

May 7, 2020

**Via Email and FedEx**

Jared DeMatteis, General Counsel  
WeWork  
115 W. 18th St.  
New York, NY 10011

**Re: WeWork Membership Fees**

Dear Mr. DeMatteis:

My firm represents numerous WeWork members located throughout the United States, including members located in New York, Los Angeles, and Washington, DC. These members have been prevented from using their WeWork office spaces, and otherwise enjoying the benefits of their agreements with WeWork because of the COVID-19 pandemic and government orders in response thereto. As you know, state and local authorities around the country have directed businesses to cease operations and have prohibited workers, including our clients, from using their workplaces. These government mandates are designed to slow the spread of a deadly disease which has already claimed the lives of tens of thousands of Americans, and which has infected many WeWork members. Our clients have complied with these public health mandates because they are the law, and also because WeWork's membership agreements so require. Indeed, our clients could not disregard these obligations even if they wanted to. In at least some cities where WeWork rents space to our clients, law enforcement officers have been directed to enter the relevant buildings and clear the premises of anyone disobeying the applicable stay-at-home orders.

As long as this pandemic prohibits our clients from using their WeWork office spaces, the purpose of their membership agreements is frustrated, thus excusing their obligation to pay membership fees. "Under New York law," which appears to govern WeWork's membership agreements, "the doctrine of commercial frustration, or frustration of purpose, discharges a party's duties to perform under a contract where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." *Sage Realty Corp. v. Jugobanka, D.D.*, No. 98-CIV-0323 RJW, 1997 WL 370786, at \*2 (S.D.N.Y. July 2, 1997) (internal quotation marks omitted). Frustration of purpose excuses performance when a "virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *U.S. v. Gen. Douglas MacArthur Senior Vill. Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). The doctrine applies particularly to situations like the present, where a government enactment makes unlawful the intended use of contracted-for premises.<sup>1</sup> Moreover,

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<sup>1</sup> See, e.g., *Sage Realty*, 1997 WL 370786, at \*2 (concluding that executive order blocking Yugoslavian entities from using assets located in U.S. frustrated Yugoslavian bank's "principal purpose for renting [the] space" it used for its New York branch office); *Gardiner Properties v. Samuel Leider & Son, Inc.*, 279 A.D. 470, 472 (1st Dep't 1952) ("frustration of the purposes of the lease may be available as a defense to any action for rent brought while the regulation in question is effective"); *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dep't 2016) (holding that where commercial lease stated that the tenant would use the lease as an office, and it

the doctrine applies equally to a temporary frustration of purpose.<sup>2</sup>

It is difficult to imagine an event more “cataclysmic” and “unforeseeable” than a once-in-a-century global pandemic. It is, likewise, hard to think of an event that more destroys the purpose of a WeWork membership agreement, and renders the agreement more “valueless” to the member, than a deadly, highly communicable disease and resulting government order that prohibit use of the member’s office space.

In sum, our clients have no legal obligation to pay their membership fees while the purpose of their membership agreements remains frustrated by the COVID-19 pandemic. Ignoring this fact, WeWork continues charging these members full monthly fees and refuses to offer concessions or compromise. In certain instances, WeWork has even taken payment without permission and despite explicit instructions not to. WeWork’s actions in this regard are both unlawful and hypocritical, since, as we understand it, WeWork has not been paying full rent to its own landlords. Moreover, WeWork’s approach stands in stark contrast to that of many of its competitors, who have been far more accommodating of their customers’ needs.<sup>3</sup>

Because our clients are excused from paying membership fees while the purpose of their membership agreements is frustrated, we hereby demand that WeWork (including its subsidiaries): (1) cease charging our clients membership fees unless and until they are legally permitted to return to their offices, and unless and until WeWork adequately sterilizes those offices and ensures implementation of other necessary health measures (such as social distancing) to protect member

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was later discovered that the certificate of occupancy (CO) required that the leased premises be used only for residential purposes, tenant may be entitled to terminate the lease: “Here, without the ability to use the premises as an office, the transaction would have made no sense, and the inability to lawfully use the premises in that manner combined with defendants’ alleged failure and refusal to correct the CO constitutes a frustration of purpose entitling plaintiff to terminate the lease.” (citations omitted)); *Two Catherine St. Mgt. Co. v. Yam Keung Yeung*, 153 A.D.2d 678, 679 (2d Dep’t 1989) (“Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease.”) (citations omitted).

<sup>2</sup> See Restatement (Second) of Contracts § 269 (“Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exists . . . .”); *Nash v. Bd. of Ed., Union Free Sch. Dist. No. 13, Town of Islip*, 38 N.Y.2d 686, 689 (1976) (citing a tentative draft of § 269 and applying it in the context of a temporary frustration of purpose); *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 931 (S.D. Ind. 2008) (“New York law recognizes the doctrine of temporary commercial impracticability.”) (citing *Bank of Boston Int’l of Miami v. Arguello Tefel*, 644 F. Supp. 1423, 1427 (E.D.N.Y. 1986), and *Bush v. Protravel Int’l, Inc.*, 746 N.Y.S.2d 790, 797-98 (Civ. Ct. 2002)), *aff’d* 582 F.3d 721 (7th Cir. 2009).

<sup>3</sup> We understand that WeWork has refused to shutter its spaces on the pretext that it needs to support companies providing “essential services,” and to deliver contracted services to such companies. To the extent WeWork is continuing to charge our clients monthly fees on that basis, we believe this sham rationale (which in any event is legally irrelevant) will be readily exposed by (1) WeWork’s failure to deliver, to our client’s empty offices, the services that are contractually required, and (2) the inescapable fact that our clients’ businesses, and those of others in the same space, are not “essential”—for which reason our clients and their neighbors have been legally mandated to keep away from their offices—and therefore such spaces require no support.

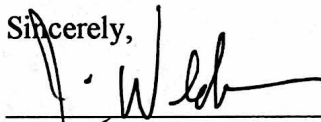
safety; and (2) return the membership fees our clients have previously paid under protest covering any period of time when the purpose of their membership agreements has been frustrated.

If WeWork refuses to provide such relief, we intend to pursue arbitration in order to vindicate our clients' rights, which will entail, *inter alia*, recovering, and enjoining WeWork from collecting membership fees for any period of time when the purpose of their membership agreements has been/is frustrated.

We therefore ask you to agree that, in the event arbitration is necessary to resolve this dispute, WeWork consent to a consolidated arbitration process so that the claims asserted by our clients may be heard in a single proceeding. This request is appropriate given the commonality of those claims and the efficiency of consolidation. Indeed, the need for such efficiency is especially important now when everyone (including WeWork, our clients, and JAMS) are operating under unprecedented resource constraints. Consolidation will thus limit the burden on all parties and avoid the inefficiency of arbitrating identical issues in separate proceedings. Should you reject this sensible request, you will simply be causing WeWork to incur unnecessary, and therefore unreasonable, attorneys' fees and arbitration costs, which would therefore be unrecoverable by WeWork even if it were to prevail. Similarly, rejecting this request will cause legal fees to accumulate more rapidly for our legal team. This ultimately will be to WeWork's financial detriment, since WeWork will be liable for our fees in the very likely event that our clients prevail.

Thank you for your attention to this matter. We look forward to your response. Please direct all communications and questions regarding this letter to the undersigned.

Sincerely,



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