

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

CLUB MONACO U.S. LLC ,

Plaintiff,

-against-

BSD 530 BROADWAY PROPCO LLC ,

Defendant

Index No.

Index No. Purchased:

SUMMONS

Plaintiffs designate New York
 County, as the place of trial based
 upon CPLR 503(c)

TO THE ABOVE-NAMED DEFENDANT: BSD 530 BROADWAY PROPCO LLC

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer on plaintiff's attorneys within 20 days after service of this Summons, exclusive of the day of service (or within 30 days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in the case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
 September, 25 2020

DAVIS & GILBERT LLP
 Attorneys for Plaintiff

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 Jesse B. Schneider

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COMPLAINT

Plaintiff Club Monaco U.S. LLC (“Club Monaco,” “Tenant,” or “Plaintiff”), by and through its attorneys, Davis & Gilbert LLP, for its Complaint (the “Complaint”) against Defendant BSD 530 Broadway PropCo LLC (“Landlord” or “Defendant”), states as follows:

NATURE OF THE ACTION

1. This action concerns Landlord improperly sending Tenant a Notice of Default (the “Notice”) on September 10, 2020, attempting to terminate its lease, dated February 15, 2013, (the “Lease”) for ground floor retail space and a portion of the lower level space (the “Premises”) in the building known as 536 Broadway, New York, New York (the “Building”). By serving the Notice, Landlord seeks to “terminate” the Lease solely over alleged “late fees” and trigger default remedies that would attempt to leave Tenant liable to Landlord for millions of dollars in future rent but deprive it of possession. This attempt by Landlord is not only cruel considering the current environment, but illegal. Any effort to “terminate” the Lease must be enjoined.

2. In addition, as part of this action, Tenant seeks, among other things, rescission of the Lease, and a declaration that the Lease is unenforceable as a result of the COVID-19 pandemic and the related government-mandated shutdowns. Those shutdowns brought New

York City to a complete halt. Since March 2020, virtually all business and commercial activity has been at a standstill. The formerly burgeoning business of selling apparel from physical store locations has been non-existent. None of this was even remotely foreseeable. As a result, the purpose of the Lease has been completely frustrated, and the object and purpose of the Lease has been rendered impossible, illegal, and impracticable.

3. Before March 19, 2020, Tenant operated a Club Monaco retail store at the Premises, strategically situated in the heart of Lower Manhattan in one of the City's retail meccas, SoHo. In exchange for the ability to operate its retail store at this heavily trafficked and bustling tourist spot, Tenant agreed to pay Defendant, *inter alia*, annual rent which for the current year is \$4.9 million and, over the remaining seven plus years of the Lease, is scheduled to increase to over \$6 million

4. Tenant's decision to pay such enormous sums was based on the Building's extraordinary location in one of New York City's busiest and most trafficked retail shopping districts. Located right on Broadway in SoHo, the Building is easily accessed via the Broadway/Lafayette, Spring Street, and Prince Street subway stations, and bus lines which service the neighborhood regularly at all hours, and is in the heart of New York's vibrant SoHo neighborhood, near dozens of art galleries, museums, and some of New York City's most visited attractions, including Washington Square Park and New York University.

5. SoHo and Lower Manhattan are home to dozens of prominent retail destinations like Nike, American Eagle, and Bloomingdale's. Upscale boutiques and retail shops line the streets all around the Premises. As a result, Tenant's store is—or at least before COVID-19 was—located in one of Lower Manhattan's premier retail shopping hubs. Before the COVID-19 pandemic, Lower Manhattan was in the midst of a transformation into a 24/7 destination for

office workers, neighborhood residents and tourists alike. Plaintiff would never have agreed to pay nearly \$5 million a year in rent (scheduled to increase to over \$6 million per year by the end of the Lease term) without Lower Manhattan's teeming sidewalks and hordes of eager shoppers. Defendant's ability to demand such high levels of rent was also based almost entirely on the Premises location in the heart of SoHo.

