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DOROTHY BROWN
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

HART 353 NORTH CLARK LLC,	)	
	)	
Plaintiff/Counter-Defendant	)	
	)	Case No. 2020-L-005476
v.	)	
	)	Hon. Jerry A. Esrig
JENNER & BLOCK LLP,	)	
	)	
Defendant/Counter-Plaintiff	)	

JENNER & BLOCK'S RESPONSE TO THE LANDLORD'S MOTION TO STRIKE

INTRODUCTION

Hart 353 North Clark LLC ("Landlord")[1] does not want this Court to reach the merits. It started this action by filing a complaint that failed to attach the Lease at the center of the dispute and that completely ignored the Lease's provisions which establish Jenner & Block's clear right to rent abatement. Now, the Landlord seeks to avoid its obligation to timely respond to Jenner & Block's defenses and counterclaims by filing an unnecessary and unjustified motion to strike ("Motion") the "Preliminary Statement" and one exhibit from Jenner & Block's Answer, Affirmative and Other Defenses, and Counterclaims ("Pleading"). Although the Motion only targets the Preliminary Statement and one exhibit, and although it does not seek to dismiss any of Jenner & Block's Affirmative or Other Defenses or Counterclaims, the Landlord allowed its responsive pleading date (July 13, 2020) to pass without answering the remaining portions of the Pleading or requesting an extension. The Court should reject this evasive tactic, deny the Landlord's Motion, and order the Landlord to provide its substantive answer to the Pleading that was due on July 13.

[1] Capitalized terms have the meanings defined in either the Lease, the Pleading, or herein.

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Indeed, the Motion is a baseless waste of time and diversion from the merits. **First**, Section 2-610 does not, as Landlord asserts (at 3), provide a basis for striking the Preliminary Statement and one exhibit (the Declaration from Richard Stein ("Stein Declaration," attached to the Pleading as Exhibit B)). Section 2-610 spells out what an answer requires; it does not prohibit an answer from containing other material (except for evasive denials). And the inclusion of Jenner & Block's Preliminary Statement and the Stein Declaration with its Pleading is separately and easily justified by Jenner & Block's Counterclaims: any complaint, including a counter-complaint, may unquestionably include a preliminary statement and exhibits.

Second, even assuming Section 2-610 provides a basis for Landlord's Motion, the request to strike the Stein Declaration as irrelevant (at 4-5) is likewise baseless. Jenner & Block alleges that the Lease is unambiguous. However, Illinois courts specifically permit a party to advance alternative legal theories, and if the Court ends up looking outside the four corners of the Lease, the Stein Declaration will go to the core of the case. Mr. Stein was the Original Landlord's lead negotiator "across the table" from Jenner & Block in the 2004-05 timeframe. The Stein Declaration affirms that Mr. Stein and the Original Landlord understood at the time of negotiating and executing the Lease that Jenner & Block expressly negotiated for the Abatement Provisions to entitle it to rent reduction as a result of "any event" that "caused Jenner & Block to reasonably determine that it could not use and occupy a material amount of its space as it intended in the normal course of business, regardless of whether that event was the Landlord's responsibility and regardless of whether that event caused physical damage to the building or space." (Stein Declaration ¶17.) The Landlord's focus on the Stein Declaration does not justify striking it, but does demonstrate the Landlord's understandable concern that the Stein Declaration would be the

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nail in the coffin of the Landlord's case, which is already doomed by the express terms of the Lease's Abatement Provisions.

Third, the Landlord's contention (at 4) that the Court should strike under Rule 408 a portion of the Preliminary Statement because it contains impermissible settlement communications is wrong. Rule 408 serves an important purpose in protecting genuine settlement communications. However, the statements targeted by the Landlord are not within the scope of Rule 408 because they are neither offers nor attempts to compromise. And the Landlord's Motion does not come anywhere close to bearing its burden of making a "substantial showing" that those particular statements are precluded under Rule 408 because the Landlord does not identify the purportedly problematic statements in its Motion or provide any substantive explanation as to why they should be stricken. Moreover, even if the seven sentences at issue violated Rule 408 (they do not), the proper remedy would be to strike only those seven sentences, not the entire Preliminary Statement as the Landlord has requested.

