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

VICTORIA'S SECRET STORES, LLC, successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC., Plaintiffs, v. HERALD SQUARE OWNER LLC, successor in interest to 1328 BROADWAY, LLC, Defendant.	Index No. 651833/2020 **ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

HERALD SQUARE OWNER LLC, successor in interest to 1328 BROADWAY, LLC ("Defendant" or "Owner"), by its counsel, Meister Seelig & Fein LLP, submits this Answer, Affirmative Defenses, and Counterclaims in response to the Complaint ("Complaint") of VICTORIA'S SECRET STORES, LLC, successor in interest to VICTORIA'S SECRET STORES, INC. ("Tenant") and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC. ("L Brands" and, together with Tenant, "Plaintiffs"):

NATURE OF THE ACTION

1. Neither admits nor denies the allegations set forth in paragraph 1 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief set forth in paragraph 1 of the Complaint.

2. Denies the allegations set forth in paragraph 2 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

3. Denies the allegations set forth in paragraph 3 of the Complaint, except admits that

Herald Square is a retail hub located in Manhattan, New York which is accessible by public transportation.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the Complaint.

5. Neither admits nor denies the allegations set forth in paragraph 5 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner admits that cases of COVID-19 were identified in New York City in March 2020 and denies the remaining allegations contained in paragraph 5 of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of the Complaint.

7. Neither admits nor denies the allegations set forth in paragraph 7 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 7 of the Complaint.

8. Neither admits nor denies the allegations set forth in paragraph 8 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 8 of the Complaint.

9. Neither admits nor denies the allegations set forth in paragraph 9 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief set forth in paragraph 9 of the Complaint.

PARTIES

10. Admits the allegations set forth in paragraph 10 of the Complaint.

11. Admits the allegations set forth in paragraph 11 of the Complaint.

12. Denies the allegations set forth in paragraph 12 of the Complaint and respectfully

refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

13. Admits the allegations set forth in paragraph 13 of the Complaint.

14. Denies the allegations set forth in paragraph 14 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

15. Admits the allegations set forth in paragraph 15 of the Complaint.

16. Admits the allegations set forth in paragraph 16 of the Complaint.

17. Denies the allegations set forth in paragraph 17 of the Complaint and avers that Herald Square Owner LLC is affiliated with SL Green Realty Corp., an S&P 500 company and New York City's large office landlord, and that SL Green Realty Corp. is a real estate investment trust.

18. Admits the allegations set forth in paragraph 18 of the Complaint.

JURISDICTION AND VENUE

19. Admits the Court has jurisdiction over the parties to this action and denies the remaining allegations contained in paragraph 19 of the Complaint.

20. Admits venue is proper in New York County and denies the remaining allegations contained in paragraph 20 of the Complaint.

COMMERCIAL LEASE AND GUARANTY

21. Denies the allegations set forth in paragraph 21 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

22. Denies the allegations set forth in paragraph 22 of the Complaint and respectfully

refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

23. Denies the allegations set forth in paragraph 23 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

24. Admits that the Original Lease has been amended ten times, denies the balance of the allegations set forth in paragraph 24 of the Complaint, and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

25. Denies the allegations set forth in paragraph 25 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

26. Denies the allegations set forth in paragraph 26 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

27. Denies the allegations set forth in paragraph 27 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

28. Denies the allegations set forth in paragraph 28 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

29. Denies the allegations set forth in paragraph 29 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate

recitation of its contents.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Complaint.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the Complaint.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 32 of the Complaint.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the Complaint

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

35. Denies the allegations set forth in paragraph 35 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

36. Denies the allegations set forth in paragraph 36 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

37. Denies the allegations set forth in paragraph 37 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

38. Admits the allegations set forth in paragraph 38 of the Complaint

39. Denies the allegations set forth in paragraph 39 of the Complaint.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the Complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the Complaint.

42. Denies the allegations set forth in paragraph 42 of the Complaint, except admits that Plaintiffs failed to pay rent owed as of April 1, 2020.

43. Denies the allegations set forth in paragraph 43 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

44. Denies the allegations set forth in paragraph 44 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

45. Denies the allegations set forth in paragraph 45 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

46. Denies the allegations set forth in paragraph 46 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

47. Denies the allegations set forth in paragraph 47 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

48. Admits the allegations set forth in paragraph 48 of the Complaint.

49. Neither admits nor denies the allegations contained in paragraph 49 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief set forth in paragraph 49 of the Complaint.

