

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Marcia Melendez, Jarican Realty Inc.,  
1025 Pacific LLC, Ling Yang, Top East  
Realty LLC, and Haight Trade LLC,

*Plaintiffs,*

v.

The City of New York, *a municipal entity*,  
Bill de Blasio, *as Mayor of the City of New  
York*, Louise Carroll, *Commissioner of New  
York City Department of Housing Preservation  
& Development*, and Jonnel Doris, *Commissioner  
of New York City Department of Small Business  
Services*,

*Defendants.*

Civ. No. 1:20-cv-05301-RA

**DECLARATION OF ARTHUR KATS IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTIVE AND DECLARATORY RELIEF**

Pursuant to 28 U.S.C. § 1746, ARTHUR KATS hereby declares as follows:

1. I am a member in good standing of the bar of the State of New York and State of New Jersey. I am counsel for Volunteers of Legal Service, appearing as *amicus curiae* in the instant proceeding. I submit this declaration in support of VOLS' *amicus* brief and in opposition to Plaintiffs' Motion for Preliminary Injunctive and Declaratory Relief. The purpose of this declaration is to present to the Court certain public information regarding the legal and economic challenges facing small business owners in New York City as a result of the 2019 novel coronavirus disease ("COVID-19") pandemic.

2. We are in the midst of a global public health crisis that has caused more damage to the United States than could have been foreseen prior to its arrival in the country.<sup>1</sup> Attached as Exhibit 1 is a true and correct copy of an article by Andrew Jacobs and Sheri Fink entitled “*How Prepared Is the U.S. for a Coronavirus Outbreak?*,” providing an early prediction of how well prepared the U.S. was for the COVID-19 pandemic.
3. As of August 11, 2020, more than 5,101,300 people have been diagnosed with COVID-19, and at least 163,000 people have died in the United States alone.<sup>2</sup> On August 10, 2020, there were at least 537 new deaths and 47,126 new confirmed cases reported in the U.S. Attached as Exhibit 2 is a true and correct copy of the New York Times U.S. COVID-19 Map and Case Tracker (last visited on August 11, 2020).
4. New York City was the epicenter of the COVID-19 pandemic.<sup>3</sup> Only three weeks after the first coronavirus infection was detected in New York, the City accounted for roughly 5% of the world’s confirmed coronavirus cases. Attached as Exhibit 3 is a true and correct copy of an article by Jesse McKinley entitled “*New York City Region Is Now an Epicenter of the Coronavirus Pandemic*,” which provides coverage of the pandemic at its early stages in New York.
5. As of August 11, 2020, at least 426,000 people have been infected with the coronavirus in New York and 32,361 people have died.<sup>4</sup> On its worst day, New York saw 12,274 new cases

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<sup>1</sup> See Andrew Jacobs & Sheri Fink, *How Prepared Is the U.S. for a Coronavirus Outbreak?*, N.Y. TIMES (February 29, 2020), <https://www.nytimes.com/2020/02/29/health/coronavirus-preparation-united-states.html?searchResultPosition=19>.

<sup>2</sup> For the most up-to-date numbers, the New York Times has established a map tracking cases across the United States, which it updates regularly. See New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last visited August 11, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>3</sup> See Jesse McKinley, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, N.Y. TIMES (March 22, 2020), <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html>.

<sup>4</sup> For the most up-to-date numbers, the New York Times has established a map tracking cases in New York, which it updates regularly. See New York Times, *New York Coronavirus Map and Case Count*, N.Y. TIMES (last visited August 11, 2020), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.

of infection and 1,036 new deaths. Attached as Exhibit 4 is a true and correct copy of the New York Times N.Y. Covid-19 Map and Case Tracker (last visited on August 11, 2020).

