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 Justice Andrew Borrok **Motion Sequence No. 001**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT

MEISTER SEELIG & FEIN LLP
Stephen B. Meister, Esq.
Howard S. Koh, Esq.
125 Park Avenue, 7th Floor
New York, New York 10017
Phone: (212) 655-3500

Attorneys for Defendant
Herald Square Owner LLC

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Defendant Herald Square Owner LLC ("Owner" or "Landlord"),[1] ground lessee of 2 Herald Square, New York, New York (the "Building"), submits this memorandum of law in support of its motion, under CPLR 3212, for summary judgment dismissing the Complaint by Plaintiffs Victoria's Secret Stores, LLC ("VS" or "Tenant") and lease guarantor, L Brands Inc. ("Guarantor" and, together with Tenant, "Plaintiffs").

PRELIMINARY STATEMENT

With no *force majeure* clause in the Lease, the sophisticated Plaintiffs[2] contend the Lease and Guaranty[3] they freely signed should be annulled under the common law doctrines of "frustration of purpose" and "impossibility" given the COVID-19 pandemic. Plaintiffs' claims are defeated by the Lease which explicitly allocated the risk of Tenant being unable to occupy the demised premises; the parties agreeing that, absent Landlord having brought about closure of Tenant's store by a failure to provide required services, Tenant would remain obligated to pay rent

[1] Capitalized terms not defined herein shall have the meanings set forth in Owner's Answer and Counterclaims, a copy of which is attached as Exhibit J to the Affirmation of Stephen B. Meister dated June 29, 2020 ("Meister Affirmation"). Owner asserted counterclaims for rental sums due from both Plaintiff-Tenant (Victoria's Secret Stores, LLC) and the Plaintiff-Guarantor (L Brands Inc.). Though no discovery has occurred, issue was joined on Plaintiffs' claims for declaratory relief rescinding the Lease and Guaranty (and related claims), upon the filing of Owner's Answer and Counterclaims. Because Plaintiffs' claims fail as a matter of law, and there are no open issues of material fact, Owner now moves under CPLR 3212 for summary judgment dismissing Plaintiffs' Complaint. If granted, discovery can proceed on Owner's counterclaims.

[2] L Brands Inc. is a publicly traded company having a present market capitalization of over $4 billion. *See* https://finance.yahoo.com/quote/LB. The Victoria's Secrets brand includes around 1,100 stores across the globe. *See* https://www.lb.com/our-brands/victorias-secret.

[3] "Lease" and "Guaranty" refer, respectively, to the lease and guaranty contemporaneously entered into on August 22, 2001 by the predecessors-in-interest of the parties' herein, as subsequently amended. True and correct copies of the Lease and Guaranty are attached as, respectively, Exhibits A and C to the Affidavit of Neil H. Kessner dated June 29, 2020 ("Kessner Affidavit").

even though it could not run its business.[4] There being no open issues of material fact, Landlord is entitled to summary judgment dismissing the Complaint.[5]

Tenant's "frustration" and "impossibility" claims[6] fail because the express terms of the Lease negate an essential element common to both doctrines.[7] It is an essential element of both these claims that the parties not have allocated the risk in question to one or the other party. Here, that is precisely what they did. Because the parties expressly allocated the risk of a closure to Tenant (except when closure was caused by Landlord's failure to provide some required service),

[4] While the lease does not contain a "force majeure" clause, it does contain an "unavoidable delay" clause in Art. 26, but Tenant does not rely on this clause, because, as we show below, this clause supports Landlord, not Tenant.

[5] A true and correct copy of Plaintiffs' Complaint is attached as Exhibit I to the Meister Affirmation.

[6] In New York, the "frustration" and "impossibility" defenses are narrower than under the old common law; *see Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.*, 2009 WL 9087853 (Sup. Ct. N.Y. Co. Dec. 4, 2009) (see further *infra*). An oft-quoted explanation of the other elements of these two doctrines, appears in *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974):

> ln general impossibility may be equated with an inability to perform as promised due to intervening events, such as … destruction of the subject matter of the contract. The doctrine comes into play where (1) the contract does not expressly allocate the risk of the event's occurrence to either party, and (2) to discharge the contractual duties (and, hence, obligation to pay damages for breach) of the party rendered incapable of performing would comport with the customary risk allocation. Essentially, then, discharge by reason of impossibility — as well as the concomitant remedy (to the discharge) of rescission — enforces what can reasonably be inferred to be the intent of the parties at the time of contract.
>
> Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract. [Citations omitted.]

