrase "Essential Building Services" is that they must be, first of all, "services"—i.e., something that is tangible and is physically provided by Landlord. Second, such services must be specific to the "Building"; they are tangible things the Tenant can make use of only when its personnel arrive

at the Building. Third, of course, they are limited to the items actually listed in the definition of that phrase.

This definition confirms that the "Essential Building Services" are all physical things/services a landlord can provide: electricity, HVAC, elevators, fire services, sewage, plumbing, and so on. Even the phrase "secure access to the Building" emphasizes both the physical aspect ("to the Building") and the services Landlord can provide (security). The parenthetical referring to Section 4.02 of the Lease likewise proves the point: every element of Section 4.02 is either a physical thing or a physical service, and in either case, one the Landlord can furnish "at its cost and expense": keeping outdoor areas clean and free of obstruction (4.02(i)), keeping the lobbies clean and presentable (4.02(ii)), caring for the landscaping (4.02(iii)), and, relevant here, providing a first-class "Building security system" and "prompt access (in a manner consistent with a first-class modern office building in the District of Columbia) into the Building (through the lobby) and the Premises twenty-four (24) hours each day, seven (7) days per week" (4.02(iv)-(v)). App525.

Section 13(f) contemplates that Landlord might not provide these Essential Building Services, whether through its own fault or because some external cause (a force majeure) prevented Landlord from providing the service. For example, Landlord might negligently fail to service the HVAC (its own fault), or a strike by

maintenance personnel might render a broken HVAC unusable (force majeure). In either event, Landlord would have failed to provide the service it otherwise promised to provide, and Tenant would have the start of a claim for abatement. (Tenant would then have to show it meets the other prongs of the provision, and as discussed below, the prongs are separate: for example, a broken HVAC system might not render any part of the Premises unusable on a mild winter day.) Similarly, Landlord might fail to provide "secure access to the Building": if it malevolently decided to lock the doors to keep Tenant's personnel from entering the Premises (its fault), or if a flood knocked out the electric locks and key fob readers, rendering the Premises unsecured and open to access by unauthorized persons (force majeure). In either circumstance, Landlord would have failed to provide secure access.

These examples show how Essential Building Services are tangible things that Landlord promised to provide to Tenant and that Landlord was capable of purchasing or paying for and then providing to Tenant. This is distinct from Tenant's interpretation, which would have Landlord provide something it didn't promise (a generalized right of full use and occupancy) and couldn't provide for all the money in the world (a protection against a government order affecting Tenant's ability to use the Premises at maximum capacity).

### B. The Lease Allocates to Tenant the Risk of Compliance with Government Orders

Like other contracts, commercial real estate leases are substantially allocations of risk. Section 13(f) shifted to Landlord the risk that it wouldn't be able to provide specified services that it promised to provide for Tenant's benefit.

In contrast, Article 10 of the Lease shifted to *Tenant* the risk of government regulation—including the risk that the Mayor of the District of Columbia would issue various stay-at-home orders during the pandemic, and that such orders might affect Tenant's ability to make use of its office space. Specifically, 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 of Federal, state, county, municipal and other authorities having jurisdiction over the Premises[.]" App541.

Indeed, a raft of provisions shows that Landlord disclaimed any intent to provide Tenant a warranty against laws affecting its use of the space. These provisions specifically contemplate that the practice of Tenant's business may be limited or restricted by law or government order. (*See, e.g.*, App579 (Sec. 33.11, Tenant warranting that "Tenant has complied with all applicable laws, rules, and governmental regulations relative to its right to do business in the District of Columbia"); App672 (Seventeenth Amendment, Sec. 9, requiring Tenant to comply with "all applicable codes and laws" in performing alterations within the

Premises and to "obtain a certificate of occupancy" if required by law, "at Tenant's expense" subject to a certain allowance); *see also* Def's Ex. WW attached to Response to Pl's MSJ, Twelfth Amendment, Sec. 7(b) ("Tenant shall not use or occupy the P-3 Multi-Purpose Space for any unlawful purpose[.]"); *id.*, Section 21(b) (Tenant to comply with laws regarding storage of hazardous materials).

Tenant argued below that the phrase, "[n]otwithstanding any provision of the Lease to the contrary" in the abatement provision rendered Article 10 inoperable. App187-88. But if Tenant wants to argue that the parties eliminated Article 10 from the contract, "notwithstanding" is not enough. Such a clause does not effect an amendment or deletion of other provisions of the Lease. Indeed, it does not even supersede other provisions unless the provisions actually conflict. *Meehancombs Glob. Credit Opportunities Master Fund, LP v. Caesars Ent. Corp.*, 162 F. Supp. 3d 200, 211–12 (S.D.N.Y. 2015) (declining to hold "notwithstanding clause" trumps where "plaintiffs have not shown that there is a conflict between" provisions); *Saugatuck, LLC v. St. Mary's Commons Assocs., L.L.C.*, No. 19-CV-217 (SJF)(SIL), 2020 WL 4587534, at *10 (E.D.N.Y. Jan. 22, 2020), *report and recommendation adopted*, 2020 WL 2537264 (E.D.N.Y. May 19, 2020) ("Plaintiff argues that the QC Clause's inclusion of 'notwithstanding any provisions of this agreement to the contrary' language deems it superior to the Option. This contention is . . . misplaced, as the clauses at issue do not conflict.") (citations

omitted); *United Steelworkers of Am. v. Crane Co.*, 605 F.2d 714, 719 (3d Cir. 1979) ("notwithstanding" clause of union contract did not nullify pension provisions that did not conflict with, but merely "clarif[ied] and supplement[ed]," containing clause). Likewise, a "notwithstanding" clause does not require the Court to adopt "an unnatural reading of the contract." *United States Conf. of Mayors v. Great-Western Life & Annuity Ins. Co.*, 288 F. Supp. 3d 4, 9 (D.D.C. 2017).

