UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNIVERSITY COMMUNICATIONS, INC., a New Jersey corporation doing business as FORTRESS ITX, Plaintiff, - vs. – CAPITAL MARKET SERVICES LLC, a New York limited liability company, and VISUAL TRADING SYSTEMS, LLC, a New York limited liability company, Defendants.	CIVIL ACTION NO. 10:3806 (NRB)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT AND STATEMENT OF FACTS[1]

Plaintiff University Communications, Inc., doing business as Fortress ITX ("Fortress"), provides Internet infrastructure outsourcing resources to business enterprises, mainly by providing services at a data center, sometimes called a server farm. This is a facility located in Clifton, New Jersey housing computer systems, particularly computer, on which those customers' Internet operations "reside."

As an industry-standard data center, the Fortress data center is comprised of specially designed space and shelving or "racks" for computer servers, as well high-level "connectivity" (connections to the Internet of varying types and specifications). Among the services provided by Fortress at its data center is "colocation."[2] Multiple colocation customers rent server "space" and resources at the Fortress data center (hence the term "co-location"), where they maintain and operate their network, server and storage gear and connect to the Internet. By utilizing colocation, enterprises impose minimal cost and complexity on their own operations and benefit from services and resources purchased and provided in bulk and at the highest level of technical expertise for multiple customers. Colocation customers also share in the benefit of adjunct resources and facilities built into a colocation center, including storage and backup systems, redundant and backup power supplies, redundant data communications connections, environmental controls (e.g., air conditioning and fire suppression) and security devices.

[1] The facts are as set forth in the Complaint, except where indicated.

[2] The spelling of this relatively new word remains the subject of debate. We have throughout our papers utilized the "single L" spelling which, according to some, is the "proper" one, although in reported legal decisions utilizing the term as applied to a different technology, telecommunications collocation, two "L's" are used. See, "Frequently Asked Questions: Which is it? Colocation? Collocation? Co-Location? Or Colo?," (found at http://www.iodatacenters.com/about-io/faq.php#q6, last accessed August 29, 2010). For purposes of consistency this style is maintained even when quoting language from the operative contracts in this matter which utilize the "two L's" approach.

Utilizing colocation, Fortress's clients are able to manage, maintain, back up and in all respects operate their Internet and other server-based business operations utilizing industry-standard technical capacity and benefiting from Fortress's substantial investment in infrastructure, physical space and technical expertise.

Colocation agreements such as the one in this action typically utilize the word "space" to describe the resources being provided to customers, but this usage should not be misconstrued. Under their contract with Fortress, defendants, have—contrary to their incorrect assertion—no right to any particular "space," anywhere, **at all**. As the contract terms make clear, "space" refers, not to a specific geographical location amenable to plotting on a map, but to capacity or a quantum of resources made available within a data center, a license for access to which is granted by the agreements, which is measured in "space." Thus, as set out in the Colocation Services Addendum ("Colocation Agreement") set forth in defendants' Exhibit 2 to the Rothstein Affirmation:

> **1. THE LICENSED SPACE**
>
> Fortress ITX agrees to lease to Customer, and customer agrees to lease to Fortress ITX, during the term, one (1) or more colocation bay(s) ("Bay"). Twenty-four (24) hour access to the Bay shall be provided to the Customer via secure entry. . .

Although Defendants were granted a license to utilize one or more unidentified "colocation bay(s)" (¶ 1) the Colocation Agreement does **not** give Defendants any rights whatsoever to any particular geographical location anywhere on earth—merely to a bundle of services and resources:

> **6. RIGHT TO RELOCATE**
>
> Fortress ITX may require Customer to relocate its equipment, at Fortress ITX's expense, within [the] Site and/or another Site designated by Fortress ITX, provided that any new such new Site shall provide Customer with the same rights and services afforded under this Agreement.

Indeed, when using their license for access to whatever space Fortress provided for their

equipment, Defendants were contractually required to be "escorted" by Fortress personnel at all times (¶ 3).

Defendants Capital Market Services LLC and Visual Trading Systems, LLC provide information technology services to the foreign exchange market ("forex") industry, a worldwide decentralized over-the-counter financial market for the trading of foreign currencies. On or about November 16, 2006, Defendants entered into a contract with Fortress for substantial space and colocation services. The contractual term for the provision of these services was 36 months at the base price of $31,250 in addition to certain contractually-specified increases.

The contract also provided that for automatically renewal for an unlimited number of one year terms at the same price formula unless 45 days' notice was provided by the terminating party prior to the contract's effective date. The 36-month term under the original contract ended on January 1, 2010. Neither party gave notice of termination 45 days prior to the expiration of the original term. Pursuant to the contract between Fortress and defendants, therefore, its terms automatically renewed for a term of one year ending on January 1, 2011. Nothing gave Fortress reason to believe that defendants intended to do otherwise than to remain important customers.

Defendants were well aware of this expectation on Fortress's part, for while they remained in Fortress's data center past the deadline to give notice of termination of the original contract term, they executed a secret, notice-less "withdrawal" of their equipment—on which, as set forth in the agreements, Fortress held a security interest—right under Fortress's nose. During this period, defendants utilized the full scope of services provided under the contract and benefited from a pricing structure premised on the automatic renewal of the contract provided by its terms. Unbeknownst to Fortress, however, defendants actually began to remove their equipment from Fortress's facility and move it to another data center surreptitiously in two steps,

one of which took place on Christmas Eve and the second of which took place on New Year's Eve. In both cases, only a skeleton staff was on duty at the Fortress data center, and each late-night exploit took place during a period of extended vacations and long weekends when Fortress could not insist on close supervision of defendants.

