SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000491-24

TJ ROCCO ENTERPRISES, LLC, Plaintiff/Appellant, v. BP LUBRICANTS USA, INC., JOHN DOES 1-10, RICHARD ROE 1-10 (names being fictitious). Defendant/Respondent.	:	On Appeal From the Decision of the Superior Court of New Jersey, Law Division Passaic County Dkt. No.: PAS-L-3515-21 Honorable Vicki A. Citrino, J.S.C. sitting below Submitted: 12/27/2024

BRIEF ON BEHALF OF APPELANT, TJ ROCCO ENTERPRISES, LLC

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PRELIMINARY STATEMENT

Before the Court is Plaintiff/Appellant's appeal from the trial court's grant of summary judgment to Defendant. The issue before the Court is whether the Force Majeure clause in the contract relieved Defendant from the contractual obligation to pay Plaintiff the subsidy guaranteed by contract for the months of March 2020 to December 2020 and the entire year of 2021. Defendant claims that the Covid pandemic relieves it from the obligation to perform simply because a Force Majeure clause existed in the contract.

Absent from Defendant's Motion below was any legal analysis beyond the language of the clause. Furthermore, Defendant's actions in continued communication with Plaintiff throughout the duration of the contract term, discussing proposed protocols on reopening for example, demonstrate the contract was not cancelled.

Moreover, the answer to the issue before the court is that the Force Majeure clause does not relieve Defendant of its contract obligations. Defendant made a business decision to close and not to fully reopen its corporate offices for a period of time during the contract term, which was not mandated by any government action, nor was Defendant's ability to perform made impossible by any government action, pandemic, or other circumstance.

Further, no government action mandated the discontinuation of Plaintiff's services. In fact, executive orders entered by the Governor encouraged the continuation of cafeterias and food services, with grab and go and delivery options which Plaintiff was fully equipped and ready to provide throughout the duration of the contract term.

Moreover, the Defendant's awareness of the pandemic prior to executing the March 2020 amendment to the contract with Plaintiff, precludes Defendant from utilizing the pandemic as a defense; and therefore, negates the applicability of the Force Majeure clause.

Further, even if the Force Majeure clause is considered, it does not apply to the contractually required subsidy guarantee since Defendant did not argue and cannot prove that the pandemic caused an inability to pay. Defendant has only argued that because it closed its cafeteria and did not provide food service to the employees in the building, it is generally excused from its contractual obligations. However, the contract terms clearly guarantee the subsidy payment for Plaintiff's costs of business which is conceded by BP representatives.

Moreover, regarding food services, Plaintiff was able to perform services under the contract throughout the duration of the contract term. This is particularly reflected in the communications between Defendant representatives and Plaintiff, which unequivocally demonstrate Defendant expected Plaintiff be ready and

prepared to continue services, and therefore reflects Defendant had not terminated the contract.

Defendant's actions are contrary to its argument that the contract was automatically terminated based on the mere existence of a force majeure clause. Further, the record is devoid of any direct action by Defendant to terminate the contract.

The trial court's Order and decision granting summary judgment relied on non-binding, unpublished, inapplicable case law, failed to address facts that unequivocally render the force majeure clause inapplicable, disregarded that the contract term was for a period of two years during most of which there was no shutdown in effect, and ignored the existence of significant disputed material facts that negate the grant of summary judgment. For these reasons, Defendant was not entitled to judgment as a matter of law and the Order granting summary judgment must be reversed.

PROCEDURAL HISTORY

On November 4, 2021, Plaintiff filed a Complaint in the Superior Court of New Jersey, Passaic County, against Defendant, BP Lubricants for breach of contract and breach of the implied covenant of food faith and fair dealing based on BP's failure to pay a guaranteed subsidy mandated by the contract terms from March 2020 through December 31, 2021. (Aa454).

On April 6, 2022, an Answer to the Complaint was filed on behalf of BP denying Plaintiff's claims. (Aa460).

Following discovery, Defendant moved for Summary Judgment. A Notice of Motion for Summary Judgment was filed on July 25, 2024. (Aa1). Accompanying the Notice of Motion was a Brief, Separate Statement of Undisputed Facts (Aa2) and a Certification by Liana M. Nobile, Esq. (Aa6) with Exhibits attached.

Plaintiff opposed the Motion. Plaintiff submitted a Brief, response to Defendant's Facts and Counterstatement of Undisputed Facts (Aa603), and Certification of Ronald J. Ricci, Esq. (Aa478) with Exhibits attached. A Reply Brief by Defendant BP followed.

Oral argument was held before the Honorable Vicki A. Citrino, J.S.C. on September 27, 2024. (Transcript of September 27, 2024 Oral Argument proceeding).

Judge Citrino executed an Order dated September 27, 2024, accompanied by a statement of reasons, granting Defendant's Motion for Summary Judgment. (Aa614). Plaintiff thereafter filed a timely Notice of Appeal. (Aa618).

STATEMENT OF FACTS

On April 4, 2011, BP and LJ's Corporate and Private Caterers, TJ Rocco

Enterprises, LLC, entered into a Professional Services Agreement Contract No. BP00178983. (Aa8). TJ Rocco agreed to provide café and catering services to BP at its corporate office facility located in Wayne, New Jersey. (Aa8).

The Contract contained a guaranteed weekly subsidy requiring BP to pay TJ Rocco. The weekly subsidy guarantee was a payment in the amount of $1,632.72, to represent costs to operate business and actual weekly sales of up to $1,125.00 as reflected in Amendment 3. (Aa8, Aa17). The subsidy increased in a tiered structure upon actual weekly sales in excess of $1,125.00. (Aa8, Aa17).

Walter Kamienski was employed as regional procurement manager for BP from approximately 2013/2014 to 2022, and worked closely with facility manager, Steve Campbell, who had control over third parties in the facility. (Aa66, Deposition of Walter Kamienski, T12:9-14; T13:20-24; T15:3-20).

Kamienski negotiated Amendment 3 with Joe Scirocco (TJ Rocco) and executed it on behalf of BP on March 13, 2020, with a retroactive effective date of January 1, 2020. (Aa66, T20:5-25; T21:22-25; 22:3-16).

Kamienski testified that the payment of the subsidy allowed BP to keep the prices down so that people would utilize the cafeteria as much as possible, to keep people in the building. (Aa66, T26:22-28:3).

Additionally, Kamienski said the subsidy was "to support LJ's cost of doing

business, operating cost" which included staff, service at the cafeteria, and the other facility he utilized to prepare food. (Aa66, T36:18-39:23).

Kamienski said TJ Rocco was compensated from two avenues under the contract, one through subsidy, and also at the gate, meaning what he would collect at the register from sales. (Aa66, T40:8-17.)

The contract contained a force majeure clause which states:

> Article 7.10 Force Majeure
> Neither party shall be responsible for any failure to perform or delay in performing any of its obligations under this Agreement where and to the extent that such failure or delay results from causes outside the reasonable control of the Party. Such causes shall include, without limitation, Acts of God or of the public enemy, acts of the government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, freight embargoes, civil commotions, or the like. Not-withstanding the above, strikes and labor disputes shall not constitute an excusable delay for either Party under this Agreement. Further, the passage of time, especially the change from the year 1999 to the year 2000 and the year 2000 to the year 2001, will not constitute a force majeure event.
> (Aa8).

Regarding termination, the Contract provides:

> Article 7.1 Termination
> This Agreement will continue in force for One (1) year or until terminated by either Party on thirty (30) days written notice to the other Party. However, SUPPLIER may not terminate this Agreement while any Schedule A engagement hereunder has not been completed. BP may terminate any Schedule A engagement in its sole discretion on fourteen (14) days notice to SUPPLIER. In the event that BP terminates a Fixed Price Engagement according to this Section, SUPPLIER shall be entitled to fair compensation for time and materials at a price to be negotiated in good faith by the Parties but in no event to exceed either the fixed price specified in Schedule A or

> price determined by SUPPLIER'S then current rates for time and materials, whichever is lower. Further, in the event that SUPPLIER or any of its personnel breach a material term of this Agreement, BP may terminate all affected engagements immediately in addition to any other remedies BP may have under this Agreement or at law or equity.
> SUPPLIER may not termination any Scheduled engagement hereunder without BP's prior written consent.
> In the event of any such termination of any Scheduled engagement hereunder, BP shall be entitled to the ownership, possession, and use of any and all work in process.
> [Aa8].

On March 9, 2020, Governor Murphy executed Executive Order 103 declaring a State of Emergency and Public Health Emergency in New Jersey as a result of COVID. (Aa480).

BP made a decision to close its office on March 17, 2020, with only essential employees coming in, including security personnel, facilities management personnel and leadership. (Aa66, T41:12-42:8).

EO 107, executed by the Governor on March 21, 2020, encouraged business to accommodate telework arrangements to reduce employees onsite. (Aa435). EO 107 permitted people to go to and from work. (Aa435). Further, EO107 encouraged cafeterias and food courts to operate normal business hours, but limited service to food delivery or take-out services. (Aa435, Para. 8).

Kamienski advised Scirocco that BP would be compensating him for two invoices in the month of March 2020 and that he was to stop servicing the location until otherwise directed. (Aa66, T44:3-11).

The following is contained in Kamienski's deposition:

> Q. Did you ever have a conversation with Joe, either on the phone or in person that his position was that BP should be paying him $1,632.72 even though LJs was not open?
>
> A. Not on the phone, but across email.
>
> Q. How many emails, if you recall, were sent in that regard?
>
> A. Approximately five.
>
> Q. Did you speak to anybody at B about the emails that Hoe was sending you?
>
> A. Yes.
>
> Q. Who did you speak to?
>
> A. Steve Campbell.
>
> Q. What did you speak to Steve Campbell about?
>
> A. Because I was authorizing LJ's to be paid for two invoices as a measure of good faith that would be within Steve's budget and Steve's approval. So I had to make sure he was comfortable with that approach and that we were going to be informing Joe to stand down on providing services.
>
> [Aa66, T45:9-46:4].

Kamienski emailed Scirocco on April 10, 2020: "Going forward, however, and in accordance with our contract, payment will only be rendered when there are actual weekly sales in the café are provided and therefore to support LJ's cost of doing business at the Wayne facility." (Aa66, T46:12-14).

The following is contained in Kamienski's deposition:

> Q. So it's your interpretation of this contract, if you sold one – if Joe sold one Tootsie Roll and made five cents, … he was entitled to $1,632.72; is that correct?
> A. I would more characterize it if he had a weekly sale that he would be eligible for the subsidy.
>
> Q. How much did the weekly sale have to be for him to be eligible for subsidy?
>
> A. It would have to exist.it would have to be a monetary amount.
>
> Q. So it could have been a Tootsie Roll for 15 cents, is that correct?
>
> A. Theoretically, yes.
>
> [Aa66, T48:12-49:15].
>
> . . . .
>
> Q. Did you ever speak to anybody at BP about your interpretation of Paragraph 3 of this contract?
>
> A. Yes.
>
> Q. Who did you speak to?
>
> A. Steve Campbell.
>
> [Aa66, T49:17-22].
>
> . . . .
>
> Q. Did you have a conversation with Joe that he told you that he disagreed with your interpretation of the contract?
>
> A. No.
>
> [Aa66, T51:6-9].

Kamienski stated he returned to the office infrequently, maybe once or twice a month from April 2020 to December 2021. (Aa66, T51:10-19). Kamienski recalls employee's return to work in the office was discretionary. (Aa66, T53:2-8). Every

time an employee enters the building, the employee uses a swipe card. (Aa66, T54:7-13); (Aa570).

Executive Order 142 permitted the reopening of non-essential retail business to the public effective May 13, 2020. (Aa557).

Regarding the contract, the following is contained in Kamienski's deposition:

> Q. Did you ever send a letter or an email or speak to Mr. Scirocco officially canceling the contract between TJ Rocco Enterprises and BP Lubricants Inc.?
>
> A. No. I did not.
>
> [Aa66, T54:18-24].

Kamienski confirmed that the cafeteria was renovated during the contract term. (Aa66, T55:12-18)

In 2022, a supplemental type of food service, grab and go, was offered in the café, by an entity other than TJ Rocco. (Aa66, T55:20-24; 56:23-57:5)

Kamienski recalls that he had conversations with Scirocco about alternative food service Options during the period the contract was in effect. (Aa66, T57:6-21).

Steve Campbell, former facilities manager at BP, was deposed on February 12, 2024. (Aa511, T11:12-12:2). Campbell stated that he did not review or negotiate the contract between BP and TJ Rocco, as it was not his job. (Aa511, T21:4-22).

Campbell recalls speaking with Scirocco regarding the pandemic. (Aa511, T23:23-24:2). Campbell recalls telling Scirocco that BP sent all our staff home and "we'll reopen" when it is appropriate. (Aa511, T24:3-16).

Campbell returned to work in the building in June 2020. (Aa511, T24:22-25:5). Campbell stated that from March 2020 to June 2020 security was present, and that in April more people returned, so more security and facilities people, cleaners were sent back as well. (Aa511, T26:4-15). Security guards were authorized to use the cafeteria. (Aa511, T29:14-30:6).

Campbell recalled that the BP wanted people to come back in July 2020. He testified "we were ready for people to arrive" (referring to himself as manager). (Aa511, T32:2-14).

Campbell took no position of whether Mr. Scirocco is owed money from April 2020 to January 2022. (Aa511, T36:21-37:17).

Campbell did discuss the food left in the cafeteria with Scirocco shortly after beginning of pandemic because he was concerned since it had been longer than anticipated and did not want a mice problem. (Aa511, T37:18-38:9).

Regarding another occasion that Scirocco came to retrieve items from the Wayne location, Campbell testified "that was a second circumstance. And yes, he did. We asked him to remove more stuff because we were going to renovate the cafeteria" with "upgraded" "new countertops," added structure to keep salads cool, added sneeze guards, and put in a new floor. (Aa511, T38:10-39:3). Campbell stated the cafeteria was renovated in winter 2021. (Aa511, T39:4-22).

The following is contained in Campbell's deposition:

> Q. Did you ever speak to Mr. Scirocco and indicate that someone at BP was advising – was advising you they were cancelling the contract between BP lubricants USA and TR Rocco Enterprises LLC?
>
> A. No.
>
> [Aa511, T40:22-41:2].

Joe Scirocco testified that TJ Rocco started doing business with BP in 2011, and ran corporate catering and a corporate cafeteria. (Aa131, T21:10-15).

The Professional Services Agreement initially presented to him was a form template suppliers he had to sign, was not negotiated, and any changes made would be done by way of amendment. (Aa131, T24:10-26:6).