There is absolutely no textual evidence that the Seventeenth Amendment was intended to amend or modify Article 10 (or any of the other compliance-with-laws provisions). On the contrary, Section 33.10 of the original Lease states that "[n]o amendment or modification of this lease shall be binding or valid unless expressed in a writing executed by both parties hereto," App579, and Section 35 of the Seventeenth Amendment states that "[e]xcept as expressly amended by this Amendment, all other terms, conditions and provisions of the Amended Lease . . . are hereby ratified and confirmed and shall continue in force and effect." App694. Consistent with those sections, when these Parties have wanted to amend or delete a provision, they have done so expressly, not *sub silentio*. *See, e.g.*, App669 (Seventeenth Amendment, Sec. 5 (replacing prior "use" provision)); App678 (Sec. 11(c) (deleting "Section 19 of the Twelfth Amendment . . . in its entirety")); App689 (Sec. 21(b) (deleting "Section 17.02 of the Lease and all references thereto

. . . in their entirety")). Nothing in Section 13(f)—or any other part of the Seventeenth Amendment—expressly amends or modifies Article 10.

Nor did the parties eliminate Article 10 by implication, because the provisions do not conflict. There is a natural, plain-language meaning of the abatement provision that is easily harmonized with Article 10 and the other compliance-with-law provisions: Section 13(f) allocates risk to Landlord for the loss of specified physical services (even if the loss is caused by a Force Majeure), while Article 10 and its ilk allocate risk to Tenant regarding compliance with laws affecting its business operations. Such allocations of risk are not conflicting at all, but complementary. "Contractual provisions are interpreted taking into account the contract as a whole, so as to give effect, if possible, to all of the provisions in the contract." *Steele Foundations, Inc. v. Clark Const. Grp., Inc.*, 937 A.2d 148, 154 (D.C. 2007). And this is exactly what the Superior Court noted at oral argument. App96-97 ("I didn't think Article 10 was inconsistent with [Section] 13(f)").

Thus, unsurprisingly, Section 13(f) of the Seventeenth Amendment starts from the premise that Tenant *cannot* obtain a rent abatement, even in the event of "government regulation, moratorium, or other government action," except in special, narrowly-circumscribed circumstances. App681 (Section 13(f), first sentence). Because Section 13(f) starts from the position that rent abatement is *not* available, the list of circumstances under which abatement *is* available must be

construed narrowly. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001) (applying rule that "when faced with a general rule and enumerated exceptions, we interpret the exceptions narrowly, lest they overwhelm the rule"). This follows naturally from the principle that a contract is read as a whole and to give effect to every part of it. *D.C. v. D.C. Pub. Serv. Comm'n*, 963 A.2d 1144, 1157 (D.C. 2009). If Tenant could get a rent abatement due to any loss of use and enjoyment, whether tied to loss of an Essential Building Service or not, the first clause would be of no effect.

Tenant's own appellate brief concedes that the language of the Seventeenth Amendment must be read in the context of the contract as a whole. AOB at 21. Article 10 shows a clear intent of the parties that the tenant will take on the burden of compliance with laws as to carrying on its business. Taken with all the other textual evidence discussed above, Article 10 clearly supports a read of Section 13(f) as applying, at most, to government actions that impact Landlord's ability to provide Essential Building Services. But the Mayor's orders did not in any way restrict Landlord's provision of Essential Building Services.

### C. Landlord Provided "Essential Building Services" at All Times

Landlord unequivocally provided its promised "Essential Building Services." In addition to providing, for example, HVAC and hot water, working elevators and electricity, Landlord consistently provided "secure access" to Tenant.

Tenant's and Landlord's corporate designees (and others) testified that the Building remained open and there was "24/7 access to the building through the lobby," security services, and keycards functionality, throughout the pandemic. App954 (corporate designee/operations manager testifying that some of Tenant's personnel were in the office); App954-55 (personnel in the office had access to the entire office); App958 (security and keycards still available and working); App883 (Tenant's expert witness testifying that Landlord was not required to lock or close building and that Landlord was "allowing people to come in"); *see also* App964 (Landlord's corporate designee testifying there was "always access to the building"). This included not just areas like the mailroom or common areas, but also the attorneys' offices: Tenant's staff would ship equipment and files out to attorneys from their offices as needed, App895-96, and Tenant occasionally allowed its attorneys to go into the office as well. App896; *see also* SUMF ¶ 49 and Exs. R, S, T, U, V, and X thereto.

Tenant also used the office Premises for purposes other than personnel being present. Hard copy files typically stored onsite remained onsite, App955, and attorneys' furniture and personal items remained in their offices. *See* SUMF ¶ 52 and Exs. Y, DD, and EE. Likewise, Tenant's general counsel and corporate designee testified that "[i]f there was an instance or an occasion when someone had to be physically present in the office," Tenant's employees could enter the office.

App934. Landlord's own witness agreed: "Tenant did have access. The building was open, and it was -- was functioning." App965.[4] At all times, Landlord provided the Essential Building Services.

### D. Tenant's Alternative Definitions Are Incompatible with the Rest of the Lease

Tenant's position is this: Landlord was to supply the items listed in Essential Building Services, like HVAC and hot water and elevators, and when it comes to "secure access," this actually means two things. First, it means the ability to have authorized personnel enter, and to keep authorized personnel out through the use of keys, fobs, security and the like. (Landlord agrees with this definition.) But Tenant also argues for a second, parallel interpretation, which converts "secure access" into a broad right of use. This way, when their compliance with the Mayor's orders resulted in a limited use of their Premises, they claim an interruption of "access." This deft use of the word "access" —usually dropping "secure" but always meaning simple "use"—is the crux of Tenant's claim. And it is wrong.

[4] Tenant appears to suggest that a 2020 draft email from the building manager shows that Landlord was limiting entry to Tenant's "essential employees." AOB at 12 (citing App991). To the extent that is what Tenant means, it is manifestly false, as the Court can determine from the face of the document. Rather, the building manager expressly stated in the draft that Landlord left it entirely to *Tenant's* discretion to determine which if any employees would enter the office. App991 (laying out Landlord's procedures for employees to access the building) (emphasis added). And Tenant's attorneys admitted the same on questioning by the trial court about this email: "It's not that the landlord told us or limited our access. It's that the orders limited our access." App122.

