

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GAP, INC.,

Plaintiff/ Counterclaim Defendant

-against-

PONTE GADEA NEW YORK LLC,

Defendant/Counterclaimant.

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

**THE GAP, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF GAP'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

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Pursuant to Federal Rule of Civil Procedure 56, Plaintiff The Gap, Inc. (“Gap”) respectfully submits this memorandum of law in support of Gap’s cross-motion for summary judgment.

ARGUMENT

I. Gap is entitled to summary judgment because the Lease’s purpose was frustrated.

A. The undisputed facts demonstrate the purpose of the Lease was frustrated.

Ponte Gadea’s opposition fails to offer any evidence of the parties’ intent when the Lease was signed. Only Gap has done so. [Dkt. Nos. 32, 35.] Thus, the undisputed evidence demonstrates that neither the Lease nor the parties contemplated the store would not be able to, and now it cannot, operate for its express and exclusive intended purpose – a “first-class retail business” consistent with Gap’s stores across the country as they existed when the lease was signed – much less in the midst of a global pandemic. No one anticipated Gap would need to require workers and customers to wear masks, socially distance themselves, communicate through plastic barriers, or limit the customers in the store, among other things. The undisputed evidence shows these obligations and the conditions created by the pandemic preclude the operation of the typical first-class retail store in the vibrant economic corridor as contemplated, and frustrate the purpose of the Lease.¹

New York law recognizes a contract is unenforceable where, as here, there is a frustration of a purpose that is “so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.” *Jack Kelly Partner LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dept 2016); Restatement [Second] of Contracts §§ 265 and 269 (“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties are discharged, unless the language or the circumstances indicate the

¹ Indeed, these same forces led Ponte Gadea’s counsel’s firm to copy much of Gap’s complaint verbatim in asserting a strikingly similar counter-claim for Eddie Bauer. (See Ex. A, B (redline))

contrary.”). Ponte Gadea has not, and cannot, establish anyone would have (or did) intend or agree to pay more than \$20,000 per day for retail space at 59th and Lexington in the face of the current unforeseen conditions. Ponte Gadea has failed to establish that the fundamental purpose of the Lease was not frustrated.

B. Ponte Gadea’s factual issues do not support the denial of summary judgment.

Attempting to sidestep its lack of evidence of intent, Ponte Gadea raises a number of issues, none of which controverts the frustration of the fundamental purpose of the Lease. *First*, Ponte Gadea contends a failure to vacate precludes frustration. Put differently, Ponte Gadea contends that, in March 2020, in the midst of a global pandemic, when New York City was in lockdown, employees should have violated stay-at-home orders and risked their health and safety to empty out retail space. The assertion is as absurd as it is unsupported by caselaw.² No case Ponte Gadea cites holds a failure to vacate is a bar to asserting frustration of purpose. To the contrary, New York courts hold that a commercial tenant is entitled to a reasonable time to vacate the premises; Gap is set to vacate the Premises by October. *See S.E. Nichols, Inc. v. New Plan Realty Tr.*, 160 A.D.2d 251, 252 (1st Dept 1990) (abandonment of a store “in an orderly manner may be a lengthy process” and “a delay of even several months might be reasonable under certain circumstances”); *135 E. 57th St., LLC v. Calypso Capital Mgt., LP*, 2018 WL 4381741 (Sup. Ct., N.Y. County 2018) (delay of almost nine month not unreasonable); Rondholz Decl. ¶21; Supp. Rondholz Decl. ¶¶ 8-9. Further, the trier of fact must determine the amount of rent, if any, owed for the period of time before a tenant vacates the Premises. *See West Broadway Glass Co. v. I.T.M Inc.*, 245 A.D. 2d 232, 666 N.Y.S. 2d 629 (1st Dept. 1997) (when landlord rented untenable premises, difference between value of the leased premises as intended and as breached).

Second, Ponte Gadea asserts that because Gap engaged in curbside delivery and shipped

² The absurdity grows as Ponte Gadea simultaneously contends Gap should pay holdover rent of 150-200% despite a frustration of purpose. This provision too illustrates the unforeseeability of the situation presented and the parties’ anticipated operation as intended during a holdover.

products from the store for a limited time, that as a matter of law the purpose of the Lease could not have been frustrated. This also makes no sense. The express purpose of the Lease was to operate a first class, prototypical store in a vibrant and bustling location, not a small warehouse or distribution center in a ghost town. Lease § 4.1; Dkt. 32 (Butala) ¶¶ 7-23; Dkt. 35 (Adams) ¶¶ 4-16. Ponte Gadea has not cited any authority for the proposition that Gap is estopped from asserting the purpose of the Lease was frustrated merely because, for a limited period of time, it made efforts to mitigate its losses by engaging in curbside delivery and ship-from-store.³

Finally, Ponte Gadea absurdly argues the purpose of this Lease could not have been frustrated because Gap has opened other stores elsewhere in New York City. Ponte Gadea has failed to put forward any evidence that the two stores it references are in any way relevant to the issues before this Court. Ponte Gadea has offered no evidence that the stores operate under the same or even similar lease terms, that the economics of those stores are the same or similar, that they serve the same market, that they serve the same demographic, or that the fundamental purpose of the leases are the same. They are not. *See* [Supp. Rondholz Decl. ¶¶3-4] Gap’s choice to open other stores in other parts of the City, with different demographics, under different leases, with different landlord-tenant relationships, does not bar Gap from asserting that the purpose of this Lease has been frustrated.