The Court should deny the Motion and order the Landlord to answer the Pleading.[2]

ARGUMENT

"The denial of a motion to strike or dismiss is within the sound discretion of the trial court." *Caracci v. Patel*, 2015 IL App (1st) 133897 ¶18 (affirming denial of motion to strike amended answer). Courts disfavor motions to strike portions of pleadings unless the portion attacked is both

[2] In a footnote (at 4, n. 4), the Landlord asks the Court to strike the portions of the Answer in which Jenner & Block points out that the Landlord did not attach the Lease to its Complaint. In the Complaint, the Landlord claims that it did not attach the Lease because it is "voluminous," but in this footnote, the Landlord claims it did not do so "out of respect for Defendant's right to confidentiality—as set forth in Section Y of the Lease." The Court should reject this request because Section Y of the Lease says nothing about the confidentiality of the Lease and in no way prohibited the Landlord from attaching the Lease to the Complaint as is typical in an action for breach of contract.

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"irrelevant and prejudicial to the moving party." *See* Ill. Prac., Civ. P. Before Trial § 27:2 (2d ed.) ("Such a motion is appropriate only if the allegation attacked is both irrelevant and prejudicial to the moving party. In an era of crowded dockets and limited judicial resources, quibbles over whether nonprejudicial allegations are irrelevant appear difficult to justify."). As demonstrated below, the portions of the Pleading that the Landlord seeks to strike are highly relevant and are not unfairly prejudicial. Therefore, the Court should exercise its discretion to deny the Motion.

I. Section 2-610 Does Not Prohibit The Preliminary Statement Or Stein Declaration.

Contrary to Landlord's assertion (at 3), Jenner & Block's inclusion of a Preliminary Statement in its Pleading and its attachment of the Stein Declaration do not run afoul of Section 2-610. That Section governs certain aspects of answers, providing: "Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." Neither Section 2-610(a), nor any other sub-paragraph of Section 2-610, **limits** affirmative matter that can be included in an answer; instead, it sets forth what **must** at very least be included in an answer. The Landlord cites no case—and our research has not revealed any—where a court struck a preliminary statement or attachment to an answer on the ground that it was at odds with the requirements of Section 2-610. When the Landlord contends (at 5) that Section 2-610 "requires the Answer to contain **only** an explicit admission, denial, or statement of want of knowledge" (emphasis added), the Landlord unjustifiably adds to the statutory language, inserting the word "**only**" without any support in the statute or case law.

Moreover, Jenner & Block's inclusion of its Preliminary Statement and attachment of the Stein Declaration to its Pleading are unquestionably authorized by Jenner & Block's Counterclaims contained in that Pleading. There is no plausible argument that a counter-complaint cannot contain a preliminary statement or attach relevant exhibits. Here, Jenner & Block's

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Counterclaims are described in the Preliminary Statement, and those Counterclaims cite and incorporate the Stein Declaration (*see* Counterclaims ¶¶13-14 and 19-20). The Counterclaims justify the inclusion of our Preliminary Statement and attachment of the Stein Declaration even if (contrary to fact) the Answer does not.

II. Jenner & Block Properly Attached The Highly Relevant Stein Declaration.

The Landlord's contention (at 4-5) that the Stein Declaration should be stricken because the Court may ultimately not admit the Stein Declaration is another groundless attempt to hide from the relevant facts. The Stein Declaration provides important factual context for Jenner & Block's Affirmative and Other Defenses and Counterclaims, and is highly relevant evidence of the Abatement Provisions' meaning and application **if** this Court determines there is an ambiguity. *See Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 451 (1st Dist. 2007) ("Indeed, lay testimony may be used by courts to aid in interpretation of facially ambiguous contract language. Hence, [Company President]'s testimony indicates what [Company]'s understanding was, and, thus, what its intent may have been in drafting the covenant not to compete, a consideration that would be highly relevant in resolving any ambiguity.") (internal citation omitted); *Cent. Ill. Pub. Serv. Co. v. Ill. Com. Comm'n*, 219 Ill. App. 3d 291, 299 (4th Dist. 1991) (holding it was proper to permit testimony of head of committee that negotiated agreement as to what his understanding of ambiguous term in contract would have meant at time contract was signed).