As discussed above, "secure access to the Building" does not appear in a vacuum, but on a list of landlord "services," the nature of which Tenant ignores completely. And Tenant further fails to read "secure access to the Building" as a whole phrase—one which likewise emphasizes that the access is *physical*: secured, Building-specific, and provided by Landlord. Tenant also fails to grapple with the abatement provision's reference to the highly concrete services constituting "secure access" under Section 4.02: "a **Building security system** of a **quality** equal to other first-class modern office buildings in the District of Columbia" and "**prompt** access (in a manner consistent with a first-class modern office building in the District of Columbia) **into the Building** (**through the lobby**) and the Premises **twenty-four (24) hours each day, seven (7) days per week**." App525 (emphases added). Landlord would have failed in providing secure access if it locked the Building and precluded Tenant's personnel from entering. That never happened. Landlord also would have failed in providing secure access if it left the Building completely open to whoever wandered in, even if unauthorized. That never happened, either.

Trying to broaden the meaning of the phrase "secure access to the Building," Tenant points to the word "including" in Section 4.02, and argues that "including" is not a term of limitation. AOB at 27 (citing *In re Maharaj*, 681 F.3d 558, 564 (4th Cir. 2012)). The point seems to be that if the word "including" prefaces the

list, anything goes. This isn't an exaggeration: Tenant winds up arguing that Section 13(f) applies simply to "all interruptions," period. AOB at 28.

But Plaintiff's proposition is not true: many courts hold that "the primary import of" the word "including" is "to indicate restriction," because if the drafters "had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes." *Application of Cent. Airlines*, 1947 OK 312, ¶¶ 19-20, 199 Okla. 300, 304; *People v. Arias*, 45 Cal. 4th 169, 180 (2008) (same); *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 677 (9th Cir. 1997) (same); *United States v. Walker*, 393 F.3d 819, 827 (8th Cir. 2005) (same) (citing 2A Norman J. Singer, Statutes and Statutory Construction § 47:17 (6th ed. 2000)).

Courts, including D.C. courts, therefore apply the maxim of *ejusdem generis* (or sometimes *noscitur a sociis*) to limit the scope of an "including/includes" phrase to, at most, items similar to the listed examples. *D.C. v. Beretta U.S.A. Corp.*, No. 2000 CA 000428 B, 2006 WL 1892023, at *9 (D.C. Super. Ct. May 22, 2006), *aff'd*, 940 A.2d 163 (D.C. 2008) (in firearms statute, the "specific examples listed" limited the application of a statute to state statutes of a similar kind); *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature

to those enumerated."); *Chestnut Hill Benevolent Ass'n v. Burwell*, 142 F. Supp. 3d 91, 103 (D.D.C. 2015) ("[I]t is widely accepted that general expressions such as 'including, but not limited to' that precede a specific list of included items . . . apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples.") (quoting *Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 520 (3d Cir.2012)). *Bd. of Trs. of Hotel & Rest. Emps. Loc. 25 v. JPR, Inc.*, 136 F.3d 794, 799 (D.C. Cir. 1998) (interpreting ERISA plan) (interpreting "all expenses of collection incurred by the Trustees, including, but not limited to reasonable counsel fees, auditing fees, and court costs" to "only permit[] the Trustees to recoup those 'auditing fees' that qualify as 'expenses of collection,'" not all such fees); *Wilson v. Clark Atlanta Univ., Inc.*, 339 Ga. App. 814, 834 (2016) (interpreting university handbook) ("Under the rule of ejusdem generis, the words 'including but not limited to' ordinarily should be construed as referring to [reasons] of the same kind as those specially named."); *Peralta Cmty. Coll. Dist. v. Fair Emp. & Hous. Com.*, 52 Cal. 3d 40, 50, 801 P.2d 357, 363 (1990) (interpreting an "including, but not limited to" clause to items of "the same general nature or class as those enumerated"); *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 75 (S.D.N.Y. 1999) (interpreting assignment agreement) (The phrase 'including , but not limited to' does not alter this analysis—the general expression is not limited to the single specific example given, but should nevertheless be

restricted to obligations of the same type or class."); *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 34, 207 P.3d 1235, 1241–42 (interpreting easement agreement) (holding, under the principle *ejusdem generis*, that "the general term 'obstruction[]' should be construed according to the specific enumerations of 'fence, wall, [and] barricade,'" and not to include "building").[5]

In short, as a District of New Jersey judge aptly put it, "when we see the list 'peaches, strawberries, grapes, etc.,' we naturally assume that 'etc.' does not include 'the King of Norway.'" *Coyoy v. United States*, 526 F. Supp. 3d 30, 37 (D.N.J. 2021).

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[5] To be clear: reference to these canons is **not** an argument based on ambiguity. Both parties agreed with the Superior Court that Section 13(f) was unambiguous. *E.g.*, App334 (Tenant's attorney arguing that the Section has a plain and unambiguous meaning; *see also* App414 ("Presently, no party contends that the contract is ambiguous."). Rather, this Court and the federal courts have routinely used these canons to confirm the *plain meaning* of words in a text. *In re Wilde*, 68 A.3d 749, 758 n.13 (D.C. 2013) ("Plain meaning is usually ascertained by considering applicable canons of construction, including ordinary meaning, canons of word association such as *noscitur a sociis* and *ejusdem generis*, canons of negative implication such as *inclusio unius*, grammatical rules, and others."); *People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1148 (11th Cir. 2018) ("No further inquiry is needed because common usage, as informed by the application of noscitur a sociis, reveals that 'harm' and 'harass' have a 'plain and unambiguous meaning with regard to [this] particular dispute.'"); *M. S. v. Premera Blue Cross*, 118 F.4th 1248, 1270–71 (10th Cir. 2024) ("[a]pplying the principles of ejusdem generis and noscitur a sociis" to determine "the plain meaning of" a statute); *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 688 (3d Cir. 1991) (confirming "the plain meaning" of certain "related terms" by referring to *noscitur a sociis*); *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017) ("The doctrine of noscitur a sociis . . . confirms the plain meaning of the term 'use.'") (cleaned up).