Defendants acted surreptitiously to benefit from the pricing in their contract with Fortress premised on a minimum year-long commitment pursuant to the automated renewal, even though they had no intention to honor that contractual term. Defendants knew that if they informed Fortress of their plans, Fortress would likely increase their rates to ones more consistent with short-term usage of the facilty, require that all accounts among the companies be squared away, and that payment be made in advance for services rendered. To avoid these things, defendants misled Fortress and led Fortress to rely on the stream of continued regular payments from defendants, the lack of notice of intent to leave the data center, and their physical control over defendants' equipment as assurance for such payments.

Defendants now make made this motion claiming that, despite both their and their cynical "gaming" of the termination date under the agreements, they are entitled to the benefit of two New York statutes meant to protect small businesses from unethical "service contract" providers and tenants from unscrupulous landlords that rely on automatic term renewals. But in fact, none of the rights associated with either an equipment service contract or an agreement to lease space, or even to gain access to it, are granted under the Colocation Agreement. Indeed, the Master Services Agreement and the Colocation Agreement provide the exact opposite.

The Master Services Agreement is a business arrangement between presumed equals premised on the submission, by defendants, of service orders to Fortress. These, in turn, are set out in various related agreements, including the Colocation Agreement, which provides:

> **2. USE OF THE LICENSED SPACE**
>
> a. Unless otherwise expressly provided in a Service Order, Customer will be responsible for configuring, providing, placing, installing, upgrading, maintaining, repairing, and operating Customer's Equipment. . .
>
> **11. EQUIPMENT REPAIR AND MAINTENANCE**
> During the Term, Customer shall provide, at its expense, repair and maintenance with respect to Customer provided equipment installed in the Bay.

These provisions are obviously inconsistent with a claim that the contract here was one in which Fortress contracted to provide service or maintenance of defendants' property.

The inapplicability of the "real property" defense here is also strikingly obvious when considering not only the description of the license to "space" set forth in the actual Colocation Agreement (emphasis added), but the following reservations of rights as well found there:

> **19. ADDITIONAL RIGHTS / RESERVATIONS OF RIGHTS OF FORTRESS ITX**
>
> a. This Agreement, and the Rights of Customer hereunder, are, without any further action by any party, subject and subordinate to the leases for the Data [C]enters and all superior instruments to such leases (including, without limitation, mortgages or ground leases for the Data Centers**). This Agreement is a services agreement and is not intended to and will not constitute a lease or any real or personal property.** Customer acknowledges and agrees that
>
> i. it has been granted only a license ("License") to use the Licensed Space in accordance with this agreement;
>
> ii. **Customer has not been granted any real property interest under this Agreement**; and
>
> iii. **Customer has no rights as a tenant or otherwise under any real property or landlord / tenant laws, regulations, or ordinances**. . . .

No provision in the agreements, including those cited by defendants granting a license for access to their own equipment at a facility determined by Fortress ITX, remotely contradicts the foregoing unequivocal terms. For these reasons, there is no reason defendants should be able to evade their contractual and moral obligations based on far-out interpretations of an agreement they, in fact, read closely and abused sorely.

LEGAL ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE NEW YORK GENERAL OBLIGATIONS LAW GOL § 5-903 DOES NOT APPLY TO THE CONTRACTS OR FACTS HERE.

A. Standard for dismissal under Fed. R. Civ. P. 12(b)(6)

When deciding a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded factual allegations of the complaint and draw all inferences in favor of the pleader. See *City of Los Angeles v. Preferred Communications, Inc*., 476 U.S. 488, 493 (1986); *Mills v. Polar Molecular Corp*., 12 F.3d 1170, 1174 (2d Cir.1993). "The complaint is deemed to include any written instrument attached to it as an exhibit or any statement or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holdings L.P.*, 949 F.2d 42, 47 (2d Cir.1991). The Court also may consider "matters of which judicial notice may be taken." *Leonard T. v. Israel Discount Bank of New York*, 199 F.3d 99, 107 (2d Cir.1999).

B. Defendants' distortion of the Complaint to attempt to portray an Internet colocation services contract as a "service, repair or maintenance contract" under New York GOL § 5-903 to is a cynical attempt to evade their contractual commitments.

Defendants, sophisticated financial services companies, argue that they should not be held to the contract into which they entered for colocation services because it was really a contract for "service, repair or maintenance to or for any real or personal property" under New York's General Obligations Law, Article 5, § 903. This statute requires that notice be provided by registered mail between 15 and 30 days before the deadline for opting out of the renewal period under any automatic contract-renewal clause in such a service contract. The problem for Defendants is fairly obvious: This is a contract for Internet colocation services, not service of their property.

The history and purpose of GOL § 5-903 has already been aptly summarized by the courts. As the Appellate Division's First Department explained in *Donald Rubin, Inc. v. Schwartz*, 160 A.D.2d 53, 56, 559 N.Y.S.2d 307, 309 (N.Y. App. Div. 1990):

> Restrictions on automatic renewal clauses were first applied to leases of real property. Former RPL § 230. (L.1936, ch. 702). Former Section 399 of the General Business Law ("GBL"), enacted in 1953 (L.1953, Ch. 701), extended this restriction to leases of personal property. [See, *Peerless Towel Supply Co. v. Triton Press*, 3 A.D.2d 249, 160 N.Y.S.2d 163 (1st Dept.1957) voiding renewal of a towel and soap supply contract as within this remedial provision]. The provisions of GOL § 5-903 relating to "contracts for service, maintenance or repair to or for any real or personal property" were first adopted in 1961 as GBL § 399-a. (L.1961, Ch. 507). A supporting memorandum by the Attorney General, who endorsed the bill, described the legislation as applying to "automatic renewal provisions contained in service-type contracts" and to a "contractor furnishing maintenance, or repair services." The memorandum refers to the measure as one designed to protect "small businessmen" who unwittingly find themselves 'married' to contracts for sign maintenance, laundry and linen supplies and a variety of other services." *Telephone Secretarial Service v. Sherman*, 49 Misc.2d 802, 804, 268 N.Y.S.2d 453 (District Court of Nassau, 1966) (citing N.Y.Legis.Ann.1961 p. 52), *aff'd.*, 28 A.D.2d 1010, 284 N.Y.S.2d 384 (1967).