6. On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8, requiring the closure of all non-essential businesses throughout the State in response to the COVID-19 pandemic. That Order would require non-essential small businesses to remain closed to the public until at least June 8, 2020, when New York City officially entered Phase 1 of the Governor’s Four Phase New York Forward Reopening Plan. Attached as Exhibit 5 is a true and correct copy of Governor Cuomo’s Executive Order No. 202.8.
7. In the midst of the pandemic, Times Square—an area that employs 180,000 people, provides 15% of New York City’s economic output, and generates \$2.5 billion in tax revenue for the City—experienced dramatic decreases in traffic.<sup>5</sup> Once trafficked by 350,000–400,000 people per day, foot-traffic declined by over 90% to less than 35,000 people per day during the pandemic. Attached as Exhibit 6 is a true and correct copy of an article by Anne Kadet entitled “*Times Square Is Eerily Empty During the Pandemic, but Advocates Are Focused on a Comeback,*” which corroborates this account of the pandemic’s effects on Times Square.
8. In 2014, small businesses generated \$5.9 trillion, or 43.5% of the \$13.6 trillion private, non-farm U.S. economy.<sup>6</sup> Attached as Exhibit 7 is a true and correct copy of a report published by the U.S. Small Business Administration’s Office of Advocacy entitled “*Small Business GDP: 1998-2014,*” which corroborates these statistics.

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<sup>5</sup> See Anne Kadet, *Times Square Is Eerily Empty During the Pandemic, but Advocates Are Focused on a Comeback*, WALL ST. J. (May 19, 2020), <https://www.wsj.com/articles/times-square-is-eerily-empty-amid-the-pandemic-but-advocates-are-focused-on-a-comeback-11589896801>.

<sup>6</sup> KATHRYN KOBE & RICHARD SCHWINN, U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, *SMALL BUSINESS GDP: 1998-2014* 4 (2018), <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/21060437/Small-Business-GDP-1998-2014.pdf>.

9. In New York, small businesses “[f]rom mom-and-pop corner stores to medical practices to computer software start-ups, [] play a vital role in [the local] economy.”<sup>7</sup> Attached as Exhibit 8 is a true and correct copy of a report by the Office of the New York State Comptroller, providing statistics relating to the impact of small businesses in New York State.
10. In 2016, small businesses in New York State employed 4.1 million people, or 50.2% of the private work force, and created 139,058 new jobs.<sup>8</sup> Small businesses employing fewer than 20 employees experienced the largest gains, creating 89,213 jobs. Attached as Exhibit 9 is a true and correct copy of the U.S. Small Business Administration’s 2019 Small Business Profile for the State of New York.
11. Small businesses represent 98% of New York City’s employers and provide employment for over 3 million people—about half of the City’s workforce.<sup>9</sup> Attached as Exhibit 10 is an article by Matthew Haag entitled “*One-Third of New York’s Small Businesses May Be Gone Forever,*” corroborating these statistics.
12. On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES”), which provided over \$2 trillion in relief to Americans and small businesses struggling as a result of the economic crisis provoked by the COVID-19 pandemic. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020). The CARES Act established the novel Paycheck Protection Program (“PPP”), through which a small business could access “loans” of the lesser of \$10 million or 250% of its average monthly payroll costs for the prior 12-month period. Under the original CARES

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<sup>7</sup> OFFICE OF THE N.Y. STATE COMPTROLLER, SMALL BUSINESS IN NEW YORK STATE: AN ECONOMIC SNAPSHOT 1 (2019), <https://www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2019-03/small-business-nys-2019.pdf>.

<sup>8</sup> U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, 2019 SMALL BUSINESS PROFILE 133 (2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142654/2019-Small-Business-Profiles-NY.pdf>.

<sup>9</sup> Matthew Haag, *One-Third of New York’s Small Businesses May Be Gone Forever*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/nyc-small-businesses-closing-coronavirus.html>.

Act, if a small business spent 75% of the loan on payroll and the remainder on rent, utilities, and the like, within an eight-week period, the loan would be forgiven.