[7] Because the terms of the Lease itself defeat Plaintiffs' claims, Owner's motion thus meets the higher standard applicable to CPLR 3211(a)(1) motions to dismiss. *See* R. Haig, ed., Commercial Litigation in N.Y. State Courts, (4th ed.) § 8:45, explaining, in respect of a CPLR 3211(a)(1) motion, that "if the documentary evidence disproves a single but nonetheless essential allegation to any of plaintiff's causes of action, those causes should be dismissed even though there may be other surviving factual issues [fn. with citations omitted]." Nevertheless, given that issue has been joined as to Plaintiffs' claims by the filing of Owner's Answer and Counterclaims, Owner now moves under the lower CPLR 3212 standard, which merely requires Owner making a prima facie case for dismissal, and a showing that there are no issues of material. The burden then shifts to Plaintiff to lay bare its proof that issues of material fact exist.

Tenant's claim is defeated. Tenant's remaining claims are all derivative of and/or dependent upon its "common law" theories, and likewise fail.

Where the risk was "foreseeable," claims of "frustration of purpose" and "impossibility" fail.[8] And when, as here, the parties' contract explicitly contemplates the risk in question, that risk was perforce "foreseen" by the parties, and their contractual allocation of that risk must be respected as matter of freedom to contract.

A risk, *e.g.*, of forced store closure, is deemed "foreseeable" for this purpose "even if the precise cause or extent . . . was not foreseen at the time the contract was executed."[9] *Urban Archeology, Ltd. v. 207 E. 57th St. LLC*, 2009 WL 8572326, at *5 (Sup. Ct. N.Y. Co. Sept. 10, 2009) (Sherwood, J. [citing to *General Electric Co. v. Metals Resources Group Ltd.*, 293 A.D.2d 417 (1st Dep't 2002)], *aff'd*, 68 A.D.3d 562 (1st Dep't 2009) (discussed further *infra*).

VS's Complaint refers to the two key Lease provisions that explicitly address the possibility of a forced store closure — Lease § 2(C) [Complaint ¶ 52] and § 26(ii) [Complaint ¶ 69]. However, Tenant misleadingly omitted to even mention the portions of those sections that show that VS, having recognized the possibility of forced store closure, accepted and agreed it would remain liable for rent.

Finally, the Court should bear in mind that possession is not at issue — the sole issue here is money.[10] Owner has duly terminated Tenant's lease, for non-payment of rent, pursuant to the Lease's "conditional limitation" clause, § 17(A)(1) (see Kessner Affidavit at ¶ 13). Tenant, for its

[8] *See, e.g.*, *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 360 (N.D.N.Y. 2013), explaining that the doctrine of "impossibility" and of "frustration of purpose" are alike in that "the underlying principle of both doctrines is foreseeability," "'both require unforeseeability' [citation omitted]," and both are defeated when the risk of the adverse conditions at issue "'should have been guarded against in the contract' [citation omitted],"

[9] All emphasis in material quoted herein is added, unless otherwise noted.

[10] How much money is the subject of Owner's counterclaims.

part, by asserting that "the Lease and Guaranty are rescinded" (Complaint ¶ 72), has effectively admitted that it has now abandoned the Premises — since abandonment is a necessary predicate to a claim for rescission of a lease.[11]

In short, the question now is whether the sophisticated parties should be bound to the allocation of the risk contained in the Lease.

SUMMARY OF UNDISPUTED FACTS

Key Lease Provisions

The Lease gives Tenant a rent abatement only in the limited circumstance where the closure of the store was necessitated by some fault on Landlord's part. Under the Lease, Tenant agreed that if it is forced to close its store because Landlord failed to preform "any obligation" (including the fundamental continuing obligation to furnish Tenant with possession of the premises[12]), Tenant remains liable to pay rent unless Landlord's inability to perform resulted from a failure on Landlord's part and such failure is not caused by "governmental preemption" or "order" including one issued in the case of an "emergency." In particular:

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

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[11] As stated in *Edgar A. Levy Lasing Co., Inc. v. Siegel*, 230 N.Y. 634, 637 (1921):

> This is the general rule. A party cannot rescind while retaining the fruits of the contract. In case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession.