Similarly, explaining the application and scope of "services" provided under GOL § 5-903, that same court observed that the Legislature never intended to extend them to contracts for every type of personal services, regardless of how unlike those contemplated by the statute:

> We agree with the trial court that GOL 5-903 is not applicable in the instant situation. That statute is addressed to contractors who furnish "service, maintenance or repair to or for any real or personal property . . . ", and provides that when such services are performed pursuant to a contract that contains an automatic renewal clause, the party receiving the service must be given timely written notice calling his attention to the existence of the renewal provision in the contract. It was enacted to protect small businessmen who unwittingly find themselves "married" to self-renewing maintenance or service-type contracts (N.Y. Legis. Ann., 1961, p. 52, 451), and may not reasonably be construed to encompass the personal service agreement at bar.

Prial v. Supreme Court Uniformed Officers Ass'n, 91 Misc. 2d 115, 117, 397 N.Y.S.2d 528, 530 (N.Y. App. Term. 1977) (agreement for legal services). It is appropriate, then, to apply these characterizations to the agreements at issue in this case.

Unfortunately, defendants do nothing of the sort. Ignoring what the Master Services or Colocation agreements say, defendants argue (Moving Memorandum of Law ["MOL"] at 3-4) that these constitute a contract for "service, repair or maintenance to or for personal property" as defined in GOL § 5-903, based on the following "creative" interpretation of the Complaint:

> The relevant personal property is described in the complaint as defendant's "network, server and storage gear" and "equipment." (Cplt. ¶¶ 3, 18) In several places, the complaint describes the contract as one for "services" related to this property, including, as mentioned earlier, "resources purchased and provided" by plaintiff: "storage and backup systems, environmental controls (e.g., air conditioning and fire suppression) and security devices." (Cplt. ¶¶ 3, 5, 11-12, 17, 20). Thus, plaintiff's services are within the terms of Section 903.

This submission by defendants asks this Court to abandon not only common sense but a basic level of reading comprehension; and perhaps much more still. By ripping words from the context of the Complaint, Defendants have so shorn them of their meaning as to effectuate a complete lie, as demonstrated below.

Defendants cite first to ¶ 3 of the Complaint, stating that "The relevant personal property is described in the complaint as defendant[s'] 'network, server and storage gear.'" The Complaint does use these words to describe defendants' network, server and storage gear—but not with reference to their being "maintained" by Fortress ITX. To the contrary, the entire sentence relied on by defendants is, "Multiple customers rent space and resources and the Fortress data center (hence the term 'co-location'), where they [i.e., multiple customers] maintain and operate their **network, server and storage gear** and connect to the Internet." (¶ 3; emphasis added).[3] Paragraph 3 therefore has the exact opposite meaning from the one defendants suggest:

[3] It is impossible to read this sentence to mean that the "Fortress data center"—which are neither persons, multiple entities nor anything plural—"maintain" network, server and storage gear. Moreover, defendants' reading would require that the pronouns then switch back, in the same clause, to mean the "multiple customers" referred to by the word "their." (Alternatively, if "their" did refer to Fortress, of course, this would be even worse for defendants, because the clause would merely refer to Fortress maintaining its own equipment.) In truth, the word "they"

Maintenance on equipment is done, not by Fortress, but by its colocation customers—only.

Defendants' second reference is to the word "equipment" as used in ¶ 18 of the Complaint. This, again, means to suggest that the contract was one for "service, repair or maintenance to or for personal property." But there is nothing about the use of the word "equipment" that could sustain such an understanding. In fact, the full sentence in ¶ 18 from which that word has been excised is as follows (emphasis added):

> Unbeknownst to Fortress, however, defendants began to remove its **equipment** from Fortress's facility and move it to another data center surreptitiously in two steps, one of which took place on Christmas Eve and the second of which took place on New Year's Eve.

It is understandable why defendants would not want to remind the Court of this allegation. But it is not defensible for them to turn this sentence into something so divorced from its plain meaning. For Paragraph 16 of the Complaint is a description, not of "service or maintenance" by Fortress, but of defendants' **own actions** in secreting equipment, on which Fortress had a security interest, from Fortress's data center. This was done in order to "cheat" Fortress out of its rightful recourse to that security interest. Defendants' argument that the word "equipment" here refers in any way to "service, repair or maintenance" of defendants' equipment by Fortress goes beyond advocacy to frank misrepresentation. In a similar vein, defendants state:

> In several places, the complaint describes the contract as one for "services" related to this property, including, as mentioned earlier, "resources purchased and provided" by plaintiff: "storage and backup systems, environmental controls (e.g., air conditioning and fire suppression) and security devices." (Cplt. ¶¶ 3, 5, 11-12, 17, 20).

But of course, the Complaint does not allege that Fortress provided "services to property," and certainly not services to defendants' property, at all. Rather, it describes a suite of services,

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can only refer to "[m]ultiple customers," a plural compound noun constituting the only possible antecedent to the plural pronoun "they." Defendants' inventive but dishonest approach to "parsing" the Complaint must be rejected.

resources and infrastructure provided throughout an entire facility where defendants, along with other customers, were committed to **maintain their own equipment**. As the Complaint continues, "Utilizing colocation, **Fortress's clients are able to manage, maintain, back up and in all respects operate** their Internet and other server-based business operations . . . " (¶ 4; emphasis added). Nothing in the Complaint is inconsistent with this allegation. And nothing in the Complaint or the agreements suggests that maintenance or repair services were to be provided to defendants' property. Defendants' selective plucking of words from the Complaint to assign completely preposterous meanings to them should be rejected by the Court.