Here, Tenant's expansive view of "secure access" is "the King of Norway." It is not like the other things in Section 4.02. Tenant would like the Court to mostly ignore "secure" and to read the word "access" to mean "permission, liberty, or ability to enter, approach, or pass to and from a place" and the "freedom or ability to obtain or make use of something." AOB at 25 (citing Merriam-Webster, https://www.merriam-webster.com/dictionary/access). But Section 4.02 (like the definition of Essential Building Services) is a list of concrete, physical things and services that a landlord can provide—landscaping, cleaning, a security system, and 24/7 entry into the Building and the Premises via the lobby. It has nothing to do with "permission, liberty," etc., nor the freedom to use something.

To the extent "including" can be read to expand the meaning of "secure access to the Building," the expansion must be limited to things and services a landlord can provide. For example, it might be fairly read to include security *guards* (above and beyond the security *system* required by 4.02(iv)), at least if they are necessary to assist with "prompt access." It cannot, however, be expanded to include a free-floating warranty of Tenant's legal right to operate its law firm business on the premises. And, indeed, common sense, Article 10, and a plain language reading counsel that Landlord did not intend to make such a warranty.

Additionally, secure access can't mean "the ability to use" because the concept of "use and enjoyment" of the Premises is *already* a part of the first prong.

There would be a loss of "use and enjoyment" with an interruption of electricity or HVAC on a hot summer day. There would similarly be a loss of "use and enjoyment" if Landlord bolted the doors against Tenant (or did so on weekends and holidays, contrary to the requirement that there be secure access 24/7). Tenant's definition, however, would provide abatement for loss of "use and enjoyment" . . . due to loss of use and enjoyment. This is untenable. *D.C. v. D.C. Pub. Serv. Comm'n,* 963 A.2d 1144, 1157 (D.C. 2009) (court "must avoid" contract interpretations that "would render [some] language surplusage").)

The Court can dispose of the appeal on the first prong alone: summary judgment was properly granted because Landlord never failed to provide an Essential Building Service.

## II. PRONG 2: NO "PART OF THE PREMISES" WAS EVER RENDERED "UNUSABLE"

Tenant's claim likewise fails at the second prong of the abatement provision: the "Interference" described in prong 1 must "render all or any material part of the Premises unusable for the purpose of conducting Tenant's business in such applicable part of the Premises as permitted under this Lease." App682. Tenant's interpretation reduces prong 2 to a simple robustness of use that is wholly independent of the physical status of the space within the Premises. That is, the measure for Tenant isn't whether any portion of the space was unusable, but instead whether the Premises was simply *unused*.

As with prong 1, the Court must read this provision to give effect to every part—including giving effect to the Parties' emphasis on a "material part" of the Premises being "render[ed] . . . unusable." The undisputed material facts show that no "material part" of the Premises was ever "render[ed] . . . unusable"—indeed, the record is absolutely clear that Tenant was physically able to use (and frequently did use), every part of the space during the entire relevant period.

### A. Nothing Ever Happened to the Premises to Render Them Unusable

To start with, this prong is framed in terms of something that physically happens to the Premises—some "material part" of the Premises is "rendered" unusable (due to a loss of one or more of Landlord's promised Essential Building Services). For example, the loss of electricity would obviously make the space unfit for modern office work. The loss of HVAC or plumbing/sewer could, in some cases, make the office intolerable for human habitation. The same is true as to "secure access": if Tenant's lawyers and staff can't get into the Premises because the security doors are malfunctioning, obviously the space is "unusable." All these examples accord with standard definitions of "unusable," which emphasize the unfit state of the thing.[6]

[6] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/unusable ("Something that is unusable cannot be used, especially because it is broken or not safe[.]"); Collins

But nothing happened to the Premises—they were never rendered unusable. Rather, as Tenant's witness aptly said, "In light of the pandemic and consequent government orders, beginning March 2020, Crowell & Moring **no longer operated its business in the Premises**[.]" App895 (emphasis added). That decision—not some "material part" of the Premises being "rendered unusable"—is what caused Tenant's staff and employees to use the Premises in fewer numbers.

It is undisputed that every part of the Premises remained usable and indeed *was used*. Tenant's and Landlord's corporate designees (and others) testified that the Building remained open and personnel had access to and use of the entirety of the office throughout the pandemic. *See* Part I.C., *supra* (citing testimony). In short, Tenant is not arguing that something was wrong with the Premises, or that they were literally unusable.

Tenant's interpretation renders prong 2 no hurdle at all: a simple inability to conduct its business as usual for reasons having nothing to do with the physical integrity of the Premises will do. AOB 30-31. The Mayor's orders may have rendered the Premises *underutilized*, but this prong isn't satisfied if Tenant's

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Dictionary, https://www.collinsdictionary.com/us/dictionary/english/unusable ("Something that is unusable is not in a good enough state or condition to be used."); Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/unusable (giving the example of a lavatory that is full of snow).

personnel could access the Premises and make use of it, albeit at fewer numbers than Tenant wanted.

### B. Tenant's Reading Collapses Multiple Provisions of the Abatement Test

Tenant would like the Court to "zoom[] out" to the broader context of Section 13(f) and import terminology from both prong 1 ("use and enjoyment") and the abatement calculation provision ("operate under normal business conditions") into prong 2. AOB at 33-34. The Court should decline this invitation to collapse separate provisions with distinct meanings and do violence to the text.

A court must give meaning to all the terms of the contract. *Sharma v. Washington Metro. Area Transit Auth.*, 57 F. Supp. 3d 36, 43 (D.D.C. 2014). The concept of the Premises being "unusable" must mean something different from loss of "use and enjoyment" used in the first prong. Otherwise, there would be no reason for the second prong and no reason to use different language. *See Hardy Expl. & Prod. (India), Inc. v. Gov't of India*, 219 F. Supp. 3d 50, 62 (D.D.C. 2016) ("[I]nterpreting different language to have the same meaning would not serve the purpose of ensuring a harmonious reading of the [contract].").

The natural reading of prongs 1 and 2 is that prong 1 is focused on the loss of services, and thus requires just some quantum of loss of use and enjoyment to demonstrate a material loss of services, while prong 2 requires that something affect the space itself that makes it actually unusable, in material part or entirely.