13. Congress later enacted the Paycheck Protection Program Flexibility Act (“PPPFA”), which was signed into law by the President on June 5, 2020, and made changes to the PPP. *See* Paycheck Protection Program Flexibility Act, Pub. L. No. 116-142 (2020). The PPPFA reduced the amount of loan proceeds required to be spent on payroll from 75% to 60%, expanded the period within which the funds must be spent from eight weeks to twenty-four weeks, and increased the repayment term for the unforgivable portions of loans issued after June 5 from one year to five years.
14. Although the PPP has provided New York City small business owners with some financial relief, many are struggling to meet commercial rent obligations in light of halted revenue.<sup>10</sup> Attached as Exhibit 11 is a true and correct copy of an article by Peter Grant and Justin Lahart entitled “*Amid Coronavirus Shutdowns, Landlords Often Determine Fate of Small Businesses,*” corroborating the struggle of small business owners attempting to meet commercial rent obligations. Attached as Exhibit 12 is a true and correct copy of an article by Yuka Hayashi entitled “*For Small Businesses With High Rents, Coronavirus Aid Falls Short,*” corroborating the insufficiency of the PPP with respect to commercial rent. Attached as Exhibit 13 is a true and correct copy of an article by Peter Grant and Justin Lahart entitled

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<sup>10</sup> *See* Peter Grant & Justin Lahart, *Amid Coronavirus Shutdowns, Landlords Often Determine Fate of Small Businesses*, WALL ST. J. (June 4, 2020), <https://www.wsj.com/articles/amid-coronavirus-shutdowns-landlords-often-determine-fate-of-small-businesses-11591224029> (“A survey of 46 of the Fifth Avenue businesses along the strip from Barclays Center to 18th Street found that only 17% paid rent in May, down from 53% in April, according to the Park Slope Fifth Avenue Business Improvement District.”); Yuka Hayashi, *For Small Businesses With High Rents, Coronavirus Aid Falls Short*, WALL ST. J. (May 1, 2020), <https://www.wsj.com/articles/for-many-small-businesses-u-s-coronavirus-aid-falls-short-11588325404> (“Many [] businesses have been forced to close, and their owners said a [] pressing need is for rent and other costs they must still pay.”); Peter Grant & Justin Lahart, *On a Vibrant Street in Brooklyn, Businesses Are Struggling for Survival*, WALL ST. J. (April 20, 2020), <https://www.wsj.com/articles/on-a-vibrant-street-in-brooklyn-businesses-are-giving-up-11587391413> (“Revenue is down, but rent is due . . .”).

*“On a Vibrant Street in Brooklyn, Businesses Are Struggling for Survival,”* further corroborating the struggles of the New York City small business community.

15. A survey of 233 businesses conducted by the Brooklyn Chamber of Commerce showed that 44% of commercial tenants missed rent in April, 46% missed rent in May, 35% missed rent in June, and 28% missed rent in July.<sup>11</sup> A true and correct copy of the survey results are attached as Exhibit 14.

16. Attached as Exhibit 15 is a true and correct copy of an article by Michael Derby entitled *“Fed Report: Small Business Sector Highly Vulnerable to Coronavirus Crisis,”* explaining the results of a Federal Reserve Bank report on the effects of the pandemic on small businesses.<sup>12</sup> The report by the Federal Reserve Bank, a true and correct copy of which is attached as Exhibit 16, shows that 86% of small businesses would have to take some action if faced with a two-month revenue loss, with 47% having to rely on personal funds and 17% having to close permanently.<sup>13</sup> The report also shows that 59% of small businesses with debt used personal guaranties to secure the debt.

17. According to the Federal Reserve Bank, only about 20% of “healthy” small businesses had sufficient cash reserves to continue normal operations if faced with a two-month revenue loss.<sup>14</sup> A true and correct copy of the Federal Reserve Bank’s findings are attached as Exhibit 17, which noted that “[o]f particular concern are the effects the pandemic is having

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<sup>11</sup> BROOKLYN CHAMBER OF COMMERCE, JULY REOPENING SURVEY SUMMARY (July 2020), <https://www.brooklynchamber.com/wp-content/uploads/2020/07/July-2020-Survey.pdf>.