C. The services to be provided under the contracts here are not "service, repair or maintenance contract" under New York GOL § 5-903.

Defendants chose, attempting to squeeze the agreements here into the category of service contracts under GOL § 5-903, to omit consideration of those agreements entirely. We need not do so and hardly expect that the Court will. What, then, does the Colocation Agreement provide in terms of "service, repair or maintenance" of defendants' property, such that the Court can determine whether GOL § 5-903 should applyk? The Colocation Agreement addresses this in two separate paragraphs; neither one remotely supports defendants' arguments. The first is ¶ 2:

> **2. USE OF THE LICENSED SPACE**
>
> a. Unless otherwise expressly provided in a Service Order, Customer will be responsible for configuring, providing, placing, installing, upgrading, maintaining, repairing, and operating Customer's Equipment. . .

The key words: "Customer will be responsible." The second guiding provision is ¶ 11:

> **11. EQUIPMENT REPAIR AND MAINTENANCE**
>
> During the Term, Customer shall provide, at its expense, repair and maintenance with respect to Customer provided equipment installed in the Bay.

If this were indeed a contract for "service, repair maintenance or maintenance" of defendants' "equipment," it would be a very bad one, featuring two different provisions explicitly placing

responsibility on defendants alone for every conceivable synonym describing "service, repair and maintenance." This is to be contrasted with the situation in *Carbo Indus., Inc. v. Coastal Ref. & Mktg., Inc.*, 154 F. App'x. 218, 219 (2d Cir. 2005), cited by defendants, where the plaintiff had expressly agreed to provide and maintain storage facilities for defendants' petroleum products, as well as insurance coverage, automated card-controlled truck loading facilities, inventory verification, "special additive equipment" and even the actual addition of additive to the petroleum. Courts do not, however, ignore that actual operative terms of a contract, as defendant asks the Court to do here, in evaluating their meaning. Thus in *Pozament Corp. v. AES Westover, LLC*, 14 Misc. 3d 1210(A), 836 N.Y.S.2d 488 (N.Y. Sup. Ct. 2006) (Table), 2006 WL 3843593 (N.Y. Sup.), the court why it rejected the suggested application of GOL § 5-903 to a contract for fly ash disposition and rubbish removal:

> Despite the legislature's intent to have this statutory provision be read as inclusive as possible, the terms of this Agreement clearly fall outside even an expansive reading of GOL § 5-903. This Agreement is quite particular in describing defendant's obligations . . .

2006 WL 3843593 at *3. See also, *Mobile Diagnostic Testing Services, Inc. v. TLC Health Care Network*, 19 A.D.3d 1145, 1146, 796 N.Y.S.2d 824, 825 (N.Y. App. Div. 2005) (contract for administering of echocardiograms to patients "cannot be said [to be] the type of contract that was within the contemplation of the Legislature when it enacted the statute").

Here too there is no reason in the world to accept defendants' completely incredible characterization of this agreement as one implicating GOL § 5-903. Unlike each case cited in their brief, which defendants suggest extend the reach of this statute beyond its obvious meaning, here there is simply no plausible way to avoid the language and reality of the contract.

D. Defendants lost the benefit of any entitlement they may have had to relief under GOL § 5-903 due to their duplicitous acts as alleged in the Complaint.

Defendants ask the Court, in applying a statute meant to defend presumably defenseless small business owners from manipulative "service contract" companies, to forget the central factual allegations of the Complaint. These are the allegations that defendants not only knew the renewal and termination dates of the agreements, but affirmatively manipulated their actions around the time of those dates. These allegations state that defendants did this in order to "beat" Fortress out of its ability to readily enforce the contractual protections in place to avoid its being deprived of the benefits of those contracts. Complaint ¶¶ 17-21. The Court must accept these allegations as true; *see Mills*, *supra*, 12 F.3d at 1174. And while GOL § 5-903 is a remedial statute, it is not a blank legislative check for breach of contract:

> While this court is mindful of the salutary purposes underlying the enactment of these remedial statutes and the equitable underpinnings of the common law principles espoused in the case authorities cited above, the remedies afforded by such statutes and/or case authorities have never been and are not now available to those who participated in a duplicitous scheme about which they now complain or to those who otherwise come into court seeking redress with unclean hands. . .

Wells Fargo Bank, NA v. Edsall, 22 Misc. 3d 1113(A), 880 N.Y.S.2d 877 (N.Y. Sup. Ct. 2009) (consumer protection statutes regarding mortgage practices). In particular, New York courts have not hesitated to apply principles of equity and common sense when considering whether the facts of a case justify a party's refuge in the remedial social purposes of GOL § 5-903. Thus in *Donald Rubin, Inc., supra*, the Appellate Division rejected the suggestion that this statute's provisions be applied blindly, without consideration of who knew what, and when, about the effect of an automatic termination clause:

> Counsel for [defendant] HSBP appears to have negotiated and prepared the subject contract and the agreement appears on HSBP letterhead. Schwartz denies that he or any of the co-defendant trustees, who are elected annually, were aware of the automatic renewal clause. However, the record reflects that a copy of the contract was set forth in full in the minutes of the trustees' meeting of July 19,

> 1983. Thus, we are not concerned herein with a small business "unwittingly" locked into the automatic renewal of a service contract.

