

IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

5501 NE 2ND AVENUE, LLC,
a Florida limited liability company,

Plaintiff,

v.

CASE NO.: 2020-018438-CC-05

CIVIL DIVISION

DISTRICT LIVE AGENCY, LLC,
D/B/A CHURCHILL'S PUB,
a Florida limited liability company,
and all others in possession,

Defendant,

**PLAINTIFF'S, 5501 NE 2ND AVENUE, LLC REPLY TO
DEFENDANT'S, DISTRICT LIVE AGENCY, LLC AFFIRMATIVE DEFENSES**

Plaintiff, 5501 NE 2ND AVENUE, LLC, ("Counter-Defendant" or "Landlord") by and through its undersigned counsel, hereby files its Reply to Defendant's, DISTRICT LIVE AGENCY, LLC, D/B/A CHURCHILL'S PUB, ("Counter-Plaintiff" or "Tenant"), Affirmative Defenses and states:

**REPLY AND DENIAL OF DISTRICT LIVE AGENCY, LLC'S
AFFIRMATIVE DEFENSES**

The Landlord denies the Tenant's affirmative defenses of Unclean Hands, Defective Three-Day Notice, Unlawful Self-Help, and Promissory Estoppel and demands strict proof thereof. In response to any of Tenant's allegations that their performance under the Lease was made impossible or frustrated by any governmental order issued in light of the COVID-19 pandemic, the Landlord further responds that: 1) the parties specifically and expressly negotiated and agreed upon terms within the Lease that would control in the event of governmental oversight or force majeure events impacting Tenant's business; and as such, the Tenant's losses were foreseen and specifically bargained for, with the risks of such occurrence divided by the

parties in the agreement itself; see “Lease Excerpt Section 46.0,” attached hereto as **Exhibit “A;”** 2) that the risk of business interruption was foreseeable; that the risk was placed solely on the Tenant’s as they were required to purchase business interruption insurance protection according to the express terms of the Lease; see “Lease Excerpt Section 20.0,” attached hereto as **Exhibit “B;”** 3) that although the Tenant claims that its business suffered unrecoverable losses due to governmental orders suspending all on-premises food consumption, the Defendants are fully able to utilize food delivery services to promote their food delivery and yet failed to operate on a daily basis; and as such, the Defendants cannot now claim frustration of purpose on one hand while enjoying the benefits of the Lease on the other; and, 4) that although the COVID-19 pandemic may have made business for all more difficult it certainly does not excuse contractual obligations, especially in a commercial setting where the parties have negotiated in good-faith and at arms-length.

SECOND AFFIRMATIVE DEFENSE OF “DEFECTIVE THREE-DAY NOTICE”

The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Tenant is owed “large sums of money.” The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Landlord’s claims are retaliatory in nature. The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Three-Day Notice is “grossly deficient because it demands more than could ever conceivably be deemed ‘rent’ under the Lease.”

THIRD AFFIRMATIVE DEFENSE OF “UNCLEAN HANDS”

The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Plaintiff’s principal perpetrated a fraud against the Tenant, the government, or any other interested party.

FOURTH AFFIRMATIVE DEFENSE OF “UNLAWFUL SELF-HELP”

The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Plaintiff in any way effected: 1) the Tenant’s failure to obtain a liquor license for the leased space; 2) the Tenant’s access to its own email accounts; 3) the Tenant’s access to its own website; 4) the Tenant’s access to its point of sale systems; 5) the Tenant’s phone and internet service; and 6) the Tenant’s access to its QuickBooks reporting data. The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Plaintiff “hack[ed] into the Business’ social media accounts and post[ed] derogatory comments against Defendant.” Defs’ Answer and Affirmative Defenses ¶ 21.

SIXTH AFFIRMATIVE DEFENSE OF “PROMISSORY ESTOPPEL”

The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Plaintiff or Plaintiff’s principal induced the Tenant to rely on false representations, affirmative representations, or promises to its detriment. The Plaintiff denies any implication outside of the four corners of the Plaintiff’s original Complaint that the Plaintiff or its principal perpetrated a fraud against the government.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of the Plaintiff and grant any additional relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the Florida Courts E-Filing Portal and that the portal has automatically generated an e-mail containing a copy of the foregoing to counsel for the Counter-Plaintiff / Counter-Defendants, Omar K. Bradford, Esq., [obradford@gjb-law.com], on this 6th day of October 2020.

By: /s/ Hilary Zalman
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Exhibit "A"

44.0 Binding Effect. Submission of this instrument for examination does not constitute a reservation of or option for the Premises nor an offer to rent the same. The instrument becomes effective as a Lease only upon execution and delivery of both Landlord and Tenant.