C. Ponte Gadea’s reliance on the force majeure “clause” is unavailing.

Ponte Gadea also misconstrues Gap’s claims and the Lease in asserting that a force majeure clause precludes Gap’s arguments. Under New York law, force majeure clauses are narrowly construed and applied; the clause must specify the precise reason for non-performance a party is actually invoking. *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dept. 2009). Here, pandemic is not identified.⁴ Moreover, Gap has not invoked force majeure to rescind or reform the

³ Indeed, Ponte Gadea’s Fifth and Seventh Affirmative Defenses assert Gap failed to mitigate, or failed to act and caused, its damages. Ponte Gadea can’t have it both ways.

⁴ At best for Ponte Gadea, the absence of any reference to “pandemic” renders the definition ambiguous, and the trier of fact must determine whether the parties intended to require Gap to

Lease, or to extend the time for payment of rent. The latter is all a Force Majeure Event could do (under the Lease's Section 21.1(F)), and even then, only after a notice of default. Without application, a force majeure definition alone is meaningless.

There has been a frustration of purpose based on the “virtually cataclysmic, wholly unforeseeable event [that] renders the contract valueless to one party.” *United States v. Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). Neither the unprecedented circumstances of COVID-19, nor the imposition of more than \$20,000 per day in rent under those circumstances were ever contemplated by the parties. Even if the force majeure definition was expanded to cover such circumstances, the time for performance is not at issue, and the definition is irrelevant here.

II. Gap is Entitled to Summary Judgment as to Gap's Remaining Claims and Defenses.

A. Gap is entitled to summary judgment on its rescission claim.

Ponte Gadea offers no meaningful response to the evidence showing Gap is entitled to rescission because it can no longer operate a “first-class retail business” at the premises, the Lease is frustrated, and that its consideration has failed. (*See* Dkt. 29 at 16-18, 25.) Instead, and notwithstanding the Lease's language, Ponte Gadea attempts to shift the analysis to whether Gap can use the Premises *for any purpose at all*. (*See* Dkt. 47 at 18-19.) Gap did not agree to rent a location in the most expensive area in the country for *any* purpose. Rather, Gap agreed to exorbitant rent for the ability to operate a “first-class retail business” like those operating when the lease was executed, in an area with exceptionally heavy foot traffic and high visibility. (Dkt. 30 at ¶ 8-10.) Without it, the consideration fails and the purpose of the Lease is frustrated.

Additionally, Ponte Gadea has repeatedly failed to point to any provision of the lease that imposes the risk of a pandemic that fractures life in Manhattan as we know it, and it has failed to do so again in its Reply and Opposition brief. Its appeal to *Culver & Theisen, Inc. v. Starr Realty*

continue to pay rent, without reprieve, during the “unique” and “unprecedented” challenges created by the COVID-19 pandemic. *See Seawright v. Bd. of Elections in City of New York*, 2020 N.Y. Slip Op. 02993 (Ct. of Appeals May 21, 2020).

Co. (NE) LLC, 307 A.D. 2d 910, 911 (App. Div. 2003), therefore fails. Ponte Gadea also takes an overly narrow view of the required relief for a rescission claim: being restored to its “status quo ante position.” (Dkt. 47 at 19.) But Ponte Gadea’s position would foreclose rescission as to any lease dispute if the tenant occupies the premises for even a day. Such an extreme doctrine has no support in New York law, and Ponte Gadea does not cite to any. On the contrary, courts have routinely validated rescission as a remedy in lease disputes. *See, e.g., Dandy Realty Corp. v. Nick’s Hideaway, Inc.*, 24 Misc. 3d 105, 106-07 (App. Div. 2009); *Sorbaro Co. v. Capital Video Corp.*, 168 Misc. 2d 143, 148-49 (N.Y. Sup. Ct. 1996). Gap has shown that the parties may be restored to the same position they would have been had the lease not been signed since Gap paid rent before the purpose of the lease was frustrated and can simply vacate the Premises now. (*See also* Dkt. 29 at 17, 25.)