160 A.D.2d at 57, 559 N.Y.S.2d at 310. This reasoning applies all the more so here, where the Complaint alleges not only defendants' knowledge of the automatic renewal clause, but their abuse of Fortress's reasonable expectations with respect to that clause. As in *Donald Rubin, Inc.*, this Court should not be concerned at all for defendants' unjustified desire to hide behind GOL § 5-903 and avoid their contractual obligations nine months after taking full advantage of the very contract terms they wish to invalidate today.

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE NEW YORK GENERAL OBLIGATIONS LAW § 5-905 DOES NOT APPLY TO THE CONTRACTS OR FACTS HERE.

A. The agreements among the parties were not leases of real property or premises.

Defendants proffer, as an alternate ground for dismissal, GOL § 5-905, which is companion legislation to § 5-903.[4] It applies the notice requirement regarding automatic renewal contracts to "any lease of any real property or premises." But the only premises in this matter are defendants' erroneous legal premises. There is no lease in this case; there is no real property or interest in real property; and to the extent any rights could ever existed that could be relevant to GOL § 5-905, they were most assuredly nullified by defendants' conduct.

Defendants, again, make much of the word "space." But as explained in the Statement of Facts, while the Colocation Agreement refers to "space" to describe the resources defendants were purchasing, that contract never granted a right to any particular "space," realty or premises. Rather, defendants were entitled to services and licenses defined by an amount of "space"

[4] Plaintiff was unable, after diligent effort, to find any authority for the proposition that GOL § 5-905 applies to alleged "premises" located in another state, as is the case here. It has hard to believe the New York legislature ever intended for such a provision to apply to premises in other jurisdictions. But no authority to the contrary was located either.

defined as a "Bay," i.e., the square area necessary to accommodate defendants' equipment, along with a license providing them access to their Bay. As stated in the Colocation Agreement in ¶1

> **1. THE LICENSED SPACE**
>
> Fortress ITX agrees to lease to Customer, and customer agrees to lease to Fortress ITX, during the term, one (1) or more colocation bay(s) ("Bay"). Twenty-four (24) hour access to the Bay shall be provided to the Customer via secure entry. . .

Unlike in a lease concerning real property, the description of the supposed "premises" here is, to say the least, sparse—actually, nonexistent. Indeed, while defendants were granted a license to utilize one or more unidentified "Bays" (¶ 1) and its associated resources, the Colocation Agreement provided no right to any "premises" anywhere. Indeed, it explicitly reserved to Fortress the right to provide the contracted-for Internet services at **any location** of its choosing:

> **6. RIGHT TO RELOCATE**
>
> Fortress ITX may require Customer to relocate its equipment, at Fortress ITX's expense, within [the] Site and/or another Site designated by Fortress ITX, provided that any new such new Site shall provide Customer with the same rights and services afforded under this Agreement.

Such a clause is completely inconsistent with a lease involving any interest in real property. That is because it is not one. Defendants are trying to fit a round peg (services and a license) into a square hole (real property), and it will not go. It cannot.

This error is not unique to defendants. New York courts have had other opportunities to flesh out the distinction between the two sorts of contracts being conflated by defendants. For example, *Gladsky v. Sessa*, CV 06-3134 ETB, 2007 WL 2769494 (E.D.N.Y. Sept. 21, 2007), was an action for wrongful eviction brought, as it turned out, by a party that could not, under the law, be "evicted." The Court explained why:

> Plaintiff and defendant did not enter into a lease by which a landlord-tenant relationship was created. Rather, by defendant's own words, they "entered into an oral agreement whereby plaintiff was to haul, store and launch the yacht S/Y CLARITY at the plaintiff's Marine yard in exchange for agreement upon payments." Defendant was not a tenant but instead a mere licensee. A licensee is

> defined in Black's Law Dictionary as "a person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor." This definition is consistent with that employed by New York courts. It has long been the rule in New York that a licensee, as opposed to a tenant or one having a greater interest in the use or particular real property, cannot maintain an action for wrongful ejection. While it is true that tenants may be evicted only through lawful procedure, others, such as licensees who are covered by New York Real Property Actions and Proceedings Law ("RPAPL") 713 are not so protected. . . .
>
> Moreover, the elements of a wrongful eviction provided by the New York Court of Appeals require that the tenant be deprived of the enjoyment or possession of the **premises**. Although the term premises has many meanings, one of its definitions—and the only one applicable to a wrongful eviction context—is the following: "Land with its appurtenances and structures thereon ... A dwelling unit and the structure of which it is a part and faculties and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant." Black's Law Dictionary . . . Defendant did not enter into an agreement to rent land or a dwelling unit from plaintiff. The contract agreed to by the parties was simply a storage agreement which gave defendant license to enter onto plaintiff's land for the purpose of storing and accessing his vessel.
>
> Based on the foregoing, defendant is a licensee and not a tenant and therefore cannot maintain an action for wrongful eviction under New York law.

Id. at *8-*9 (citations and quotations omitted). While this is not an action for wrongful ejection, as *Gladsky* was, the analysis in that opinion is entirely apposite here. The issue before the *Gladsky* Court was essentially the same: Were the contracting parties entering into a leasehold such that the remedial statutory protections, meant to remedy imbalances in bargaining power, should apply? The answer in *Gladsky* was "no," because such protections are afforded to parties respecting leases for real property, whereas that relationship there implicated no more than a license that was appurtenant to a service contract. Here too the answer should be "no" as to defendant's dismissal claim, for the same reasons: No lease, no real property, no premises.

B. There is no ambiguity in the Colocation Agreement such that the Court has reason to favor an untenable interpretation of the contract and apply GOL § 5-905, and any ambiguity as may exist is to be resolved in Fortress's favor.