45.0 OFAC Certification. Tenant certifies that: (i) it is not acting, directly or indirectly, for or on behalf of any person, group, entity, or nation named by any Executive Order or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person," or other banned or blocked person, entity, nation, or transaction pursuant to any law, order, rule, or regulation that is enforced or administered by the Office of Foreign Assets Control; and (ii) it is not engaged in this transaction, directly or indirectly on behalf of, or instigating or facilitating this transaction, directly or indirectly on behalf of, any such person, group, entity, or nation.

Tenant hereby agrees to defend, indemnify, and hold harmless Landlord from and against any and all claims, damages, losses, risks, liabilities, and expenses (including attorney's fees and costs) arising from or related to any breach of the foregoing certification.

46.0 Force Majeure. For the purposes hereof, an "Event of Force Majeure" shall be defined as the occurrence of any of the following (to the extent the same is unforeseeable): Act of God, war, terrorism, civil commotion, Casualty, extreme weather conditions, labor difficulties, general shortages of labor, materials or equipment, government regulations or other causes beyond the reasonable control of such party, its agents, employees, contractors or subcontractors (other than causes related to such party's financial condition). To qualify as an Event of Force Majeure, the delayed party must have: (i) provided notice to the other party hereto of such Event of Force Majeure within a reasonable time after the occurrence of same; (ii) thereafter periodically kept the other party hereto fully advised by notice of such delays; and (iii) used commercially reasonable efforts and all due diligence to effect the required performance. The provisions of this Section 47.0 shall only apply where expressly set forth in this Lease and shall in no event be applicable with respect to the payment of Base Rent or other sums due by Tenant hereunder, or delays caused by lack of suitable financing or changes in economic or market conditions.

47.0 Environmental Concerns. The Tenant represents and warrants that except to the extent of those materials and substances required and regulated in connection with its use of the Premises as allowed hereby: (a) it will not cause or permit the generation, storage, transportation, disposal, release or discharge of hazardous materials, hazardous waste, hazardous substances, solid waste or pollution upon, in, over or under the Premises and that it will not, to the extent practicable, cause or permit such materials or pollution to migrate to the Premises from neighboring property; (b) that the Tenant will not become involved in operations at the Premises or at other locations owned or operated by the Tenant which would lead to the imposition on the Tenant of liability under Florida Statutes, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et. seq.* ("RCRA"), the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et. seq.* ("CERCLA") or any other federal, state or local ordinances, laws or regulations regarding environmental matters or hazardous substances; (c) Tenant will promptly comply with the requirements of Florida Statutes, RCRA, CERCLA and all federal, state and local laws and regulations regarding environmental matters or hazardous substances as the same may each be amended from time to time (including all federal, state and local laws and regulations regarding underground storage tanks), and all such laws and regulations relating to asbestos and asbestos-containing materials, PCB's, radon gas, urea formaldehyde foam insulation, and will notify Landlord promptly in the event of any release or discharge or a threatened release or discharge of hazardous materials, hazardous wastes, hazardous substances, solid waste or pollution upon, in, over or under the Premises as those terms are defined in Florida Statutes and any federal, state or local ordinances, laws or regulations regarding environmental matters or hazardous substances, or the presence of asbestos or asbestos-containing materials, PCB's, radon gas or urea formaldehyde foam insulation at the Premises, or of the receipt by Tenant of any notice from any governmental agency or authority or from any other person or entity with respect to any alleged such release or presence promptly upon discovery of such release, or promptly upon receipt of such notice, and will promptly send Landlord copies of all results of any tests regarding same on the Premises.

(a) Tenant agrees to indemnify, defend and hold the Landlord harmless from and against any claims, losses, damages, liabilities (including, without limitation, all foreseeable and unforeseeable consequential damages), penalties, fines, charges, interest, judgments, including without limitation attorneys' and paralegals' fees and disbursements through all administrative, trial and appellate proceedings and any clean-up costs, incurred by the Landlord arising out of or in connection with any handling, storage, transportation or disposal of hazardous substances, or any spill, discharge, release, escape or cleanup of hazardous substances ("Hazardous Discharge") or failure to comply with any governmental law, rule or regulation, by the Tenant or any other user or operator of the Premises. For the purposes of this indemnity, any acts or omissions by Tenant or by its employees, agents, contractors or others acting for or on behalf of Tenant (whether or



EXHIBIT "B"

state, federal or other governmental authority. Tenant agrees to indemnify Landlord and save it harmless from and against any and all claims, losses, actions, damages, liabilities and expenses, including legal fees and expenses, clean-up costs suffered or incurred by Landlord, and any and all costs or expenses relating to the testing of or for any and all such hazardous materials, substances, asbestos, or waste of any nature, for or on account of or arising from or in connection with any breach of Tenant's warranties, representations or obligations under this section, or in connection with any condition created by Tenant as the result of any spill, discharge or release of any environmentally hazardous materials, substances or waste in, on or about the Premises, or in the vicinity thereof.