Referring to Amendment 3 (Aa17), Scirocco stated "the bottom tier has always been my cost of doing business." (Aa131, T29:15-30:1). Scirocco explained this is base for first tier. Then the other tiers were in relation to sales, so instead of logging a hundred meals and saying this is what the retail price is and BP pays the difference, a tier structure is in place to accommodate sales, vacations, etc. busier you are, the more you will get. (Aa131, T85:11-87:4).

Scirocco testified that Amendment 3 was sent to him to review in March 2020. (Aa131, T32:7-33:24). The effective date of Amendment 3 is January 1, 2020, but was not signed off on until March 2020. (Aa131, T37:19-38:1).

In response to Kamienski's April 10, 2020 email, Scirocco testified that he

believed that Walter was misreading the contract, asked Walter to call him, and spoke to Walter between April 14 and May 12, 2020. (Aa131, T51:21-52:16). Scirocco answered "No" when asked if anything in this email indicated to him that the contract was cancelled. (Aa131, T233:22-25). Scirocco stated that Walter was supposed to get back to him following their telephone conversation, but did not. (Aa131, T53:5-10).

The following is contained in Joe Scirocco's deposition.

> Q. Was there any conversation at all between yourself or anyone from BP at any time about cancelling the contract?
>
> A. No.
>
> Q. Did you ever ask them to cancel the contract?
>
> A. No.
>
> Q. Did they ever suggest they would?
>
> A. No.
>
> [Aa131, T234:1-9].

Employees that provided services for LJ's Café included staff at the Wallington facility that had to prepare and cook the food, drivers that would bring the food back and forth and staff that directly reported to BP. (Aa131, T57:10-25). The contract with BP was the reason TJ Rocco obtained the Wallington facility. (Aa131, T58:21-59:5).

Scirocco described the food options served at LJ's café, but prepared in the

Wallington facility, as a salad bar station with 30 toppings, hot and cold grab and go sandwiches, panini machine, deli station, hot station with soup and hot side dish with sides, or salads, yogurt parfaits. (Aa131, T61:19-64:3).

Scirocco estimated the cost of business from 4/1/2020 to 12/21/2021 as $300,000 for the 92-week period, an average of $3,300 a week. (Aa131, T68:20-69:9; T72:1-20; T74:1-2; T75:4-16).

Scirocco stated that at all times since approximately 2011, payments were made to him by BP regardless of whether there were office closures for skipped weeks, holidays or vacations which illustrates the tier system. (Aa131, T166:14-170:1)

Scirocco always submitted an invoice even if BP was closed for a period of time since he started in 2011, and that he was always paid. (Aa131, T170:23-171:1). However, Scirocco did not send an invoice after 4/30/2020 because he waiting on anticipated conversations regarding reopening with Walter. (Aa131, T171:2-8).

Scirocco stated that following March 2020, he continued to operate his facility and incur costs necessary to ensure he was prepared and ready to return to BP at any time to prove food services. (Aa131, T171:16-172:18).

Scirocco returned to the Wayne location at the direction of Steve Campbell to remove items, but other items remained there such as paper products “because we were planning on reopening.” (Aa131, T181:2-183:14).

Scirocco confirmed he had meetings in April and May 2020 about reopening, about what was being done in Texas and what the reopening protocols would be with Joe Abuso and Steve Cambell. (Aa131, T198:1-6; T200:7-201:3; T202:8-24; T215:13-216:11).

Scirocco also communicated via email regarding meetings to discuss reopening. (Aa131, T202:8-24; T203:23-24; T206:7-13; T208:2-7; T208:17-209:1); (Aa489, Emails attached as Exhibit "B" to Ricci Cert.). September 1, 2020 was chosen as a potential reopening of the café, but the café did not reopen. (Aa131, T209:9-14).

Communications continued with BP. On November 10, 2020, Scirocco was asked to perform a BP performance evaluation, and asked to call in order to complete the review. (Aa131, T211:11-212:7).

Scirocco confirmed that BP did not cancel or ask to renegotiate the contract. (Aa131, T216:13-25). Though people returned to the building, and the contract was not cancelled, TJ Rocco was not asked to do food service. (Aa131, T231:4-18).

Plaintiff filed suit against BP for breach of contract and breach of the implied covenant of good faith and fair dealing. (Aa454). Following discovery, a summary judgment motion was filed by Defendant BP, and ultimately granted by the Honorable Vicki A. Citrino, J.S.C. on September 27, 2024.

Oral argument was held in this matter on September 27, 2024. (Transcript of Oral Argument, September 27, 2024). The Court took appearances, advised she had read all submissions, and inquired whether there was anything Defendant wished to highlight. (Transcript of Oral Argument, T4:13-24). The Judge allowed very brief argument and advised her decision would be uploaded later in the day. (Id., pg. 4-9).

An Order granting summary judgment accompanied by a statement of reasons was executed by Judge Citrino on September 27, 2024. (Aa614). Because the Judge's legal analysis and decision are surprisingly curtailed to a mere two paragraphs, the entirety is set forth below:

> Force Majeure clauses are a common contractual provision in agreements that may excuse and relieve a party or both parties from performance of contractual obligation due to circumstances outside of the parties's control. A supervening event that makes performance of a contract impractical may excuse its performance. *M.J. Paquet, Inc. v. N.J. Dep't of Transp.,* 171 N.J. 378, 389-90 (2002). Where parties specifically contract for a force majeure clause and allocation their risks, New Jersey courts narrowly construe the clause with "only events or things of the same general nature or class as those specifically enumerated." *Seitz v. Mark-O-Lite Sign Contractors,* 210 N.J. Super. 646, 650 (Law Div. 1986). In *Vance v. Diversified Invs.*, the Appellate Division determined that plaintiffs were entitled to a refund for the money paid under a common law contract when the subject property was closed under an Executive Order rather than an act of God. 2021 N.J. Super. Unpub. LEXIS 2608, *3 (2021). Because the property was closed pursuant to an Executive Order, parties could only avoid

> payment responsibility if an "act of nature" included executive orders. *Id.* Because the force majeure clause in the contract did not include "government acts or directives," the Court determined the Force Majeure clause was not implicated. *Id.* at *4.
>
> Here, the force majeure clause excused either/both parties from performance under the Contract if a failure or delay to perform was caused by Acts of God, acts of the government in either its sovereign or contractual capacity, epidemics, quarantine restrictions, or the like. (Exhibit "A" to Nobile Cert. at 7.10). Similar to *Vance*, Executive Order 107 caused the shutdown, not an act of God. Executive Order 107 required businesses to accommodate telework arrangements for their workforce and reduce on-site staff to the minimal number necessary to their operation. (Exhibit "G" to Nobile Cert.). While New Jersey construes force majeure language very narrowly, an Executive Order is of the same general nature or class as a quarantine restriction as specifically contemplated for in this contract.
>
> Thus, Defendant's Motion for Summary Judgment is granted.

Plaintiff's appeal followed.

LEGAL ARGUMENT

STANDARD OF REVIEW

In reviewing a grant of summary judgment the appellate division "employ[s] the same standard . . . that governs the trial court." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). The reviewing court determines whether the moving party demonstrated there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230, (App.Div.), certif. denied, 189 N.J. 104 (2006). A determination whether there exists a genuine issue

of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2. The Appellate Division confines its review to the same record that existed before the motion judge. Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000). The court reviews issues of law de novo and affords no deference to the lower court's legal conclusions. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Finally, the reviewing court will decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231.

In this matter, the trial court's decision to grant summary judgment is contrary to the law, purported to be supported by a sole nonbinding unpublished case which is wholly distinguishable from this case; and deficient for its failure to address or make any findings related to the parties' arguments, the facts of the case; nor does it address the obvious significant material facts in dispute. For the reasons set forth herein, all raised below, the force majeure clause did not excuse Defendant's performance on the contract. Therefore, Defendant is not entitled to summary judgment and the Order granting same must be reversed.

POINT I

THE FORCE MAJEURE CLAUSE IS INAPPLICABLE AS NO GOVERNMENT ACTION PROXIMATELY CAUSED DEFENDANT'S BREACH. (Aa614).

Plaintiff's Complaint alleges breach of contract and breach of breach of the implied covenant of good faith and fair dealing.

To state a claim for breach of contract, a plaintiff must establish three elements: (1) the parties entered a contract containing certain terms; (2) the plaintiff performed as the contract required by defendant not and, thus breached; and (3) the breach caused the plaintiff to suffer a loss. Globe Motor Co. v. Igdalev, 225 N.J. 469, 472 (2016).

Notably, the only argument in opposition to Plaintiff's breach of contract claim is the defense of the Force Majeure clause. Defendant does not dispute that sufficient proof exists in the record as to all elements of this cause of action. Rather, Defendant argues its admitted breach is excused by virtue of the Force Majeure clause.

However, the Force Majeure clause contained in the contract between Defendant and Plaintiff does not insulate Defendant from liability in this case as there was no government action that prevented Defendant from its contractual obligation to pay Plaintiff the guaranteed subsidy.

Force Majeure clauses are construed narrowly. Hess Corp. v. ENI, US, LLC, 435 N.J. Super. 39, 47 (App. Div. 2014). A party's performance is only excused if the force majeure clause specifically includes the event that prevents a party's performance. Ibid.

"For a force majeure clause to apply by government order or regulation, the order must clearly direct or prohibit an act which **proximately causes** non-performance or breach of a contract." Morgan St. Partners, LLC v. Chi. Climbing Gym Co., LLC, 2022 U.S. Dist. LEXIS 35633 (N.D. Ill. March 1, 2022) (Aa469).

The trial court summarily concluded that the force majeure clause in the contract between Plaintiff and Defendant excused the parties from performance. The decision does not address any facts or arguments raised in the briefs submitted by the parties and instead relied on a non-binding, unpublished and wholly distinguishable case to conclude that Executive Order 107 relieved Defendant from performance. The trial court's decision is unsupported by case law and is belied by the facts as set forth in greater detail below.

The trial court's September 27, 2024 decision provides:

> Here, the force majeure clause excused either/both parties from performance under the Contract if a failure or delay to perform was caused by Acts of God, acts of the government in either its sovereign or contractual capacity, epidemics, quarantine restrictions, or the like. (Exhibit "A" to Nobile Cert. at 7.10). Similar to *Vance*, Executive Order 107 caused the shutdown, not an act of God. Executive Order 107 required businesses to accommodate

> telework arrangements for their workforce and reduce on-site staff to the minimal number necessary to their operation. (Exhibit "G" to Nobile Cert.). While New Jersey construes force majeure language very narrowly, an Executive Order is of the same general nature or class as a quarantine restriction as specifically contemplated for in this contract.
> Thus, Defendant's Motion for Summary Judgment is granted.
> [Aa614].

Vance v. Diversified Invs., 2021 N.J. Super. Unpub. LEXIS 2508 (App. Div. 2021), is wholly distinguishable from the instant case.

In Vance, the Plaintiff had purchased access to a campground from Defendant. By contrast, this matter involves a professional services agreement with a contract term of two years.

Further, in Vance, it was undisputed that the campground was closed by Executive Order. Unlike Vance, Executive Order 107 did not mandate the closure of BP's offices. Rather, the plain language of Executive Order 107 only provides that business offer telework arrangements where practicable to reduce the number of persons in office. Further, Executive Order 107 specifically permits people going to and from their employment. Therefore, BP's decision to close its offices was a business decision made by BP that was not mandated by Executive Order; and further whether or not the office closed has no impact on BP's obligation to pay the required minimum subsidy guaranteed by the contract as set forth in greater detail below.

The trial judge's decision specifically acknowledged that Executive Order 107 only required business to accommodate telework and reduce onsite staff, not close indefinitely. (Aa614). Therefore, the Court's holding that Executive Order 107 excused Defendant from performing its obligations for the entirety of its two-year contract term is inconsistent with the Executive Order, unsupported by Vance or any actual applicable case law, and is belied by the facts of this case.

To the contrary, the record plainly demonstrates that Defendant cannot prove that any government action or order proximately caused its breach. First, there was no government action that required it to close its corporate office. Defendant claims that Executive Order ("EO") 107 is government action that excuses their performance in that it required businesses to accommodate telework arrangements for their workforce and reduce on-site staff to the minimal number necessary for their operation.

EO 107 specifically states:

> 10. All business or non-profits in the State, **must accommodate** their workforce, **wherever practicable**, for telework or work-from-home arrangements.
>
> 11. To the extent a business or non-profit has employees that cannot perform their functions via telework or work-from-home arrangements, the business or non-profit **should make best efforts** to reduce staff on site to the minimal number necessary to ensure that essential operations can continue.
>
> [Aa435].

Thus, contrary to Defendant's contention, a plain reading of EO 107 reveals that it does not mandate the closure of BP's offices. Rather, as applied to businesses, it merely recommended that where practicable business allow telework and try to limit the number of people on site. To put another way, discretion of how to reduce onsite workforce remained with the business entity; however, there was no finite closure required.

Additionally, opposite to Defendant's contention below that all residents were required to stay home, EO 107 required people to stay home "unless they are"… 5) reporting to, or performing their job." (Aa435, pg. 5, para. 2) Thus, Defendant BP's decision to close its offices in response to the covid pandemic constitutes a business decision, not required by or proximately caused by government action, and therefore, not protected by the Force Majeure clause.

Importantly, as set forth throughout this brief, but should be highlighted at the outset, the initial government response of closures and quarantine as a result of Covid-19, was very temporary. This case involves claims to two years of unpaid subsidies guaranteed by a contract that was never terminated. Thus, on review, Plaintiff urges this Court to consider the timelines of the executive orders, re-openings throughout the state, and most significantly the continued communications by representatives of BP with Plaintiff, TJ Rocco, about how reopening is going to be implemented. These conversations clearly take place months after business

resumed full operations. Moreover, the nature of these conversations, upon which TJ Rocco relied to ensure it was ready to perform its obligations on the contract, unequivocally refute Defendant's claims that the contract was cancelled.

Returning to the executive orders, EO 107 actually encouraged the continuation of cafeterias, food courts and food services. EO 107 specifically encouraged the continuation of grab and go and delivery so as to permit business to continue and to aid with social distancing. (Aa435, pg. 7 para. 8).

Scirocco's testimony confirms that TJ Rocco, dba LJ's Café, provided grab and go food options; and could have provided services during this time frame. Furthermore, the record establishes that following March 17, 2020, security personnel, facilities management personnel, and leadership still came to the building (Aa66, T41:12-42:8); and that more employees returned in April 2020 prompting other third-party services to resume, including additional security and cleaning personnel (Aa511, T26:4-15), all of whom could have been serviced on a grab and go basis in the café. (Aa131, T61:19-64:3).