6. But in March 2020, everything changed. New York City became a ghost town and overnight, retail activity came to an abrupt halt. The COVID-19 pandemic, unmatched in scope and unprecedented in duration, resulted in government mandates that changed New York City—if not forever then for the foreseeable future. Because thousands of lives were at stake, Governor Cuomo and Mayor DeBlasio's response to the COVID-19 pandemic was swift, severe and uncompromising. Since mid-March, emergency orders have mandated the complete closure of Tenant's downtown retail location, and to this day, continue to prohibit non-essential retail establishments either from operating altogether or requiring them to operate in a manner drastically different from what was contemplated when this Lease was negotiated. This shutdown utterly and irreversibly frustrated the purpose of the parties' agreement, and rendered the object and purpose of the Lease impossible, illegal and impracticable.

7. While the parties might have imagined or even contemplated a certain ebb and flow to the economy, tourism habits, or even weather disruptions and closures, the COVID-19 shutdown is unlike anything ever before experienced in terms of its unpredictability, severity, duration, and impact on the retail industry. Surely, nothing like COVID-19 could have ever been foreseen.

8. Moreover, even when retail is eventually permitted to reopen, it will look nothing like it did pre-March 2020. Reopening will be phased over time with the possibility that stores

may, intermittently have to be shut down again in the event of a sudden uptick in Covid-19 cases in New York City. Nobody can predict if or when workers and/or tourists will return to Manhattan, or how social distancing and other governmental restrictions or even a second wave of the virus will impact retail.

9. COVID-19 cases continue to rise in many states across the country. Accordingly, businesses have been advised of extensive and mandatory guidelines they will need to follow to afford customers protection. Such restrictions are certain to negatively impact the behavior and comfort levels of customers willing to return to crowded retail shops and shopping areas. It is likely to be years before retail has even a chance to return to the pre-COVID form, which served as the bases for what both landlords and tenants relied on in agreeing to such enormous annual rents.

10. The sudden suspension of retail operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed. The purpose of tendering annual rent of nearly \$5 million (scheduled to increase to over \$6 million per year) for the Lease as been completely frustrated. That purpose is also frustrated when the store can only open at limited capacity or for curbside pick-up only, or when customers are too afraid to go out to shop. As a result, the Lease was terminated as a matter of law on or before March 19, 2020, both under the terms of the Lease and the laws of the State of New York, and Tenant had no further obligation to pay rent or other consideration under the Lease.

11. In light of the foregoing, if Landlord's attempt to "terminate" the Lease is not enjoined by this Court pending a determination on the merits as to whether Tenant is even in default (which it is not) or, if the Lease has been frustrated or otherwise terminated as a matter of law, Tenant's rights under the Lease and New York law will be severely, and irreparably,

impaired by Landlord's ability to exercise otherwise automatic remedies under the Lease that will leave Tenant facing judgment of millions of dollars and no concomitant benefit from which to mitigate such a massive obligation.

PARTIES AND JURISDICTION

12. Plaintiff Club Monaco is a Delaware corporation with its principal place of business at 100 Metro Boulevard, Nutley, New Jersey 07110.

13. Upon information and belief, Landlord is a Delaware limited liability company, with an office located c/o Shvo 745 Fifth Avenue, New York, New York 10151. Upon information and belief, Landlord is also the owner of the Building.

ALLEGATIONS COMMON TO ALL CLAIMS

14. On or about February 15, 2013, Landlord and Tenant entered into a Lease for the Premises for a term of 15 years to commence on the Commencement Date (as defined in the Lease) and end on March 31, 2029.

15. In 2013 annual rent for the Premises was set at \$4 million and scheduled to increase every year thereafter until 2029, when the annual base rent was scheduled to be over \$6 million. As of the date of this application, Tenant's annual rent is nearly \$5 million.

16. The parties' mutual and express purpose in entering into the Lease was to provide Tenant with commercial retail spaces suitable for the operation of retail stores selling apparel. For example, Section 5.1 of the Lease state in relevant part that the Premises shall only be used by Tenant for any lawful retail purpose.

17. But for the Premises being strategically and centrally located in one of Lower Manhattan's most visited and highly trafficked location and Tenant's ability to operate a retail store there unimpeded by the unforeseen and unforeseeable COVID-19-related restrictions and

guidelines concerning the capacity and manner of operation, Tenant would not have entered into the Lease on the terms it did. Tenant's ability to operate a retail store at the Premises was the sole consideration Tenant received in exchange for entering into the Lease, all other nominal benefits of the Lease being a part of, and subordinate and ancillary to, that consideration.