B. Gap is entitled to summary judgment on its impossibility claim.

Gap satisfies each element to satisfy the defense of impossibility. Specifically, the defense of impossibility requires that performance must be impossible by an unforeseeable event outside of that party’s control. *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900 (1987). The global pandemic and the unprecedented governmental orders and restrictions imposed as the result of it have rendered Gap’s performance impossible. In fact, Ponte Gadea does not dispute the *terms* of the various governmental shutdown orders in New York in response to the global pandemic that prevented Gap from operating, in any capacity, for nearly three months. Dkt. 43 at 19-20. Nor can it dispute that the COVID-19 pandemic has altered the foundation of the Lease – the restrictions that prevented and continue to prevent Gap from operating as originally intended. Indeed, only Gap has set forth evidence of the parties’ intentions and basic assumptions entering into the Lease. The COVID-19 pandemic remains more complex and operationally pervasive than any economic downturn. Unprecedented public-health challenges and restrictive governmental orders make operation as originally intended impossible.

C. Gap is entitled to summary judgment on its unjust enrichment and money had and received claims.

Ponte Gadea repeats its contention that Gap's unjust enrichment and money had and received claims cannot be sustained because of existence of the Lease. The mere fact that Ponte Gadea and Gap continue to disagree about whether the Lease is operative illustrates that there is a "bona fide dispute as to the existence" of a relevant contract or as to whether the "contract does not cover the dispute in issue." *Curtis Props. Corp. v. Greif Cos.*, 653 N.Y.S.2d 569, 571 (App. Div. 1997). Moreover, Ponte Gadea does not dispute that these claims are available where, as here, the plaintiff has asked for rescission. *LBA Intern. Ltd. v. C.E. Consulting LLC*, No. 08 Civ. 6797(SAS), 2010 WL 778019, at *4 (S.D.N.Y. Mar. 5, 2010) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E. 2d 190, 193 (N.Y. 1987)).

D. Gap is entitled to summary judgment on its reformation claim.

Despite Ponte Gadea's protests, Gap has cited specific evidence of the mutual mistake that occurred when executing the Lease. (See Dkt. 29 at 19-20.) Indeed, only Gap has cited the evidence showing whether a mutual mistake occurred when executing the Lease through the declarations of Ms. Butala and Ms. Adams. (See Dkt. 47 at 20-23.) Left with no evidentiary support for its own position, Ponte Gadea attacks these declarations, but it does so without authority to disregard the only evidence regarding whether a mutual mistake occurred. The majority of cases cited by Ponte Gadea involved disregarding declarations when there was evidence in the record that *contradicted* the declarant's version of the events. See *Khezrie v. Greenberg*, No. 98-CV-3638 (ERK), 2001 WL 1922664, at *5 (E.D.N.Y. Dec. 11, 2001); *Weider Health and Fitness v. Austex Oil Ltd.*, No. 17-cv-2089 (RMB)(OTW), 2018 WL 8579820, *11 n.13 (S.D.N.Y. Dec. 19, 2018); *U.S. Russia Inv. Fund v. Neal & Co., Inc.*, 97-CV-1788 (DC), 1998 WL 557606, at *7 (S.D.N.Y. Sept. 2, 1998); *Zappie Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d. Cir. 2000).⁵ Here, in contrast, there is no evidence contradicting Ms. Butala's and Ms. Adams'

⁵ Ponte Gadea's remaining authority involved declarations with less credibility and support than Gap's, and are thus distinguishable. See *Amerol Corp. v. Am. Chemie-Pharma, Inc.*, No. CV 04-0940(JO), 2006 WL 721319, at *10 (E.D.N.Y. Mar. 17, 2006); *United Magazine Co. v. Murdoch*

declarations. Ponte Gadea’s appeal to specific Lease provisions also fails because none of the cited provisions addresses the mutual mistake that occurred: whether “first-class retail business” was properly defined, or whether the Lease omitted the intended protection of the Lease’s purpose. (Dkts. 29 at 19-20; 47 at 23.) At a minimum, the relevant provisions can be excised under the Lease’s Section 32.10, “Divisibility.”

E. Ponte Gadea’s reliance on the casualty provision of the Lease is misplaced.

In an attempt to defeat Gap’s claim for rent abatement, Ponte Gadea advances several arguments based on implausible interpretations of the plain language of the Lease and asserts it had no notice of the pandemic’s effects (under Section 16.4 of the Lease) because Gap did not notify it in writing that a casualty had rendered the Premises unusable. Ponte Gadea cannot feign ignorance of the applicable laws of the State of New York; Section 27.1 makes the Lease subject to them. Nor can it credibly feign ignorance of the pandemic more generally.

Regardless, its argument improperly conflates Section 16.1’s notice requirement with Section 16.4’s right to rent abatement. Section 16.1 of the Lease only requires Gap to “notify Landlord promptly of any fire or other casualty that occurs *in the Premises*.” Section 16.4 does not include that limitation. It entitles Gap to rent abatement “[i]f, as a result of a fire or other casualty, ***all or any portion of the Premises shall not be usable*** by Tenant for a period of more than fourteen (14) consecutive days, for the conduct of Tenant’s business therein in substantially the same manner as prior to such fire or other casualty.”