Shunting aside, once again, the operative terms of the contracts here, defendants nonetheless acknowledge their need to address the terms in ¶ 19 of the Colocation Agreement which make it crystal-clear that it is neither a lease nor a grant of rights in real property. Defendants must try to explain why the Court should disregard the provisions stating that

- "This Agreement is a services agreement and is not intended to and will not constitute a lease or any real or personal property";
- Defendants acknowledge being granted "only a license" to gain limited, conditional access to their Bay; that Defendants have "not been granted any real property interest under this Agreement"; and that
- Defendants have "no rights as a tenant or otherwise under any real property or landlord / tenant laws, regulations, or ordinances."

(Colocation Agreement ¶ 19). Ultimately, they cannot do so.

Defendants do try, however. One approach they take is once more to play around with the words of the Complaint, ignore the document as a whole and claim that the existence of the words "space" and "lease" raise an "ambiguity," thus meriting a "generous interpretation" such that the Court should, naturally, apply GOL § 5-905 (MOL at 6-7.) But there is no such ambiguity here. Courts look to reality, not labels, when interpreting contracts. Contract language is deemed ambiguous only if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined **the context of the entire integrated agreement** and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993) (emphasis added; internal quotes omitted). As the Second Circuit explained in *Sayers*, expanding on this concept:

> Although the parties dispute the meaning of specific contract clauses, our task is to determine whether such clauses are ambiguous when read in the context of the entire agreement. By examining the entire contract, we safeguard against adopting an interpretation that would render any individual provision superfluous. Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement.

Sayers, 7 F.3d at 1095 (citations and internal quotes omitted). As set forth above, it is only by wrenching these "magic words" from the Colocation Agreement and the Complaint that defendants can even claim so much as an ambiguity. Defendants wisely do not even suggest that theirs is the only plausible interpretation of the Colocation Agreement.

Their modesty, however, is of no avail, for in the unlikely event that the Court were to find that there were a contractual ambiguity here, the Court would not then merely "default" to an interpretation favoring a remedial statute. In fact, the back-letter law concerning claims of contractual ambiguities on a 12(b)(6) motion is precisely the opposite: "If the interpretation of a contract is at issue . . . **all contractual ambiguities must be resolved in the plaintiff's favor.**" *Banks v. Corr. Services Corp.*, 475 F. Supp. 2d 189, 195 (E.D.N.Y. 2007), *citing Int'l Audiotext Network, Inc. v. Am. Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995). Thus defendants' appeal to "ambiguity" is not only logically dubious, but it is, as a legal matter, worse than unhelpful for them at this stage of the proceedings: Their claim of ambiguity as a premise for their motion mandates denial under the standards employed in Rule 12(b)(6) motions.

C. Defendants have waived any right they may have had to rely on GOL § 5-905 by their actions in connection with the end of the contract term.

In addressing the juxtaposition of the allegations concerning defendants' actions here against their flight to the supposed shelter of the remedial policies embodied in GOL § 5-903, Fortress quoted from *Wells Fargo Bank, NA v. Edsall*, *supra*, that notwithstanding "the salutary purposes underlying the enactment of these remedial statutes . . . the remedies afforded by such

statutes . . . have never been and are not now available to those who participated in a duplicitous scheme about which they now complain or to those who otherwise come into court seeking redress with unclean hands. . ." 22 Misc. 3d 1113(A), 880 N.Y.S.2d 877. Plaintiff also cited *Donald Rubin, Inc.*, *supra*, teaching that remedial statutes are not necessarily applied where, as here, the social or economic policy they seek to promote is not implicated. *See*, 160 A.D.2d at 57, 559 N.Y.S.2d at 310. Not only do these general principles apply equally to GOL § 5-905, but the courts have applied them even to deprive actual tenants (which defendants are not) of the protections of that statute and its predecessor[5] where to do otherwise would work an injustice.

These decisions have been based on waiver, not by contract—contractual waiver having been forbidden in *Boyd H. Wood Co. v. Horgan*, 291 N.Y. 422, 52 N.E.2d 932 (1943)—but by the tenant's conduct during the renewal period. The principles of waiver are well known:

> Generally and excepting instances where there would be transgressions of public policy, all rights and privileges to which one is legally entitled, *Ex contractu* or *Ex debito justitiae*, may be. A waiver, the intentional relinquishment of a known right may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage

Hadden v. Consol. Edison Co. of New York, Inc., 45 N.Y.2d 466, 469, 382 N.E.2d 1136, 1138 (1978) (citations omitted). In two cases finding waiver of the benefits of GOL § 5-905, *Winik v. Klienfeld*, 194 Misc. 513, 515, 87 N.Y.S.2d 808, 809 (N.Y. Mun. Ct. 1949) and *Farmingville Associates v. First Nat. Supermarkets, Inc.*, 93-CV-4683 (JG), 1996 WL 529312 (E.D.N.Y. Aug. 1, 1996) (both decided after *Boyd*), waiver was inferred from the tenants' remaining in the premises after the expiration of the original term. But holdover status is not necessary to find a waiver by conduct. Thus in *Simon Ginsberg Realty Co. v. Greenstein*, 158 Misc. 473, 475, 286 N.Y.S. 33 (N.Y. App. Term. 1936), the landlord failed to comply with the statute, but asked the tenant about his intentions following the lease deadline for renewal. The tenant said he intended

[5] The predecessor to GOL § 5-905 was Section 230 of the Property Law.

to stay. "This evidence, which was uncontradicted, showed a waiver of the statutory notice," wrote the Appellate Term. "Here we have the equivalent of an express waiver. " *Id*. at 35-36. While ultimately the tenant did hold over, it was not its presence in the leasehold on which the court based its ruling, but rather its waiver. Explained the court:

> [A]s the statute was enacted solely for the benefit of the tenant, we see no reason why he cannot waive its benefits, just as a monthly tenant or tenant from month to month in the city of New York may waive the 30-day statutory notice as a preliminary to the maintenance of summary proceedings for holding over the term.