18. On or about September 10, 2020 Landlord improperly sent Tenant the Notice, alleging that Tenant was in default under the Lease for failing to pay alleged late fees in amount of \$166,547.79 in connection with rent for the months of May, June, July, and August that was paid in full by Tenant on or about September 1, 2020, after months attempting to agree on terms of a rent abatement and lease modification agreement ultimately fell through. The Notice indicates Landlord's intent to terminate the Lease without first bringing summary proceedings if the alleged default is not cured. (A true and accurate copy of the Notice is attached to the accompanying affidavit of Smita Butala, Tenant's Senior Vice President of Real Estate and Associate General Counsel (the "Butala Aff.") as Exhibit 1.) To date, Landlord has yet to terminate the Lease.

19. Tenant is not in default under the Lease and is accordingly seeking protection necessary to prevent Landlord from improperly attempting to terminate the Lease. If the Lease is improperly terminated by Landlord pursuant to the conditional limitation provision of the Lease, and Tenant loses its leasehold interest before adjudication on the merits as to whether Tenant is even in default and/or whether the Lease has been frustrated or otherwise terminated as a matter of law, Tenant will suffer immediate irreparable harm.

20. Specifically, Tenant is not in default under the Lease because: (i) Landlord is prohibited from charging late fees or other penalties for the late payment of rent during the COVID-19 period pursuant to Governor Cuomo's executive Order No. 202.28; (ii) Tenant timely

paid its rent in full under protest after negotiations surrounding rent abatement and a lease modification agreement ultimately broke down, and (iii) Tenant does not owe rent as of March 19, 2020, as the purpose for which it leased the Premises has been entirely frustrated as a result of the COVID-19 pandemic.

21. Specifically, Executive Order No. 202.28 states, in relevant part that “no landlord, lessor, sub-lessor or grantor shall demand or be entitled to any payment, fee, or charge for late payment of rent occurring during the time period from March 20, 2020 through August 20, 2020.” This Order has been applied to both residential and commercial leases in an effort to mitigate the disastrous impact the Covid-19 pandemic has had on businesses everywhere.

22. Moreover, due to the grave impacts of COVID-19 on Tenant’s retail business, Tenant and Landlord attempted to reach agreement on a lease amendment that would have abated rent during the early months of COVID-19 and offered Tenant the possibility of remaining at the Premises under more favorable terms. Unfortunately, those negotiations fell apart when Landlord insisted that Tenant waive any and all claims related to COVID-19—the very claims that are now at the crux of this lawsuit. Upon the breakdown of those negotiations, and to avoid litigation, Tenant immediately paid all alleged outstanding rent in full under protest. Rather than consider itself fortunate to have collected rent in full, Landlord audaciously sent the Notice improperly seeking late fees and threatening to terminate Tenant’s lease.

23. Furthermore, Tenant’s ability to operate a retail store at the Premises was the parties’ mutual purpose in entering into the Lease, as all parties understood at the time of contracting that but for Tenant’s right to operate a retail store, Tenant would never have entered into this Lease. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant,

the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

24. Thus, not only is Tenant not in default for failing to pay late fees in connection with May, June, July and August rent, Tenant is entitled to a refund for the rent and expenses it paid Landlord since March 19, 2020, declaratory relief regarding its obligations under the Lease, and the equitable remedies described below.

25. In addition, Landlord's Notice, which threatens to terminate Tenant's valuable leasehold interest, is also a clear violation of both Governor Cuomo's Executive Order against Landlord taking actions in furtherance of evicting commercial tenants at least through October 20, 2020 as well as Section 1, Paragraph 11 of subdivision (a) of Section 22-902 of the Administrative Code of the City of New York (the "Commercial Tenant Anti-Harassment Statute," which prohibits a Landlord from threatening a commercial tenant who has seen its business impacted by the COVID-19 pandemic.