Since EO 107 did not require closure of the BP corporate office nor the cafeteria, Defendant is incapable of arguing that it was required by government action in response to the pandemic, to close its cafeteria or food services. Therefore, Defendant cannot prove a government action in response to the pandemic

proximately caused its breach, which renders the Force Majeure clause inapplicable.

Moreover, even if Defendant felt compelled to close its offices in response to EO 107, that action was only reasonable temporarily. Even non-essential retail business was permitted to reopen to the public as of May 13, 2020, pursuant to EO 142. (Aa557). Thus, the continued closure of BP's offices was not the result of any pending government directive, and does not excuse BP's breach for the duration of the two-year contract term.

Furthermore, the temporary nature of Defendant BP's closure is confirmed by the testimony of Defendant BP's employees. Former facilities manager, Steven Campbell testified that by April 2020, more employees returned to the office, requiring the attendance of additional security and cleaning personnel. (Aa511, T26:4-15). In fact, he testified that by July 2020, BP expected a full return of personnel and were ready for the return of all employees. (Aa511, T32:2-14). Campbell confirmed that whether employees would return was discretionary, which completely refutes Defendant's claim that it was required to close its office and that personnel were required stay home. (Aa511, T53:2-8).

Furthermore, records produced by Defendant reveal that by October 2020, a majority of employees had returned to the building. (Aa570, excerpt of card swipes

into the BP building during the week of October 5, 2020 and October 12, 2020).[1] On Tuesday, October 6, 2020, there were 55 entries into the building. On Wednesday, October 7, 2020, there were approximately 181 entries into the building. On Thursday, October 8, 2020, there were approximately 218 entries into the building. On Friday, October 9, 2020, there were approximately 119 entries into the building. On Monday, October 12, 2020, there were approximately 137 entries into the building. On Tuesday, October 13, 2020, there were approximately 221 entries into the building. On Wednesday, October 14, 2020, there were approximately 210 entries into the building. On Thursday, October 15, 2020, there were approximately 207 entries into the building. And on Friday, October 16, 2020, there were approximately 100 entries into the building. (Aa570). While these numbers do not equate exactly to the number of persons who entered the building, given the fact that this information was initially withheld by the Defendant, it can reasonably be inferred from entries in excess of 100 or 200, that many of the employees had returned to work which negates Defendants claim the closure of the office to its workers prohibited BP's performance of its contractual obligations.

Because Defendant cannot demonstrate that the initial nor continued closure of the BP offices was required by government action in response to the pandemic,

[1] Due to the voluminous nature of the records, only the first two full weeks of October 2020 is referenced.

the Force Majeure clause does not apply to excuse Defendant' breach of the contract nor absolve Defendant from liability to Plaintiff.

POINT II

DEFENDANT DID NOT ARGUE AND CANNOT PROVE THAT ANY GOVERNMENT ACTION IN RESPONSE TO THE PANDEMIC PROXIMATELY CAUSED ITS FAILURE TO PAY THE GUARANTEED SUBSIDY. (Aa614).

Again, as set forth above, a Force Majeure clause will not apply unless the government action proximately causes the non-performance or breach. See Morgan St., supra, (Aa469).

In this case, Defendant's breach is the failure to pay the subsidy guarantee set forth in the contract. The contract clearly demonstrates that the subsidy was paid to support cost of business, which existed regardless of whether or not food was being served. Thus, in actuality the closure of the corporate offices that Defendant claims was required by EO 107, is irrelevant. Defendant likewise cannot prove that EO 107 proximately caused its failure to make payments owed by the contract. Notwithstanding, the fact that Defendant now disputes on summary judgment that the minimum subsidy was not guaranteed, despite the testimony of the BP employees confirming such, this dispute of material fact certainly negates summary judgment.

The contract between BP and TJ Rocco specifically provides for a minimum subsidy payment. There are tiers of payments set forth therein. (Aa17). Defendant appears to take the position that the subsidy was to be paid only if there were actual

sales. While the agreement clearly reflects that the subsidy increased as actual sales increase, there can be no question that the bottom tier applies as a guarantee to pay operational costs whether sales are zero or up to $1,125, after which the operational costs increase so the subsidy payment increases.

Notwithstanding the fact that Scirocco confirmed this was the intent of the parties that the bottom tier subsidy payment in the prior years was paid regardless of whether the café was closed for long periods of time due to holidays or vacations, Defendant's argument that Plaintiff is not entitled to the guaranteed subsidy payment for costs of business unless there is one sale is illogical.

At deposition, Mr. Kamienski was asked the following:

> Q. So it's your interpretation of this contract, if you sold one – if Joe sold one Tootsie Roll and made five cents, … he was entitled to $1,632.72; is that correct?
>
> A. I would more characterize it if he had a weekly sale that he would be eligible for the subsidy.
>
> Q. How much did the weekly sale have to be for him to be eligible for subsidy?
>
> A. It would have to exist it would have to be a monetary amount.
>
> Q. So it could have been a Tootsie Roll for 15 cents, is that correct?
>
> A. Theoretically, yes.
>
> [Aa66, T48:12-49:15].

This interpretation is nonsensical. Moreover, upon receipt of the April 10, 2020 email from Kamienski stating that BP would no longer be paying Plaintiff until there were actual sales, Mr. Scirocco reached out to Kamienski, asked to speak, and that they spoke about this between April and May 2020. (Aa131). Kamienski denied that he had a conversation with Scirocco wherein he indicated he disagreed with Kamienski's interpretation. (Aa66, T51:6-9). However, he confirmed he communicated with Scirocco about the contract. (Aa66, T45:9-46:4). Thereafter, Kamienski ignored Scirocco. (Aa131, T53:5-10).

Mr. Scirocco explained the agreement at deposition. He confirmed the agreement calls for the bottom tier to be paid, and has always been paid as a guarantee to support the costs of doing business. (Aa131, T29:15-30:1). He explained that the other tiers were in relation to sales, so instead of logging a hundred meals and saying this is what the retail price is and BP pays the difference, a tier structure is in place to accommodate sales, vacations, etc.; and the busier you are, the more you will get. (Aa131, T85:11-87:4).

Further, despite Kamienski's assertion after covid began that there would be no payment unless there were actual sales, his testimony in fact corroborates Scirocco's understanding of the intention and function of the contract. Kamienski agreed in his testimony that the subsidy was "to support LJ's cost of doing business, operating costs" which included staff, service at the cafeteria and the maintaining

the off-site facility, where food was stored, prepared, cooked and then transported, which was required for TJ Rocco to service LJ's café. (Aa66, T36:18-39:23). He further confirmed that the contract compensated TJ Rocco from two avenues, one through subsidy and the other from what he collected at the register, thereby demonstrating that actual sales were separate and apart from the guaranteed subsidy and that as sales increased, costs increased and therefore, the subsidy increased.

Nonetheless, if Defendant claims a different interpretation, this serves as a material factual dispute sufficient to defeat summary judgment. Where a contract's meaning is uncertain or ambiguous and depends upon parole evidence admitted in aid of interpretation, the meaning of the doubtful provisions should be left to the jury. Newark Publishers' Ass'n. v. Newark Typographical Union, 22 N.J. 419, 427 (1956). "The conduct of the parties after execution of the contract is entitled to great weight in determining its meaning." Joseph Hilton and Assoc., Inc. v. Evans, 201 N.J. Super. 156, 171 (App. Div.), certif. denied, 101 N.J. 326 (1985).

Here, the conduct of the parties over the years, as well as the fact that Defendant paid invoices for weeks in March 2020, for weeks which no sales were made should be given weight. Scirocco confirmed that at all times since approximately 2011, payments were made to him by BP regardless of whether there was skipped weeks, holidays or vacations which illustrates the tier system. (Aa131, T166:14-170:1). He testified that he has always submitted an invoice even if BP

was closed since he started in 2011 and was always paid for that time. (Aa131, T170:23-171:1).

Plaintiff has established the contract called for a guaranteed subsidy, not a conditioned subsidy. Moreover, again, Defendant's only defense is that EO 107 and the pandemic caused it to close its offices and therefore it is excused from performance due to the Force Majeure clause. However, this argument does not relate to the subsidy payment required to be paid to TJ Rocco for its operational costs.

Furthermore, Defendant has not even claimed it was unable to make the payments required by the contract by virtue of EO 107 in response to the pandemic. Thus, Defendant cannot establish that EO 107 nor the pandemic was the proximate cause of its failure to pay the guaranteed subsidy. Therefore, as found by many courts, the Force Majeure clause is inapplicable and does not excuse Defendant's breach of the contract. See STORE SPE LA Fitness v. Fitness Int'l, LLC, 2021 WL 3285036 (C.D. Cal. June 30, 2021) (Force Majeure clause did not protect Defendants from Plaintiff's breach of contract claim because Defendants failed to show that the government closures caused them to stop paying rent, but rather could only show that fitness studios could not operate at that time; and that even if force majeure did apply, it would not support a theory that rent obligations for the period of the closures could simply be extinguished); Rudolph v. United Airlines Holdings, Inc. 519 F.

Supp. 3d 438 (N.D. Ill. 2021) (In plaintiffs ticketholders claim who were refused refunds, though the court held that government ordered closures fell within the force majeure provision, discovery was needed into the cause, i.e. whether the cancellations occurred because of economic considerations or were due to restrictions and warnings related to the pandemic); 98-48 Queens Blvd, LLC v. Parkside Mem'; Chapels, Inc., 137 N.Y.S.3d 679 (N.Y. Civ. Ct. 2021) (A force majeure defense requires proof that performance must be impossible, not simply difficult or financially impracticable); De La Cruz & Assocs., Inc. v. Transform SR de Puerto Rico LLC, No. CV 21-1052, 2021 WL 4006024 (D.P.R. June 14, 2021) (Where court rejected Defendant's argument that its obligation to pay agency fees was excused under the force majeure provision since "regardless of whether the COVID-19 pandemic could in some scenarios be deemed to be a force majeure, Transform has not established a causal nexus between its failure to pay Agency Fees and the COVID-19 pandemic"); Street Limited v. Big Belly Solar, LLC, Civ. No. 11020, 2020 WL 443174. at *6 (D. Mass. July 31, 2020) ("Even assuming arguendo that the pandemic and effects of same are a force majeure under the Agreement, Future Street has not shown that its failure to perform its obligations under the Agreement were caused by [the pandemic] ..."); Hong Kong Islands Line America S.A. v. Distribution Services Ltd., 795 F. Supp. 983 (C.D. Cal. 1991) ("It is well-

established that in order to constitute a force majeure, an event must be the proximate cause of nonperformance of the contract.").

Additionally, though the closure of the offices prohibited Plaintiff from making money from sales of food at BP, the closure was temporary and did not prevent food services going forward. See La. Boil v. LLC v. Hortense Assocs., LP, 2023 N.J. Super. Unpub LEXIS 2410 (App. Div. 2023) (where the Court rejected Plaintiff's contention that it should be entitled to terminate the lease agreement in its entirety based on the Covid EOs, finding that the EOs were temporary in nature and did not fundamentally alter the expectations the parties had when the ten-year lease was executed). Thus, Defendant cannot claim that it was relieved from the two-year contract for the entirety of the contract term based on temporary covid responses.

POINT III

THERE IS NO LEGAL BASIS TO ASSERT THE FORCE MAJEURE AUTOMATICALLY TERMINATED THE CONTRACT AND THE FACTS OF THE RECORD UNEQUIVOCALLY DEMONSTRATE DEFENDANT DID NOT TERMINATE THE CONTRACT. (Aa614).

Defendant's claim that the Force Majeure clause automatically terminated the contract, without any communication, is without merit.

First, the language of the clause does not render the contract void in its entirety upon a force majeure event.

Article 7.10 Force Majeure

> Neither party shall be responsible for any failure to perform or delay in performing any of its obligations under this Agreement where and to the extent that such failure or delay results from causes outside the reasonable control of the Party. Such causes shall include, without limitation, Acts of God or of the public enemy, acts of the government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, freight embargoes, civil commotions, or the like. Not-withstanding the above, strikes and labor disputes shall not constitute an excusable delay for either Party under this Agreement. Further, the passage of time, especially the change from the year 1999 to the year 2000 and the year 2000 to the year 2001, will not constitutes a force majeure event.
> [Aa8].

Absent from this clause is any language that automatically terminates the contract upon a force majeure event. In fact, the clause references failures to perform in addition to delays. There must be some affirmative steps to terminate the contract. In fact, the clause contemplates the continuation of performance obligations notwithstanding a force majeure event. Further, Defendant has not pointed to any provision nor legal authority that supports its interpretation that the Force Majeure clause automatically terminates the contract. Rather, the process of termination of the contract is set forth in and guided by Section 7.1. (Aa8).

Moreover, it is indisputable that Defendant never put Plaintiff on notice of its position that the Force Majeure clause excused Defendant from making payments to Plaintiff, at any time prior to Plaintiff's filing of the instant Complaint. The record

is devoid of any communication which advises Plaintiff that Defendant cannot perform under the contract pursuant to the Force Majeure clause.

Additionally, it is indisputable that Defendant never terminated the contract. The Professional Services Agreement provides

> Article 7.1 Termination, provides:
> This Agreement will continue in force for One (1) year or until terminated by either Party on thirty (30) days written notice to the other Party. However, SUPPLIER may not terminate this Agreement while any Schedule A engagement hereunder has not been completed. BP may terminate any Schedule A engagement in its sole discretion on fourteen (14) days notice to SUPPLIER. In the event that BP terminates a Fixed Price Engagement according to this Section, SUPPLIER shall be entitled to fair compensation for time and materials at a price to be negotiated in good faith by the Parties but in no event to exceed either the fixed price specified in Schedule A or price determined by SUPPLIER'S then current rates for time and materials, whichever is lower. Further, in the event that SUPPLIER or any of its personnel breach a material term of this Agreement, BP may terminate all affected engagements immediately in addition to any other remedies BP may have under this Agreement or at law or equity.
> SUPPLIER may not termination any Scheduled engagement hereunder without BP's prior written consent.
> In the event of any such termination of any Scheduled engagement hereunder, BP shall be entitled to the ownership, possession, and use of any and all work in process.
> [Aa8].