<sup>12</sup> Michael S. Derby, *Fed Report: Small Business Sector Highly Vulnerable to Coronavirus Crisis*, WALL ST. J. (April 7, 2020), <https://www.wsj.com/articles/fed-report-small-business-sector-highly-vulnerable-to-coronavirus-crisis-11586281573>.

<sup>13</sup> This percentage is based on a survey of 5,139 small businesses (1-499 employees) across the U.S. FED. RESERVE BANK OF N.Y., 2020 REPORT ON EMPLOYER FIRMS: SMALL BUSINESS CREDIT SURVEY ii, 5 (2020), <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/2020-sbcs-employer-firms-report>.

<sup>14</sup> This percentage is based on a survey of 1,192 “healthy” small businesses. FED. RESERVE BANK OF N.Y., CAN SMALL FIRMS WEATHER THE EFFECTS OF COVID-19? 1 (April 2020), <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/covid-brief>.

and will continue to have on small businesses as they endure the direct impacts of social distancing directives, including temporary closures and modified operations.”

18. The New York City Council passed Local Law 53 of 2020 and Local Law 55 of 2020, which are the subject of this lawsuit. Local Law 53 (the “Commercial Tenant Harassment Law”) amended N.Y.C. Admin. Code § 22-902 by creating protection from commercial tenant harassment predicated on a landlord threatening a commercial tenant on the basis of its status as a COVID-19-impacted business. *See* N.Y.C. Admin. Code § 22-902(a). Local Law 55 (the “Guaranty Law”) added N.Y.C. Admin. Code § 22-1005, which prohibits the enforcement of personal guaranties as to defaults on the payment of rent pursuant to a commercial lease occurring between March 7, 2020 and September 30, 2020. *See* N.Y.C. Admin. Code § 22-1005. Local Law 55 also amended N.Y.C. Admin. Code § 22-902 by designating as commercial tenant harassment any threat by a landlord to enforce a personal guaranty that the landlord knows or reasonably should know is unenforceable under the Law. A true and correct copy of Local Law 53 is attached as Exhibit 18. A true and correct copy of Local Law 55 is attached as Exhibit 19.
19. Attached as Exhibit 20 is a true and correct copy of the Committee Report of the Governmental Affairs Division on Local Law 53 (then pending before the City Council as Proposed Int. No. 1914-A).
20. The City Council passed the challenged laws with ample input from the public and from advocates. For example, VOLS submitted testimony in support of the challenged laws while they were pending in the City Council and urged the Council to enact the laws in order to protect the small business community in New York City. A true and correct copy of VOLS’ testimony is attached as Exhibit 21.

21. Since intensifying its work with underserved small business tenants through the Commercial Lease Assistance Program in late 2017, VOLS has served over 682 low- and moderate-income small business owners with over 1,200 distinct legal matters throughout all five boroughs. Our work focuses on marginalized communities who most frequently lack professional resources and support, including in the immigrant communities and communities of color where the Plaintiffs' buildings are located. Of VOLS' small business clients since late 2017: 78% are people of color; 63% are women, and over 1/3 of our clients are immigrants.

22. As the pandemic intensified in March 2020, VOLS surveyed 51 of its current and former small business clients to assess immediate legal and technical needs. The survey was conducted in April of 2020 and revealed that:

- a. 88% of our clients reported decreases in revenue as a result of the COVID-19 pandemic;
- b. 57% of our clients reported that their businesses were completely closed as a result of government orders;
- c. 67% of our clients reported that they were having difficulty paying or had missed payments of employees' salaries;
- d. 86% of our clients reported having difficulties meeting financial obligations;
- e. 40% of our clients with commercial leases indicated that they had already missed commercial rent payments, and 89% indicated that they anticipated missing commercial rent payments in the future;
- f. 90% of those who had initiated conversations with their commercial landlords about the possibility of receiving a rent abatement, deferment, or cancellation for the period



of the pandemic were either still negotiating, received no response, or received a negative response;

- g. 33% of our clients with outstanding loans indicated that they had already missed commercial loan payments, and 90% indicated that they anticipated missing commercial loan payments in the future.