To see the distinction, imagine that hot water is rendered unavailable, so users of the bathrooms in Tenant's office must wash their hands in cold water only. Use and enjoyment is arguably affected by the interruption of the Essential Building Service of hot water. So prong 1 is satisfied. But are the Premises thereby rendered unusable for Tenant's business as a result? No. Tenant's employees can still do Tenant's work in the office, even if washing hands is a less pleasant affair.

Consideration of "normal business conditions" is likewise not an element of prong 2, but of the damages calculation provision. App682 (calculation of abatement takes into account "reasonably relevant factors, including that portion of the Premises which Tenant actually continues to reasonably operate under normal business conditions"). It is not a consideration at prong 2, where we are still determining whether there are grounds for abatement in the first place. Tenant is putting the cart before the horse.

### C. The Mayor's Orders Were Directed at Business Activities, Not Buildings

Tenant also argues that the unusability requirement must extend to the effect of the Mayor's orders because "the Mayor's Closure Orders specifically targeted "'activities *at those facilities*' in DC operating non-essential businesses." AOB at 34 (emphasis added by Tenant). That misrepresents the thrust of the orders, however. The orders do not identify specific "facilities" for closure at all—they identify the *businesses* that must cease operations. The key order, from March 24,

2020, is titled "Closure of Non-Essential **Businesses** and Prohibition on **Large Gatherings** During Public Health Emergency for the 2019 Novel Coronavirus (COVID-19)." App736 (emphases added). The order contains three pages of definitions of "Essential **Businesses**" and "Essential Government **Functions**" and orders non-essential *businesses* to cease *operations*. App741-43 (emphases added). Moreover, the Mayor specifically excluded "[o]ffice space" (as well as hotels and residential buildings) from the definition of a "Large Gathering"—further confirming that the focus was on specific *activities*, not types of buildings. If Tenant couldn't function as a law firm because the Orders limited how many of its personnel could make use of the Premises, that was a risk Tenant undertook in Article 10. But nothing about the Orders kept Landlord from providing any Essential Business Service, and nothing about the Orders rendered any part of the Premises physically unusable for the persons who, pursuant to Tenant's compliance with the Orders, were allowed to use the space.

### D. Unusability Is Not the Same as Casualty

Tenant argues that physical unusability is already covered by a separate provision that provides for abatement in the event of damage to the building—so Section 13(f) must be about something else. AOB at 32. But Landlord's argument is not that there must have been *damage* to the Premises to trigger prong 2. Rather,

the issue is that the Premises must have been rendered physically *unusable* due to some loss of an Essential Building Service.

Of course, if the Building had been hit by a meteorite, or burned in a fire, it would also be "unusable." But it does not follow that all conditions of unusability are caused by casualty or are covered under Article 16—if they were, Plaintiff would never have needed to add Section 13(f) to deal with the malfunctioning HVAC system. App909, 923. Instead, Section 13(f) covers the kind of unusability covered by things like extreme temperatures due to loss of HVAC; the impossibility of operating office equipment without electricity; the practical impossibility of having employees on-site with leaking sewage, etc.

In short, under prong 2 of the abatement provision, Landlord's failure to provide some physical service must render "all or some part"—i.e., a physical portion of the office—actually unusable. Not merely unused, nor used but less enjoyable, but so impaired that if a human sought to use them, they could not reasonably do so. Tenant identifies no portion of the Premises that was unusable, and the record shows that its personnel could use the entire office, throughout the relevant period.

## III. PRONG 3: NO FORCE MAJEURE EVER INTERRUPTED SERVICES OR RENDERED THE PREMISES UNUSABLE

The third prong is also not satisfied for numerous reasons. Primarily, because there was no "Interference" under prongs 1 and 2, there is necessarily no

"Interference [that] arises from . . . a Force Majeure[.]" App682. Additionally, there is no material dispute of fact that, as to most of the supposed "Abatement Period," the Mayor's orders simply *did not prevent Tenant from working in the office*—at least not in the absolute, nondiscretionary sense that would be needed to constitute a "Force Majeure." Finally, the Force Majeure clause is best read to apply only to government orders that effect a taking.

### A. A Force Majeure Event, Alone, Is Not Enough

To start with, Prong 3 presumes the existence of an "Interference" satisfying prongs 1 and 2. Without that "Interference," prong 3 is not satisfied even if there is an event otherwise satisfying the definition of "Force Majeure." Critically, a Force Majeure event that interrupts Tenant's use and enjoyment of the Premises is not, by itself, sufficient to satisfy the abatement test. 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. We underscore this point because this is Tenant's fundamental position: that it is "entitled to abatement if its use and enjoyment of the premises were interrupted for any reason covered by the force majeure provision," and that the Mayor's Orders constituted such a reason.[7] AOB

[7] Tenant offhandedly suggests that "The COVID-19 pandemic and the Mayor's Orders constitute an Act of God, an order of government, and a cause similar to the

at 9. Of course, for the reasons discussed above, this is flat wrong: Tenant effectively reads out most of prong 1, including the requirement of an interruption of "Essential Building Services," and all of prong 2.

### B. Tenant Retained Discretion Over Staff Entry—Not a "Force Majeure"

The degree of discretion that Tenant had in interpreting and implementing the Orders as their own particular circumstances warranted also highlights how the Orders do not satisfy the contractual requirements for abatement. Tenant's theory of the case depends on a claim that the Mayor's Covid Orders forced Tenant out of its office for the Abatement Period. This is wrong. Indeed, for much of the Abatement Period, the Orders did not impose *any* prohibitions on Tenant's use of the office. And for the entire period, Tenant retained discretion as to how many personnel to allow in.