Defendant could have terminated the contract. However, Defendant did not. As confirmed by Mr. Kamienski:

> Q. Did you ever send a letter or an email or speak to Mr. Scirocco officially canceling the contract between TJ Rocco Enterprises and BP Lubricants Inc.?
>
> A. No. I did not.
>
> [Aa66, T54:18-24].

As confirmed by Mr. Campbell:

> Q. Did you ever speak to Mr. Scirocco and indicate that someone at BP was advising – was advising you they were cancelling the contract between BP lubricants USA and TR Rocco Enterprises LLC?
>
> A. No.
>
> [Aa511, T40:22-41:2].

Likewise, as confirmed by Mr. Scirocco:

> Q. Was there any conversation at all between yourself or anyone from BP at any time about cancelling the contract?
>
> A. No.
>
> Q. Did you ever ask them to cancel the contract?
>
> A. No.
>
> Q. Did they ever suggest they would?
>
> A. No.
>
> [Aa131, T234:1-9].

BP did not cancel or ask to renegotiate the contract, even after Mr. Scirocco inquired. (Aa131, T216:13-25). This testimony confirms that BP did not terminate the contract.

Further, the actions of Defendant, memorialized in email communications and confirmed by deposition testimony, show discussions remained ongoing between the

parties as to how the café would be handled on reopening. Thus, the conduct of the parties negates the argument that the contract was terminated.

Mr. Scirocco testified as to the many communications he had with Steve Campbell and Joe Abuso regarding the reopening of the café. Scirocco confirmed he had meetings in April and May 2020 about reopening, about the process that was being done in Texas and what the reopening protocols would be. (Aa131, T198:1-6; T200:7-201:3; T202:8-24; T215:13-216:11) (Aa489).

Scirocco also communicated with Defendant via email regarding reopening protocols. (Aa131, T202:8-24; T203:23-24; T206:7-13; T208:2-7; T208:17-209:1) (Aa489).

Furthermore, On November 10, 2020, eight (8) months after the start of the pandemic, Scirocco was asked to contact Jose Abuso to complete a review / BP performance evaluation. (Aa131, T211:11-212:7) (Aa489). If the contract had been cancelled, there would not be continued communication by BP employees with Plaintiff about reopening.

Moreover, these communications were confirmed by BP employees' deposition testimony. Kamienski testified he recalled conversations with Scirocco about alternative food service options going forward. (Aa66, T57:6-21). Mr. Kamienski confirmed the cafeteria was enhanced as had been previously discussed with Scirocco. (Aa66, T55:12-18).

Campbell recalled discussions with Scirocco and recalled telling Scirocco that BP sent staff home and will reopen when it is appropriate. (Aa511, T23:23-24:2; T24:3-16). Regarding discussions with Scirocco to retrieve items from LJ's café, Campbell confirmed that they discussed retrieving items from the cafeteria because of the concern that it had been there longer than expected and he did not want a mice problem. Additionally, he confirmed that he requested removal of items because the cafeteria was getting upgraded, which occurred in or about winter of 2021. (Aa511, T37:18-39:22). Scirocco likewise testified that communications regarding the removal of items from the café was out of the concern that food would be expiring, but that other items, such as paper products, were left because we were planning on reopening. (Aa131, T181:2-183:14). Thus, the retrieval of items cannot be argued to have been communicated because BP intended on cancelling the contract.

September 1, 2020 had been proposed as a tentative reopen date; however, despite the fact that employees had returned, the café did not reopen. (Aa131, T209:9-14; T231:4-18). Based on the communications and actions of BP, Plaintiff's business remained prepared ready to service BP as LJ's café as soon as requested to return. (Aa131, T171:16-172:18).

The foregoing unequivocally demonstrates that the contract was not terminated by Defendant at any time nor is there any legal or factual support for the argument that the Force Majeure clause automatically terminated the contract. For

these reasons, Defendant's motion for summary judgment should have been dismissed, and the Order granting summary judgment to Defendant must be reversed.

POINT IV

DEFENDANT IS PRECLUDED FROM ASSERTING FORCE MAJEURE AS A DEFENSE SINCE THE CONTRACT WAS FINALIZED AND EXECUTED AFTER DEFENDANT HAD KNOWLEDGE OF THE IMPENDING COVID PANDEMIC. (Aa614).

It is undisputed that the contract between BP and TJ Rocco was not executed until March 13, 2020. Because the contract was executed after BP had knowledge of the coronavirus health emergency, Defendant is precluded from asserting the force majeure clause as a defense.

Facto v. Pantagis, 390 N.J. Super. 227, 232-34, 915 A.2d 59 (App. Div. 2007) is frequently cited for the proposition that the doctrine of force majeure can excuse a contracting party's performance when an unforeseen event makes that party's performance impossible or impracticable. Notwithstanding the fact that Defendant has not asserted the common law impossibility or frustration of purpose defenses, (and even if it had, they would be superseded by the force majeure clause), the record refutes those claims as well as the applicability of the Force Majeure clause in this case because Defendant had knowledge of the impending covid crisis

prior to finalizing the contract with Plaintiff. Thus, the covid pandemic does not constitute an unforeseen event nor event beyond the control of the Defendant.

EO 103, which declared a State of Emergency and Public Health Emergency in New Jersey was entered by Governor Murphy on March 9, 2020. (Aa480). Therefore, Defendants cannot disclaim knowledge of an impending health emergency prior to the execution of contract on March 13, 2020.

Furthermore, Defendants' actual knowledge of the potential impact of covid are well-documented in the record prior to the execution of the contract. In an email on March 11, 2020, Steve Campbell wrote to Mr. Scirocco that the building will be closed on Friday, March 13, 2020. He stated "there are no issues in the building but we are using this as a test if everyone had to work from home. Please make whatever accommodations you need to make to be closed Friday. Also, please pay the staff for the day." (Aa65). This email proves that BP was fully aware of the possibility of upcoming disruptions to both attendance and the cafeteria.

In response to this email, Mr. Scirocco said ok, and inquired: "Please help me understand why I don't have a contract or have been receiving payments." (Aa65).

Even with BP's documented knowledge of the impending potential disruptions, the following day, March 13, 2020, Mr. Scirocco was provided with the contract, Amendment 3 guaranteeing minimum subsidy payments for a period of two years. (Aa17). Because Defendant had knowledge of potential disruptions to the

office, and still executed the contract with Plaintiff, Defendant should be precluded from using the pandemic and force majeure clause as a shield.

POINT V

PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SURVIVES SUMMARY JUDGMENT. (Aa614).

There are sufficient material facts in dispute to defeat Defendant's motion for summary judgment on Plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing.

A covenant of good faith and fair dealing is implied in every contract in New Jersey. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420, 690 A.2d 575 (1997). Likewise, there is a duty of good faith and fair dealing included in every contract as a matter of law in Illinois. Powers v. Delnor Hospital, 135 Ill. App.3d 317, 321 (1985).

Implied covenants are as effective components of an agreement as those covenants that are express. Aronsohn v. Mandara, 98 N.J. 92 100 (1984). Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term. Sons of Thunder, Inc., supra, 148 N.J. at 419. The implied covenant means that

"neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Id. at 420.

Defendant's actions, as set forth above at length, provides proof of conduct that had the effect of injuring Plaintiff's right to receive the fruits of the contract while holding Plaintiff accountable on his end of the contract, which are sufficient to defeat summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiff/Appellant respectfully requests this Court to reverse the Order Granting Summary Judgment.

Respectfully submitted,
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Attorneys for Plaintiff/Appellant,
TJ Rocco Enterprises, LLC

By: /s/*Ronald J. Ricci*
RONALD J. RICCI, ESQ.

FOURTH AMENDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000491-24

TJ ROCCO ENTERPRISES, LLC, Plaintiff/Appellant, v. BP LUBRICANTS USA, INC., JOHN DOES 1-10, RICHARD ROE 1-10 (names being fictitious), Defendant/Respondent	On Appeal From the Decision of the Superior Court of New Jersey, Law Division Passaic County Dkt. No.: PAS-L-3515-21 Honorable Vicki A. Citrino, J.S.C. sitting below Submitted: February 4, 2025

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT, BP LUBRICANTS USA INC.

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PRELIMINARY STATEMENT

Before the Court is Plaintiff/Appellant TJ Rocco Enterprises LLC's ("appellant") appeal from the trial court's grant of summary judgment to Defendant/Respondent BP Lubricants USA Inc. ("bp"). The trial court's order granting bp's motion for summary judgment must be upheld as appellant's arguments are without merit and presented without any relevant supporting case law.

This matter arises out of an alleged breach of a Professional Services Agreement Contract No. BP00178983 ("the Contract") which had been in place between bp and appellant since April 4, 2011. (Aa8). Pursuant to the Contract, appellant agreed to provide café and catering services to bp at its Wayne, New Jersey facility and bp would pay appellant a weekly subsidy based on total actual weekly sales. (Aa8). The Contract also contained a Force Majeure clause excusing either/both parties from performance under the Contract if a failure or delay to perform was caused by acts of the government in either its sovereign or contractual capacity, epidemics, quarantine restrictions, or the like. (Aa8). The only issue before this Court is whether the Force Majeure clause in the contract relieved both parties from their contractual obligations, namely relieving appellant from providing café and catering services and relieving bp from paying appellant the weekly subsidy

based on total actual weekly sales, because of the ongoing COVID-19 pandemic.

Based on the clear and unequivocal express language of the long-standing contract, communications between appellant and bp throughout the COVID-19 pandemic, various Executive Orders issued by Governor Murphy, and the pendency of the COVID-19 pandemic itself, the parties were undoubtedly relieved of their contractual obligations due to the Force Majeure taking effect, as the trial court correctly concluded. Therefore, bp respectfully requests this Court affirm the lower court's grant of its summary judgment.

PROCEDURAL HISTORY

In its Complaint, filed November 4, 2021, appellant asserted two counts against bp: (i) breach of contract and (ii) breach of the implied covenant of good faith and fair demand, based on bp's nonpayment of $1,632.72 per week from March 30, 2020, through the Contract's expiration on December 31, 2021. (Aa454). bp filed its Answer denying appellant's claims on April 6, 2022. (Aa460). After the close of discovery bp moved for summary judgment, which appellant opposed. (Aa1-Aa6; Aa603; Aa478). Oral argument was held before the Honorable Vicki A. Citrino J.S.C. on September 27, 2024, and bp's motion was properly granted on September 27, 2024. (Aa618). This appeal follows.

COUNTER STATEMENT OF FACTS

The parties entered into the Contract on April 4, 2011, pursuant to which appellant agreed to provide café and catering services to bp at its Wayne, New Jersey facility. (Aa8). Amendment #3 to the underlying 2011 Contract contained a Weekly Subsidy section which required bp to pay appellant a weekly subsidy based on total actual weekly sales made in the café, exclusive of catering services. (Aa8). The underlying 2011 Contract contained a Force Majeure clause excusing either/both parties from performance under the Contract if a failure or delay to perform was caused by acts of the government in either its sovereign or contractual capacity, epidemics, quarantine restrictions, or the like. (Aa8). Pursuant to the Contract, neither party was obligated to formally invoke the force majeure clause for it to take effect and conclusion of the force majeure clause did not automatically trigger renewal of the Contract. (Aa8). Amendment #3 slightly altered the Contract by extending the term for a 24-month period, making the new effective date January 1, 2020, and new expiration date December 31, 2021. (Aa8). It also changed the amount of the Weekly Subsidy, marginally increasing the amount due when appellant made actual weekly sales in the café. (Aa8).

On March 11, 2020, the World Health Organization ("WHO") declared COVID-19 a global pandemic and on the same day, bp employee Steve

Campbell advised appellant that cafeteria services were not needed while the Wayne location closed for in-person work and implemented a remote-work period. (Aa19, Aa65). On or about March 17, 2020, bp indefinitely closed its Wayne facility in its entirety, including the café, to in-person work, requiring all non-essential employees to work from home in response to the COVID-19 pandemic, but continued to pay appellant through March 27, 2020. (Aa106-107 at 41:12-42:1; Aa302-303 at 172:16-18; Aa303 at 173:1). bp ceased payments to appellant thereafter, as the Wayne facility and its cafeteria remained closed due to the ongoing COVID-19 pandemic and as by his own admission, appellant never made any actual weekly sales in the café after approximately March 20, 2020. (Aa169 at 39:15-20, Aa171 at 41:3-10; Aa179 49:9-15 Aa302 at 172:16-18, Aa303 at 173:1; Aa109 44:3-11).

On March 21, 2020, Governor Murphy issued Executive Order 107 which required businesses to accommodate telework arrangements for their workforce and reduce on-site staff to the minimal number necessary for their operations. (Aa435). The WHO declared COVID-19 to no longer be considered a global pandemic on May 5, 2023, nearly one and a half years after the Contract's expiration. (Aa19).

In bp's original moving papers and during oral argument for the underlying summary judgment motion, it was clearly shown that:

1) Appellant did not establish that bp breached the Contract due to the existence of the force majeure clause, as COVID-19 qualified as an epidemic and due to the government mandated quarantine restrictions and prohibitions against cafeteria services in place during the time the Contract was in effect; and
2) Appellant did not succeed on its claim for breach of any implied covenants as the Contract specifically states that "neither party provides any warranties to the other, either express or implied, including the implied warranties of merchantability and fitness for a particular purpose."

The lower court correctly found that "the force majeure clause excused either/both parties from performance under the Contract if a failure or delay to perform was caused by Acts of God, acts of the government in either its sovereign or contractual capacity, epidemics, quarantine restrictions, or the like," and its decision must remain undisturbed. (Aa614).

Though the lower court primarily relied on Executive Order 107 to conclude that the force majeure clause applied and performance under the Contract was excused, performance is still excused because COVID-19 is an epidemic which is also contemplated by the force majeure clause. The force majeure clause took immediate effect upon the entry of Governor Murphy's

various executive orders and/or the classification of COVID-19 as an epidemic.

STANDARD OF REVIEW

When reviewing an order for summary judgment, the appellate courts utilize the same standard that governs the trial court. Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004). The appellate court is to determine if there was a genuine issue of material fact and, if none exists, to then decide whether the lower court's ruling on the law was correct. Henry v. New Jersey Dep't of Hum. Servs., 204 N.J. 320, 329 (2010). Appellate review of a trial court's summary judgment order is de novo and applies the same standard as the trial court, affording no deference to the trial court's legal conclusions. Stewart v. N.J. Tpk. Auth., 249 N.J. 642, 655 (2022), Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019). As such, appellate courts are guided by Rule 4:46-2(c), pursuant to which summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting R. 4:46-2(c)).