FRUSTRATION OF PURPOSE AND IMPOSSIBILITY OF PERFORMANCE

50. Denies the allegations set forth in paragraph 50 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

51. Denies the allegations set forth in paragraph 51 of the Complaint.

52. Denies the allegations set forth in paragraph 52 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

53. Denies the allegations set forth in paragraph 53 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

54. Denies the allegations set forth in paragraph 54 of the Complaint.

55. Denies the allegations set forth in paragraph 55 of the Complaint.

56. Denies the allegations set forth in paragraph 56 of the Complaint, and denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the Complaint concerning Plaintiffs' characterization of the scope and effect of COVID-19.

57. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 57 of the Complaint.

58. Denies the allegations set forth in paragraph 58 of the Complaint and respectfully

refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

59. Denies the allegations set forth in paragraph 59 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

60. Denies the allegations set forth in paragraph 60 of the Complaint and respectfully refers the Court to the documents quoted therein, which speak for themselves, for a true and accurate recitation of their contents.

61. Denies the allegations set forth in paragraph 61 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

62. Denies the allegations set forth in paragraph 62 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

63. Denies the allegations set forth in paragraph 63 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

64. Denies the allegations set forth in paragraph 64 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

65. Denies the allegations set forth in paragraph 65 of the Complaint.

66. Denies the allegations set forth in paragraph 66 of the Complaint.

67. Denies the allegations set forth in paragraph 67 of the Complaint.

68. Denies the allegations set forth in paragraph 68 of the Complaint.

69. Denies the allegations set forth in paragraph 69 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents. Owner further avers that section 26(ii) of the Original Lease, by its terms, applies only if Owner fails to provide any service or perform any obligation that Owner is obligated to provide or perform under the Lease and that such failure has rendered the Premises unusable.

70. Denies the allegations set forth in paragraph 70 of the Complaint.

71. Denies the allegations set forth in paragraph 71 of the Complaint.

72. Neither admits nor denies the allegations contained in paragraph 72 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 72 of the Complaint.

FIRST CAUSE OF ACTION
(Rescission Based on Frustration of Purpose)

73. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 72, as if fully set forth herein.

74. Denies the allegations set forth in paragraph 74 of the Complaint.

75. Denies the allegations set forth in paragraph 75 of the Complaint except affirmatively states that the Lease and Guaranty are valid and should be enforced.

76. Neither admits nor denies the allegations set forth in paragraph 76 of the Complaint, which purport to describe legal doctrines, and to which no response is required.

77. Denies the allegations set forth in paragraph 77 of the Complaint.

78. Denies the allegations set forth in paragraph 78 of the Complaint.

79. Neither admits nor denies the allegations set forth in paragraph 79 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required,

Owner denies the allegations contained in paragraph 79 of the Complaint.

80. Neither admits nor denies the allegations set forth in paragraph 80 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 80 of the Complaint.

81. Neither admits nor denies the allegations set forth in paragraph 81 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief set forth in paragraph 81 of the Complaint.

82. Neither admits nor denies the allegations set forth in paragraph 82 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 82 of the Complaint.

83. Neither admits nor denies the allegations set forth in paragraph 83 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 83 of the Complaint.

84. Neither admits nor denies the allegations set forth in paragraph 84 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 84 of the Complaint.

85. Neither admits nor denies the allegations set forth in paragraph 85 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 85 of the Complaint.

SECOND CAUSE OF ACTION
(In the Alternative – Rescission Based on Impossibility of Performance)

86. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 85, as if fully set forth herein.

87. Denies the allegations set forth in paragraph 87 of the Complaint and respectfully

refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

88. Denies the allegations set forth in paragraph 88 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

89. Neither admits nor denies the allegations contained in paragraph 89 of the Complaint, which purport to describe legal doctrines, and to which no response is required.

90. Denies the allegations set forth in paragraph 90 of the Complaint.

91. Denies the allegations set forth in paragraph 91 of the Complaint.

92. Neither admits nor denies the allegations set forth in paragraph 92 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 92 of the Complaint.

THIRD CAUSE OF ACTION
(In the Alternative – Reformation of Lease)

93. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 92, as if fully set forth herein.