The Mayor's first "stay-at-home" order, Order 2020-053, directed "non-essential businesses" to "cease all activities at [their D.C.] facilities, except

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foregoing that are outside Landlord's control." AOB at 35. Tenant does not develop this argument in the brief (and should not be allowed to do so on reply), but, briefly: nothing connects any alleged "Act of God" here to a loss of services that Landlord provides. Tenant stayed away because of public health orders, not an "Act of God." *Dominion Energy Cove Point LNG, L.P. v. Mattawoman Energy, LLC*, No. 1:20-CV-611, 2020 WL 9260246, at *8 (E.D.Va. Oct. 20, 2020) (distinguishing between first-order effects of virus itself and second-order effects from human reactions to it) (citing cases); *Gaviria v. Lincoln Educ. Servs. Corp.*, 547 F. Supp. 3d 450, 459 (D.N.J. 2021) (same); *Gear v. Gray*, 10 Ind.App. 428, 37 N.E. 1059, 1061 (1894) (same).

Minimum Basic Operations, as defined in section IV.4 of this Order." App739. Professional services firms like law firms were defined as "Essential Businesses" to the extent that their work was "necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental Functions," App743, and/or to the extent their services were "devoted to assisting essential business operations." App736. Tenant has characterized this as limiting its in-office presence to a "Minimum Basic Operations" crew and, occasionally, other personnel when "necessary."

A few observations: first, Section IV.4 of Order 2020-053 does not say anything about how many employees may be in the facility to conduct Minimum Basic Operations. App744-45. Second, even as to non-Minimum Basic Operations activities, the Mayor left it entirely in the hands of firms to decide a) what work was "necessary to assist in compliance with legally mandated activities, Essential Businesses or Essential Governmental Functions" or "devoted to assisting essential business operations," and b) when to go into the office to accomplish such work. Plaintiff clearly understood that it had wide discretion, as it allowed attorneys into the office during the "Abatement Period" under all sorts of circumstances that could be seen as something less than strictly "necessary," including giving real estate brokers a tour of the office, finding papers that dated back to the 1970s, and

picking up gifts for summer associates. SUMF ¶ 49 and Exs. R, S, T, U, V, and X thereto.

The "Additional Information"/FAQ section appended to the end of Order 2020-053 underscores this discretion. It includes guidance about law firms using their offices for court filings: "As a general matter, you should be working from home, as your business is otherwise a non-essential professional services firm . . . . You may go to the office if necessary to meet court deadlines." App750. Again, this is no absolute bar to entry or use of the office: the firm has discretion to decide whether going into the office is "necessary" to meet deadlines.

By June 19, 2020, as D.C. headed into "Phase Two," the Mayor allowed nonessential, non-retail businesses to return to work with no real limitations except that they "continue to have employees telework to the greatest extent consistent with their business operations." App773. What is "consistent with" a firm's "business operations" is not defined anywhere in the Order. *Id.*That is because it is not a legal mandate, but purely a business decision, within the firm's discretion, as Tenant's corporate representative agreed. App940. Thus, the Mayor's clear expectation was that office-based businesses would have employees in the office at greater numbers than those already allowed under Minimum Business Operations and those performing Essential Business.

As of November 23, 2020, approximately halfway through Tenant's claimed abatement period, there were no longer *any* restrictions, even discretionary ones, on nonessential, non-retail businesses. The Mayor now just "strongly encourage[d] continued telework." App792. Except for a brief one-month "pause" in the winter App795-App800, that remained the standard until a March 17, 2021 Order removed even the encouragement of telework. App802-803. Thus, in Tenant's 14-month abatement period, there were at least 10 months where there were effectively no rules preventing Tenant from bringing employees back to the office, if it believed in its business judgment that doing so was consistent with its operations.

In short, law firms always had discretion to allow personnel into the office when "necessary to meet court deadlines" or to assist with certain designated activities. After June 2020 they were given even broader discretion over their own return, which Tenant exercised—as disclosed in its interrogatory responses. App981-82. And after November 2020 (except for one month) there were no restrictions on use or occupancy at all—as Tenant's corporate representative acknowledged in deposition. App946-47; App948.

A "Force Majeure" is, by definition, not something within the parties' control. Black's, for example, describes "force majeure" as "[a]n event or effect that can be neither anticipated nor controlled[.]" FORCE MAJEURE, Black's Law

Dictionary (12th ed. 2024). Yet the Mayor singled out law firms, in particular, for an incredible degree of latitude and discretion at the exact moment that other kinds of businesses were being told, flatly, to stay home.

### C. The "Force Majeure" Clause Limits Its Reach to Government Orders that Effect a Taking

The phrase "orders of government," on which Tenant relies to declare prong 3 satisfied, appears in a portion of the list of forces majeures that limits its scope to various kinds of "taking." App682. Because no taking occurred here, Tenant's claim fails on prong 3 for this independent reason as well.

It is clear that the overall list of Force Majeure events includes at least some sublists—even Tenant says so. AOB at 38 (referring the Court to "an earlier sub-list in the definition"). To take Tenant's example, "inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market" is all one term, not a set of terms—so "facilities" or "materials" are obviously not individual Force Majeure events themselves. It is the "inability to procure" various things that is the Force Majeure. Another such sublist, as Tenant itself suggests, is "Act of God, fire, earthquake, flood, explosion, action of the elements"—each of the latter five is a subtype of "Act of God." AOB at 37.

So far, then, there is no dispute. Where the parties part company is in parsing the takings sublist ("a taking by eminent domain, requisition, laws, orders of government or of civil, military or naval authorities"). Candidly, this is a tricky

endeavor, and requires careful scrutiny of the language used as well as the surrounding circumstances.[8]

Tenant's argument is this: "a taking by eminent domain, requisition, laws, orders of government or of civil, military or naval authorities" can't be a list of takings (as fire, earthquake, etc. were a list of Acts of God) because there is no conjunction at the end of the list. AOB 38-39. Thus, Tenant argues, "'a taking by eminent domain,' 'requisition,' 'laws,' and 'orders of government' are instead each independent items." *Id.* The problem with that argument is that, one way or another, it creates redundancy and confusion.