26. For purposes of the Commercial Tenant Anti-Harassment Statute, "impacted by Covid-19" means such person's business was closed as a direct result of the COVID-19 state disaster emergency (the "Closure Requirement"); and either (i) it was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issue by the Governor or Mayor during the COVID-19 period (the "Occupancy Limitation") or (ii) its revenues during any three-month period within the COVID-19 period (March 7, 2020 through the first month after the eviction moratorium) were less than 50 percent of its revenues for the same three-month period in 2019 or less than 50 percent of its aggregate revenues for the months of December 2019, January 2020, and February 2020 and such revenue loss was the direct result of the COVID-19 state disaster emergency (the "Revenue Reduction Requirement").

27. From the inception of the Lease until March 2020, Tenant maintained and operated a retail apparel store at the Premises pursuant to the Lease. At all relevant times, the Lease was in full force and effect.

28. On March 7, 2020, the Governor of New York issued Executive Order 202 declaring a disaster in the State of New York.

29. On March 12, 2020, the Governor issued Executive Order 202.1, requiring any place of business to operate at no greater than fifty percent occupancy.

30. Also on March 12, 2020, the Mayor of New York City issued Emergency Executive Order No. 98, declaring a disaster in the City of New York.

31. On March 16, 2020, the Mayor issued Emergency Executive Order No. 100 imposing restrictions on various types of retail operations.

32. On March 18, 2020, the Governor issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. Tenant's retail store at the Premises is non-essential under this Order.

33. On March 20, 2020, the Governor of New York issued Executive Order 202.8, requiring non-essential businesses to reduce their in-person work force by 100% no later than March 22, 2020 at 8:00 p.m. Tenant's retail store at the Premises is non-essential under this Order.

34. Also on March 20, 2020, the Mayor issued Emergency Executive Order No. 102, further restricting retail operations in the City.

35. Following the outbreak of COVID-19 in the United States, Tenant was forced to suspend all retail operations at the Premises on or before March 19, 2020, to comply with applicable governmental orders and guidelines and to protect the health and safety of its

employees, customers, and the surrounding community. Tenant has since never been able to resume normal operations at the Premises. Indeed, it is likely that Tenant will never be able to resume operations in a manner contemplated by the Lease.

36. As a result of the foregoing circumstances and orders, and other applicable governmental orders and guidelines, all of which were unforeseeable at the time the Lease was entered into, and which resulted from no act of either party, the parties' intended use of the Premises was frustrated, became impossible, illegal, and impracticable. Specifically, Tenant was forced to suspend all retail operations at the Premises. The object and purpose of the Lease became impossible, illegal, and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

37. Indeed, although the Lease specifically contemplated that Tenant would benefit from its use for a fixed term, as a result of the unforeseeable COVID-19 crisis, Tenant has been deprived of its use of the Premises for the full term that Tenant was promised under the Lease. Such a result is inequitable and damages Tenant, in part because the term of the Lease and the expectation that Tenant would be able to benefit from the foot traffic and popularity of downtown Manhattan as an international retail shopping and tourist hub, were the basis for the parties' negotiations and calculations at the time of contracting Tenant's obligation to pay rent. Thus, for the additional fact and reason that the Premises will not be what was originally contemplated for the foreseeable future, the object and purpose of the Lease became impossible, illegal, and impracticable, the parties' mutual purpose for entering into the Lease has been frustrated, and the consideration Tenant was to receive under the Lease has failed.

38. Because the Landlord is not able to restore the Premises or Lower Manhattan to its former state, and Tenant will never be in a position to operate the Premises in the way in

which it was contemplated when it entered into the Lease, the abatement of rent ought to be permanent and the Lease rescinded. In fact, the Lease terminated pursuant to law on the date Tenant was forced to close its business at the Premises, March 19, 2020.

39. Landlord had notice, and Tenant has given the Landlord sufficient written notice, of all the rights and remedies demanded in this complaint.

40. Despite Tenant's rights as a result of the frustration of purpose of the Lease, the failure of consideration, and the impossibility, illegality and impracticability of the purpose and object of the Lease, Landlord has wrongly demanded that Tenant pay late fees under the Lease for the period after Tenant was deprived of its use of the Premises, including, without limitation, the Notice dated September 10, 2020.

