

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GAP, INC.,

Plaintiff,

-against-

PONTE GADEA NEW YORK LLC,

Defendant.

Case No. 20-cv-4541 (LTS)(KHP)

**THE GAP, INC'S REPLY AND
AFFIRMATIVE DEFENSES TO
COUNTERCLAIMS**

Plaintiff/Counterclaim defendant The Gap, Inc. ("The Gap"), by its attorneys Davis & Gilbert LLP, makes this Reply and Affirmative Defenses to the Answer and Counterclaims (the "Counterclaims") of Defendant/Counterclaimant Ponte Gadea New York LLC ("PGNY"), as follows:

AS AND FOR A RESPONSE TO PGNY'S COUNTERCLAIMS

92. Paragraph 92 contains allegations to which no response is required. To the extent a response is required, The Gap denies the allegations contained in paragraph 92 of the Counterclaims.

93. The Gap denies the allegations contained in paragraph 93 of the Counterclaims.

94. The Gap denies the allegations contained in paragraph 94 of the Counterclaims.

95. The Gap denies the allegations contained in paragraph 95 of the Counterclaims.

96. The Gap denies the allegations contained in paragraph 96 of the Counterclaims.

97. The Gap denies the allegations contained in paragraph 97 of the Counterclaims.

98. The Gap denies the allegations contained in paragraph 98 of the Counterclaims.

99. The Gap denies the allegations contained in paragraph 99 of the Counterclaims, except to the extent they refer to a Notice to Cure, the content of which speaks for itself.

100. The Gap denies the allegations contained in paragraph 100 of the Counterclaims.

101. The Gap denies the allegations contained in paragraph 101 of the Counterclaims.

102. The Gap denies the allegations contained in paragraph 102 of the Counterclaims, except to the extent they refer to a Notice of Termination, the content of which speaks for itself.

103. The Gap denies the allegations contained in paragraph 103 of the Counterclaims.

104. The Gap denies the allegations contained in paragraph 104 of the Counterclaims.

105. The Gap denies the allegations contained in paragraph 105 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

106. The Gap denies the allegations contained in paragraph 106 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

107. The Gap denies the allegations contained in paragraph 107 of the Counterclaims.

108. The Gap denies the allegations contained in paragraph 108 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

109. The Gap denies the allegations contained in paragraph 109 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

110. The Gap denies the allegations contained in paragraph 110 of the Counterclaims.

111. The Gap admits the allegations contained in paragraph 111 of the Counterclaims.

112. The Gap denies knowledge or information sufficient form an opinion as to the truth of the allegations contained in paragraph 112 of the Counterclaims.

113. Paragraph 113 contains a legal conclusion to which no response is required.

114. Paragraph 114 contains a legal conclusion to which no response is required.

115. The Gap denies the allegations contained in paragraph 115 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

116. The Gap denies the allegations contained in paragraph 116 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

117. The Gap denies the allegations contained in paragraph 117 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

118. The Gap denies the allegations contained in paragraph 118 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

119. The Gap denies the allegations contained in paragraph 119 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

120. The Gap denies the allegations contained in paragraph 120 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

121. The Gap denies the allegations contained in paragraph 121 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

122. The Gap denies the allegations contained in paragraph 122 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

123. The Gap denies the allegations contained in paragraph 123 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

124. The Gap denies the allegations contained in paragraph 124 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

125. The Gap denies the allegations contained in paragraph 125 of the Counterclaims.

126. The Gap denies the allegations contained in paragraph 126 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

127. The Gap denies the allegations contained in paragraph 127 of the Counterclaims, except to the extent they refer to Section 21.2 of the Lease, the content of which speaks for itself.

128. The Gap denies the allegations contained in paragraph 128 of the Counterclaims, except to the extent they refer to Section 21.2 of the Lease, the content of which speaks for itself.

129. The Gap denies the allegations contained in paragraph 129 of the Counterclaims, except to the extent they refer to Article 23 of the Lease, the content of which speaks for itself.

130. The Gap denies the allegations contained in paragraph 130 of the Counterclaims, except to the extent they refer to Section 23.3 of the Lease, the content of which speaks for itself.

131. The Gap denies the allegations contained in paragraph 131 of the Counterclaims, except to the extent they refer to Section 24.1 of the Lease, the content of which speaks for itself.

132. The Gap denies the allegations contained in paragraph 132 of the Counterclaims.

133. The Gap denies the allegations contained in paragraph 133 of the Counterclaims, except to the extent they refer to Section 25.2 of the Lease, the content of which speaks for itself.