A genuine issue of fact exists only if "the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Stated differently, if the "competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party[,]" then the movant is not entitled to summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Here, the Contract contains a choice of law provision which states that Illinois law governs. (Aa15). In Illinois, §2-1005 of the Illinois Code of Civil Procedure governs summary judgment motions. Pursuant to this section, a defendant may move, at any time, for summary judgment in its favor as to all or part of the relief sought against it. 735 ILCS 5/2-1005. Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Hall v. Henn, 280 Ill. Dec. 546, 547 (2003).

Under Illinois or New Jersey law, the applicability of the force majeure clause to excuse bp from performance under the Contract is a question of law.

The trial court's finding that there were no genuine issues of material fact for trial and that the force majeure clause excused either/both parties from performance under the Contract should not be disturbed.

ARGUMENT

POINT 1

THIS APPEAL IS ENTIRELY LACKING IN MERIT AS THERE ARE NO ISSUES OF MATERIAL FACT AND THE TRIAL COURT DID NOT MISAPPLY THE LAW IN GRANTING SUMMARY JUDGMENT IN ITS SEPTEMBER 27, 2024 ORDER.

In addition to the arguments set forth below, appellant's arguments lack any merit to reverse the trial court's September 24, 2024 Order granting summary judgment to bp. There is absolutely no dispute as to the material facts at issue in this matter. Indeed, appellant's entire appeal is merely a thinly veiled attempt to fabricate factual issues in this matter in contravention of Brill's instruction. Appellant's efforts to create factual disputes must be afforded no weight, as by appellant's numerous admissions both in testimony and in opposition to bp's Motion for Summary Judgment, the parties agree about every single relevant material fact in this case:

A. There was a professional services agreement ("the Contract") between bp and appellant. (Aa8).

B. The Contract was for appellant to provide café and catering services to bp at its Wayne, NJ facility. (Aa8; Aa603)

C. The Contract contained a Force Majeure clause at Section 7.10. (Aa3; Aa603).

D. On March 11, 2020, the World Health Organization ("WHO") declared COVID-19 a global pandemic. (Aa3-4; Aa604).

E. bp indefinitely closed its Wayne facility in its entirety to in-person work on or about March 17, 2020, due to the ongoing COVID-19 pandemic. (Aa4; Aa13).

F. The Contract expired on December 31, 2021. (Aa5; Aa604).

G. The WHO declared COVID-19 to no longer be considered a global pandemic on May 5, 2023. (Aa5; Aa604).

Appellant admits that the only issue before this Court is "whether the Force Majeure clause in the contract relieved [bp] from the contractual obligation to pay [appellant] the subsidy guaranteed by contract for the months of March 2020 to December 2020 and the entire year of 2021." (Appellant's brief at p. 1). Any facts unrelated to the issue of whether the force majeure clause excuses performance are therefore immaterial by appellant's own concession.

It is abundantly clear from the undisputed factual record in this case and the correct holding of the trial court that the force majeure clause excused bp from performance due to the ongoing and ever-evolving COVID-19 pandemic.

POINT 2

EXECUTIVE ORDER 107 EXCUSED BP'S PERFORMANCE OF THE CONTRACT, INCLUDING PAYMENT OF THE SUBSIDY, PURSUANT TO THE FORCE MAJEURE CLAUSE.

Under either Illinois or New Jersey law, bp is excused from performance of the Contract pursuant to the force majeure clause which states in pertinent part:

> Neither Party shall be responsible for any failure to perform or delay in performing any of its obligations under this agreement where and to the extent such failure or delay results from cases outside the reasonable control of the Party. Such cases shall include, without limitation, Acts of God or of the public enemy, acts of the government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, freight embargoes, civil commotions or the like.

(Aa8 emphasis added).

I. Executive Order 107, issued by Governor Murphy, is an "act of the government in either its sovereign or contractual capacity," under both Illinois and New Jersey law.

To say, as appellant does, that "no government action […] prevented Defendant from its contractual obligation to pay [appellant] the guaranteed

subsidy," ignores multiple Executive Orders issued during the ongoing COVID-19 pandemic, the plain text of the Contract at issue, and case law in both Illinois and New Jersey. On the contrary, a careful examination of the Executive Orders, the Contract, and a rapidly developing body of case law related to COVID-19 makes clear that the force majeure clause at issue here is exactly the type that excuses performance in situations involving COVID-19.

In New Jersey, during 2020 and into 2021, New Jersey Governor Murphy issued an extensive body of Executive Orders establishing guidelines for reacting to and dealing with the ever-changing COVID-19 pandemic. Of critical importance here, on March 21, 2020, Governor Murphy issued Executive Order 107, directing all residents to stay at home. (Aa435-Aa447). While businesses that required an in-person workforce were permitted to continue operations, Executive Order 107 instructed businesses to accommodate telework arrangements for their workforce to the maximum extent practicable and to reduce their onsite staff to the minimal number necessary for their operations. (Aa442). Executive Order 107 also stated that "all […] cafeterias […] are *permitted* to operate their normal business hours, but are limited to offering only food delivery and/or take-out services," (Aa441-442 emphasis added). bp complied, shutting down its Wayne facility, including closure of the café which was not essential to its operations but was

merely a convenience offered to employees. (Aa92 at 27:11-28:3). The permissive, not mandatory, language of Executive Order 107 is an important nuance, as bp had to balance both abiding by Executive Order 107's mandate to reduce onsite staff to the minimal number necessary for its essential operations and the risk of keeping its café open for food delivery and/or take-out services as *permitted* (not mandated) by Executive Order 107.

Ultimately, the trial court concluded that government mandate "[…] Executive Order 107 caused the shutdown [of the Wayne facility]," and "required businesses to accommodate telework arrangements for their workforce and reduce on-site staff to the minimal number necessary for their operation." (Aa617). The trial court continued, "while New Jersey construes force majeure language very narrowly, an Executive Order is of the same general nature or class as a quarantine restriction as specifically contemplated for in this contract." (Aa617). Therefore, the trial court rightfully recognized that the closure of the Wayne facility and café was legally required of bp by a government mandate that operated as a quarantine restriction, both of which were contemplated by the parties in negotiating the force majeure clause from the very beginning of the contract, which excused performance. Its decision should not be disturbed.

As cases involving the application of force majeure clauses during COVID-19 are only now reaching the Courts, it is expected that the body of published case law will be few and far between. However, courts in both Illinois, which governs the Contract between the parties, and New Jersey have considered the issue, as have courts across the country, and these decisions are guiding, here.

A. Illinois Courts have concluded that governmental mandates such as executive orders qualify as acts of the government pursuant to force majeure clauses.

Illinois has considered cases addressing how COVID-19 affects the applicability of force majeure clauses invoked by governmental mandates such as executive orders. In Morgan St. Partners, LLC v. Chicago Climbing Gym Co., LLC, 2022 WL 602893 (N.D. Ill. Mar. 1, 2022), the plaintiff, Morgan St. Partners ("Morgan St.") leased commercial property to defendants Chicago Climbing Gym Company LLC ("Chicago Climbing"), which operated a gym on the property. Id. at *1-2. During the COVID-19 pandemic, governmental mandates forced Chicago Climbing to close the gym completely in March 2020 and reopen in August 2020 at a reduced capacity. Id. at *3. Chicago Climbing was not legally permitted to reopen at full capacity until July 11, 2021. Id. Chicago Climbing stopped paying rent entirely during the complete shutdown and paid only a reduced rent once it reopened. Id. Morgan St. sued

alleging that Chicago Climbing owed $655,281.86 in unpaid rent, late fees, taxes, and insurance, and sought summary judgment claiming that the failure to pay rent constituted a breach of contract. Id. Chicago Climbing relied on the force majeure clause in the parties' lease agreement, alleging that same excused its payment obligations. Id. The force majeure clause at issue read:

> It is understood and agreed between the parties hereto that time is of the essence of all the terms and provisions of this Lease. However, whenever a period of time is herein prescribed for the taking of any action by Landlord or Tenant, then Landlord or Tenant, as applicable, shall not be liable or responsible for, and there shall be excluded from the computation of such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, terrorism, legal requirements, or any other cause whatsoever beyond the control of Landlord or Tenant, as applicable. The foregoing force majeure provisions of this paragraph are applicable to any payments of Rent or other monies due from Tenant under this Lease.

Id. at *2.

The lease also contained a clause titled "Government and Other Requirements" which read:

> Tenant shall faithfully observe in the use of the Premises all municipal and county ordinances and codes and all state and federal statutes, rules and regulations now in force in force or which may hereafter be in effect.

Id.

The Illinois court denied Morgan St.'s motion for summary judgment reasoning that Illinois Executive Orders requiring gym closure constituted

"legal requirements" which forced Defendants to shut down the gym. Id. at *5. The Illinois court specifically recognized that "in Illinois, for a force majeure clause to apply by government order or regulation, the order must 'clearly direct or prohibit an act which proximately causes non-performance or breach of a contract,'" and further concluded that "the circumstances surrounding the COVID-19 pandemic implicate[d] the force majeure clause in the lease." Id. at *4. Pursuant to the force majeure clause at issue, Chicago Climbing "shall not be liable or responsible for, and there shall be excluded from the computation of such period of time, any delays due to…legal requirements, or any other cause whatsoever beyond the control of Landlord or Tenant." Id. at *4. The force majeure clause at issue explicitly applied to "to any payments of Rent or other monies due from Tenant under this Lease," and the court, giving that language its plain and ordinary meaning, concluded "that the force majeure clause allows a party to delay performance under the Lease when a delay [was] due to legal requirements or another event outside the control of either side." Id. (internal quotations omitted). The court found, as a matter of law, that the force majeure clause applied and delayed Chicago Climbing's rent payments. Id.

B. New Jersey Courts have concluded that governmental mandates such as executive orders qualify as acts of the government pursuant to force majeure clauses.

New Jersey Courts similarly view Governor Murphy's COVID-19 related Executive Orders as governmental acts or directives that have excused parties from performance of contracts pursuant to the enactment of same. See generally Vance v. Diversified Invs., 2021 WL 4854109 (N.J. Super. Ct. App. Div. Oct. 19, 2021) (ordering refund of monies paid to campground closed due to COVID-19 related Executive Order).

Indeed, this Court recently examined the applicability of force majeure clauses in contracts related to the COVID-19 pandemic and, specifically, the effect which Governor Murphy's Executive Orders have with respect to same. See generally, Rukaj v. Puccio, 2024 WL 3384943, at *1 (N.J. Super. Ct. App. Div. July 12, 2024). In Rukaj, plaintiff entered into an Event Contract with the Rockland Country Club, LLC ("RCC") to have her wedding and reception for 224 guests at the RCC on June 20, 2020, for a total contract price of $68,000.63 including a $50,000 deposit. Id. The Event Contract at Paragraphs 6 and 8 included clauses stating that RCC "shall not be liable to the client due to reasons beyond the control of management, including floods, fire, strikes, accidents, weather, emergency response situations, and any other reason that is not in the direct control of RCC," and that the "plaintiff would forfeit the

initial deposit in the event that she cancels, repudiates, or otherwise breaches this Contract by any cause or reason whatsoever." Id. (internal quotations omitted).

This Court recognized that upon COVID-19 appearing in early 2020, Governor Murphy issued "a series of Executive Orders [] aimed at stopping the spread of the COVID-19 virus." Id. This Court specifically looked at Executive Order 104 which limited gatherings of people in New Jersey to 50 or fewer with certain exceptions and to Executive Order 107 which "further restrict[ed] New Jersey residents from leaving their homes." Id. This Court acknowledged that, like bp, in response to Executive Order 107, "RCC closed its venue pending further order from the Governor." Id. Ultimately, after back-and-forth communications, the plaintiff requested a refund of its deposit due to a gathering of 225 people being illegal pursuant to various Executive Orders. Id. at *3. The trial court granted plaintiff's motion for partial summary judgment ordering RCC to return the deposit based on its finding that RCC was "unable to perform under the Contract because of COVID-19 and Governor Murphy's Executive Orders." Id. The lower court relied on Facto v. Pantagis, 390 N.J. Super. 227 (App. Div. 2007), to conclude that COVID-19 qualified as a force majeure event relieving both parties of their duty to perform under the Event Contract. Id. On appeal, RCC argued, among other

things, that the lower court "erred by voiding the contract as a whole rather than finding there was an enforceable contract that plaintiff had breached by cancelling the event and shifting the risk of loss from plaintiff to defendants." Id. at *11. This Court found "no support for [RCC's] contentions," and affirmed the lower court's order in its entirety, specifically noting that there was no dispute that the "wedding and reception plans were drastically and unfortunately interrupted by the COVID-19 pandemic and the Governor's mandated restrictions […]." Id. at *11-12.

It is clear from the Rukaj decision that New Jersey courts readily recognize Governor Murphy's Executive Orders as governmental acts which invoke force majeure clauses, especially in cases involving COVID-19 related business closures and interruptions. Applying this logic here, once Executive Order 107 was enacted, bp was legally required to pare down its in-person operations at the Wayne facility to the minimal number necessary to continue operations, which did not warrant or include continued operation of the optional-use on site café.

C. Other jurisdictions across the country at the federal and state levels have concluded that governmental mandates such as executive orders qualify as acts of the government pursuant to force majeure clauses.

The Second Circuit has held that COVID-19 related orders issued by the New York governor restricting how nonessential businesses operated during

the pandemic constituted circumstances beyond a party's reasonable control for purposes of invoking force majeure clauses to excuse contractual performance. JN Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118 (2d Cir. 2022). In JN, a case dealing with a fine art auction cancelled due to COVID-19, the Second Circuit explicitly found that "the COVID-19 pandemic, coupled with the state government's orders restricting the activities of nonessential businesses, constitute an occurrence beyond the parties' reasonable control, allowing [one party] to end [the contractual agreement]." Id. at 124. The JN court continued, finding that "the pandemic and government shutdown orders are the same type of events listed in the force majeure clause, which include, "without limitation," natural disaster, terrorist attack, and nuclear or chemical contamination. […] Each of the enumerated events are of a type that cause large scale societal disruptions, are beyond the parties' control, and are not due to the parties' fault or negligence." Id.