If the Court determines that the Lease, including its Abatement Provisions, is unambiguous and fully integrated, as Jenner & Block contends it should, then the Court will not need to take parol evidence on the meaning of its provisions, and it could disregard the Stein Declaration for these purposes. But the Landlord disputes the clear meaning of the Abatement Provisions. In the

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event the Court finds there is more than one reasonable construction of those provisions, the Stein Declaration will establish that the Original Landlord and Jenner & Block vigorously negotiated the Abatement Provisions and that the Original Landlord understood the agreement to provide rent abatement in circumstances like those presented by the Covid-19 pandemic. In all events, Illinois courts expressly permit parties to advance alternate positions at the pleading stage. *IK Corp. v. One Fin. Place P'ship*, 200 Ill. App. 3d 802, 815 (1st Dist. 1990), *superseded by statute on other grounds* ("When a party knows the facts, but cannot be sure of the legal effect of those facts, he may plead inconsistent theories of recovery or defenses."); *Daehler v. Oggoian*, 72 Ill. App. 3d 360, 370 (1st Dist. 1979) (" . . . when a party knows the facts, but cannot be sure of the legal effect of those facts, he may plead inconsistent theories of recovery or defense, and the proof at trial will determine which theory, if any, entitles him to a favorable verdict").

The Landlord's apparent contention (at 5) that the Court may not take any parol evidence, even if it finds an ambiguity, because the Lease has an integration clause is also incorrect. While it is true that parol evidence is not admissible to contradict a contract that is **both** integrated **and** unambiguous, the Court may hear evidence to clarify an **ambiguous** contract even where it has an integration clause. "A court may not use extrinsic evidence to interpret a facially unambiguous contract if the contract contains an integration clause. But an integration clause will not preclude the court's consideration of extrinsic evidence in the event the contract is ambiguous." *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568 ¶26 (citations omitted) (holding that an integration clause did not preclude use of extrinsic evidence "because we find the contract ambiguous"). The Landlord's citation of *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999), is not to the contrary because, there, the Court only held that "the four corners rule

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precludes the consideration of extrinsic evidence where a contract contains an integration clause **and is facially unambiguous**." *Id*. at 466 (emphasis added).

In any event, the Landlord's arguments about the proper treatment of parol evidence are better suited for subsequent motion practice or trial; the point at the pleading stage is simply that the Stein Declaration may well prove relevant and even dispositive, and its inclusion in the Pleading is perfectly appropriate.[3]

III. Jenner & Block's Preliminary Statement Does Not Reveal Settlement Discussions.

Jenner & Block's Preliminary Statement includes a discussion of certain pre-suit communications between the parties to demonstrate that there is a live controversy that warrants declaratory relief and to explain why the parties are before the Court. The Landlord's contention (at 4) that the Preliminary Statement should be stricken because it offends Rule 408 is incorrect for three independent reasons.

First, the Landlord does not meet its burden because the Landlord's Motion does not identify with any specificity the statements it contends would not be admissible under Rule 408. The Landlord only says (at 4) the Preliminary Statement "consists of a legal argument detailing, among other things, Defendant's version of settlement discussions with Plaintiff . . . ." But to invoke Rule 408, "[t]he party seeking exclusion of the alleged settlement communications must make a **substantial showing** that the communications were, in fact, part of an attempt to settle a disputed claim." *Control Sols., LLC v. Elecsys*, 2014 IL App (2d) 120251 ¶38 (quotations omitted, emphasis added). The Landlord does not even identify the statements it contends should be

[3] Although the Landlord filed a motion to **strike** extrinsic evidence from the record, that very motion **introduces** more into the record by attaching a letter from Jenner & Block to the Landlord and referencing multiple of the parties' communications and an order and public statement from the Governor—none of which are germane to the relief sought by the Motion. (*See* Mot. at 1-2.) The Landlord also has served written discovery and a third-party subpoena seeking a broad range of extrinsic evidence related to the interpretation of the Lease and the Stein Declaration.

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stricken here, let alone make a substantial showing how they are excluded by the rule. It is not entitled to any relief.