Finally, after ironically claiming force majeure should be read broadly to include pandemic, Ponte Gadea takes issue with Gap’s reliance on New York case law defining a casualty as an “unfortunate occurrence” because the case law did not specifically address whether a pandemic qualifies. While force majeure clauses are interpreted narrowly, Ponte Gadea cites no case requiring the same for the definition of casualty. Instead, the cases broadly use the term. The COVID-19 pandemic is indisputably a sudden, unforeseeable, and unfortunate occurrence. It is a

Magazines Distrib., Inc., 393 F. Supp. 199, 211 (S.D.N.Y. 2005); *Belcher v. Serriano*, No. 95-CV-1340 (RSP/GJD), 1998 WL 173169, at *1 (N.D.N.Y. 1998).

casualty as a matter of law. Thus, Gap is entitled to summary judgment on its casualty claim.

III. Gap is Not Required to Pay Use and Occupancy *Pendente Lite*.

Ponte Gadea contends that New York state law, rather than Rule 65(a), dictates the standard for determining whether Gap should be ordered to make use and occupancy payments pending litigation.⁶ Ponte Gadea cites no authority for this proposition, which contradicts the well-settled principle that in federal court, federal law governs a request for a preliminary injunction. *See, e.g., Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 106 (1945) (“State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State’s courts.”); *Baker’s Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co.*, 830 F.2d 13, 15 (2d Cir. 1987) (“The question whether a preliminary injunction should be granted is generally one of federal law even in diversity actions, though state law issues are sometimes relevant to the decision to grant or deny.”); 11 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2943 (3d ed. 2020) (“Because they only afford temporary relief, there is little chance that the entry of an order under Rule 65(a) or Rule 65(b) ultimately will interfere seriously with the goals or policies of the state-created right that is being litigated and will be adjudicated in accordance with state substantive law.”).

Without a noticed motion, Ponte Gadea also argues it has met Rule 65(a)’s burden for a

⁶ In passing, Ponte Gadea also requests holdover rent pursuant to Section 25.2 of the Lease. The clause provides that if Gap overstays the expiration of the Lease, it must pay 150% of its fixed rent for the first month, and 200% of its aggregate rent for every month after that. A liquidated damages clause is not enforceable where “the amount fixed is plainly or grossly disproportionate to the probable loss.” *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 361 N.E.2d 1015, 1018 (N.Y. 1977). Thus, rent holdover clauses are enforceable only if they require a tenant to pay holdover rent at a rate that represents a reasonable estimate of what a replacement tenant would pay. *See, e.g., Thirty-Third Equities Company LLC v. Americo Group, Inc.*, 294 A.D.2d 222, 743 N.Y.S.2d 10 (N.Y. App. Dic. 2002). Here, the pandemic has resulted in a substantial drop in retail rents across the city. *See* Lauren Thomas, *Retail rents plummet across New York City, as America’s glitzy shopping districts turn into ghost towns*, CNBC, Aug. 2, 2020, <https://www.cnbc.com/2020/08/02/retail-rents-plummet-across-new-york-city-a-warning-for-other-areas.html>. As a result, the rent holdover clause in Section 25.2 requiring Gap to pay double rent is grossly disproportionate to Ponte Gadea’s actual losses, and is unenforceable. Ponte Gadea offers no evidence to support the opposite conclusion.

preliminary injunction, contending it will suffer irreparable harm if an injunction is not issued because Gap might file for bankruptcy, which would hamper its ability to pay damages. But the only “evidence” Ponte Gadea presents of Gap’s supposedly impending bankruptcy is two online opinion columns—one of them from 2016—and its own speculation about Gap’s liabilities. A preliminary injunction is an extraordinary remedy that may be granted only upon a clear showing that irreparable harm is not just possible, but likely. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Ponte Gadea’s conjecture does not meet this burden. Any serious consideration of preliminary injunctive relief should be separately briefed and heard on noticed motion.

IV. Gap’s motion for summary judgment is supported by admissible evidence.

Ponte Gadea argues that three of the four declarations Gap submitted “are not admissible evidence.”⁷ (Dkt. 47 at 8-11.) Initially, by not moving to strike them, Ponte Gadea waived any objections to them. *See Starter Corp. v. Converse, Inc.*, No. 95 CIV. 3678, 1996 WL 706837, at *1 n.1 (S.D.N.Y. Dec. 3, 1996); *see also Tucker v. New York City*, 376 F. App’x 100, 103 n.4 (2d Cir. 2010). Ponte Gadea’s arguments fail on their merits too. Each declarant both states and explains their personal knowledge. Ms. Adams states that she signed the Lease on behalf of Gap and explains only to the contents of the Lease and the circumstances surrounding why Gap entered into it—information clearly within the personal knowledge of the Senior Director and Associate General Counsel of Gap who signed the lease. For her piece, Ms. Rondholz’s knowledge is evident from her position as Gap’s Senior Director of Real Estate and her awareness of the circumstances underlying her testimony. (See, e.g., Dkt. 31 at ¶ 1.) Dr. Zenilman too states his personal knowledge. (Dkt. 33 at ¶ 1.) And while it is true that Dr. Zenilman does not have personal knowledge of the Premises or safely operating a retail location, he does not declared anything about such things. (Dkt. 33 at ¶ 1-25.) All of these are more than adequate. *See U.S. v. Chelsea Brewing Co., LLC*, No. 12 Civ. 1544(ER), 2014 WL 4801330, at *4 (S.D.N.Y. Sept. 26, 2014) (holding that declaration was competent summary judgment evidence because personal knowledge