For one thing, there *is* a terminal conjunction in the phrase: "a taking by eminent domain, requisition, laws, orders of government **or** of civil, military or naval authorities." (Emphasis added.) Perhaps it would have been clearer, if slightly awkward, to repeat the word "orders" before "of civil," but that can hardly be seen as dispositive. (We note that Tenant's briefing actually inserts conjunctions in brackets in other, similarly-grouped sublists. *See* AOB at 37 (referencing "fire,

[8] Tenant rightly points out that even Landlord's attorneys did not initially grasp the correct reading until it was pointed out to us by Judge Tunnage. AOB at 39-40. Fair play: we missed it. At the time counsel's focus was on prongs 1 and 2, which are clearly dispositive. But that doesn't make the trial court's reading any less correct. And when the court called attention to the list's structure, counsel immediately perceived the nature of the sublists at issue. App499 ("I think that there is at least evidence of the drafter's intent to have a predicate descriptor here . . . a taking by, and then they have a litany.").

earthquake, flood, explosion, [and] action of the elements" and "invasion [and] insurrection") (brackets in Tenant's brief).)

For another, "eminent domain" is one form of taking, and "requisition" is another.[9] Thus, there is a logical grouping here. And if the list of takings were intended to include only "eminent domain" and "requisition," then per Tenant's theory of conjunctions, the correct structure would be: "a taking by eminent domain **or** requistion, laws, government orders, etc."

Certainly the inclusion of "eminent domain" and "requisition" on the list defeats Tenant's assertion that the sublist can't be about takings because takings issues *must* be dealt with in another section dealing with condemnation.[10] AOB at

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[9] For "eminent domain," *see Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (eminent domain acquisition of land for pipeline analyzed as taking); *Seneca Nation of Indians v. Brucker*, 262 F.2d 27, 27 (D.C. Cir. 1958) (Congress authorized "taking by eminent domain" of Indian nation's land). For "requisition," *see Alpirn v. Huffman*, 49 F. Supp. 337, 344 (D. Neb. 1943) (requisition of plaintiffs' equipment and materials analyzed as "taking" under the Fifth Amendment); *Henjes v. United States*, 87 F. Supp. 780, 783 (Ct. Cl. 1950) (requisition of private vessels a "taking"). *See also Am.-Hawaiian S S Co. v. United States*, 124 F. Supp. 378, 381-82 (Ct. Cl. 1954); *Benedict v. United States*, 271 F. 714, 719 (E.D.N.Y. 1920); *Etlimar Societe Anonyme of Casablanca v. United States*, 106 F. Supp. 191, 196 (Ct. Cl. 1952), *overruled as to other matters by Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955). And Tenant's expert witness agreed that the term "'requisition' in this provision" would mean "the government's acquisition of -- of a certain property, real property, or 'personalty' for temporary use." SUMF ¶ 72 and Ex. TT thereto.

[10] The condemnation clause provides Tenant relief in two circumstances: either "all or substantially all of the Premises" is taken, in which case the Lease automatically terminates, or a part less than "all or substantially all" of the Premises is taken, in

38; *see also* App926 (Tenant's attorney asserting that "the parties did not intend to limit "orders of government" to those involving takings" because the "language (which was agreed upon) carved out casualty and condemnation"). A government can effect a taking that impacts Essential Building Services in numerous ways, not just condemnation of the real property that is the subject of the Lease. If the Navy commandeered the steel cable in Landlord's elevators, such that Landlord could no longer provide elevator services, that could satisfy prong 3. Yet such a taking would not trigger the condemnation clause.

In any event, there are good reasons to read this clause as the trial court did. In interpreting contract language, the court is bound to consider the contract as a whole, *D.C. Pub. Serv. Comm'n,* 963 A.2d at 1155, and as discussed in Part I, other parts of the Lease show that the parties intended to carefully allocate various risks as to outside forces. And "[f]orce majeure clauses are construed narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." 30 Williston on Contracts § 77:31. Thus, to the extent there is any doubt, the definition of "Force Majeure"

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which case the Tenant has the option to, but need not, terminate the Lease, but it must do so within 60 days of the taking. (Landlord's Ex. A, Sec. 17.01 at 31; Landlord's Ex. B, Sec. 21 at 25-26.) To the extent Tenant intends to argue there actually was a condemnation, its remedy was to terminate under Section 17.01. Tenant never pursued this remedy, and the 60-day window has long since passed.

must be narrowly construed to include only government orders that effect takings, not all such orders.

Despite telling the Superior Court multiple times that the abatement provision was unambiguous, Tenant flip flops and now argues that the list is at least ambiguous, its reading is at least reasonable, and therefore the Court was obliged to consider extrinsic evidence of the parties' actual intent. AOB at 40-41. But… what extrinsic evidence? Tenant cannot avoid summary judgment "merely by demonstrating a disputed factual issue. Rather, the opposing party must show that . . . there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial." *W. End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 725 (D.C. 1994).

Here, Plaintiff presented the trial court with no admissible evidence that would shed light on the meaning of the takings sublist. To the extent the trial court may consider extrinsic evidence of the parties' subjective intent to resolve an ambiguity, *1010 Potomac Assocs. v. Grocery Manufacturers of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984), the relevant determination is the parties' subjective intent "**at the time the contract was made**," *id.* (emphasis added), and a party's intent must be determined "**as expressed by his outward actions and words**, not by his private thoughts." *Bowles v. Hagans*, 256 A.2d 407, 408 (D.C. 1969) (emphasis

added). Tenant presented no evidence below (and identifies none now) to show any outward actions or words at the time the Seventeenth Amendment was negotiated that would illuminate the meaning of the takings sublist. Landlord's and Tenant's real estate attorneys each provided lengthy testimony, yet neither mentioned any act by Tenant or its representatives manifesting any intent regarding the meaning of the takings sublist. App906-931. Tenant has identified no email, no draft,[11] no documentation of any kind that supports its contended meaning. At most, the summary judgment record shows there was competing lawyer testimony from Ms. Perkins and Ms. Gorman (the drafting attorneys for each side) about what they personally believed the provision to mean. But "self-serving" and "conclusory statements" about a factual issue "are not sufficient to defeat a motion for summary judgment." *McFarland v. George Washington Univ.*, 935 A.2d 337, 349 (D.C. 2007); *Chang v. Inst. for Pub.-Priv. Partnerships, Inc.*, 846 A.2d 318, 332 (D.C. 2004) (employee's self-serving statements not sufficient to preclude summary judgment for employer). In light of this utter failure of proof, remanding for a bench trial on this issue is a waste of time.[12]

[11] Ms. Perkins does identify revisions to the Force Majeure clause—but none that shed light on the meaning of the takings sublist. App928-29.