Id. *Accord*, *Doublel Bldg. Co. v. Littell*, 23 N.Y.S.2d 728, 729 (N.Y. App. Term. 1940) (finding no waiver). The possibility of a tenant's voluntary waiver of this provision by his conduct has never been doubted. Once waiver is inferred from the facts, there is no legal difference between an express waiver, as was found in *Simon Ginsberg Realty Co.*, and implied waiver, as strongly suggested by the facts alleged here. See *Hadden*, *supra*, 45 N.Y.2d at 470, 382 N.E.2d at 1139.

The allegations here fully justify, for purposes of this motion, denial of any relief under either of these statutes, due to estoppel arising either from waiver or, as discussed earlier, unclean hands. As the Complaint alleges, defendants remained in Fortress's data center past the deadline to give notice of termination of the original contract term, utilized all the services provided under the contract and benefited from a pricing structure premised on the automatic renewal of the contract provided by its terms. Yet defendants began to secretly remove equipment from Fortress's facility on legal holidays, when only a skeleton staff was present at the data center. They are alleged to have done this to prevent Fortress from taking appropriate measures to protect its interests with respect to a departing customer. They are alleged to have made their last "breakout" from the data center the very night their lease term was ended. Equity should not permit parties facing such allegations to be excused, much less on a motion under

Rule 12(b)(6), from their contractual obligations merely because they did not get a registered letter informing them of a fact they showed that they knew all too well.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE AUTOMATIC RENEWAL CLAUSE IS NOT AN UNENFORCEABLE PENALTY CLAUSE.

Defendants maintain[6] that the automatic renewal clause here is an unenforceable penalty clause as a matter of law. Notwithstanding the smattering of cases, some involving consumer or small claims or in distant jurisdictions, the law in this State does not support defendants' argument. As this Court has noted:

> Liquidated damages may be established in advance where the amount established bears a reasonable proportion to the probable loss, and actual damages are difficult to ascertain as of the time the parties enter into the contract. A clause which provides for an amount plainly disproportionate to actual damages is deemed a penalty and is not enforceable because it compels performance by the "very disproportion" between liquidated and actual damages. Both the reasonableness of the liquidated damages and the certainty of actual damages must be measured as of the time of the contract's execution rather than at the time of the loss actually incurred. . . .
>
> However, due consideration must also be given to the nature of the contract and the attendant circumstances. Further, the New York Court of Appeals has cautioned against interfering with the agreement of the parties, absent some persuasive justification. *Cf. Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800, 803, 389 N.E.2d 113 (1979) ("Absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach," court should enforce agreement of the parties). Relevant here is whether the parties were sophisticated and represented by counsel, the contract was negotiated at arm's-length between parties of equal bargaining power, and similar damages provisions were incorporated into other [comparable] contracts.

Bigda v. Fischbach Corp., 849 F. Supp. 895, 902 (S.D.N.Y. 1994) (citations and internal quotes omitted). *See also, Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577, 389 N.E.2d 113, 116 (1979) ("Absent some element of fraud, exploitive overreaching or

[6] They maintain this for the first time here—this ground for dismissal was not listed as a ground for this motion in defendants' pre-motion letter

unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties"); *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 427, 361 N.E.2d 1015, 1019-20 (1977) ("The agreement was fully negotiated and the provisions of the form, in many other respects, were amended. There is no indication of any disparity of bargaining power or of unconscionability. The provision for liquidated damages related reasonably to potential harm that was difficult to estimate and did not constitute a disguised penalty).

In short, New York law firmly favors enforcement of liquidated damages clauses such as the one at issue here. Defendants have not come close to providing a factual basis for the Court to depart from that general rule in this case—a burden of coming forward that rests on them. *Bigda v. Fischbach Corp., id.* Such facts must rise above the baseless speculation in defendant's brief, which starts out as an expression of certainty, albeit vague, but quickly segues into self-described admitted guesswork:

> The foreseeable actual damages for breach were not difficult to estimate – for example, one estimate would be payments due minus revenue obtainable through reasonable efforts to mitigate damages.

(MOL at 10.) This "estimate" is merely a series of conceptual "Hail Marys" which, if they had in fact been so easy to ascertain when the contract was negotiated, could have been negotiated into the agreement by defendants. Defendants' musings on this topic are of no legal significance and do not meet their burden. *See, The Edward Andrews Group, Inc. v. Addressing Services Co., Inc.*, 04-CIV-6731(LTS), 2005 WL 3215190 (S.D.N.Y. Nov. 30, 2005) ("Defendant's arguments and factual proffers are insufficient to defeat enforcement of the accelerated payment clause of the Agreement. ASCO has proffered no evidence that probable damages to EAG were "readily ascertainable" at the time of negotiations.")

IV. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE COMPLAINT ADEQUATELY SETS OUT THE EXISTENCE OF SUBJECT MATTER JURISDICTION.

Defendants urge the court to dismiss this action on the grounds that (a) the undersigned failed properly to fill out the Civil Cover Sheet in this action, omitting to indicate that (b) there had been a dismissal of a case related to this one, not on the merits, by another judge *sua sponte*, based on (c) a supposed lack of subject matter jurisdiction. None of these is an adequate ground for dismissal of this action and, to the extent this argument is fundamentally based on (c), defendants have failed to move under the proper Rule of Federal Procedure governing such dismissals, to enunciate the legal standards of that Rule or to apply those standards to the facts here.