Other New York courts have also found that the Governor's executive orders qualify as government acts to invoke force majeure clauses. In Nelkin v. Wedding Barn at Lakota's Farm, LLC, 152 N.Y.S.3d 216 (N.Y. Civ. Ct. 2020), a plaintiff had entered into a contract to rent a wedding venue and paid a deposit to secure a date, but after the Governor of New York issued executive orders banning people from gathering in large numbers due to

COVID-19 sought a refund of the deposit based on the force majeure clause in the relevant rental contract. In granting the plaintiff's motion for summary judgment, the Court stated that "force majeure clauses are to be interpreted in accord with their function, which is to relieve a party of liability when the parties' expectations are frustrated due to an event that is an extreme and unforeseeable occurrence, that was beyond the party's control and without its fault or negligence." Id. at 219 (internal quotations and citations omitted). Looking to the force majeure provision in the contract between the plaintiff and the wedding venue, the Nelkin Court recognized that it "specifically includes 'government regulations' and 'disasters,'" and concluded that the executive orders "fall within the scope of the Contract's force majeure provision as 'government regulations.'" Id. at 220, 222.

Courts across the country, including Nevada, have reached similar conclusions regarding force majeure clauses, state level executive orders, and COVID-19. In Big City Dynasty Corp. v. FP Holdings, L.P., the Nevada District Court found that a reasonable jury could conclude that a performance contract between DJ Kaskade ("Kaskade") and KAOS nightclub was not breached because Kaskade would not have been able to "perform for at least some period in 2020 due to the [Governor's] shutdown orders." Big City Dynasty Corp. v. FP Holdings, L.P., 2021 WL 1949384, at *1, 4 (D. Nev. May

14, 2021). The Nevada District Court recognized that "the contract's force majeure clause provides that performance will be excused if either party's performance is prevented, rendered impossible or materially frustrated by any act, requirement or regulation or action of any public authority or bureau … or any other cause beyond either party's reasonable control." Id. at *4. Accordingly, the Nevada District Court rightfully concluded that "a reasonable jury could find the Governor's shutdown orders triggered this clause." Id.

It is the clear intent of courts from coast to coast to treat state level governmental actions such as Governor Murphy's Executive Orders, as triggers for force majeure clauses when their applicability to COVID-19 situations. There is no dispute that Executive Order 107 required bp to accommodate telework options for its employees, drastically limit on-site employee presence, and cease all unessential operations such as the café, making it impracticable, and indeed unsafe and illegal, to keep the café open.[1]

[1] Despite appellant's assertions that employees numbering into the hundreds "swiped in" to the Wayne, NJ facility, this characterization is patently false and an attempt to further mislead this Court. A careful examination of the documents produced during discovery show that at most 84 individual employees used their pass cards on any given day to gain entry to the Wayne, NJ facility from September 24, 2020 to December 31, 2021, the period of time from which pass card data is available. Most days during this timeframe showed on site presence in the mid-teens to mid-20s. The raw data shows all pass card data used to navigate among the entirety of the facility, as multiple doors contained within the facility itself required a user already at the premises to swipe their pass card to gain access to other parts of the facility. This is clear on the face of the documents provided pursuant to the column titled "SecondaryObjectName." Accordingly, the raw data which appellant cites to is not an accurate summation of the total number of persons on site at any given time. Rather, the companion chart that was produced provides a clearer picture and reveals that no more than 84 persons were on site on a given day during the relevant period. (Da0001-00907).

bp's performance under the Contract is excused by virtue of Executive Order 107 triggering the force majeure clause.

POINT 3

EVEN IF GOVERNOR MURPHY'S VARIOUS EXECUTIVE ORDERS DO NOT QUALIFY AS "ACTS OF THE GOVERNMENT," THE FORCE MAJEURE CLAUSE WAS TRIGGERED BY ITS INCLUSION OF "EPIDEMICS" AS A TRIGGER.

Even if this Court finds the force majeure clause was not triggered by Governor Murphy's various executive orders, bp's performance was still excused as the force majeure clause was triggered by its inclusion of "epidemics" and/or "acts of god." COVID-19 has been described as both an "epidemic" and an "act of god," in Illinois and in New Jersey and these definitions should apply here, as well.

A. bp's performance is excused by the force majeure clause as COVID-19 is an epidemic.

The force majeure clause at issue states "Neither Party shall be responsible for any failure to perform or delay in performing any of its obligations under this agreement to the extent that such failure or delay arises from cases outside the reasonable control of the Party. Such cases shall include, without limitation […] epidemics […] or the like." (Aa15). COVID-

19 is commonly referred to as a "pandemic," not an "epidemic." Black's Law Dictionary defines "pandemic" as "a disease, or a medical condition that has spread over a significantly large area." *Pandemic*, Black's Law Dictionary Free (2nd Online ed. Last visited January 8, 2025). Black's Law Dictionary defines "epidemic" as "any disease which is widely spread or generally prevailing at a given place and time." *Epidemic*, Black's Law Dictionary Free (2nd Online ed. Last visited January 8, 2025). The Mayo Clinic explained that a pandemic is an epidemic that spread over several countries or continents and affected many people. Endemic vs. epidemic vs. pandemic: What you need to know, MAYO CLINIC HEALTH SYSTEM, https://www.mayoclinichealthsystem.org/hometown-health/featured-topic/endemic-epidemic-pandemic (last visited January 8, 2025). Therefore, COVID-19 is both a pandemic and an epidemic, and the plain meaning of "epidemic" in the Contract encompasses COVID-19. The force majeure clause in the Contract is triggered by epidemics, for which COVID-19 qualifies.

Indeed, many courts in both Illinois and New Jersey have described COVID-19 as an "epidemic." Hampton v. Williams, 2023 IL App (1st) 220942-U, ¶ 47 ("[…] from the record it is clear that there were many reasons for this significant delay, including the COVID-19 epidemic […].) (emphasis added); In re Marriage of Jeffrey F. & Yuko Y.-F., 2021 IL App (4th) 210386-

U, ¶ 34 ("although travel for the children was not ideal at this moment in time with all of the uncertainty that goes on in international travel and with the COVID epidemic […]") (emphasis added); Walker v. Demos, 2022 IL App (1st) 210152-U, ¶ 23 ("lastly, the coronavirus epidemic has indisputably presented some special circumstances in litigation generally) (emphasis added). Priolo v. Shorrock Garden Care Ctr., 2022 WL 4350133, at *3 (N.J. Super. Ct. App. Div. Sept. 20, 2022) ("therefore, Podrat does not have the qualifications to opine on the standard of care required of an assisted care facility during the first months of the COVID-19 epidemic.") (emphasis added).

The Contract clearly contemplates for the occurrence of epidemics to trigger the force majeure clause. Accordingly, giving the Contract its plain meaning and looking to the language in guiding case law, COVID-19 is an epidemic that triggered the force majeure clause, excusing bp from performance thereunder.

POINT 4

COVID-19, A FORCE MAJEURE EVENT, AUTOMATICALLY EXCUSED PERFORMANCE UNDER THE CONTRACT.

Nothing in the Contract requires either party to formally invoke the force majeure clause for it to take effect and excuse performance. Appellant's

argument that the Contract needed to be formally cancelled or that the force majeure clause needed to be formally invoked is merely a distraction from the only correct conclusion – that any failure to perform under the Contract, whether it was formally cancelled or whether the force majeure clause was formally invoked or not, is excused by virtue of the force majeure clause. Appellant's reliance on Article 7.1, Termination, is similarly misplaced. While Article 7.1 permits bp to terminate the Contract on fourteen (14) days' notice to appellant, there is nothing in the contract that *requires* bp to do so and in any event, Article 7.1 is completely unrelated to the force majeure clause.

However, by appellant's own admission, he was advised to stop servicing the Wayne facility until otherwise instructed, knew he was in a "holding pattern," regarding the reopening of the cafeteria, and the parties were engaging in ongoing communications regarding the possibility of reopening the café if and when it was safe and practical to do so. (Aa606; Aa300 at 170:15-20; Aa302 172:3-5; Aa612 at ¶76). Unfortunately, at no point during the remainder of the Contract term was it safe or practical to reopen the café. Further, despite multiple assertions by appellant that he was told to "stay ready," to reopen, he could not recall with specificity whether or when or by whom he was told to "stay ready" to reopen the café, he admitted that "no one defined stay ready" and confirmed he was never given a firm date from bp as

to when to reopen the café. (Aa329 at 198:19- 199:21). In his moving papers, appellant admits that it would have been impossible for him to provide café services as he had been instructed to remove his items so the café could be renovated and was under construction through winter of 2021. (Appellant's brief at p. 38). Indeed, appellant never submitted payment invoices at any time after April 30, 2020 despite testifying that he had previously submitted invoices during facility closures, manifesting his understanding that there would be no subsidy payments during the COVID-19 related facility closure. (Aa300 at 170:15-171:1; Aa304 at 174:12-175:1; Aa307 at 177:17-178:4; Aa at 178:9-19). The simple fact remains that appellant knew the café was closed, he was not actively providing any services, nor could he due to the ongoing construction taking place in the café, he was never given a firm date from bp as to when to reopen the café, and he understood that he was not due any subsidy payments during the COVID-19 related facility closure.

Appellant cannot be permitted to use "business decisions," as both sword and shield. Appellant was well aware that he had been instructed to cease performance under the Contract due to the ongoing and ever-changing COVID-19 pandemic and governmental response thereto. It was his business decision to "stay ready" in the manner he unilaterally deemed fit, despite knowing that he was not actively servicing the café, expected to service the

café with any kind of immediacy, nor being able to provide service in the café due to the ongoing renovations. bp must not be penalized for this personal choice.

Appellant points to no case law to support his argument that the force majeure clause did not automatically terminate the contract and that either the force majeure clause needed to be formally invoked or the Contract formally cancelled. The force majeure clause at issue is clearly written and nowhere does the Contract require either party to invoke the force majeure clause for it to take effect. (Aa15).

Illinois courts apply basic tenets of contract interpretation, and primarily "give effect to the intention of the parties," by "look[ing] to the language of the contract itself to determine the parties' intent. Thompson v. Gordon, 241 Ill. 2d 428, 441 (2011). When contract terms are "clear and unambiguous, they must be given their plain, ordinary and popular meaning." Id. Likewise in New Jersey, it is readily understood that force majeure clauses are offered no special treatment under but are construed just as any other contractual provisions are – by considering the contract's purpose and terms and the surrounding circumstances. Facto, *supra* 390 N.J. Super. at 232. (internal citations and quotations omitted). While it may be true that ambiguous contracts are construed against the party preparing it, this Court has firmly

held that "the polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991). As such, this Court requires contract language to "be interpreted in accord with justice and common sense," by considering the "relations of the parties, the attendant circumstances, and the objects they were trying to attain." Id. (internal citations and quotations omitted). Courts must construe contracts "in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose." Id. Essentially, this Court has made abundantly clear that "even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties, should be adopted, so that neither will have an unfair or unreasonable advantage over the other." Id. (internal citations and quotations omitted).

It is also well settled in New Jersey that when a contract is clear and unambiguous, courts must enforce the contract as written. Id. This Court has firmly stated that courts have "no right to rewrite the contract merely because one might conclude that it might have been functionally desirable to draft it differently." Id. (internal citations and quotations omitted). Courts are also prohibited from creating a "better contract for the parties than they themselves

have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other." Id.

Appellant begs this Court to write a better contract for him than the one in which he entered. Specifically, he encourages this Court to rewrite the force majeure term to include a requirement that the parties formally invoke same for it to take effect and argues that "there must be some affirmative steps to terminate the contract," without providing any support for such a requirement factually or legally. This Court is not permitted to craft a better contract for appellant than the one he entered into, and the nonexistent requirement for the force majeure clause to be formally invoked that appellant argues for cannot not now be forced upon bp to its detriment.

In arguing that the force majeure clause is inapplicable, appellant repeatedly confuses excusal of performance under the Contract as governed by the force majeure clause at Article 7.10, with wholesale cancellation of the Contract governed by the termination clause at Article 7.1. bp has never taken the position that it formally cancelled the Contract with appellant nor that it was required to cancel the Contract with appellant. Indeed, appellant admits, and the record is replete with evidence, that appellant was advised to cease services in the café and bp remained in frequent communication with him as it navigated the ever-changing COVID-19 pandemic and government restrictions

related thereto as it attempted to enact a safe and legal return to work policy for its employees. (Aa199 at 199:1-22, 202:8-204:13, 212:10-16, 215:13-216:18; Aa489-510; Aa511 at 23:23-24:16). It is the unfortunate situation that such a safe and legal return to work policy was not possible prior to the expiry of the Contract due to the ongoing COVID-19 pandemic, which outlasted the Contract's term and excused bp's performance thereunder, pursuant to the force majeure clause until the Contract's stated end. This Court must uphold the Contract, and its force majeure clause, as written, leaving the lower court's ruling undisturbed.

POINT 5

THE PARTIES CONTINUED TO PERFORM UNDER THE CONTRACT AS THEY HAD SINCE 2011 AND ANY ARGUMENT THAT THE CONTRACT WAS NOT FINALIZED UNTIL AFTER COVID-19 MATERIALIZED IS A RED HERRING.

Despite not having finalized the terms of Amendment #3 to the underlying Professional Services Agreement, which had been in place since 2011, by appellant's own admission, appellant provided food services prior to March 13, 2020, in accordance with "whatever [appellant was] doing since 2011," as was common practice between the appellant and bp. (Aa167 at 12-39:2). The force majeure clause is part of the underlying Professional Services

Agreement signed by the parties in 2011, not part of Amendment #3, signed by the parties in 2020. (Aa8-16). All that Amendment #3 altered was the payment term, contract term, and weekly subsidy amount. (Aa18). It did not alter the underlying Contract terms, including the force majeure clause, which had been in effect as part of the underlying agreement since 2011, and the parties had been continually operating under the terms of the Contract since its effective date of January 1, 2020. Id. Plaintiff's argument that the Contract was finalized and executed after bp had knowledge of the impending COVID-19 pandemic should be afforded no weight.

Appellant argues that Facto's "proposition that the doctrine of force majeure can excuse a contracting party's performance when an unforeseen event makes that party's performance impossible or impracticable," to support its contention that "because [bp] had knowledge of the impending covid [sic] crisis prior to finalizing the contract with [appellant…] the covid [sic] pandemic does not constitute an unforeseen event nor event beyond the control of the Defendant," such that the force majeure clause is inapplicable. (Appellant's brief at p. 39-40, emphasis in original). A closer examination, however, of cases involving COVID-19 shows that Courts across the country are taking a different approach than the one argued for by appellant.

For example, in JN, *supra*, the court did not afford any weight to the argument that the decision to postpone the art auction at issue two days *prior* to the New York governor's order prohibiting gatherings of 50 or more people was discretionary. JN, 29 F.4th 118 at 125. To the contrary, the JN court rightfully concluded that "the decision to postpone was dictated by the pandemic and executive orders issued in response to the pandemic, and thus fell within the force majeure clause." Id.