134. The Gap denies the allegations contained in paragraph 134 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

135. The Gap denies the allegations contained in paragraph 135 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

136. The Gap denies the allegations contained in paragraph 136 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

137. The Gap denies the allegations contained in paragraph 137 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

138. The Gap denies the allegations contained in paragraph 138 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

139. The Gap denies the allegations contained in paragraph 139 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

140. The Gap denies the allegations contained in paragraph 140 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

141. The Gap denies the allegations contained in paragraph 141 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

142. The Gap denies the allegations contained in paragraph 142 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

143. The Gap denies the allegations contained in paragraph 143 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

144. The Gap denies the allegations contained in paragraph 144 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

145. The Gap denies the allegations contained in paragraph 145 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

146. The Gap denies the allegations contained in paragraph 146 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

147. The Gap denies the allegations contained in paragraph 147 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

148. The Gap denies the allegations contained in paragraph 148 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

149. The Gap denies the allegations contained in paragraph 149 of the Counterclaims, except to the extent it refers to government Orders, the contents of which speak for itself.

150. The Gap denies the allegations contained in paragraph 150 of the Counterclaims.

151. The Gap denies the allegations contained in paragraph 151 of the Counterclaims, except admits that the parties spoke by phone on or about April 9, 2020.

152. The Gap denies the allegations contained in paragraph 152 of the Counterclaims, except to the extent they refer to Gap public filings, the content of which speaks for itself.

153. The Gap denies the allegations contained in paragraph 153 of the Counterclaims, except to the extent they refer to Gap public filings, the content of which speaks for itself.

154. The Gap denies the allegations contained in paragraph 154 of the Counterclaims, except to the extent they refer to Gap public filings, the content of which speaks for itself.

155. The Gap denies the allegations contained in paragraph 155 of the Counterclaims.

156. The Gap denies the allegations contained in paragraph 156 of the Counterclaims.

157. The Gap denies the allegations contained in paragraph 157 of the Counterclaims, except admits that the parties spoke by phone on April 24, 2020.

158. The Gap denies the allegations contained in paragraph 158 of the Counterclaims.

159. The Gap denies the allegations contained in paragraph 159 of the Counterclaims, except to the extent they refer to a certain Five Business Day Notice to Cure Default and Section 21.1(A) of the Lease, the content of which speaks for itself.

160. The Gap denies the allegations contained in paragraph 160 of the Counterclaims, except to the extent they refer to the Notice to Cure, the content of which speaks for itself.

161. The Gap denies the allegations contained in paragraph 161 of the Counterclaims, except to the extent they refer to the Notice to Cure, the content of which speaks for itself.

162. The Gap denies the allegations contained in paragraph 162 of the Counterclaims, except to the extent they refer to the Notice to Cure, the content of which speaks for itself.

163. The Gap denies the allegations contained in paragraph 163 of the Counterclaims, except to the extent they refer to the Notice to Cure, the content of which speaks for itself.

164. The Gap denies the allegations contained in paragraph 164 of the Counterclaims.

165. The Gap denies the allegations contained in paragraph 165 of the Counterclaims.

166. The Gap denies the allegations contained in paragraph 166 of the Counterclaims, except to the extent they refer to Section 21.1(A) of the Lease, the content of which speaks for itself.

167. The Gap denies the allegations contained in paragraph 167 of the Counterclaims, except to the extent they refer to Section 21.2 of the Lease, the content of which speaks for itself.

168. The Gap denies the allegations contained in paragraph 168 of the Counterclaims, except to the extent they refer to a 3 Business Day Notice of Termination, the content of which speaks for itself.

169. The Gap denies the allegations contained in paragraph 169 of the Counterclaims, except to the extent they refer to a 3 Business Day Notice of Termination, the content of which speaks for itself.

170. The Gap denies the allegations contained in paragraph 170 of the Counterclaims.

171. The Gap denies the allegations contained in paragraph 171 of the Counterclaims, except admits that it filed an action on or about June 12, 2020 against PGNV.

172. The Gap denies the allegations contained in paragraph 172 of the Counterclaims, except to the extent they refer to the allegations contained in the Gap's June 12, 2020 Complaint, the content of which speaks for itself.

173. The Gap denies the allegations contained in paragraph 173 of the Counterclaims, except to the extent they refer to the allegations contained in the Gap's June 12, 2020 Complaint, the content of which speaks for itself.

174. The Gap denies the allegations contained in paragraph 174 of the Counterclaims, except to the extent they refer to a letter entitled "Supplemental Notice of Casualty," the content of which speaks for itself.

175. The Gap denies the allegations contained in paragraph 175 of the Counterclaims, except to the extent they refer to a letter entitled "Supplemental Notice of Casualty," the content of which speaks for itself.