41. Landlord's demands constitute a breach of Tenant's rights pursuant to applicable law. Further, Landlord owes Tenant damages equal to the amount of rent and other expenses paid in advance for the months of March, April, May, June, July, August, and September 2020 during which Tenant was deprived of the use of the Premises, as well as damages for excess charges of rent and other expenses prior to the COVID-19 crisis.

42. Moreover, as Tenant meets the Closure Requirement, the Occupancy Limitation, as well as the Revenue Reduction Requirement with respect to the Premises, Landlord's threat of Lease termination is a direct violation of the Commercial Tenant Anti-Harassment Statute.

43. For these reasons, Landlord's attempt to terminate Tenant's Lease at the Premises is both improper and unenforceable.

44. In the unlikely event the Court determines that Tenant is, in any way, in default under the Lease, the default can be cured and Tenant has the desire and ability to cure any such default. That is to say, to the extent the Court finds that Landlord is rightfully owed late fees in

connection with rent paid in full during the COVID-19 period, or that the Lease has not been entirely frustrated and/or terminated as a matter of law, Tenant is ready, willing, and able to take necessary measures to remedy the alleged default by paying the alleged late fees in accordance with the Court's directives.

45. Under the circumstances at hand, in order to protect Tenant's interests under the Lease and prevent irreparable injury, Landlord must be enjoined from attempting to terminate the Lease or otherwise enforcing its rights under the Lease with respect to the alleged default, pending a determination by the Court as to the validity and existence of such default.

46. As stated above, Tenant is ready, willing and able to cure any default that this Court may find to exist after a trial on the merits.

47. If, however, the Lease is improperly terminated pursuant to the conditional limitation of the Lease, Tenant will suffer immediate irreparable harm by losing its valuable leasehold interests at the Premises.

48. No prior application has been made to this Court or any other for the relief sought herein.

COUNT ONE BREACH OF CONTRACT

49. Tenant repeats, realleges, and incorporates all prior paragraphs.

50. The Lease is (or, in the alternative, was before the effective date of the Lease's termination and/or rescission as a matter of law, which occurred on or before March 19, 2020), a binding enforceable contract.

51. Landlord breached the contract by, among other things: demanding Tenant pay late fees in connection with rent paid in full for the months May, June, July, and August 2020 which were not owed under the Lease and violated Executive Order 202.28, demanding,

collecting and subsequently failing to reimburse Tenant for excess charges paid in advance under the Lease before the COVID-19 crisis; later failing to reimburse Tenant for the amount of the rent, charges and other expenses attributable to the period that Tenant has been deprived of its use of the Premises; serving purported notices to cure a default in violation of Tenant's rights and taking such other actions as are inconsistent with Tenant's rights.

52. Tenant performed all of its obligations under the Lease except those that were waived, excused or rendered impossible and/or impracticable.

53. As a direct and proximate result of Landlord's breach of contract, Tenant suffered the damages alleged hereinabove.

54. Tenant is entitled to a judgment against Landlord in an amount to be proven at trial.

COUNT TWO DECLARATORY RELIEF

55. Tenant repeats, realleges, and incorporates all prior paragraphs.

56. Tenant has duly performed all of the terms of the Lease on its part to be performed.

57. Tenant does not owe late fees in connection with rent paid during the COVID-19 period pursuant to Executive Order No. 202.28 which states, in relevant part that "no landlord, lessor, sub-lessor or grantor shall demand or be entitled to any payment, fee, or charge for late payment of rent occurring during the time period from March 20, 2020 through August 20, 2020."

58. Tenant's ability to operate a retail store at the Premises and benefit from the centrality of its location in one of Lower Manhattan's most visited and highly trafficked location

was the express purpose of entering into the Lease and agreeing to annual rent of nearly \$5 million (scheduled to increase to over \$6 million per year) for the Lease.