See also, e.g., *Theodore v. Genendl, Inc.*, 8/23/95 N.Y.L.J. 25 (col. 1) (Civ. Ct. Queens Co. 1995) ("If the tenant continues in possession of the premises, he is deemed to affirm the lease.").

Nor is it sufficient for the tenant to just proffer that it is prepared to vacate: it must have actually vacated. *McKeever v. Aronow*, 194 N.Y.S. 475 (1st Dep't 1922) ("In the case at hand the tenants did not give up possession, claiming that it was sufficient to offer to restore possession to the landlord"; that offer was thus held insufficient as a matter of law.)

[12] *See* Lease Art. 13 (Condition of the Premises) and Art. 22 (Quiet Enjoyment).

(b) in Lease § 26(ii),[13] Tenant specifically anticipated that it might need to close its Retail Premises for an extended period of time, in the event of, *inter alia*, "unavoidable delay" — *i.e.*, a failure of Landlord to perform "any obligation" due to "governmental preemption" or "order" emanating out of an "emergency" — but expressly agreed that Tenant would only be entitled to a rent abatement if the closure were due to some failure by Landlord to provide some required service, or to perform some other required obligation, where the performance/provision thereof would not itself be 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, while it would be excused from its obligation to continuously operate its Retail Premises only in the event

[13] Art. 26 provides (underlining and italics added):

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

of "fire or casualty"[14] — nevertheless, as quoted above, even in such event Tenant would remain obligated to pay rent. Tenant agreed that, if it failed to "continuously operate," and such failure was not due to, *e.g.*, store remodeling [see Lease § 2(C)(i)], Landlord could declare a default and charge Tenant with "liquidated damages" for the balance of the Lease term. Thus, Tenant actually considered in entering into the Lease, the possibility that its store might be forced to close due to a variety of circumstances. Yet, VS agreed it would nevertheless be obligated to pay its rent except in limited circumstances not relevant here.

In Complaint ¶ 69, VS quotes from only part of Lease § 26(ii) — *viz.*, the part granting an abatement in the event of a forced store closing. But Tenant misleadingly fails to note the stated pre-conditions to such an abatement as stated in Lease § 26(ii) — *i.e.*, an unexcused failure by Landlord. Likewise, in Complaint ¶ 52, Tenant quotes from part of Lease § 2(C) — but fails to quote Lease § 2(C)(vi), and its acknowledgment (a) that Tenant shall remain liable for rent even in the event of a "casualty" (see § 10(A) of the Lease), and (b) that Tenant would be liable, upon Landlord's election, for "liquidated damages."

Tenant's proposed excuses of "frustration" and "impossibility" are defeated by the express terms of the Lease. Nor can Tenant seek to "reform" the Lease, so as to re-write the allocation of

[14] Section 2(C)(vi) provides:

> (vi) [S]hould 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.

risk it previously agreed to.[15] *A fortiori*, Tenant is not entitled to any "money back."

ARGUMENT

I. The Lease Language Precludes Tenant's "Common-Law" Defenses; There is No Force Majeure Clause

Because the Lease itself refutes Tenant's claims, there are no issues of material fact, and Landlord should be granted summary judgment dismissing the Complaint. *See Goldmuntz v. Schneider*, 99 A.D.3d 544, 544-45 (1st Dep't 2012) (summary judgment was not "premature," as opposing party "point[ed] to no facts essential to her opposition" that were in other party's control); *Lewis v. Safety Disposal Sys. of Pennsylvania, Inc.*, 12 A.D.3d 324, 324-25 (1st Dep't 2004) (opposing party's "conclusory assertions" were "wholly insufficient" to defeat moving party's prima facie entitlement to summary judgment and did not warrant discovery); *see also Nationstar Mortg. LLC v. Accardo*, 159 A.D.3d 662, 662-63 (1st Dep't 2018) (summary judgment based on terms of note and "corroborating documentary evidence" establishing moving party's possession of the note).

The Lease unambiguously shows the parties contemplated the possibility of a store closure, and explicitly agreed that, absent Landlord having brought about such closure by reason of its own unexcused failure to provide required service, Tenant would remain obligated to pay rent. *See* Lease §§ 1(A), 2(C)(vi), 26(ii).