176. The Gap denies the allegations contained in paragraph 176 of the Counterclaims

177. The Gap denies the allegations contained in paragraph 177 of the Counterclaims

178. The Gap denies the allegations contained in paragraph 178 of the Counterclaims, except to the extent they refer to Article 16 of the Lease, the content of which speaks for itself.

179. The Gap denies the allegations contained in paragraph 179 of the Counterclaims, except to the extent they refer to Section 16.2 of the Lease, the content of which speaks for itself.

180. The Gap denies the allegations contained in paragraph 180 of the Counterclaims, except to the extent they refer to allegations contained in the Complaint, the content of which speaks for itself.

181. The Gap denies the allegations contained in paragraph 181 of the Counterclaims.

182. The Gap denies the allegations contained in paragraph 182 of the Counterclaims

183. The Gap denies the allegations contained in paragraph 183 of the Counterclaims

184. The Gap denies the allegations contained in paragraph 184 of the Counterclaims, except admits that no such payments were made because they were not due and owing.

185. The Gap denies the allegations contained in paragraph 185 of the Counterclaims.

COUNT I (DECLARATORY JUDGMENT)

186. The Gap hereby repeats, realleges and incorporates by reference the responses contained in paragraphs 92 through 185 above as if set forth more fully herein.

187. The Gap denies the allegations contained in paragraph 187 of the Counterclaims.

188. The Gap admits the allegations contained in paragraph 188 of the Counterclaims.

189. The Gap denies the allegations contained in paragraph 189 of the Counterclaims.

190. Paragraph 190 contains a legal conclusion to which no response is required. To the extent a response is required, The Gap contends that the Lease terminated as a matter of law on or about March 19, 2020.

191. The Gap denies the allegations contained in paragraph 191 of the Counterclaims.

192. The Gap denies the allegations contained in paragraph 192 of the Counterclaims.

193. The Gap denies the allegations contained in paragraph 193 of the Counterclaims.

194. The Gap denies the allegations contained in paragraph 194 of the Counterclaims.

COUNT II (BREACH OF CONTRACT)

195. The Gap hereby repeats, realleges and incorporates by reference the responses contained in paragraphs 92 through 194 above as if set forth more fully herein.

196. The Gap denies the allegations contained in paragraph 196 of the Counterclaims.

197. The Gap denies the allegations contained in paragraph 197 of the Counterclaims.

198. The Gap denies the allegations contained in paragraph 198 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

199. The Gap denies the allegations contained in paragraph 199 of the Counterclaims.

200. The Gap denies the allegations contained in paragraph 200 of the Counterclaims, except to the extent they refer to a Notice of Termination, the content of which speaks for itself.

201. The Gap denies the allegations contained in paragraph 201 of the Counterclaims.

202. The Gap denies the allegations contained in paragraph 202 of the Counterclaims.

203. The Gap denies the allegations contained in paragraph 203 of the Counterclaims.

204. The Gap denies the allegations contained in paragraph 204 of the Counterclaims.

205. The Gap denies the allegations contained in paragraph 205 of the Counterclaims.

COUNT III (BREACH OF CONTRACT)

206. The Gap hereby repeats, realleges and incorporates by reference the responses contained in paragraphs 92 through 205 above as if set forth more fully herein.

207. The Gap denies the allegations contained in paragraph 207 of the Counterclaims.

208. The Gap denies the allegations contained in paragraph 208 of the Counterclaims.

209. The Gap denies the allegations contained in paragraph 209 of the Counterclaims, except to the extent they refer to the Lease, the content of which speaks for itself.

210. The Gap denies the allegations contained in paragraph 210 of the Counterclaims.

211. The Gap denies the allegations contained in paragraph 211 of the Counterclaims.

212. The Gap denies the allegations contained in paragraph 212 of the Counterclaims.

213. The Gap denies the allegations contained in paragraph 213 of the Counterclaims.

214. The Gap denies the allegations contained in paragraph 214 of the Counterclaims.

AFFIRMATIVE DEFENSES

As further, separate and affirmative defenses, without assuming the burden of proof of any such defense that rests with PGNY, The Gap states as follows:

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Complaint fails to state a claim upon which relief may be granted. The Complaint also fails to state a claim for the reasons stated in The Gap's Complaint.

**SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate)**

PGNY has failed to comply with its duty to mitigate and to act in a commercially reasonable manner. PGNY has taken no steps to mitigate its damages whatsoever. To the extent The Gap is found to owe PGNY, that amount must be offset by the amount PGNY has received in mitigation or would have received if PGNY had fully performed its obligation to mitigate damages.