- 23. Since Governor Cuomo's March 20, 2020 Executive Order, VOLS has served over 170 COVID-affected small businesses with over 220 distinct legal matters including navigating federal stimulus programs and private grants, coordinating expanded unemployment benefits under the CARES Act, and assessing business insurance coverage.
- 24. At least one-third of VOLS' COVID-affected business referrals raised concerns regarding their commercial leases including: navigating the Executive Order's shut-down requirements, understanding ongoing monetary and non-monetary obligations pursuant to their respective leases, and temporary limitations on landlords' abilities to evict tenants for the duration of the Governor's eviction moratorium.
- 25. The overwhelming majority of VOLS' small business tenant clients seeking COVID-related assistance:
  - a. Are obligated under leases that provide no recourse or relief for them in the event of a forced government shutdown in the context of a pandemic. In nearly all cases, our clients' leases required ongoing rent payments despite full or significant impairment of any ability to use the commercial space for its intended purpose: to operate their small business;

- b. Are personally obligated under personal guaranties that provided no recourse or relief for them in the event of a forced government shutdown in the context of a pandemic; and
- c. Are contractually liable for the entirety of the lease term under their commercial leases, in most instances with an acceleration provision upon material default.

26. Fewer than 10% of VOLS' small business tenant clients seeking dispute resolution assistance with their commercial landlords had the resources to retain an attorney before signing their commercial leases and personal guaranties. Frequently, VOLS' small business tenant clients report that they did not read or understand their leases before signing, that they were pressured by landlords, brokers, or other agents to sign without legal counsel. In some egregious instances, VOLS assists small business tenant clients who were persuaded to sign commercial leases and personal guaranties despite their clear limited English proficiency.

27. From the perspective of a practitioner with over 10 years of experience as a former commercial real estate attorney in private practice representing commercial landlords and currently a legal service provider in the Community Economic Development arena, in the vast majority of instances the disparity in negotiating power in favor of a commercial landlord versus a small business tenant in new lease negotiations, renewals, or dispute resolution on existing leases is stark. Low-income small business tenants in New York City faced onerous obstacles to entrepreneurship even before the pandemic.

28. Even "small" landlords like the Plaintiffs regularly retain attorneys in the negotiation of their commercial leases and reserve extremely strong rights throughout and after the lease term. For example, the overwhelming majority of VOLS' small business tenant clients have leases including pass-along charges such as real estate and BID taxes, CAM and building

improvements, and other expenses paid for the benefit of the fee owner rather than the tenant. As Plaintiffs note in their complaint (Compl. ¶ 4) fee owners are primarily responsible for payment of real estate taxes to the taxing authority, however, they also have the right to file a tax contest but lack motivation to do so because pass-along lease provisions shift many of the landlords' carrying burdens to tenants.

29. VOLS regularly advises its small business tenant clients to form a legal business entity prior to entering a commercial lease agreement in order to obtain limited liability to their personal assets – just as Plaintiffs did in the purchase of the subject mixed-use buildings. (Compl. ¶¶ 18, 20, 37, 38.)
30. The permanent loss of small businesses in New York City will hamper economic recovery. An analysis of City and ADP records by the Partnership for New York City found that as many as 520,000 jobs have already been lost from the small business sector as unemployment in the City remains near 20%. A true and correct copy of the report is attached as Exhibit 22.
31. The report also found that most New York City small businesses carry less than three months' cash reserves. (*See* Exhibit 22, p 34.) Without relief, New York City small businesses, particularly those owned by people of color, lacked resources to sustain the three-month shutdown under the Governor's Executive Order and restart operations. (*Id.*)
32. I submit this declaration in support of VOLS' *amicus* brief in opposition to Plaintiffs' Motion for Preliminary Injunctive and Declaratory Relief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 13, 2020

/s/ Arthur Kats

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