Because Plaintiffs allege closure of the store was brought about solely by the effects of the pandemic and the responsive emergency orders, there are no issues of material fact. In so alleging, Plaintiffs have admitted that the store closure was not brought about by any failure by Landlord,

[15] We note that there is no "general" *force majeure* clause here, and so none should be implied. *General Electric v. Metals Resources*, *supra*, squarely held that if an integrated contract does not include a force majeure clause, none will be "implied." *Accord*, *UBS Real Estate v. Gramercy Park Land LLC*, 2009 WL 10729957 (Sup. Ct. N.Y. Co. Dec. 11, 2009). It is further noted that this Lease is an "integrated" agreement; see Lease § 24, penultimate sentence.

let alone an unexcused one. *See* Complaint ¶ 1 (seeking "a declaration that the lease is unenforceable as a result of the COVID-19 Pandemic and the related government-mandated shutdowns (including Governor Andrew Cuomo's 'New York State on PAUSE' Executive Order"); ¶ 49 (alleging "frustration of purpose and/or impossibility of performance" caused by "the COVID-19 Pandemic, and the related government shutdown orders"); ¶ 55 (alleging "VS is expressly precluded by law from operating its retail store" as a result of "governmental lockdown restrictions resulting from the COVID-19 Pandemic"); ¶ 61 (alleging that "at the close of business on March 16, 2020, VS suspended all retail operations at the Premises to comply with applicable governmental orders and guidelines"); ¶ 67 (alleging "VS cannot operate its retail store at the Premises" because of Governor Cuomo's Executive Order 202.8).

Notably, the Lease contains no *force majeure* clause. Plaintiffs cannot rely on a *force majeure* event (in which Landlord unquestionably played no role) to cancel their Lease and associated Guaranty where Tenant (a) explicitly agreed it would remain liable for rent following a store foreclosure unless it was caused by an unexcused failure by Landlord, and (b) signed a Lease (and L Brands signed a Guaranty) with no *force majeure* clause. *See General Electric*, 293 A.D.2d at 418.

II. Tenant's First Cause of Action, for "Rescission" by Reason of "Frustration of Purpose," Should be Dismissed

It does not matter whether the specific eventuality (*i.e.*, a global pandemic) that forced the closing of Tenant's store was anticipated by VS. Instead, the question is whether it is reasonable to conclude that a sophisticated party like VS — a publicly traded multi-billion dollar company with over a thousand stores — could have worded the Lease in a manner that could have broadly "protected" it, including a rent abatement, without expressly mentioning the pandemic. If it is reasonable to conclude the Lease could have been so-worded by such a sophisticated party, then

if VS signed the Lease without insisting upon "such protection," it should not now be heard to ask this Court to re-write the allocation of risk that it did agree to.

Thus, in *Urban Archeology*, 2009 WL 8572326, plaintiff-tenant argued, *inter alia*, that its obligation to pay rent should be excused because, it said, in the wake of the 2008/2009 "Great Recession," "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.*, 293 A.D.2d 417.]

The First Department affirmed. *See Urban Archaeology*, 68 A.D.3d 562 ("An economic downturn could have been . . . guarded against in the lease").

Indeed, in *General Electric*, *supra*, Metals Resources argued that while it had assumed the risk of "normal" fluctuations in the price of cobalt, it had not assumed the extraordinary risk of a labor strike that shut down the key cobalt mines. [*Compare* Complaint ¶ 5, where VS admits that it obviously contemplated the "ups and downs of tourism," but asserts that it did not specifically contemplate this pandemic.] The First Department rejected the defense, however, and explained that even if the "precise cause" of the price fluctuations was not foreseen, nevertheless, the parties surely could have limited their exposure, if such had been their intent.

In *A & E Television Networks, LLC v. Wish Factory Inc.*, 2016 WL 8136110, at *13-*14 (S.D.N.Y. Mar. 11, 2016), the value of a product licensing agreement, tied to a particular television show, was destroyed overnight when the star of the show publicly made offensive comments. Plaintiff asserted it was not foreseeable that the star would make such self-destructive comments.

The Court explained, however, that the relevant question was whether it was foreseeable that the show might, for whatever reason, decline in popularity; and so, the defense was rejected.