**THIRD AFFIRMATIVE DEFENSE
(Rescission)**

The express purpose of the Lease was to allow The Gap to use the Premises as a retail apparel store. Due to unforeseeable events related to the COVID-19 pandemic, all of which were outside of The Gap's control, The Gap was deprived of the intended use and such use became impossible, illegal and/or impracticable. As a result, the purpose and object of the Lease was frustrated, impossible, illegal and commercially impracticable, The Gap's performance became frustrated, impossible, illegal, and impracticable, and the consideration The Gap received in exchange for entering the Lease failed. The Gap is entitled to judicial rescission of the Lease.

**FOURTH AFFIRMATIVE DEFENSE
(Reformation)**

The express purpose of the Lease was to allow The Gap to use the Premises as a retail apparel store. Due to unforeseeable events related to the COVID-19 pandemic, all of which were outside of The Gap's control, The Gap was deprived of the intended use and such use became

impossible, illegal and/or impracticable. As a result, the purpose and object of the Lease was frustrated, impossible, illegal and commercially impracticable, The Gap's performance became frustrated, impossible, illegal, and impracticable, and the consideration The Gap received in exchange for entering the Lease failed. The Gap is entitled to judicial reformation of the Lease.

**FIFTH AFFIRMATIVE DEFENSE
(Setoff)**

During and after the COVID-19 crisis, PGNY refused to reimburse The Gap for the excess charges of rent attributable to the time that The Gap was deprived of its use of the Premises. To the extent that the Court finds The Gap owes PGNY, The Gap's liability to PGNY must be setoff in whole or in part by the amounts that PGNY owes The Gap.

**SIXTH AFFIRMATIVE DEFENSE
(No Duty)**

With respect to the alleged rights, claims and obligations that PGNY seeks to enforce against The Gap, The Gap owed no duty to PGNY, and, therefore, The Gap is not liable to PGNY for damages.

**SEVENTH AFFIRMATIVE DEFENSE
(Estoppel)**

PGNY is estopped from enforcing any of the alleged rights, claims and obligations it seeks to enforce against The Gap.

**EIGHTH AFFIRMATIVE DEFENSE
(Frustration of Purpose)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused because the purpose and object of the Lease was frustrated. The Gap's ability to use the Premises was the express purpose of the Lease, as both parties understood at the time of

contracting, and without The Gap's ability to use the Premises, the transaction that the parties entered that resulted in the Lease makes no sense.

**NINTH AFFIRMATIVE DEFENSE
(Failure of Consideration)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused for a failure of consideration.

**TENTH AFFIRMATIVE DEFENSE
(Impossibility)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused because the purpose, object, and performance of the Lease became impossible.

**ELEVENTH AFFIRMATIVE DEFENSE
(Illegality)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused because the purpose, object, and performance of the Lease became illegal.

**TWELFTH AFFIRMATIVE DEFENSE
(Commercial Impracticability)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused because the purpose, object, and performance of the Lease became commercially impracticable.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Actions of PGNY and Third Parties)**

The Gap's obligation to perform any of its alleged obligations under the Lease was excused by PGNY's actions or the actions of third parties.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Lack of Damages)**

PGNY has not suffered any damages as a result of any actions taken by The Gap, and PGNY is barred from asserting any cause of action against The Gap.

**FIFTEENTH AFFIRMATIVE DEFENSE
(Breach of Contract)**

PGNY failed to comply with terms of the Lease and is therefore barred from asserting any cause of action against The Gap, or its claimed damages must be offset by the amount of damages caused by PGNY's own failure to comply with the Lease.

**SIXTEENTH AFFIRMATIVE DEFENSE
(Unclean Hands)**

Each of the alleged causes of action contained in the Complaint is barred by the equitable doctrine of unclean hands. During and after the COVID-19 crisis, PGNY refused to reimburse The Gap for the excess charges of rent attributable to the time that The Gap was deprived of its use of the Premises.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(Mistake)**

PGNY's Complaint is barred by the parties' unilateral or bilateral mistake.

**EIGHTEENTH AFFIRMATIVE DEFENSE
(Failure of Condition Precedent)**

PGNY's Complaint is barred by a failure of a condition precedent to the obligation to pay rent and expenses.

The Gap expressly reserves the right to supplement or amend this reply to PGNY's Counterclaims and add additional defenses, including affirmative defenses, which may be discovered or become relevant in the future.

WHEREFORE, The Gap respectfully requests that this Court enter judgment in its favor, dismiss PGNY's Counterclaims with prejudice, award The Gap its costs (including reasonable attorney fees and disbursements with interest), and grant The Gap such other relief as requested in its Complaint, as the law, equity, and justice require.

Dated: July 28, 2020

DAVIS & GILBERT LLP

By: /s/Jesse B. Schneider

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