⁷ Notably, Ponte Gadea does not argue the Court cannot consider the declaration of Smita Butala.

could be inferred from position and because declarant stated that the information was personally known to him). Gap's declarations mirror the legal arguments because its legal arguments mirror the facts. That is no ground for exclusion.

Moreover, Ponte Gadea points to specific portions of just three paragraphs in Ms. Rondholz' declaration, and no specific paragraphs in Dr. Zenilman's and Ms. Adams declarations, that it contends are not based on personal knowledge. (Dkt. 47 at 8-10.) Nevertheless, Ponte Gadea inexplicably argues the Court should not consider the declarations entirely, including paragraphs detailing terms of the Lease, describing basic facts about the Premises, introducing relevant documents, or, in the case of Dr. Zenilman, regarding the pandemic. (*See* Dkts. 31 at ¶ 5, 6, 8-24; 35 at ¶ 1-16; 33 at ¶ 1-25.) Ponte Gadea's extreme statement of the law has no support in the Second Circuit. On the contrary, a motion to strike an affidavit must specify which parts of the declaration "should be stricken and why," and the court may strike only the inadmissible portions. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578-79 (2d Cir. 1969).

Lastly, contrary to Ponte Gadea's argument (and lack of controverting evidence) about Gap's ability to operate the Premise as the intended prototypical store, the three declarations are replete with facts, including and especially those expressing why the purpose of the Lease was frustrated. (*See* Dkts. 31 at ¶ 5-24; 35 at ¶ 5-16.) Ponte Gadea offers little explanation for additional specifics Gap would need to offer for the declarations to be valid. Not wishing to be tied down to a specific argument that could be refuted, Ponte Gadea argues, "by way of example only," that the declarations should not be considered because they do not contain testimony as to the purpose Ponte Gadea would prefer the lease to require—operating the store in "a reasonably safe manner"—rather than what the lease actually requires, operating a "first class retail business" of the type existing at the time of Lease execution. (Dkts. 17, Ex. 1 at 35; 47 at 10-11.) Declarations cannot be stricken for not addressing irrelevant facts or legal contentions.

CONCLUSION

For these reasons, Gap respectfully requests its cross-motion for summary judgment be granted.

Dated: September 25, 2020

Respectfully submitted,

DAVIS & GILBERT LLP

By: /s/ Joshua H. Epstein

Joshua H. Epstein, Bar No. (JE-2187)

Jesse B. Schneider (JS-4080)

1740 Broadway

New York, NY 10019

Telephone: (212) 468-4800

jepstein@dglaw.com

jschneider@dglaw.com

Lisa M. Coyle (LC-6750)

ROBINS KAPLAN LLP

399 Park Avenue, Suite 3600

New York, NY 10022

Telephone: (212) 980-7400

LCoyLe@RobinsKaplan.com

Michael A. Geibelson (*pro hac vice* forthcoming)

Daniel Allender (*pro hac vice* forthcoming)

ROBINS KAPLAN LLP

2049 Century Park East, Suite 3400

Los Angeles, CA 90067

Telephone: (310) 550-0130

MGeibelson@RobinsKaplan.com

DAllender@RobinsKaplan.com

Attorneys for Plaintiff The Gap, Inc.

EXHIBIT A



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
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Court of Common Pleas

ANSWER AND COUNTERCLAIM \$75
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By: MICHAEL J. MATASICH 0078333

Confirmation Nbr. 2027156

CP COMMERCIAL DELAWARE, LLC

CV 20 933505

vs.

EDDIE BAUER, LLC

Judge: MAUREEN CLANCY

Pages Filed: 31

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CP COMMERCIAL DELAWARE, LLC)	
)	
Plaintiff-Counterclaim Defendant,)	Case No. CV 20933505
)	
vs.)	JUDGE MAUREEN CLANCY
)	
EDDIE BAUER, LLC)	
)	
Defendant-Counterclaimant.)	