Importantly, the Nelkin Court recognized that when invoking the force majeure clause, the analysis is "whether the Plaintiff[] had sufficient grounds to exercise the force majeure provision in May of 2020 based upon the circumstances present *at that time*, not how those circumstance[s] may have changed by October 10, 2020. Nelkin, *supra*, 152 N.Y.S.3d at 222. (emphasis in original). Although the Court recognizes that the Plaintiff sought to exercise the force majeure provision almost five months before the date of performance, there was no indication that the prohibitions would be lifted by October 10, 2020. Further, from March 7 through May 28 of 2020, the prohibitions on non-essential gatherings became stricter and were repeatedly extended, strongly suggesting that the restrictions would remain in effect into the foreseeable future." Id. The Nelkin Court found that "the government regulations present in May of 2020 were sufficient for the Plaintiffs to exercise

the force majeure provision of the Contract on the basis that the Defendant would not be able to perform on October 10, 2020." Id. at 223. The Court continued, recognizing that the various executive orders issued during COVID-19:

> made it very difficult to predict what prohibitions would be in effect in the foreseeable future. As such, determining whether there was a sufficient basis for the Plaintiffs to exercise the force majeure provision must focus on the circumstances present *at the time* they chose to cancel the contract and whether those circumstances were sufficient to show that the Defendant would not be able to perform on the Contract. To determine otherwise would place an inequitable burden upon contracting parties, whereby they could never exercise force majeure provisions, regardless of the present circumstances, without being potentially contractually bound later.

Id. (emphasis in original).

Indeed, Facto, the case relied upon by appellant, is clear that absolute foreseeability, or lack thereof, of a force majeure event is not a prerequisite for relying on a force majeure clause to excuse performance pursuant to a contract. Facto, 390 N.J. Super. at 233. The Facto Court explicitly stated that "the fact that a power failure [i.e.: a force majeure event] is not absolutely unforeseeable during the hot summer months does not preclude relief from the obligation to perform. Id.

This Court must afford no weight to appellant's baseless argument that because COVID-19 was in the news before the terms of Amendment #3 to the Contract (which the parties had been performing under continually since 2011)

were finalized precludes reliance on the force majeure clause. (Aa167 at 37:12-16). COVID-19 was an ever-evolving period of uncertainty and unpredictability, and as the facility closure was clearly dictated by the pandemic and executive orders issued in response thereto, JN and Nelkin provide guidance that it is the circumstances that existed *at the time* that matter. Any determination to the contrary is inequitable. Facto stands for the proposition that absolute foreseeability is not required for a force majeure clause to take effect. Accordingly, bp is within its rights to rely on the force majeure clause to excuse its performance under the Contract here.

POINT 6

EVEN IF BP'S PERFORMANCE WAS NOT EXCUSED UNDER THE CONTRACT, THE SUBSIDY WAS NOT OWED TO APPELLANT BECAUSE HE MADE NO ACTUAL WEEKLY SALES IN THE CAFÉ FROM "THE DAY BEFORE THE SHUTDOWN" THROUGH THE EXPIRATION OF THE CONTRACT.

By appellant's own multiple admissions, he made no weekly sales in the café from "the day before the shutdown." (Aa171 at 41:3-10; Aa179 at 49:9-15). The Contract is clear that the subsidy does not trigger unless there are "actual weekly sales" made in the café:

> Subject to the yearly subsidy cap below, [BP] shall pay [appellant] a weekly subsidy as set forth below based on actual weekly sales in the

> café (which excludes catering) to support LJ's cost of doing business at the Wayne facility. On weekly sales of up to $1,125 the subsidy guarantee is $1,632.72."

(Aa17) (emphasis added).

In both New Jersey and Illinois, when the terms of a contract are clear and unambiguous, the Court must enforce it as written. In Illinois, if the language in the contract is clear and unambiguous, the judge must determine the intention of the parties "'solely from the plain language of the contract' and may not consider extrinsic evidence outside the 'four corners' of the document itself." Owens v. McDermott, Will & Emery, 344, 736 N.E.2d 145, 150 (2000). Courts must give clear and unambiguous contract terms their "plain and ordinary meaning, and the contract should be enforced as written." Richard W. McCarthy Tr. Dated Sept. 2, 2004 v. Illinois Cas. Co., 946 N.E.2d 895, 903 (2011). Furthermore, contracts are "not rendered ambiguous merely because the parties disagree on its meaning." Rich v. Principal Life Ins. Co., 875 N.E.2d 1082, 1090 (2007). Rather, contracts are ambiguous "only if it is reasonably or fairly susceptible of different constructions." Whiting Stoker Co. v. Chicago Stoker Corp., 171 F.2d 248, 250–51 (7th Cir. 1948). They are "not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends." Id.

In New Jersey, this Court has been explicit in stating "where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales & Serv., *supra*, 249 N.J. Super. at 493. (internal citations omitted). Furthermore, "the court has no right to rewrite the contract merely because one might conclude that it might have well been functionally desirable to draft it differently [or] remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other." Id. (internal quotations and citations omitted). The role of the court is simply to "enforce the contracts which the parties themselves have made." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960).

The plain text of the Contract is clear – for the subsidy to be due and owing, there must have been an actual weekly sale. In the absence of any sales no subsidy is due. Appellant admitted that the last time he made an actual weekly sale in the café was the day before the shutdown. (Aa171 at 41:3-10; Aa179 at 49:9-15). Appellant's self-serving testimony, an overt attempt to muddy the record and create issues of material fact which simply do not exist, must not be afforded any weight, here, especially as appellant's own conduct belies his arguments that the subsidy was due.

POINT 7

BP DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Appellant's argument that its cause of action for the breach of the implied covenant of good faith and fair dealing should survive summary judgment, for which there is no supporting case law, is contrary to the plain text of the Contract's disclaimer clause and is yet another red herring seeking to distract this Court from the actual issues at hand. The disclaimer clause states in clear, unequivocal all-capital terms:

> EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, NEITHER PARTY PROVIDES ANY WARRANTIES TO THE OTHER, EITHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(Aa15 at §6.9). There are no warranties expressly stated in the Contract or Amendment #3. (Aa8-18). The Court should give absolutely no weight to appellant's inapplicable argument that his claim for breach of the implied covenant of good faith and fair dealing survives summary judgment because he contracted away any such implied covenants and warranties.

In Illinois, when a contract "vests one of the parties with broad discretion in performing a term of the contract," such discretion must "be exercised reasonably and with proper motive, not arbitrarily, capriciously, or

in a manner inconsistent with the reasonable expectations of the parties," for there to be no breach of the covenant of good faith and fair dealing. Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc., 352 Ill. App.3d 160, 165 (2004) (internal citations and quotations omitted). Therefore, to successfully "plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion" in performance of the contract Id. (internal citations and quotations omitted); see also N. Tr. Co. v. VIII S. Michigan Assocs., 276 Ill. App. 3d 355, (1995). When there is no contractual discretion, there is no covenant of good faith and fair dealing. Mid-W. Energy Consultants, Inc., 352 Ill. App. 3d at 165 (internal citations omitted). Illinois courts are also emphatic that "parties are entitled to enforce the terms of their negotiated contracts to the letter without being mulcted for lack of good faith." Id. (internal citations omitted). Illinois courts also routinely find that "a covenant of good faith and fair dealing is implied into every contract, absent express disavowal." Foster Enterprises, Inc. v. Germania Fed. Sav. & Loan Ass'n, 97 Ill. App. 3d 22, 28 (1981) (emphasis added).

New Jersey law similarly permits parties to waive covenants and warranties when, such as here, the waiver calls attention to itself and is written in plain language. N.J. Stat. Ann. § 12A:2-316. See also Jutta's Inc. v. Fireco Equip. Co., 150 N.J. Super. 301 (App. Div. 1977) (finding that warranties were

not waived when there was a total failure to comply with conditions for such waiver as provided in N.J. Stat. Ann. §12:2-316).

Even if this Court finds that there is an implied covenant of good faith and fair dealing in this Contract, despite the clear and unambiguous waiver of same, bp did not breach it. To succeed on a claim for the breach of the implied covenant of good faith and fair dealing, in New Jersey, appellant needs to establish that bp did something that had "the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997).

The record is clear, and bp has unequivocally established that it advised appellant that its services in the café were no longer required after approximately March 20, 2020, appellant was never given a firm date of return or reopening of the café, the appellant never made any actual weekly sales in the café after the day prior to COVID-19 related shut downs, such that the subsidy was triggered, and the contract term expired without being renewed before the conclusion of the COVID-19 pandemic. (Aa169 at 39:15-18; Aa170 at 40:8-41:2; Aa171 at 41:10). Further, specific to the application of Illinois law, appellant did not plead contractual discretion, nor has any such argument been made, and it is axiomatic that either or both parties could rely on the *force majeure* clause to excuse performance in either jurisdiction. Under New

Jersey law and Illinois law alike, the parties waived the implied covenant of good faith and fair dealing, and the Contract should be enforced as it is clearly and unequivocally written. However, even if there was not an effective waiver of the implied covenant of good faith and fair dealing, in both jurisdictions, appellant has not successfully established a breach of same and this argument should be given no weight by this Court.

CONCLUSION

For the foregoing reasons, the lower court's ruling granting summary judgment in favor of bp must stand.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000491-24

TJ ROCCO ENTERPRISES, LLC, Plaintiff/Appellant, v. BP LUBRICANTS USA, INC., JOHN DOES 1-10, RICHARD ROE 1-10 (names being fictitious). Defendant/Respondent.	:	On Appeal From the Decision of the Superior Court of New Jersey, Law Division Passaic County Dkt. No.: PAS-L-3515-21 Honorable Vicki A. Citrino, J.S.C. sitting below Submitted: March 26, 2025

REPLY BRIEF ON BEHALF OF APPELLANT, TJ ROCCO ENTERPRISES, LLC

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TABLES OF JUDGMENTS, ORDERS AND RULINGS

LEGAL ARGUMENT

POINT I

THE FORCE MAJEURE CLAUSE IS INAPPLIACABLE AND DOES NOT EXCUSE DEFENDANT'S BREACH. (Aa614).

In Point 1 of its opposition, BP wrongly asserts that there are no material facts in dispute. The record is replete with significant disputes of material facts which are raised in Plaintiff's initial brief and herein and acknowledged by BP in its opposition.

Moreover, BP's opposition solely focuses on what triggers the FM clause, as opposed to whether its nonperformance was caused by those triggering events. Thus, BP ignores and fails to address what the law requires in order to invoke a FM clause.

Specifically, the majority of BP's opposition is focused on argument that EO 107 and/or the Covid Pandemic constitute events covered by the force majeure clause. However, the fact that BP never invoked the force majeure clause during the contract term nor cancelled the contract during the contract term precludes its applicability. BP misunderstands that if BP never told TJ Rocco at any time during the contract term that the contract was cancelled, then the contract remained in full effect. Thus, after the executive orders that BP claims excused its performance were lifted, BP has no defense to its continued breach of the contract.

Moreover, the facts unequivocally prove that BP never cancelled or terminated the contract. BP's opposition plainly concedes and agrees that it kept TJ Rocco in a "holding pattern." (Db, pg. 18). BP claims it did not need to cancel or

terminate the contract. Yet it now claims the contract was always null and void even though BP continued communications with TJ Rocco. BP's argument is nonsensical.

Though BP's Point 4 asserts that the contract was "automatically" cancelled, BP cites no case law in support. No case is presented by BP in which a FM clause was found to excuse a party's breach of contract or nonperformance without the party actually invoking the clause and/or cancelling the contract. In claiming the protections of the force majeure clause even though it failed to do so and acted as if the contract was in effect, BP asks this Court to find facts that do not exist in the record. The facts only show that BP never communicated the contractual relationship was over. BP's closure of the cafeteria, and TJ Rocco's awareness that the cafeteria was closed, does not cancel the entirety of the contract. Moreover, the continued communications between BP and TJ Rocco negate any claim that the contractual relationship ceased. Thus, BP cannot now after the fact, after BP's continued communications were relied on by TJ Rocco, claim the contract was automatically cancelled since March 2020 (the same month it was executed).

A. EO 107 Nor the Pandemic Caused Defendant's Breach. (Aa614).

Executive Order 107 did not mandate the closure of BP's offices. BP's opposition concedes this point. BP's opposition now acknowledges that in response to EO 107, it had to "pare down its in-person operations," not that it was required to fully close. (Db, pg. 13-14). Thus, BP acknowledges and concedes, as argued by

TJ Rocco, that there was no government action that *required* BP's nonperformance nor prohibited BP's performance.

BP has failed to offer any case law that supports the entry of summary judgment. In its Point 2(I)(A), BP cites Morgan St. Partners, LLC v. Chi. Climbing Gym Co., LLC, 2022 U.S. Dist. LEXIS 35633 (N.D. Ill. March 1, 2022) (Aa469), in support of its claim for summary judgment. However, the Morgan Court actually declined to enter summary judgment in that case finding triable issues of fact defeated summary judgment. In fact, the Court only found Defendant's obligation to pay rent may have "suspended" "for some period of time" but these were issues of fact to be determined by a jury. Id. at 13.

Similarly, BP's claim in Point 2(I)(C) that the Nevada case, Big City Dynasty Corp supports its opposition is mistaken. Big City Dynasty actually held that whether the Governor's shutdown orders triggered the clause was a question of fact for the jury and therefore, not appropriate for summary judgment. Big City Dynasty Corp. v. FP Holdings, L.P., 2021 U.S. Dist. LEXIS 92287 (D. Nev. May 14, 2021). These cases directly contradict BP's claim that summary judgment is appropriate.

In its Point 2(I)(B), BP cites Rukaj v. Puccio, 2024 N.J. Super. Unpub. LEXIS 1504 (App. Div. 2024) and argues that because the Court found an executive order constitutes a triggering event for a FM clause, this court should too. However, it

was the undisputed fact that the executive order rendered the performance impossible and illegal that led to the Court's grant of summary judgment.

In Rukaj, Plaintiff entered into an event contract with The Rockleigh to have her wedding and reception there on June 20, 2020 for 225 guests and paid a deposit. Id. at 2. The parties had several communications following EO 107 (March) which prohibited gatherings. On June 9, 2020, EO 152 was issued which eased restrictions to 25% of room capacity, but still to no greater than 50 people. That same date, counsel for Plaintiff sent a letter to Defendant requesting a full refund since the law prohibited The Rockleigh from holding Plaintiff's wedding of 225 guests. Id. at 7. Following Defendant's refusal, Plaintiff filed suit. The trial court found both parties were fully aware of restrictions that made the event **impossible** based on review of many communications back and forth between the parties; and performance was in fact rendered **impossible** by the executive orders. On appeal, the Court upheld the trial court's determination to award the return of Plaintiff's deposit. Id. at 30.