In *Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.*, 2009 WL 9087853 (Sup. Ct. N.Y. Co. Dec. 4, 2009), plaintiff leased railroad cars to transport ethanol. Its two key "destination" companies went bankrupt. The court held that even if those specific bankruptcies were not foreseeable, the general problem of bankruptcy was foreseeable. *See also, Fifth Ave. of L.I. Realty Assocs. v. KMO-361 Realty Assoc.*, 211 A.D.2d 695 (2d Dep't 1995).[16]

See also *Trinity Centre, LLC v. Wall St. Correspondents, Inc.*, 2004 WL 2127216 (Sup. Ct. N.Y. Co. Aug. 9, 2004), explaining that while the specific tragedy of the 9/11 attacks was obviously a "surprise," the lease's "casualty" clause would nevertheless be deemed to be an agreement allocating the risk (at *5):

> Although the terrorist act caught the whole city by surprise, the lease between the parties in fact anticipated a potential casualty. By the express terms of the lease, WSC would receive a rent abatement for the period during which the space was unusable.

In *Profile Publ'g and Mgmt. Corp. v. Musicmaker.com, Inc.*, 242 F. Supp. 2d 363 (S.D.N.Y. 2003), the court again rejected defense of frustration: "while it is obvious that Napster did make a mess of a lot of things, so do many events in unpredictable life, perhaps only partially perceived at the time, or even unperceived. That, however, does not a legal frustration of purpose make . . . ." *Id.* at 365.

See also, e.g., *In re M&M Transportation Co.*, 13 B.R. 861 (Bankr. S.D.N.Y. 1981), where the court rejected the defense of "frustration," explaining that: "A person who makes an absolute

[16] The record on appeal shows that at the trial court level in *Fifth Ave. of L.I. Realty*, the Nassau County Supreme Court held that the inclusion of a provision permitting a Landlord to cancel the lease if B. Altman sold its premises and ceased retail merchandising was evidence that tenant could have foreseen the possibility that B. Altman would become bankrupt.

promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended." *Id.* at 871.

"Foreseeability" is not a subjective question; the test is one of "reasonable" forseeability, such that the tenant could reasonably be expected to have guarded against the general problem, or else be deemed to have accepted the risk. This point was addressed in *Sage Realty Corp. v. Jugobanka, DD*, 1998 WL 702272 (S.D.N.Y. Oct. 8, 1998). The tenant's officers argued that there was an issue of fact, as to whether they subjectively anticipated sanctions against Yugoslavia. The court wrote, however (at footnote 5):

> The relevant question is whether the sanctions were reasonably foreseeable not whether they were in fact foreseeable. *Schenck*, 69 B.R. at 911 (finding frustration of purpose inapplicable where the frustrating event was "reasonably foreseeable").

See also, e.g., *Ninth St. Assocs. v. 20 East Ninth Corp.*, 114 A.D.3d 518, 519 (1st Dep't 2014).

Of course, the Court can take judicial notice that the risk of a pandemic was already being discussed in secondary literature. *See, e.g.*, Jodi Feder, "Riots! Pandemics! Active Shooters! – Thinking about the Unthinkable When Negotiating Real Estate Documents," 33 (no. 2) Practical Real Estate Lawyer 5 (March 2017); and Patrick O'Connor, "Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World," 23 Construction Lawyer 5 (Fall 2003), both available on Westlaw. And we have seen similar issues in the past, even if we have "forgotten" them. *See, e.g., Majestic Hotel Co. v. Eyre*, 53 A.D. 273 (1st Dep't 1900) (outbreak of scarlet fever amongst tenants in building did not constitute actual or constructive eviction).

Indeed, after the SARS outbreak of 2002/3, many business-interruption insurance carriers modified their policies to include an express "virus exclusion."[17] If the insurance bar figured out

[17] As recently reported in the Washington Post:

a way to word business interruption policies to protect their carrier clients from the possibility of claims arising from a pandemic, there is no reason to conclude the sophisticated lawyers representing VS could not have done the same.

In sum, the express terms of Lease defeat an essential element of Tenant's claim.[18]

III. Tenant's Second Cause of Action, Asserting "Rescission" Due to "Impossibility," Should be Dismissed

Gander Mountain 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 defeated when the risk of the adverse conditions at issue "'should have been guarded against in the contract' [citation omitted]," 923 F. Supp. 2d at 362-63.[19]

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim. But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators. SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International. As a result, many insurers added exclusions to standard commercial policies for losses caused by viruses or bacteria. Now, the added policy language will potentially allow insurance companies to avoid hundreds of billions of dollars in business-interruption claims because of the covid-19 pandemic.

Todd C. Frankel, *Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage*, Apr. 2, 2020, available at https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage.