**EDDIE BAUER LLC’S ANSWER AND COUNTERCLAIM FOR BREACH OF
CONTRACT, DECLARATORY RELIEF, RESCISSION, REFORMATION,
UNJUST ENRICHMENT, ABUSE OF PROCESS AND CONVERSION**

PRELIMINARY STATEMENT

The COVID-19 pandemic has presented unprecedented and unforeseen circumstances that have severely impacted the retail environment across the country. The federal, state, and local governments acted to prevent the virus from spreading, and since mid-March Eddie Bauer LLC (“Eddie Bauer”) has at various times been altogether or partially unable to conduct its retail operations from its stores. To protect the health and safety of its employees, customers, and the surrounding community, and to comply with gubernatorial orders and applicable law, Eddie Bauer closed its stores. Indeed, the State of Ohio has issued emergency orders that have severely restricted retail operations. Even as shelter-in-place orders were gradually relaxed and stores began to reopen, COVID-19 remains highly communicative and cases are again peaking in many states. To be sure, the shopping experience at Eddie Bauer stores will be dramatically different for the foreseeable future. Indeed, shopping for apparel in physical stores will look nothing like what was contemplated when Eddie Bauer and Plaintiff-Counterclaim Defendant CP Commercial

Delaware, LLC (“CP Commercial”) executed the lease for the store at issue in this case in the Crocker Park shopping center (the “Store”).

Eddie Bauer is suffering severe and irreparable harm at its Store and the COVID-19 pandemic has and continues to frustrate the express purpose of the lease at issue in this case (the “Lease”). The pandemic has also destroyed the consideration that the parties contemplated at the time the Lease was executed. In short, the principal object of the Lease – operation of a retail business – has been rendered illegal, impossible, and impracticable. Therefore, under the terms of the Lease and the laws of the State of Ohio, Eddie Bauer has no further obligation to pay rent (or other monetary obligations) or to perform non-monetary obligations. Eddie Bauer is entitled to a refund of a prorated portion of the rent and expenses it paid in advance for March 2020, declaratory relief regarding its obligations under the Lease (including abatement for subsequent months), and the equitable remedies described below.

As if the COVID-19 pandemic had not already presented enough challenge for Eddie Bauer’s business, on May 22, 2020, CP Commercial locked Eddie Bauer out of the Store without any notice whatsoever and without resort to any judicial process, despite the fact that the parties were in the midst of negotiations and discussions with respect to the impact of COVID-19 on Eddie Bauer’s obligations under the Lease. CP Commercial is attempting to seize upon the fallout from COVID-19 by preventing Eddie Bauer from accessing its inventory, preventing it from opening and selling goods, causing it to miss deliveries, not permitting Eddie Bauer’s employees to work during these troubling times, and injuring Eddie Bauer’s reputation with customers.

That unnecessary, bad faith lock out also violates Ohio Law and the terms of the Lease. In fact, this is not the only tenant that CP Commercial has engaged in a bad faith lock out. Just last month, this Court granted tenant Bath & Body Works, LLC a temporary restraining order against

CP Commercial due to its improper dispossession of the tenant from its retail location also at Crocker Park. As a result of CP Commercial's improper lockout, Eddie Bauer is entitled to a declaration that it need not pay rent for any of the time during which it was denied access to its Stores and is entitled to all damages arising from the improper lock out, plus reasonable attorney's fees and court costs.

Therefore, in its Answer and Counterclaim, Eddie Bauer alleges as follows:

ANSWER TO CP COMMERCIAL'S COMPLAINT

1. Eddie Bauer is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the Complaint and therefore denies same.

2. Eddie Bauer denies the allegations in paragraph 2 of the Complaint.

3. Eddie Bauer denies the allegations in paragraph 3 of the Complaint, except admits that on or about May 28, 2004, Eddie Bauer, Inc. executed a Crocker Park Shopping Center Westlake, Ohio Lease by and between Crocker Park, LLC as landlord and Eddie Bauer, Inc. as tenant, and further avers that the lease speaks for itself and denies any allegations inconsistent therewith.

4. Eddie Bauer denies the allegations in paragraph 4 of the Complaint, except admits that (i) on or about December 17, 2009, Eddie Bauer LLC executed a First Amendment to Shopping Center Lease with Crocker Park Delaware, LLC, (ii) on or about September 1, 2014, Eddie Bauer LLC executed a Second Amendment to Shopping Center Lease with Crocker Park Delaware LLC, and (iii) on or about July 28, 2016, Eddie Bauer LLC executed a Third Amendment to Shopping Center Lease with Crocker Park Delaware LLC, and further avers that the lease amendments speaks for themselves and denies any allegations inconsistent therewith.

5. Eddie Bauer is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 5 of the Complaint and therefore denies same.

6. In answer to paragraph 6 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

7. In answer to paragraph 7 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

8. Eddie Bauer denies the allegations in Paragraph 8 of the Complaint, except admits that it has not paid rent to CP Commercial for April, May and June 2020.

9. In answer to paragraph 9 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

10. In answer to paragraph 10 of the Complaint, Eddie Bauer admits that a document purporting to be a notice of default is attached to the Complaint as Exhibit A. Further answering, Eddie Bauer states that the document speaks for itself and denies any allegations inconsistent therewith.