19.4 Mold. Except for Landlord's obligation to remove any and all mold existing in the Premises as of the Effective Date hereof, Landlord shall not be responsible or liable at any time to the Tenant, or to those claiming by, through or under Tenant, for any claim for loss of life, bodily or personal injury, personal property damage, damage to property or business, advertising injury, or for business interruption or relocation expense and/or any other claim arising out of and/or caused directly or indirectly by the existence or the actual, alleged or threatened occurrence, discharge, dispersal, seepage, transmission, migration, release, exposure to or escape of any mold, mildew, spores, fungus or materials containing them, at any time now or hereafter found within, upon and/or about the premises, the site or location or any tangible property and/or the common elements and/or limited common elements, and/or in any areas or space of the Property, Building(s) or Premises and/or from any person, organization located anywhere in the world. This paragraph applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage. "Mold", "spores" and/or "fungus" means any mold, spores and/or fungus of any type or nature whatsoever that can cause or threaten harm to any living organism (including human health or human welfare, or the health or welfare of any animal or plant) or can cause or threaten physical damage, deterioration, loss of use and/or loss of value or marketability, to any tangible property whatsoever. This includes, but is not limited to, any type(s) of mold, spores and/or fungus that are harmful or potentially harmful to health, welfare (such as Stachybotrys and others), or that are damaging or potentially damaging to tangible property (such as wet or dry rot, mildew and others) or that can otherwise cause or threaten to cause bodily injury, property damage, personal injury or advertising injury of any kind whatsoever. Tenant agrees that Tenant shall make routine visual inspections for mold growth or signs of water damage or wetness, and that these routine inspections are the most reliable method for identifying the presence of mold or mildew. Tenant agrees to use air-conditioning at all times and to use heating, if at all, in moderation and in a reasonable manner and to keep the Premises properly ventilated by periodically opening windows to allow the circulation of fresh air during dry weather only. Tenant agrees that the Premises shall be kept at a temperature between fifty and seventy-eight degrees Fahrenheit, at all times, including, without limitation, when the Premises are not open for business.

20.0 Insurance. The Tenant shall maintain at its expense throughout the terms of this Lease the following insurance coverages: (i) liability insurance for bodily injury and property damage to protect both Landlord and Tenant against damage, costs and attorneys' fees arising out of accidents of any kind occurring on or about the Premises and Building (including all Common Facilities) with combined single limit liability coverage of not less than \$2,000,000 and property damage coverage of not less than \$1,000,000; (ii) fire and extended casualty insurance with sufficient coverage to reimburse the loss of all of Tenant's improvements to the Premises, and all of Tenant's fixtures, equipment, personal property and inventory; (iii) plate glass insurance to protect both Landlord and Tenant covering the replacement value of all plate glass in or about the Premises; (iv) appropriate workmen's compensation and any and all other insurance required by law; (v) business interruption and rent insurance in an amount equal to not less than twelve (12) months Base Rent hereunder and (vi) beer and wine liability insurance in an amount not less than \$1,000,000 or full liquor liability insurance in an amount not less than \$2,000,000, as the case may be.

All insurance shall be written by a company or companies qualified to do business in Florida and reasonably acceptable to Landlord. A certificate of duplicate policies showing such insurance in force shall be delivered to Landlord prior to the Commencement Date, and such insurance and updated certificates or renewed policies shall be maintained with Landlord throughout the term of this Lease. No policy shall be canceled or subject to reduction in coverage or other change without at least thirty (30) days advance written notice to Landlord. All policies shall be written as primary policies not contributing with and not in excess of coverage Landlord may carry. To the extent permitted by its insurers, Tenant hereby waives any right of recovery against Landlord for any loss covered by Tenant's insurance or for which Tenant is required to maintain insurance hereunder. Tenant shall apply to its insurers to obtain such waiver and shall obtain any special endorsements if required by its insurer to evidence compliance with such waiver.

All Policies referred to above shall: (i) be taken out with insurers licensed to do business in Florida and reasonably acceptable to the Landlord; (ii) be in a form reasonably satisfactory to the Landlord; (iii) be non-contributing with, and shall apply only as primary and not as excess to any other insurance available to the Landlord or the Mortgagee; and (iv) contain an undertaking by the insurers to notify the Landlord by registered or certified mail not less than thirty (30) days