[18] Insofar as Plaintiffs characterize their claims as being for, *e.g.*, a "declaration from this Court that the Lease is rescinded," the request for a "declaration" is simply duplicative of their demand for rescission and should be dismissed. *See, e.g., Apple Records, Inc. v. Capital Records, Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988). In any event, since, as shown here, the merits can and should be resolved as a matter of law based on the Lease, the Court can and should resolve Plaintiffs' requests for declarations by stating that Plaintiffs are not entitled to such declarations; *see, e.g., Dixon v. 105 West 75th St. LLC*, 148 A.D.3d 623, 623 (1st Dep't 2017) (on a CPLR 3211(a)(1) motion the First Department modified the motion court's dismissal of plaintiff's contention that apartment was still subject to rent stabilization and, instead, declared that "the apartment at issue is no longer subject to rent stabilization").

[19] While Tenant sometimes uses the term "impracticable" in the alterative to "impossible" (*e.g.*, Complaint ¶ 95), "New York Courts do not recognize . . . commercial impracticability as a separate defense to the doctrine of impossibility; rather, impracticability is treated as a type of impossibility and construed in the same restricted manner."

A tenant's primary obligation is, of course, simply to pay rent. And there is nothing that makes it "impossible" for VS as Tenant to do so here — there is no law, for example, forbidding Landlord from accepting rent payments from Tenant at the present time. (Landlord is not violating any "rent control" law). As stated in *Raner v. Goldberg*, 244 N.Y. 438, 440 (1927):

> "There is obviously no impossibility or illegality in paying the rent, and the landlord by making the lease has conveyed to the tenant the estate for which rent was promised." Williston on Contracts, § 1955.

Even if payment were to force Tenant (and/or its Guarantor) into bankruptcy, that would not render such payment an "impossibility." *See, e.g., 407 East 61st St. Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968) (hotel forced out of business not an excuse for breaching its contract with a service provider); *accord, e.g., Bank of N.Y. v. Tri Polyta Finance B.V.*, 2003 WL 1960587 (S.D.N.Y. Apr. 25, 2003) (collapse of the Indonesian economy), *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 52 F. App'x 528 (2d Cir. 2002) (change in Chinese law regarding investment).

Tenant's Complaint seeks to focus on a secondary obligation, *viz.*, its obligation under § 2(C)(i) to "continuously operate" its store. But Tenant specifically negotiated, in § 2(C)(vi), that it would be excused from that obligation in certain circumstances, *e.g.*, in the event of damage to or destruction of the building by reason of a "casualty" (in which event, however, while it would not have to operate, it would still have to pay rent). And Tenant agreed that in the event of an unexcused default in its obligation otherwise to "continuously operate," Landlord would be entitled (a) to terminate the Lease and also (b) collect "liquidated damages" as provided in Lease Art. 18. Clearly — taking note also of Lease § 26(ii), and the reference therein to "unavoidable

Axginc Corp. v. Plaza Automall, Ltd., 2017 WL 11504930, at *8 (S.D.N.Y. Feb. 21, 2017) (citation omitted), *aff'd*, 759 Fed. App'x 26 (2d Cir. 2018).

delay" — Tenant could have refused to sign the Lease unless the Lease had provided that Tenant would be relieved of the duty to "continuously operate," and would receive a rent abatement, in a broader set of circumstances. But the Lease does not contain any "broader" "protective" language, nor does it contain a *force majeure* clause — and yet Tenant signed, and Guarantor guaranteed. Thus, the same "foreseeability" obstacle is determinative here.

See also, e.g., *MidFirst Bank v. 159 West 24th St. LLC*, 2010 WL 2639221 (Sup. Ct. N.Y. Co. June 21, 2010) ("impossibility does not apply, *inter alia*, if the risk "could . . . have been . . . guarded against in the contract").

IV. Tenant's Third Cause of Action, for Reformation, Should be Dismissed

There are two types of "reformation for mutual mistake" claims. *See generally*, Glen Banks, 28 New York Practice Series, Contract Law § 6:2. The first concerns a "scrivener's error," or similar mechanical failure of the parties' written agreement to reflect a term or concept to which the parties actually had agreed. *See generally, e.g.*, Glen Banks, 28 New York Practice Series, Contract Law § 6:9. To allege this sort of mutual mistake, Tenant would be required to point to what the parties supposedly had actually agreed-to, but then accidentally omitted from the document signed back in August 2001, in respect of the COVID-19 pandemic, as an exception to the allocation of risks in Lease § 2(C)(vi) and § 26(ii), discussed above. But Tenant's present theory is inconsistent with a "scrivener's error" — for Tenant's claim is that the parties did not, back then, contemplate a global pandemic as disruptive as COVID-19. *See* Complaint ¶ 97 ("Had the Parties been able to anticipate . . . .").