11. In answer to paragraph 11 of the Complaint, Eddie Bauer admits that a document purporting to be a three-day Notice to Leave Premises is attached to the Complaint as Exhibit B. Further answering, Eddie Bauer states that the document speaks for itself and denies any allegations inconsistent therewith.

12. In answer to paragraph 12 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

13. Eddie Bauer admits that CP Commercial locked Eddie Bauer out of its Store on May 22, 2020, and specifically avers that such lock out was improper and unlawful.

14. Eddie Bauer is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the Complaint and therefore denies same.

15. Eddie Bauer denies the allegations in paragraph 15 of the Complaint, except admits that it has not paid rent to CP Commercial for April, May and June 2020.

16. Eddie Bauer denies the allegations in paragraph 16 of the Complaint.

17. Eddie Bauer denies the allegations in paragraph 17 of the Complaint.

18. In answer to paragraph 18 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

19. In answer to paragraph 19 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

20. In answer to paragraph 20 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

21. In answer to paragraph 21 of the Complaint, Eddie Bauer states that the Lease speaks for itself and denies any allegations inconsistent therewith.

COUNT I – BREACH OF CONTRACT

22. Eddie Bauer reincorporates its admissions, denials, and averments set forth above as fully restated herein.

23. Eddie Bauer denies the allegations in paragraph 23 of the Complaint.

24. Eddie Bauer denies the allegations in paragraph 24 of the Complaint.

25. Eddie Bauer denies the allegations in paragraph 25 of the Complaint.

COUNT II – DECLARATORY JUDGMENT

26. Eddie Bauer reincorporates its admissions, denials, and averments set forth above as fully restated herein.

27. Eddie Bauer denies the allegations in paragraph 27 of the Complaint.

28. Eddie Bauer denies the allegations in paragraph 28 of the Complaint.

29. Eddie Bauer denies all allegations contained in the WHEREFORE clause and headings contained in the Complaint and further denies each and every statement and allegation contained in the Complaint that is not expressly and specifically admitted herein.

FIRST DEFENSE

30. The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

31. The claims in the Complaint are barred by the doctrines of waiver, abandonment, release, estoppel, and/or unclean hands.

THIRD DEFENSE

32. The claims in the Complaint are barred by CP Commercial's failure to meet contractual obligations and conditions precedent.

FOURTH DEFENSE

33. The claims in the Complaint are barred because CP Commercial has breached the lease.

FIFTH DEFENSE

34. The claims in the Complaint are barred because CP Commercial breached the implied duty of good faith under the Lease.

SIXTH DEFENSE

35. The claims in the Complaint are barred because Eddie Bauer acted reasonably and in good faith at all times.

SEVENTH DEFENSE

36. The claims in the Complaint are barred because of the unforeseeable and unanticipated COVID-19 pandemic and related government orders.

EIGHTH DEFENSE

37. Any alleged damages and/or injuries sustained by CP Commercial, which are specifically denied, are the result of superseding, intervening and/or independent causes, omissions, and/or acts of others not within the control of Eddie Bauer.

NINTH DEFENSE

38. Eddie Bauer performed all duties owned under the Lease other than any duties which were prevented or excused, and therefore did not breach the Lease.

TENTH DEFENSE

39. CP Commercial has failed to mitigate its alleged damages.

ELEVENTH DEFENSE

40. The claims in the Complaint are barred by the doctrines of impossibility, impracticability, frustration of purpose and/or lack of consideration.

TWELFTH DEFENSE

41. The claims in the Complaint are barred to the extent any provision of the Lease acts as a penalty.

THIRTEENTH DEFENSE

42. Eddie Bauer reserves the right to assert additional defenses as the grounds for such defenses become known through discovery or otherwise.

Dated: July 8, 2020

Respectfully submitted,

/s/ Jeffrey Mayer

Jeffrey Mayer (0069327)
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, IL 60606
Telephone: (312) 634-5700
Facsimile: (312) 424-1900
Jeffrey.Mayer@akerman.com

and

Joshua D. Bernstein (*pro hac vice* application to be filed)
Benjamin R. Joelson (*pro hac vice* application to be filed)
Haley C. Greenberg (*pro hac vice* application to be filed)
Akerman LLP
520 Madison Avenue, 20th Floor
New York, New York 10022
Telephone: (212) 880-3800
Joshua.Bernstein@akerman.com
Benjamin.Joelson@akerman.com
Haley.Greenberg@akerman.com

and

/s/ Michael J. Matasich

Michael J. Matasich (0078333)
David L. Drechsler (0042620)
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
E-mail: mmatasich@mcdonaldhopkins.com
ddrechsler@mcdonaldhopkins.com
Attorneys for Eddie Bauer LLC

COUNTERCLAIM

THE PARTIES, THE PROPERTY AND THE LEASE

1. Eddie Bauer LLC (“Eddie Bauer”) is a Delaware limited liability company with its principal place of business in Washington.
2. Eddie Bauer is a retail company that sells apparel, footwear and gear, among other merchandise.
3. CP Commercial Delaware, LLC (“CP Commercial”) is a Delaware limited liability company with its primary place of business located at 629 Euclid Avenue, Suite 13000, Cleveland, Ohio 44114.
4. CP Commercial or its affiliate is the current owner of the Crocker Park shopping center in Cuyahoga County, Ohio (the “Property”).