Beginning with (c), the most substantive of defendants' complaints—a lack of subject matter jurisdiction—defendants argue that the Complaint fails to allege the citizenship of the members of the LLC defendants, citing the unreported decision in *Scantek Med., Inc. v. Sabella*, 08-CV-453 (CM), 2008 WL 2518619 (S.D.N.Y. June 24, 2008). But *Scantek* does not require dismissal of an action that fails to meet this standard; it merely recites the requirement for such allegations as applied to a relatively developed record involving a jurisdictional dispute related to removal and remand. *Id.* at *1. In doing so it relies on *Handelsman v. Bedford Vill. Associates Ltd. P'ship*, 213 F.3d 48, 55 (2d Cir. 2000), which also found a lack of diversity jurisdiction based on a record full enough to determine the parties' respective citizenships—including, in the case of the LLC's, the citizenship of their respective members. Here, however, Fortress has no way of knowing anything about the defendant LLC's other than that they were formed pursuant to the laws of this State. Fortress, unlike the parties in those cases, has no access to the identities of the members of these limited liability companies, much less their citizenship. Because this

will almost always be the case at the pleading stage, defendants' argument, if accepted, would amount to an exemption of LLC's from any case based on diversity jurisdiction.

Defendants could have avoided this gamesmanship by properly designating this motion as being based alternatively on a lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), instead of Rule 12(b)(6), and providing the Court and parties with appropriate factual submissions proffering actual jurisdictional facts. It may be that one or both of the defendant entities is composed of members whose citizenship destroys diversity—but then again, it is hard to imagine that if this were in fact the case, defendants would not just say so instead of reaching for arcane grounds for dismissal.

Faced with a similar situation in *Occidental Hotels Mgmt. B.V. v. Westbrook Allegro L.L.C.*, 05 CIV. 9547PKCTHK, 2009 WL 2482157 (S.D.N.Y. Aug. 12, 2009), this Court granted plaintiffs leave to conduct discovery to determine the actual facts regarding citizenship of the relevant defendant limited partners and then to file an amended complaint—even though, unlike here where discovery has not even begun, the discovery period had already ended. Such discovery, absent defendants' own offer of relevant information, could demonstrate either that diversity does exist, or that it could: "Fed. R. Civ. P. 21 provides in relevant part: 'On motion or on its own, the court may at any time, on just terms, add or drop a party.' Rule 21 'allows a court to drop a nondiverse party at any time to preserve diversity jurisdiction, provided the nondiverse party is not 'indispensable' under Rule 19(b).'" *Quantlab Fin., LLC, Quantlab Technologies Ltd. (BVI) v. Tower Research Capital, LLC,* 10 CIV 2491 (DLC), 2010 WL 2179960 (S.D.N.Y. May 28, 2010). Indeed, as contemplated in *Handelsman* as well, it may be advisable or appropriate to drop one non-diverse defendant from this suit which, depending on the facts, may or may be deemed a non-essential party. See *Handelsman, id*. at 52-53. But there is no way Fortress could

know any of that now, and no possible justification for dismissal based on grounds.

Defendants also complain that the prior order dismissing another complaint by Fortress against one defendant should govern this case, but cite no authority other than the utterly inapplicable decision in *Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2008). In that case, the original complaint was filed in October, 1999, and this is what followed:

> Over the next three years of active litigation, Ruotolo was twice given leave to amend his complaint, notably to add the filing of his lawsuit as the second-and only other-instance of speech for which Ruotolo alleged retaliation. By May 2006, the parties had concluded extensive discovery, narrowed the claims through multiple dispositive motions (various state law claims were dismissed on an earlier Rule 12(b)(6) motion), litigated numerous discovery and trial-related motions, and submitted their final joint pretrial order. . . .
>
> Ruotolo's proposed amendment comes post-judgment in a case that had been trial-ready, and pleads a new scenario that would prevent disposition of the case until either further motion practice or a trial-and any trial or motion practice would likely be delayed pending discovery on open questions. . . .
>
> The district court also denied leave to amend . . . because of undue delay, and the undue burden and prejudice that would result to defendants.

Id. at 187, 192. In other words, an amendment of the complaint was completely unjustified under the usual standards governing the granting of leave to amend.

In contrast, here, as defendants acknowledge, an amended complaint in the "prior action" was entered by the ECF clerk as filed one day after Judge Kaplan's order dismissing the prior complaint. This action was filed only a few months later. Defendants do not, and cannot possibly, suggest any basis for claiming either undue delay, an undue burden on them or prejudice as a result of the continuation of this action. *Ruotolo* is entirely inapposite.

Granting defendants' characterization of the two actions as "similar," it may be that this action should, procedurally, have followed a motion to vacate the prior one. If so, this Court obviously has the power to deem that motion as made and granted and, under the circumstances as well as the policy permitting liberal amendment of pleadings, should do so if it deems such

actions necessary. What defendants have failed to do, however, is to cite any where a complaint was dismissed on such technical grounds. And they certainly have come up empty in demonstrating authority for the suggestion that an action in this Court should be dismissed based on an incorrect entry on a Civil Cover Sheet, which is "merely an administrative aid to the court clerk, and is therefore not typically considered part of a litigant's pleading papers." *Favors v. Coughlin*, 877 F.2d 219, 220 (2d Cir. 1989).

Ultimately, however, to the extent defendants' last ground for dismissal is, as their brief says, based on "failure to properly allege subject-matter jurisdiction," it is deficient and should be denied because amendment, not dismissal, is the appropriate remedy; because the Court should hold any such determination in abeyance following an opportunity, at this beginning stage of the litigation, for jurisdictional discovery; and because defendants themselves have failed to move or argue under the appropriate Rule of Federal Procedure for dismissal on these grounds.

CONCLUSION

For the foregoing reasons, plaintiff University Communications, Inc. respectfully requests that the Court deny defendants' motion to dismiss in its entirety.

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