59. Tenant's operation of a retail store at the Premises was the parties' mutual purpose in entering into and the object of the Lease, as both parties understood at the time of contracting, that but for Tenant's right to operate in a location like that of Lower Manhattan, Tenant would not have entered into the Lease and/or would not have agreed to pay rent in excess of almost \$5 million per year for the Lease (ultimately increasing to over \$6 million per year). Indeed, without Tenant's ability to use the Premises in the manner originally contemplated or for Lower Manhattan to continue to be the destination location contemplated, the transaction between the parties that resulted in the Lease would have made no sense. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant. The Lease's object and purpose became illegal, impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

60. Although necessary, the sudden suspension of retail operations at the Premises and the prospect of unknown future halts was unforeseeable and not contemplated by the parties at the time the Lease was executed.

61. An actual controversy exists between Tenant and Landlord concerning its respective rights under the Lease. Tenant has no adequate remedy at law. Specifically, the parties dispute:

- a. Whether Tenant is required to pay late fees for rent paid in full during the COVID-19 period pursuant to Executive Order 202.28

- b. Whether the Lease terminated as of March 19, 2020 pursuant to the Lease and applicable law;
- c. Alternatively, whether the obligation to pay rent and expenses were abated from and after March 19, 2020,
- d. Alternatively, for what period from and after March 19, 2020 the obligation to pay rent and expenses abated if the abatement was not permanent despite the interruption or impairment of Tenant's use of the Premises and the likelihood of future disruptions and shutdowns;
- e. Whether there was a frustration of purpose of the Lease,
- f. Whether the continued operation of the Lease was illegal, impossible, or impracticable;
- g. Whether there was a failure of consideration under the Lease; and
- h. Whether the Lease should be reformed.

62. The parties further dispute the effects of the foregoing on the Lease's term, expiration, and the continuing obligations, if any, of the parties. Therefore, Tenant seeks a judgment declaring the following:

- a. That Tenant is not responsible for the payment of any late fees for rent it paid in full during the COVID-19 period;
- b. That the Lease terminated as of March 19, 2020 pursuant to the Lease and applicable law;
- c. Alternatively, that the rent and expenses under the Lease abated from and after March 19, 2020,

- d. Alternatively, if the abatement of rent and expenses was not permanent despite the interruption or impairment of Tenant's use of the Premises and the likelihood of future disruptions and shutdowns, that the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020;
- e. That there was a frustration of purpose of the Lease,
- f. That the continued operation of the Lease was illegal, impossible, or impracticable;
- g. That there was a failure of consideration under the Lease;
- h. The effects of the foregoing on the Lease's Term and expiration;
- i. That the Lease should be reformed;
- j. That the parties have no continuing obligations to one another under the Lease from and after March 19, 2020 (or another date in the discretion of the Court) when Tenant was forced to suspend retail operations, which occurred on or before March 19, 2020, and at all times thereafter.
- k. In addition, Tenant seeks a judgment declaring that Landlord's purported Notice was ineffective and of no legal consequence, because Tenant was not in default, because the Lease had already terminated as a matter of law, and because Landlord failed to respect the notice provisions of the Lease.
- l. In addition, Tenant seek a judgment declaring that Tenant is not in default under the Lease and is entitled to immediate and permanent injunctive relief restraining Landlord from terminating the Lease.

**COUNT THREE
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

63. Tenant repeats, realleges, and incorporates all prior paragraphs.

64. At all relevant times, the Lease was in full force and effect.

65. Tenant has duly performed all of the terms of the Lease on its part to be performed.

66. Tenant has the desire and ability to cure any default this Court may find by any means short of vacating the Premises should it not be ruled that the Lease has been terminated as a matter of law and/or that Tenant is responsible for late fees in connection with rent paid in full during the COVID-19 period.

67. Because of the foregoing, a declaratory judgment should be entered in Tenant's favor, finding that Tenant is not in default under the Lease and are entitled to immediate and permanent injunctive relief restraining Landlord from terminating the Lease pursuant to a conditional limitation in the Lease.

**COUNT FOUR
RESCISSION
(Rescission/Cancellation of Lease)**

68. Tenant repeats, realleges, and incorporates all prior paragraphs.

69. Tenant's ability to operate a retail store in arguably one of Lower Manhattan's most visited and highly trafficked locations was the parties' mutual purpose and intent in entering into the Lease and in Tenant agreeing to pay rent in excess of \$5 million per year for the Lease (scheduled to increase to over \$ 6 million per year).