94. Denies the allegations set forth in paragraph 94 of the Complaint.

95. Denies the allegations set forth in paragraph 95 of the Complaint.

96. Denies the allegations set forth in paragraph 96 of the Complaint.

97. Denies the allegations set forth in paragraph 97 of the Complaint.

98. Denies the allegations set forth in paragraph 98 of the Complaint.

99. Neither admits nor denies the allegations set forth in paragraph 99 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 99 of the Complaint.

100. Neither admits nor denies the allegations set forth in paragraph 100 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Plaintiffs are entitled to the relief sought in paragraph 100 of the Complaint.

FOURTH CAUSE OF ACTION
(Breach of Contract)

101. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 100, as if fully set forth herein.

102. Neither admits nor denies the allegations set forth in paragraph 102 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner admits that the Lease constitutes a binding and enforceable contract and denies the remaining allegations contained in paragraph 102 of the Complaint.

103. Denies the allegations set forth in paragraph 103 of the Complaint.

104. Denies the allegations set forth in paragraph 104 of the Complaint.

105. Denies the allegations set forth in paragraph 105 of the Complaint.

FIFTH CAUSE OF ACTION
(Money Had and Received)

106. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 105, as if fully set forth herein.

107. Denies the allegations set forth in paragraph 107 of the Complaint.

108. Denies the allegations set forth in paragraph 108 of the Complaint.

109. Denies the allegations set forth in paragraph 109 of the Complaint.

110. Denies the allegations set forth in paragraph 110 of the Complaint.

111. Denies the allegations set forth in paragraph 111 of the Complaint.

112. Denies the allegations set forth in paragraph 112 of the Complaint.

113. Denies the allegations set forth in paragraph 113 of the Complaint.

114. Denies the allegations set forth in paragraph 114 of the Complaint.

115. Denies the allegations set forth in paragraph 115 of the Complaint.

SIXTH CAUSE OF ACTION
(Unjust Enrichment)

116. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 115, as if fully set forth herein.

117. Denies the allegations set forth in paragraph 117 of the Complaint.

118. Denies the allegations set forth in paragraph 118 of the Complaint.

119. Denies the allegations set forth in paragraph 119 of the Complaint.

120. Denies the allegations set forth in paragraph 120 of the Complaint.

121. Denies the allegations set forth in paragraph 121 of the Complaint.

122. Denies the allegations set forth in paragraph 122 of the Complaint.

123. Denies the allegations set forth in paragraph 123 of the Complaint.

124. Denies the allegations set forth in paragraph 124 of the Complaint.

125. Denies the allegations set forth in paragraph 125 of the Complaint.

PRAYER FOR RELIEF

126. Denies that Plaintiffs are entitled to any relief sought in the "WHEREFORE" clause.

AFFIRMATIVE DEFENSES

First Affirmative Defense

127. The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

128. Plaintiffs' claims are barred, in whole or in part, by documentary evidence,

specifically the Lease and the Guaranty, which do not include *force majeure* clauses in favor of Tenant.

Third Affirmative Defense

129. Plaintiffs' claims are barred by their material breach of the lease and guaranty agreements at issue in this action.

Fourth Affirmative Defense

130. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs suffered no damages.

Fifth Affirmative Defense

131. Plaintiffs failed to mitigate their alleged damages.

Sixth Affirmative Defense

132. Plaintiffs' equitable and quasi-contract claims in the Complaint are barred by the existence of express agreements between Plaintiffs and Owner.

Seventh Affirmative Defense

133. Owner is entitled to set off any obligation to Plaintiffs by the amounts Plaintiffs owe Owner on its Counterclaims set forth below.

Eighth Affirmative Defense

134. Owner hereby gives notice that Owner intends to rely upon any other defense or defenses that may become available or appear during pretrial proceedings in this action and hereby reserves the right to amend this Answer to plead and assert any such additional affirmative defenses and/or counterclaims as they become known and appropriate during the course of litigation.

COUNTERCLAIMS

Owner, as ground lessee of the land and owner of the building known as 2 Herald Square, New York, New York (the "Building"), for its counterclaims against: (i) Tenant under a lease for certain retail premises located at the Building (the "Retail Premises"), as guaranteed by L Brands under a written guaranty of lease, and by any successors and assigns thereof not presently known to Owner (such successors and assigns referred to collectively with L Brands as "Guarantor"), and (ii) Tenant of certain office premises located at the building (the "Office Premises" and together with the Retail Premises, the "Premises") not guaranteed by Guarantor alleges as follows:

NATURE OF OWNER'S COUNTERCLAIMS

135. These counterclaims seek recovery from Tenant or from Guarantor for certain moneys owed as rent and/or damages under the parties' lease in connection with the termination of that lease following Tenant's default in payment of rent.