[12] A bench trial is required per the parties' Lease. And if this matter were to be tried, what is the trial court to make of such conflicting testimony? At most it will simply show there was no meeting of the minds at all on this provision.

## IV. TENANT WANTS TO RENEGOTIATE THE DEAL IT MADE

Of course, the Court need not dive into the Force Majeure clause in fine detail at all. Because there's something simpler going on here—essentially, Tenant would like a do-over. Rather than having negotiated a complex abatement provision that starts from a position that Tenant is *not* entitled to abatement, and then requires Tenant to clear numerous hurdles to obtain it in certain narrow circumstances, it would be so much simpler if the abatement provision just said what Tenant claims it does: that it is "entitled to abatement if its use and enjoyment of the premises were interrupted for any reason covered by the force majeure provision." AOB at 9. But that is only a fair reading if we eliminate the opening and its general presumption against abatement, and only if we collapse prongs 1 and 2 into a simple, binary "use and enjoyment" requirement.

Taking that seriously for a moment, here is what Tenant's proposed Section 13(f) looks like:

> ~~Subject to the terms of this Section 13, Landlord shall not be liable for, and Tenant shall not be entitled to, any damages, abatement or reduction of Rent, or other liability by reason of any failure to furnish any services or utilities described herein (it being understood that Landlord shall use commercially reasonable efforts to keep any disruption of services and utilities to a minimum which shall include payment of any commercially reasonable monetary amount) for any reason (other than Landlord's negligence, willful misconduct, breach of contract or illegal acts), including, without limitation, when caused by accident, breakage, water leakage, flooding, repairs, Alterations or other improvements to the Project, strikes, lockouts or other labor disturbances or labor disputes of any character, governmental regulation, moratorium or other governmental action, inability to obtain electricity, water or fuel, or any other cause beyond Landlord's control. Landlord shall be entitled to cooperate with the energy conservation mandates of governmental agencies or utility suppliers. No such failure, stoppage or~~

~~interruption of any such utility or service shall be construed as an eviction of Tenant, nor shall the same relieve Tenant from any obligation to perform any covenant or agreement under this Lease expect as provided below. Except as specifically set forth in this Lease, no representation is made by Landlord with respect to the adequacy or fitness of the Building's ventilating, air conditioning or other systems to maintain temperature as may be required for the operation of any computer, data processing or other special equipment of Tenant.~~ Notwithstanding any provision of the Lease to the contrary (including without limitation Section 8.05 of the Lease), ~~(1)~~ in the event that Tenant actually suffers 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 (defined below)(collectively,~~ "Interference"), ~~(2) such Interference shall render all or any material part of the Premises unusable for the purpose of conducting Tenant's business in such applicable part of the Premises as permitted under this Lease~~ and ~~(3)~~ either such Interference arises from (I) reasons within the control of Landlord (other than if arising due to the negligence or willful misconduct of Tenant) and such Interference shall continue for more than three (3) consecutive business days after Landlord has been given written notice by Tenant of the Interference, or (II) a Force Majeure (as defined below) event and such Interference shall continue for more than seven (7) consecutive business days after Landlord has been given written notice by Tenant of the Interference, then Annual Rental shall abate in a reasonable and proportional amount ~~(which takes into account all reasonably relevant factors, including that portion of the Premises which Tenant actually continues to reasonably operate under normal business conditions)~~ based upon the degree of material interference of Tenant's use and enjoyment of the Premises ("Premises Interference"), calculated from the date of Landlord's receipt of Tenant's written notice until the date Tenant's use and enjoyment of the applicable part of the Premises is restored. Such abatement amount may decrease, in accordance with the standard set forth in the previous sentence, to the extent the Premises Interference is diminished. If any abatement permitted hereunder occurs during any free rent period, Tenant shall receive an additional rent credit against the next monthly installment of Annual Rental and other Rental actually due and payable for the amount of Annual Rental which would otherwise have been abated under this Section 13(f) had the free rent period not been applicable. ~~"Essential Building Services" shall include HVAC, electrical, elevator and fire and life safety services as well as secure access to the Building (including the requirements set forth in Section 4.02 of the Lease), hot and cold water, plumbing and sewage services. The foregoing shall not apply with respect to a casualty or condemnation, in which event the provision of Sections 16 and 17 of the Lease shall apply.~~ "Force Majeure" shall mean any prevention, delay or stoppage due to any Act of God, fire, earthquake, flood, explosion, action of the elements, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or a general storage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strike, lockout, action of labor unions, a taking by eminent domain~~,~~ or requisition, laws,

> orders of government or of civil, military or naval authorities, or any other cause similar to the foregoing not within the reasonable control of Landlord.

Such a provision would, indeed, likely entitle Tenant to abatement under these circumstances. But it is not the provision Tenant bargained for and ultimately executed.

Tenant may have lost use and enjoyment, but not because Landlord failed to provide Essential Building Services, and not because the Premises were rendered unusable due to such a failure of services. There is no claim for abatement.

## CONCLUSION

For all the foregoing reasons, Tenant's claims fail, the Superior Court was correct to grant summary judgment, and that judgment must be affirmed.

DATED: July 30, 2025

**SEYFARTH SHAW LLP**

*/s/ Rebecca Woods*

Rebecca Woods (DC Bar No. 468495)
*rwoods@seyfarth.com*
Seth J. Fortin (*pro hac vice*)
*sfortin@seyfarth.com*
SEYFARTH SHAW LLP
1075 Peachtree Street, N.E., Suite 2500
Atlanta, Georgia 30309-3958
(404) 885-1500
*Attorneys for Appellee*

## CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2025, a copy of the foregoing Response Brief of Appellee was served electronically on all counsel of record.

DATED: July 30, 2025

*/s/ Rebecca Woods*
Rebecca Woods