70. When Tenant was forced to suspend all retail operations at the Premises, the purpose and object of the Lease was frustrated and impossible to effectuate due to no fault of the

Tenant, the Lease's object and purpose became impossible, illegal and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

71. The sudden suspension of retail operations at the Premises and the likely long-term impact on Lower Manhattan as a destination location was unforeseeable and could not have been contemplated by the parties at the time the Lease was executed.

72. An actual controversy exists between Tenant and Landlord concerning their respective rights under the Lease and Tenant has no other adequate remedy at law.

73. In addition to, and/or in the alternative to, Tenant's claim for declaratory relief regarding the termination of the Lease, Tenant is entitled to judicial rescission of the Lease, as a result of the frustration of purpose of the Lease, the illegality, impossibility and impracticability of the Lease, and/or the failure of consideration, effective on such date as the Court determines based on the evidence presented at trial.

COUNT FIVE REFORMATION OF LEASE

74. Tenant repeats, realleges, and incorporates all prior paragraphs.

75. Tenant's ability to operate a retail store at arguably Lower Manhattan's most popular and highly trafficked locations was the parties' mutual purpose and intent in entering into the Lease and agreeing to annual rent of nearly \$5 million currently (scheduled to increase to over 6 million per year). But for Tenant's right to do so, Tenant would not have entered into the Lease.

76. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

77. This sudden suspension of retail operations at the Premises and the likelihood of future intermittent interruptions was unforeseeable and not contemplated by the parties at the time the Lease was executed.

78. The Parties would not have entered into the Lease and/or agreed to pay such exorbitant annual rent had they known that Tenant would be unable to operate retail apparel stores at the Premises or that, for the foreseeable future, Lower Manhattan would no longer be a premier destination for New Yorkers and international tourists alike. Such was the sole consideration for Tenant entering into the Lease and agreeing to exorbitant annual rents.

79. It was the Parties' true intent that Tenant would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable. Had the Parties been able to foresee the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language stating their true intent expressly.

80. An actual controversy exists between Tenant and Landlord concerning their respective rights under the Lease and Tenant has no adequate remedy at law.

81. In the alternative to Tenant's claims related to the termination and rescission of the Lease, Tenant is entitled to judicial reformation of the Lease to reflect the Parties' true intent that Tenant would have no obligation to pay rent once it was deprived of the use of the Premises and that the Lease would terminate automatically when Tenant was deprived of its use of the Premises as originally contemplated by the Lease, or that the amount of rent for the Term would have otherwise been adjusted to account for the portion of the Lease's Term during which Tenant could not operate a retail store at the Premises.

**COUNT SIX
MONEY HAD AND RECEIVED**

82. Tenant repeats, realleges, and incorporates all prior paragraphs.

83. Tenant's ability to operate a retail store at arguably one of Lower Manhattan's most popular and highly trafficked locations was the parties' mutual purpose in entering into the Lease and agreeing to pay annual rent of nearly \$5 million currently (scheduled to increase to over \$6 million per year). But for Tenant's right to do so, Tenant would not have entered into the Lease.

84. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible, illegal, and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

85. The sudden suspension of retail operations at the Premises and the likely long-term impact on Lower Manhattan as a destination location was unforeseeable and could not have been contemplated by the parties at the time the Lease was executed.

86. Had Tenant known that it would be unable to operate a retail apparel store at arguably Lower Manhattan's most highly trafficked and notable locations for some undetermined period of time during the terms of its Lease, and that there would likely be future intermittent disruptions, it would not have entered into it and/or would not have agreed to pay in excess of nearly \$5million per year in rent (increasing to over \$6 million). Tenant's ability to use the Premises as a retail store was the sole consideration it received under the Lease.

87. Tenant has previously paid rent and other consideration to the Landlord, in an amount to be proven at trial, for a period of time that Tenant was unable to operate a retail store at the Premises.

88. The Landlord benefited from these payments to Tenant's detriment.

89. Under principles of good conscience, Landlord should not be allowed to retain the rent and other consideration paid for the period of time that Tenant was unable to operate a retail store at the Premises as originally contemplated by the Lease.