PARTIES

136. Owner is a limited liability company duly formed and existing under the laws of the State of Delaware and authorized to do business in the State of New York, with its principal office c/o SL Green Realty Corp., 420 Lexington Avenue, New York, New York 10170.

137. Tenant is a limited liability company duly formed and existing under the laws of the State of Delaware with its principal office at Three Limited Parkway, Columbus, Ohio 43230.

138. L Brands is a corporation duly formed and existing under the laws of the State of Delaware with its principal office at Three Limited Parkway, Columbus, Ohio 43230.

139. According to news reports, L Brands is planning to "spin off" the Victoria Secret stores to some other entity, the identity of which has not yet been disclosed; but as shown here, that "spin-off" entity — and L Brands — remain jointly and severally liable as guarantor, and

Owner reserves the right to join such spin-off entity as a party to this action upon such disclosure.

FACTUAL BACKGROUND

The Underlying Lease

140. On or about August 22, 2001, Tenant entered into an agreement of lease, as related to certain store/retail space in the Building (*i.e.*, the Retail Premises), with a predecessor-in-interest of Owner. That agreement of lease has subsequently been amended by 10 amendments, most recently as of August 19, 2018, and various letter agreements (altogether, the "Lease").

141. The stated expiration date of the Lease is March 31, 2022.

142. The Lease provides, *inter alia*, that:

(a) Tenant is required to pay the "Minimum Rent" due for the Retail Premises and the Office Premises (see original Lease § 1(A), and Tenth Am. ¶ 2) on the first day of each calendar month;

(b) Tenant is required to pay certain additional rent and/or "percentage rent" charges;

(c) if Tenant defaults in payment of any rent relating to the Retail Premises or the Office Premises, Owner can issue a 5-day notice to cure [Lease § 17(A)(1)]; and if Tenant fails to cure within that time, Owner may terminate the Lease as pertains to the Retail Premises or Office Premises, as applicable, on 3 days' notice (*id.*; *see also* Ninth Am. ¶¶ 15-16);

(d) following termination, under Lease § 18(B)(i)(c), Owner is entitled to ongoing liquidated damages, as provided for therein; and

(e) under Lease § 18(C), Owner can, upon such termination, seek attorneys' fees.

143. In addition, the parties allocated in the Lease the business/economic risks of

circumstances that might lead to a closure of the Retail Premises, and Tenant agreed that it would in all such circumstances — other than where closure was brought about by Landlord's failure to provide essential services — remain liable to pay its rent. Thus:

(a) in Lease § 1(A), as the starting point, Tenant agreed that it was liable to pay its rent "without set-off, offset, abatement or deduction whatsoever";

(b) in Lease § 26(ii),[1] Tenant specifically anticipated that it might need to close

[1] Art. 26 provides:

> INABILITY TO PERFORM. (i) Except as expressly set forth in subparagraph (ii) below, this Lease and the obligation of Tenant to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord or because Landlord is unable to make, or is delayed in making any repairs, additions, alterations, improvements or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of strikes or labor troubles or by accident or by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency (herein sometimes referred to as **"unavoidable delay"**).
>
> (ii) If Landlord fails to provide any service or perform any obligation that Landlord is obligated to provide or perform under this Lease and solely as a result thereof, Tenant shall be not able to operate its store at the Premises, shall be closed for business and have discontinued its operation of the store for a period of six (6) consecutive days or more after written notice by Tenant to Landlord advising Landlord of such failure to provide any such service or perform any such obligation, that such failure has rendered the Premises unusable and that Tenant has closed for business and discontinued its operation of the store, then, Tenant shall be entitled to an abatement of Minimum Rent and additional rent for each day after said six (6) consecutive day period through the earlier to occur of the day preceding (i) the day on which the service is substantially restored and (ii) the day Tenant reopens for business and recommences its operation of the store at the Premises. Tenant shall not be entitled to an abatement of rent in the event that such failure results from (i) any installation, alteration or improvement which is not performed by Tenant in a good workmanlike manner; (ii) Tenant's failure to

its Retail Premises for an extended period of time in the event of, *inter alia*, "unavoidable delay," but agreed that Tenant would only be entitled to a rent abatement if the closure was due to some failure by Owner that was not excused by "unavoidable delay"; and

(c) in Lease § 2(C)(vi), Tenant further recognized that circumstances might prevent it from honoring its commitment to continuously operate its store, but Tenant agreed that Tenant would be excused from its obligation to continuously operate its Retail Premises only in the event of "fire or casualty."[2]

144. Thus, Tenant plainly considered, in entering into the Lease, the possibility that its Retail Premises might be forced to close due to various circumstances — yet Tenant agreed that it would nevertheless be obligated to pay its rent except in circumstances not relevant here.[3]

---

perform any obligation hereunder; (iii) the negligence or tortious conduct of Tenant; (iv) casualty; or (vi) unavoidable delay.