Second, the statements the Landlord apparently has in mind are not within the scope of, or for a prohibited use under, Rule 408. That rule protects evidence of "furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim" or of "conduct or statements made in compromise negotiations regarding the claim." Ill. R. Evid. 408(a). After the Landlord filed its Motion, which failed to identify the supposedly offending statements, counsel for Jenner & Block asked the Landlord to identify the specific statements that allegedly violate Rule 408. The Landlord identified the following statements in Jenner & Block's Pleading:

- "On May 1, 2020, the Landlord informed Jenner & Block that it was entitled to a separate credit for overpaid 2019 operating expenses and property taxes. Jenner & Block is also entitled to credits for certain reimbursable expenses from calendar year 2017 (a portion of which Landlord has agreed to). The total credits due to Jenner & Block for overpaid March rent ($694,898), 2017 reimbursable expenses ($121,557), and 2019 operating expenses and property taxes ($643,641) is over $1.4 million. After using those credits to pay the abated rent which Jenner & Block was required to pay for April, May, and June 2020, it is the *Landlord who owes Jenner & Block* a residual credit of over $840,000." (at 2-3.)

- "Jenner & Block also invited Landlord to discuss any disagreement about the proper level of abatement under the Lease. Landlord refused to acknowledge Jenner & Block's entitlement to rent abatement and instead filed its Complaint, without disclosing to the Court or the public that Jenner & Block had expressly negotiated the Abatement Provisions to cover precisely this type of circumstance." (at 3.)

- "In its communications with Jenner & Block, the Landlord has not suggested that Jenner & Block's determination was unreasonable, but has focused on Jenner & Block's physical ability to access the Building." (at 5.)

Those statements are not protected by Rule 408 because they are not offers or attempts to compromise anything. Rather, on their face, these are communications that show there is a dispute

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and convey the parties' respective legal positions. The statements in the first bullet, regarding the amounts of credits due Jenner & Block, reflect the total amounts of credits the Landlord admits, or Jenner contends, are due; they do not convey potential compromise amounts or any attempt at settlement. The second bullet, with its reference to "invit[ing]" the Landlord to a discussion, only shows there was no discussion and the parties have a live dispute. It makes no reference at all to the content of any settlement communication or any amount of value offered in compromise. And the third bullet, with its reference to the legal theory apparently advanced by the Landlord, is, as the Landlord characterizes it, legal argument—a reference to Jenner & Block's litigation position on the meaning of the Abatement Provisions and the Landlord's contrary position. None of these statements is evidence of "furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim" or of "conduct or statements made in compromise negotiations regarding the claim," Ill. R. Evid. 408(a), and therefore none is protected under Rule 408.

Notably, the Landlord includes in its Motion (at 1-2) several of the parties' pre-litigation communications that are part of the same set of communications the Landlord claims Jenner & Block should not have included in the Pleading on the ground that they are protected settlement communications. The Landlord provides several of those communications (*id.*), including attaching an April 3, 2020 letter from Jenner & Block to the Landlord regarding the rent dispute and stating (similar to what Jenner & Block stated in its Preliminary Statement), "Despite Plaintiff's efforts through direct discussions between its representatives and Defendant's leadership team, the parties could not reach a resolution regarding the dispute, ultimately prompting Plaintiff to formally declare a default under the Lease and file suit" (at 2).

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Third, in all events, if the Court were to find that a particular statement should be stricken, which we respectfully submit it should not, that determination would not warrant striking the entire Preliminary Statement. *See McCarthy v. Allstate Ins. Co*., 76 Ill. App. 3d 320, 324 (1st Dist. 1979) (reversing grant of motion to strike because "[i]f the necessary facts appear in the complaint but are encumbered with unnecessary matter or are insufficiently stated, the motion should ask for a correction of the pleading by striking out specified immaterial matter and making the pleading more definite and certain in specified particulars.").

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Strike.

Dated: July 29, 2020

Jenner & Block LLP

By /s/ David J. Bradford
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, David J. Bradford, certify that on July 29, 2020, I caused the foregoing **Response to the Landlord's Motion to Strike** to be served via electronic mail upon:

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