The second type of "mistake," for purposes of a claim of "reformation for mutual mistake," requires a mutual mistake about some matter of fact existing as of the time of the contract. *See, e.g.*, Banks, 28 New York Contract Law, *supra*, § 6:5, and § 12:24 (fns. 12-15), discussing, in

particular, *Simkin v. Blank*, 19 N.Y.3d 46 (2012).

But Tenant cannot qualify for this second type, either, for at least three reasons:

(a) the Lease does not somehow fail to address the contingency of a store closing forced specifically by COVID-19; rather, such a forced store closing is already included in the general allocation of risk requiring Tenant to continue to pay rent for any forced store closing that is not due to an inexcusable failure by Landlord. There is nothing "missing," and so there is nothing that needs to be reformed/re-written. *See, e.g., Thor Props., LLC v. Chetrit Grp. LLC*, 91 A.D.3d 476, 478 (1st Dep't 2012) ("Thus, the parties considered the possibility of default," even if they did not expressly address the possibility of a purposeful default);

(b) the "mistake" that Tenant is alleging is a supposed mistake about a future specific future contingency that (according to Tenant) the parties did not consider (see Complaint ¶ 97, "had they known . . . ."). But such a mistake about a future contingency is, by definition, not a mistake about an existing fact. Thus, in *Simkin*, 19 N.Y.3d 46, the parties' supposed "mutual mistake" that an investment account with Bernie Madoff would "remain safe" was held not to constitute a mistake about an existing fact, but rather was deemed to concern only a future contingency, which the parties could have planned for in their contract, even if they in fact did not create an "exception" to apply in the event of that contingency; and

(c) the reformation claim is, in any event, time-barred. The Lease was entered into in August 2001. Tenant's claim is that "[t]he Parties would not have entered the Lease had they known . . . ." (Complaint ¶ 97).

The applicable statute of limitations is six years from the date of the contract that is supposedly "missing" the necessary "exception." *See, e.g., S.E. Nichols v. Regent Props. Inc.*, 49 A.D.2d 847, 847-48 (1st Dep't 1975); *Nat'l Amusements, Inc. v. S. Bronx Dev. Corp.*, 253 A.D.2d

358 (1st Dep't 1998) (referring to the Fourth Department's explanation [*First Nat'l Bank of Rochester v. Volpe*, 217 A.D.2d 967 (4th Dep't 1995)] that CPLR 203(g) would only be triggered if CPLR 213(6) itself had referred to a discovery exception; but CPLR 213(6) does not.) For the proposition that lease renewal does not re-start the clock, see generally *421-a Tenants Ass'n Inc. v. 125 Court St. LLC*, 760 F. App'x 44, 50 (2d Cir. 2019) (renewal leases do not "restart the clock" where the renewals are not "independent" in respect of the point at issue). The fact that the Lease has been amended subsequent to (a) 9/11, (b) the 2002-2003 SARS epidemic, (c) the 2009 H1N1 flu pandemic, and (d) the 2014-2016 Ebola threat, and the increased warnings in the secondary literature of a possible new outbreak — all without any amendment to the relevant risk allocation in original Lease §§ 2(C)(vi) and 26(ii) — only highlights the time-bar.

Tenant's argument, again, is that the specific COVID-19 virus did not even exist in August 2001, so it must be that something is "missing" from the Lease, such that the Court now needs to re-write/reform the Lease. But leases are inherently long-term documents, addressing, mostly in general terms, a variety of contingencies. The fact that the document does not address a particular future event does not mean, however, that the document is incomplete, or "missing" something, or even ambiguous. *See generally Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195 (2001) (enforcing certain stock "warrants" in accordance with their existing terms, even though they did not address the specific contingency of defendant's "reverse stock split"); and see, applying *Reiss* in the context of a lease, *Bazin v. Wallsom 240 Owner, LLC*, 72 A.D.3d 190 (1st Dep't 2010).

In sum, there are no grounds for "reformation" and regardless that claim is time-barred.