[2] Section 2(C)(vi) provides in pertinent part:

> (vi) Because of the difficulty or impossibility of determining Landlord's damages due to diminished saleability or mortgageability or adverse publicity or appearance by Tenant's actions, should Tenant (a) fail to open for business in the Premises, fully fixtured, stocked and staffed by June 1, 2003, (b) vacate, abandon or desert the Premises, or (c) cease operating or conducting its business therein as required by this Lease (except during any period the Premises are rendered untenantable by reason of fire or casualty or as expressly permitted by Subsection C(i) of this Article 2), in the case of (b) or (c) for a period of five (5) days following written notice from Landlord, then and in any of such events (hereinafter collectively referred to as **"failure to do business"**), Landlord shall have the right in addition to all other remedies provided in this Lease, at its option, to treat such failure to do business as an Event of Default and shall further have the right to collect the Minimum Rent and items of additional rent and also a further item of additional rent at a rate equal to the amount of Percentage Rent payable by Tenant in respect of the immediately prior fiscal year divided by 365 for each day or portion of a day that may have elapsed during such period. . . .

[3] These "contract" provisions thus negate any claim that Tenant's obligation to pay rent is excused by reason of, *inter alia*, "frustration of purpose," or related common law excuses of "impossibility" or "commercial impracticality." Thus, in *Urban Archeology Ltd. v. 207 East 57th Street LLC*, 2009 WL 8572326 (Sup. Ct. N.Y. Co. Sept. 10, 2009) (Sherwood,

145. Owner has at all times continued to provide to Tenant all required Building services, and the Building has at all times remained "open." Nor has there been any destruction of (or physical damage to) the Building by reason of any "fire or other casualty" as referenced in Lease §21(C)(vi).[4]

The Guaranty

146. Contemporaneously with the execution of the Lease, the predecessors-in-interest of

---

J.), plaintiff-tenant argued that its obligation to pay rent should be excused because, it said, "the circumstances which are serving to frustrate performance under the terms of the Lease are due to an unforeseeable and extreme occurrence …" (at *2).

But the Court dismissed plaintiff's argument, explaining (at *5):

> The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed [citing to *General Electric Co. v. Metals Resources Group, Ltd.*, 293 A.D.2d 417 (1st Dep't 2002)]. [Emphasis added].

And the First Department affirmed, 68 A.D.3d 562 (1st Dep't 2009) ("An economic downturn could have been ... guarded against in the lease").

See likewise, *e.g.*, *Fifth Ave. of L.I. Realty Assoc. v. KMO-361 Realty Assoc.*, 211 A.D.2d 695 (2d Dep't 1995); and *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 360 (N.D.N.Y. 2013) ("Commercial frustration applies only where the parties could not have provided for the frustrating event through contractual safeguards"), *aff'd*, 561 Fed. App'x 48 (2d Cir. 2014). *Gander Mountain* also explained that the doctrine of "impossibility" and of "frustration of purpose" are alike in that "the underlying principle of both defenses is foreseeability," "'both require unforeseeability' [citation omitted]," and both are accordingly defeated when the risk of the adverse circumstances at issue "'should have been guarded against in the contract' [citation omitted]," 923 F. Supp. 2d at 362-63.

Notwithstanding that Owner had explained the foregoing principle to Tenant, Tenant and Guarantor have persisted in their deliberate decision to default in payment of rent.

[4] *Cf.* Lease § 10(A) requiring Tenant to pay its rent even in the event of fire or other casualty, and *see, e.g., 120 Wall St. Co. L.P. v. Continental Ins. Co.*, 1994 WL 107885 (Sup. Ct. N.Y. Co. Feb. 9, 1994) (explaining that an asbestos condition did not constitute "destruction" for purposes of the lease's "casualty" clause).