90. Tenant was entitled to a judgment in its favor equal to the sums that Tenant has overpaid as rent and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a retail store at the Premises as originally contemplated by the Lease or after which the Lease terminated pursuant to law.

COUNT SEVEN UNJUST ENRICHMENT

91. Tenant repeats, realleges, and incorporates all prior paragraphs.

92. Tenant's ability to operate a retail store at one of Lower Manhattan's popular and highly trafficked locations was the parties' mutual purpose in entering into the Lease and agreeing to pay annual rent of nearly \$5 million currently (scheduled to increase to over \$6 million per year). But for Tenant's right to do so, Tenant would not have entered into the Lease.

93. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible, illegal, and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease. As a result, the Lease terminated and became void.

94. This sudden suspension of retail operations at the Premises and the likelihood that there will be future intermittent disruptions was unforeseeable and not contemplated by the parties at the time the Lease was executed.

95. The Parties would not have entered into the Lease and/or agreed to pay such exorbitant annual rents had they known that Tenant would be unable to operate a retail apparel

store at the Premises or that, for the foreseeable future, Lower Manhattan would no longer be a premier destination for New Yorkers and international tourists alike. Such was the sole consideration for Tenant entering into the Lease and agreeing to exorbitant annual rents.

96. Tenant has overpaid rent and other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a retail store at the Premises.

97. Landlord was enriched as a result of these payments at Tenant's expense.

98. Under principles of good conscience, Landlord should not be allowed to retain the rent and other consideration paid for the period of time that Tenant as unable to operate a retail store at the Premises as originally contemplated by the Lease.

99. Tenant is entitled to restitution of the sums that Tenant has previously overpaid as rent and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a retail store at the Premises as originally contemplated by the Lease.

PRAYER FOR RELIEF

WHEREFORE, Tenant respectfully requests that this Court enter judgment:

- a. Awarding damages to Plaintiff in an amount to be proven at trial;
- b. Declaring that the Lease terminated pursuant to law effective on or before March 19, 2020;
- c. Declaring that Tenant is not in default as a result of not having paid late fees in connection with rent paid in full during the COVID-19 period;
- d. Enjoining and restraining Landlord from terminating the Lease;
- e. Declaring that Tenant is not in default under the Lease;

- f. Alternatively, that the obligation to pay rent and expenses under the Lease abated from and after March 19, 2020,
- g. Alternatively, if the abatement of rent and expenses was not permanent despite the interruption or impairment of Tenant's use of the Premises, that the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020;
- h. That there was a frustration of purpose of the Lease,
- i. That the continued operation of the Lease was illegal, impossible, or impracticable on and after March 19, 2020;
- j. That there was a failure of consideration under the Lease;
- k. That the parties had and have no continuing obligations to one another under the Lease from and after March 19, 2020 (or another date in the discretion of the Court);
- l. Such other effects of the foregoing on the Lease's Term and expiration as the Court deems just and proper;
- m. Declaring that Landlord's purported notice to cure default was ineffective and of no legal consequence, because Tenant was not in default, because the Lease had already terminated, and/or because Landlord failed to respect the notice provisions of the Lease.
- n. Declaring that Landlord's purported notice to cure were in violation of the Commercial Tenant Anti-Harassment Statute;
- o. In the alternative, declaring that the Lease was equitably rescinded effective on or before March 19, 2020;
- p. In the alternative, granting equitable reformation of the Lease to reflect the Parties' true intent that Tenant would have no obligation to pay rent while they were deprived of the use of the Premises and that the Lease would terminate automatically when Tenant was

deprived of its use of the Premises as originally contemplated by the Lease, or adjusting the amount of rent and expenses for the portion of the Lease's Term during which Tenant could not operate a retail store at the Premises;

- q. Ordering Landlord to reimburse and give restitution to Tenant for the payment of rent and other expenses paid for the period that Tenant was deprived of its use of the Premises as originally contemplated by the Lease;
- r. Ordering Landlord to pay Tenant's fees and costs incurred in this action, including its reasonable attorneys' fees; and
- s. Such other and further relief that this Court may deem just and proper.

Dated: New York, New York
 September 24, 2020

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