The facts of Rukaj bear absolutely no resemblance to the instant case. Rukaj involved an event contract for a one-day wedding event; whereas, this case involves a two-year services contract to which the parties had long-term mutual contractual obligations. Further, in Rukaj, the Plaintiff affirmatively cancelled the contract. By contrast, here, it is indisputable that BP never cancelled or terminated the contract, nor invoked the force majeure clause, nor even expressed that it believed it was

absolved from any obligation under the contract, during the contract term, because of the pandemic or executive order. Rather, BP's actions induced TJ Rocco to believe that the contract remained in tact and that TJ Rocco would be serving the cafeteria upon reopening.

BP argues that once EO 107 was issued, like Rukaj it was legally required to pare down its in-person operations. However, BP's argument and reliance on Rukaj is misplaced. In Rukaj, performance was legally impossible by the executive orders. Unlike Rukaj, EO 107 did **not** *require* BP to close its offices nor the cafeteria. Rather, businesses were encouraged to offer telework where practical. BP's acknowledgment of this point is evident from in its characterization of having to "pare down" as opposed to shut down its offices. (Db, pg. 13-14). Further, nothing in EO 107 required BP to close its cafeteria. In fact, EO 107 encouraged food services to continue with grab and go options/delivery/takeout options that TJ Rocco could have provided. Importantly, as set forth below, EO 107 was temporary and does not excuse BP's lack of performance after EO 107 was lifted, for the duration of the contract term. For these reasons, Rukaj is not applicable nor instructive and fails to support Plaintiff's argument.

In its Point 2(I)(C), two cases are cited by BP for the proposition that other jurisdictions have found executive orders constitute acts of government in force majeure clauses and therefore the same should be found here. The following cases

are factually distinguishable, from other states and are therefore not binding on nor instructive to this court.

In J.N. Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118 (2d Cir. 2022) and Nelkin v. Wedding Barn at Lakota's Farm, LLC, 152 N.Y.S.3d 216 (N.Y. Civ. Ct. 2020), it was held that holding the art auction (J.N.) or the wedding (Nelkin) would have been illegal per the executive orders in place limiting gatherings. By contrast, in this case, it would not have been illegal for BP to allow a grab and go food service in the cafeteria. Further, the executive order had no impact on whether BP owed TJ Rocco at least some portion of the guaranteed weekly subsidy.

Thus, BP's reliance on these cases is misplaced. The argument is not that epidemic and government acts are not included in the language of the FM clause – the argument is that the government acts or epidemic did not prohibit BP from its performance nor render it impossible or illegal. See Morgan St. (a force majeure clause applies **only if** the government order or action clearly directs or prohibits an act which **proximately causes** non-performance or breach of contract). Thus, BP has failed to demonstrate it is entitled to summary judgment.

B. Even if the Force Majeure Clause Applied During the Pendency of Executive Order 107, Defendant's Breach for the Duration of the Contract Term is Not Excused. (Aa614).

Alternatively, even if the executive orders were viewed by this Court as a justification for BP's closure of the building and cafeteria and nonpayment of the

subsidy *during* the pendency of those executive orders, the executive orders were limited in time. To put another way, the executive orders were not in effect for the majority of the contract term. Thus, there is no basis to excuse BP's performance for the duration of the contract term. Not long after EO 107, executive orders followed calling for reopening of facilities, business, restaurants, retail, etc. Thus, no government order prohibited BP from re-opening for the majority of the contract term. In fact, the record unequivocally shows that BP did reopen its offices and cafeteria *during the time* the contract with TJ Rocco remained in effect. Despite ample opportunity to do so, BP did not terminate the contract. Thus, at no fault but its own, BP's breach cannot be deemed excused.

As stated in Morgan, supra (relied on by BP), a FM clause may be found to apply to *some* portion of time; however, BP is not absolved of all liability under the contract with Plaintiff, in the absence of terminating the contract, and these are questions of fact. Therefore, at a minimum, a reasonable jury may find that TJ Rocco is entitled to $112,657.68 which represents the $1,632.72 subsidy from September 2020 to December 2021. Thus, BP's continued communications with TJ Rocco *after* EO 107 was no longer in effect coupled with the fact that BP took no action to cancel or terminate the contract unequivocally defeats summary judgment.

POINT II
BP'S DISPUTE TO THE FACT THAT THE CONTRACT GUARANTEED THE SUBSIDY PAYMENT EVEN IN THE

ABSENCE OF ACTUAL SALES FURTHER DEFEATS SUMMARY JUDGMENT. (Aa614).

The parties' dispute as to the meaning and intent of the minimum guaranteed subsidy is sufficient to defeat summary judgment.

Courts enforce contracts looking at the intent of the parties, 'the contractual terms, surrounding circumstances, and the purpose of the contract.'" Fed Cetera, LLC v. Nat'l Credit Servs., 938 F.3d 466, 469-470 (3d Cir. 2019) (citations omitted). "Even in the interpretation of an *unambiguous* contract, we may consider all of the relevant evidence that will assist in determining its intent and meaning." Id. at 470 (citations omitted). Of course, if the contract is "ambiguous, the 'fact-finder must attempt to discover what the contracting parties…intended [the disputed provisions] to mean,'" and accordingly, judgment on the pleadings would not be appropriate. Ibid. (citations omitted).

In its opposition, BP contends that TJ Rocco is asking this Court to write a better contract than it bargained for and disputes the intended meaning of the contract terms. However, the contract specifically provides for a minimum guaranteed subsidy payment. (Aa17). While the agreement clearly reflects that the subsidy increases as actual sales increase, there can be no question that the bottom tier applies as a guarantee to pay operational costs whether sales are zero or up to $1,125.

Moreover, BP's contract interpretation is illogical. It is not rational that TJ Rocco would be entitled to a guaranteed minimum subsidy if it sold just one tootsie

roll, but not in this case. Yet, that is BP's interpretation. According to BP's legal argument, as long as there is a sale greater than $0.00, even if just $0.01, TJ Rocco could be paid. However, the testimony of the BP representative who negotiated the contract amendment wholly contradicts the interpretation offered in defense of this lawsuit. Mr. Kamienski agreed in his testimony that the subsidy was "to support LJ's cost of doing business, operating costs" which included maintaining an off-site facility that was required by TJ Rocco to service LJ's café. (Aa66, T36:18-39:23). Mr. Kamienski further confirmed that the contract compensated TJ Rocco from two avenues, one through subsidy and the other from what he collected at the register, thereby demonstrating that actual sales were separate and apart from the guaranteed subsidy and that as sales increased, costs increased and therefore, the subsidy increased.

Moreover, in addition to the actual testimony of BP representatives, that is the reasonable and logical interpretation of the contract terms and comports with the prior conduct of the parties. Prior history of payment during holidays and long periods of café closure, acknowledged by BP employees, confirms and proves that BP paid TJ Rocco the minimum subsidy where no actual sales were made as it was a guaranteed minimum subsidy to offset operating costs.

Thus, despite BP's dispute as to the meaning of the contract terms, BP offers nothing in the record to dispute its own representative's acknowledgment of the

parties' intent and the meaning and purpose of the contract terms. For these reasons, BP is not entitled to summary judgement.

POINT III
DEFENDANT CANNOT SHOW THAT THE PANDEMIC WAS UNFORESEEABLE AS REQUIRED TO INVOKE A FORCE MAJEURE CLAUSE. (Aa614).

BP incorrectly characterizes Plaintiff's argument concerning foreseeability as a "red herring." It is well-settled that the viability of a force majeure defense requires the claimed triggering event to have been unforeseeable at the time the contract was executed. See Facto v. Pantagis, 390 N.J. Super. 227, 232-34 (App. Div. 2007).

BP does not specifically respond to the facts raised by TJ Rocco. However, the record shows that not only was it foreseeable, it was known by BP that there was a pandemic and that BP may have its employees report remotely in the immediate future *before* Amendment 3 was executed extending the contract for a period of two years. In an email on March 11, 2020, Steve Campbell wrote to Mr. Scirocco that the building will be closed on Friday, March 13, 2020 because "we are using this as a test if everyone had to work from home. Please make whatever accommodations you need to make to be closed Friday. Also, please pay the staff for the day." (Aa65). This email proves that BP was fully aware of the possibility of upcoming disruptions to both attendance and the cafeteria. Notwithstanding this knowledge, on March 13, 2020, BP executed a contract with Mr. Scirocco, Amendment 3, guaranteeing

minimum subsidy payments for a period of two years and contractually obligating TJ Rocco to remain able to perform its obligations under the contract. (Aa17).

BP's opposition ignores these facts which negate the required element that the triggering event be unforeseeable. Rather, BP cites two factually distinguishable cases as noted above for propositions that are not responsive to this argument. However, both cases support Plaintiff's position that the FM clause is not applicable in this case because BP never invoked the FM clause nor terminated the contract.

In both Nelkin and J.N., a party to the contract clearly *communicated* that it was cancelling the contract due to the executive orders in place. Further, in both cases, **at the time the contract was cancelled**, performance of the contract would have been illegal. Here, BP never cancelled the contract. Rather, as stated by BP in its opposition, TJ Rocco was kept in a "holding pattern." Therefore, the FM clause does not excuse breach.

POINT IV
PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SURVIVES SUMMARY JUDGMENT. (Aa614).

Respondent's arguments in Point VII of its opposition lack merit. Opposing Plaintiff's cause of action for a breach of implied covenant of good faith and fair dealing, BP asserts that Plaintiff waived the implied covenant. However, BP refers to a contractual provision in the contract that refers to warranties derived from the Uniform Commercial Code ("UCC") which governs the sale of goods and is entirely

inapplicable to this case. Likewise, BP claims that N.J.S.A. 12A:2-316 permits parties to waive warranties when conspicuously written; however, that statute governs contracts for the sale of goods under the UCC and is also not applicable to this case. BP cites only one New Jersey case in support of its waiver claim, Jutta's Inc., which again relates only to the applicability of UCC provision, N.J.S.A. 12A:2-316, and therefore, has no applicability to this matter. BP does not offer any case law factually similar to the instant case nor relating to implied covenants of good faith and fair dealing, to support its argument. Thus, BP's argument that Plaintiff has waived its claim or cannot maintain a claim of breach of implied warranty of good faith and fair dealing is without merit.

It is well-settled, and acknowledged by BP in its opposition, that the covenant of good faith and fair dealing is implied in every contract and requires that both parties act in good faith and deal fairly with the other in the performance of the contract. Brunswick Hills Racquet Club Inc. v. Route 18 Shopping Ctr. Assoc., 182 N.J. 210, 224 (2005); Wilson v. Amerada Hess, 168 N.J. 236, 241 (2001). Thus, parties must refrain from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the benefits of the contract." Palisades Prop. Inc. v. Brunetti, 44 N.J. 117, 130 (1965).

To succeed on a claim for breach of the implied covenant of good faith and fair dealing, a party "must provide evidence sufficient to support a conclusion that

the party alleged to have acted in bad faith engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Brunswick Hills, 182 N.J. at 225. Given the disputes between the parties as to the intended meaning of the contract terms, the cause of action for breach of the covenant of good faith and fair dealing must remain. TJ Rocco has proffered sufficient disputed material facts of BP's conduct to defeat summary judgment. Specifically injurious to TJ Rocco's rights to receive the fruits of this contract was BP's closure of its offices and cafeteria; BP's actions and communications which induced TJ Rocco to remain ready to service BP and incur attendant costs per its contractual obligation; BP's renovations of the cafeteria during the contract term; reopening the cafeteria with grab and go options during the contract term, not serviced by TJ Rocco; and never communicating that the contract was cancelled or terminated nor that BP never intended to abide by its contractual obligations during the contract term. These facts are sufficient to support Plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing.

Further, BP's argument that Plaintiff's cannot maintain a cause of action for breach of implied covenant of good faith and fair dealing in the absence of pleading contractual discretion fails. This argument was not made below before the trial court. It is well-settled that an argument is barred from consideration for not having been made below. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) (our

appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest).

Nonetheless, Illinois applies the covenant of good faith and fair dealing in multiple contexts, and historically inconsistently among its districts. See generally Honorable Howard L. Fink, The Splintering of the Implied Covenant of Good Faith and Fair Dealing in Illinois, 30 Loy.U.Chi.L.J.247 (1999). The covenant guides the construction of explicit terms in an agreement when a claim is based in contract. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443 (7th Cir. 1992) (applying Illinois law). Illinois courts look to the implied covenant of good faith and fair dealing to resolve conflicts between the parties' interpretations of the contract terms. See Northern Trust Co. v. VIII South Mich. Assocs., 657 N.E.2d 1095, 1104 (I11. App. Ct. 1st Dist. 1995) (citing Resolution Trust Corp. v. Holtzman, 618 N.E.2d 418, 424 (Ill. App. 1st Dist. 1993)) (finding that the obligation of good faith and fair dealing is "essentially used to determine the intent of the parties where a contract is susceptible to two conflicting constructions."). Additionally, the covenant may give rise to a claim when the contractual obligations of one party are contingent upon a condition peculiarly within the power of that party. Id. at 1444. See also Peterson v. H R Block Tax Serv. Inc., 971 F. Supp. 1204 (N.D. Ill. 1997)

The foregoing demonstrates that contrary to BP's assertion, implied covenants and good faith and fair dealing are applied in multiple contexts in Illinois. Further, even if contractual discretion is applicable, the facts of this record demonstrate that the contract provided that BP had the discretion to terminate the contract. Rather than terminate the contract, rather than invoke the force majeure clause, BP acted as if the contract remained in full force and effect, despite now claiming the contract was null and void per the FM clause. TJ Rocco relied on this conduct. Thus, BP induced Plaintiff to incur costs necessary to perform its contractual obligations by continuing discussions of reopening, while also refusing to pay Plaintiff a subsidy guaranteed by the contract. BP's failure to exercise its discretionary power to terminate the contract while also inducing TJ Rocco to comply with its own obligations under the contract shows bad faith and defeats summary judgment.

CONCLUSION

For the foregoing reasons, and those set forth by Plaintiff in its initial brief, Plaintiff/Appellant respectfully requests this Court to reverse the Order Granting Summary Judgment.

Respectfully submitted,
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