V. Tenant's Fourth Cause of Action, Asserting That Landlord Has Breached the Lease by Demanding Rent, Lacks Merit

Because Tenant's stated "excuses" for its failure to have paid rent lack merit, Landlord is not, conversely, somehow in breach of the Lease for demanding that Tenant pay rent.

VI. Tenant's Fifth Cause of Action, Asserting that Landlord is Not Entitled to Keep the Full Rent Paid by VS for March 2020 Because of "Subsequent Events Later That Month," Lacks Merit

Leaving aside that a tenant cannot in any event recover, based on subsequent changed circumstances, rent required to be paid in advance,[20] we have shown above that Tenant's "excuses" lack merit.

VII. Tenant's Sixth Cause of Action, for "Unjust Enrichment," Lacks Merit

Because the Lease is a binding contract, and Tenant is not entitled to rescind it, there is no basis for Tenant to seek "quasi-contract" relief for supposed "unjust enrichment." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987).

CONCLUSION

Tenant's claims are defeated by the express terms of the Lease. The Lease explicitly contemplates a forced closure of Tenant's store, and yet obligates Tenant to continue to pay rent despite such closure unless the closure arose due to an unexcused failure by Landlord to provide required services or perform an obligation.

The parties could have included a *force majeure* clause in the Lease. They did not. They did include a "casualty" clause and agreed that Tenant would remain obligated to pay rent following a casualty which resulted in the closure of its store.

Faced with a *force majeure* type event but no *force majeure* clause, Tenant tries to shoehorn its claims into the narrow common law doctrines of "frustration of purpose" and "impossibility." They do not apply. The subject of the contract, the demised premises, has not been destroyed, so "impossibility" does not apply. "Frustration of purpose" does not apply either because the parties

[20] See *One World Trade Center LLC v. Cantor Fitzgerald Sec.*, 6 Misc. 3d 382, 386 (Sup. Ct. N.Y. Co. 2004).

foresaw the possibility of a forced closure of Tenant's store and allocated that risk to Tenant absent its being caused by Owner's unexcused failure.

While the parties were under no burden to deal specifically with a global pandemic in the Lease, they easily could have. The parties here are highly sophisticated. Guarantor is multi-billion dollar publicly traded company, with thousands of stores. Tenant is a subsidiary of Guarantor and operates one of its largest flagship stores. Viral infections and global pandemics are infrequent (thankfully) but not unprecedented. It has been estimated that the 1917/18 Spanish Flu pandemic killed over 5 percent of the world's then population (the equivalent of nearly 400 million today, a far cry from COVID-19's actual toll). *See, e.g.*, *Majestic Hotel*, 53 A.D. 273 (outbreak of scarlet fever did not constitute constructive eviction). Plaintiffs could have addressed this risk; they did not.

The Court should decline Plaintiffs' invitation to rewrite the allocation of risk expressly agreed to by the parties in the Lease.

Because the Lease is not subject to rescission, annulment or reformation, the Guaranty must likewise be enforced.

The remainder of Plaintiffs' claims are derivative of its failed claims for rescission, annulment and reformation and should as well be dismissed.

Although Landlord could have moved pre-answer under CPLR 3211(a)(1) because the Lease defeats Plaintiffs' claims and constitutes "documentary evidence" for such purposes, Landlord instead chose to answer (and counterclaim) and, issue having been joined on all Plaintiffs' claims, moved under CPLR 3212 for summary judgment dismissing such claims. Thus, to prevail on its motion, Landlord need not "conclusively establish" that Plaintiffs' claims fail

(though it could and has); but rather need only make out a prima facie case for dismissal, and show no material issues of fact exist.

Landlord handily meets this standard. Plaintiffs have affirmatively pled that Landlord had no hand in the forced closure of Tenant's store. They have admitted that the closure arose solely from the COVID-19 pandemic and associated emergency gubernatorial orders. This means Landlord is not at fault and that the closure has not resulted from any failure by Landlord to provide the limited required services specified in the Lease, and that is the only circumstance, under the Lease, wherein Tenant's obligation to pay rent is excused.

The Court should grant summary judgment dismissing all of Plaintiffs' claims with prejudice.

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

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CERTIFICATE OF COMPLIANCE

The total number of words in the foregoing memorandum of law, inclusive of headings and footnotes and exclusive of the caption, table of contends, table of authorities, and signature blocks, is 6,833 and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court, effective October 1, 2018.

Dated: New York, New York
June 29, 2020

/s/ Stephen B. Meister
STEPHEN B. MEISTER