L Brands executed a written Guaranty dated August 22, 2001; and that Guaranty was amended and reaffirmed by L Brands as guarantor on April 23, 2013 (the "Guaranty").

147. That Guaranty provides, as relevant here, that

(a) Guarantor shall pay all moneys due under the Lease in respect of the Retail Premises (¶ 2);

(b) the Guaranty is binding upon Guarantor's successors, "notwithstanding any merger, consolidation, reorganization or absorption" (¶ 15);

(c) Guarantor shall pay all reasonable attorneys' fees incurred by Owner in enforcing Guarantor's obligations (¶ 13); and

(d) Guarantor can be sued in New York State courts (¶ 8(a)). Guarantor also consented to accept service of process by certified mail, return receipt requested (¶ 9).

Tenant's Default, and Owner's Termination of the Lease in Respect of the Premises

148. Tenant failed to pay the monthly Minimum Rent for its Retail Premises due as of April 1, May 1, and June 1, respectively.

149. Owner duly issued a notice to cure dated May 11, 2020, stating that Tenant's time to cure, by paying its arrears, ended on May 18, 2020.

150. Tenant failed to make any payment on account of any of the arrears.

151. Indeed, on or about May 25, 2020, Tenant and L Brands filed a summons with notice in this Court seeking, *inter alia*, "rescission" of the Lease; and on June 8, 2020, Tenant and L Brands filed the complaint in the above-captioned action requesting the foregoing relief.[5]

[5] A tenant can only seek rescission if and after it has surrendered the premises; *see, e.g.*, *Edgar A. Levy Leasing Co., Inc. v. Siegel*¸ 230 N.Y. 634, 637 (1921). Accordingly, by demanding "rescission," Tenant has, *inter alia*, waived any requirements that Owner provide any further notices to Tenant.

152. On June 4, 2020, Owner duly issued a notice of termination of the Lease in respect of the Retail Premises effective June 9, 2020 (but reserved all rights).

153. On June 4, 2020, Owner issued a Notice to Cure for the Office Premises, stating that Tenant's time to cure, by paying its arrears on the Office Premises ended on June 11, 2020.

154. On June 18, 2020, Owner duly issued a notice of termination of the Lease in respect of the Office Premises effective June 23, 2020 (but reserved all rights).

155. Guarantor has been "on notice" of Tenant's default and has likewise failed to make any payment on account of the April, May, or June rent due.

FIRST COUNTERCLAIM
BREACH OF LEASE (AS AGAINST TENANT)

156. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 155, as if fully set forth herein.

157. The Lease is a valid, enforceable contract.

158. Owner fully performed its obligations under the Lease.

159. Tenant breached the lease when it failed to pay Minimum Rent and other charges due under the Lease.

160. By virtue of the foregoing, Tenant is liable to Owner in an amount to be determined at trial which is not less than $25,000,000.00, a portion of which will accrue after the date of this complaint, plus interest and reasonable attorneys' fees.

SECOND COUNTERCLAIM
BREACH OF GUARANTY (AS AGAINST GUARANTOR)

161. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 160, as if fully set forth herein.

162. Guarantor entered into a written Guaranty whereby Guarantor agreed to guaranty

payment of the amounts due under the Lease in respect of the Retail Premises.

163. Guarantor failed to meet its obligations under the Guaranty.

164. By reason of the forgoing, Guarantor is liable to Owner in an amount to be determined at trial which is not less than $25,000,000.00, a portion of which will accrue after the date of this complaint, plus interest and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Owner respectfully requests that judgment be entered as follows:

(a) against Tenant on the first counterclaim in an amount to be determined at by the Court, which is not less than $25,000,000.00, a portion of which will accrue after the date of this Complaint, plus interest and reasonable attorneys' fees;

(b) against Guarantor on the second counterclaim in an amount to be determined by the Court, which is not less than $25,000,000.00, a portion of which will accrue after the date of this Complaint, plus interest and reasonable attorneys' fees;

(c) the costs and disbursements of this action; and

(d) granting Owner such other and further relief as may be just and proper.

Dated: New York, New York
June 29, 2020

MEISTER SEELIG & FEIN LLP

By: /s/ Stephen B. Meister
Stephen B. Meister, Esq.
Howard S. Koh, Esq.

125 Park Avenue, 7th Floor
New York, New York 10017
Tel: (212) 655-3500

Attorneys for Defendant
Herald Square Owner LLC