JURISDICTION AND VENUE

5. This Court has personal jurisdiction over the parties.
6. This Court possesses subject matter jurisdiction over all claims in this action.
7. Venue of this action properly lies in Cuyahoga County, Ohio pursuant to Ohio Rule of Civil Procedure 3(C).

STATEMENT OF FACTS

8. Prior to being unlawfully locked out of its store by CP Commercial, Eddie Bauer operated an Eddie Bauer store (the “Store”) at the Property under a lease, as amended (the “Lease”) with CP Commercial.
9. The parties’ mutual and express purpose in entering into the Lease was to provide Eddie Bauer with commercial retail space suitable for the operation of a retail store.
10. For example, the Use-Operation clause within the Lease states in relevant part that Eddie Bauer shall use the Premises:

for the operation of a store selling at retail (i) men's, women's, and children's wearing apparel, outerwear, footwear, accessories and soft goods (including but not limited to backpacks, duffel bags, handbags, luggage, and miscellaneous outdoor equipment and accessories), (ii) first-quality furniture, home furnishings, housewares, household furniture and accessories (with the right to provide decorating and consulting service related to the sale of such items), (iii) novelty food items for off-premises consumption, or (iv) any other items branded with Tenant's brand name or carried from time to time in a majority of Tenant's similar stores within the United States or pursuant to Tenant's catalog or internet website or other electronic commerce offered by Tenant from time to time.

11. If not for the ability to operate a retail store at the Property, Eddie Bauer would not have entered into the Lease. In fact, Eddie Bauer's ability to operate a retail store at the Property was the sole consideration Eddie Bauer received in exchange for entering into the Lease, all other nominal benefits of the Lease being a part of, and subordinate and ancillary to, that consideration.

12. Eddie Bauer maintained and operated the Store in conformity with the Lease's terms through March 2020.

13. Rent under the Lease is payable in advance and due on or before the first day of each month. Accordingly, Eddie Bauer remitted rent for March 2020 and was current on its monetary obligations under the Lease.

14. When open, Eddie Bauer employed approximately 16 individuals at its Store at the Property.

15. In March 2020, the COVID-19 pandemic began to spread throughout the United States, ushering in an unprecedented and unforeseeable time of uncertainty and change.

16. On March 22, 2020, the Ohio Director of Health issued a Director's Order closing all non-essential businesses in Ohio.

17. Eddie Bauer was not considered an essential business under the Director's Order and was therefore required to close.

18. Eddie Bauer and other non-essential businesses were required to remain closed until May 12, 2020.

19. The pandemic, related government orders, restrictions, safety concerns, and public fear have been crippling to retail stores like Eddie Bauer.

20. Indeed, since March 2020, Eddie Bauer has been unable to resume normal operations at its stores in the United States, including the Store. And in light of a recent spike in COVID-19 infections and corresponding orders extending the restriction of non-essential operations, Eddie Bauer may never be able to resume operations in a manner contemplated by the Lease.

21. In fact, in comments to the Cleveland Jewish News, published on March 20, 2020 under the headline of “Shopping Centers working with tenants to ease pain amid mandated closures,” Ezra Stark, Chief Operating Officer of Robert L. Stark Enterprises, Inc. d/b/a Stark Enterprises (“Stark Enterprises”), admitted that “everybody’s hurting ... volume is down because people aren’t leaving their homes.”¹

22. As Mr. Stark further noted, retail tenants were “struggle[ing] to the point of closing their doors without any help” and that there was no question that some of these tenants would “go bankrupt” as a result of the pandemic. Mr. Stark further claimed that his company would “be the first one in line to help alleviate the rent component to our tenants.” Stark Enterprises is a parent and/or affiliate of CP Commercial and its website claims that Crocker Park (<https://starkenterprises.com/portfolio/#retail>) is within its portfolio of properties. The purported notices of default that CP Commercial sent to Eddie Bauer were on Stark Enterprises letterhead.

¹ See https://www.clevelandjewishnews.com/news/local_news/shopping-centers-working-with-tenants-to-ease-pain-amid-mandated-closures/article_3a27be1e-6ad4-11ea-abb4-97717eec68af.html

23. As a result of the foregoing circumstances and orders, all of which were unforeseeable at the time the Lease was entered into, and which resulted from no act of either party, the parties' intended use of the Store was frustrated, and became impossible, illegal, and impracticable.

24. More specifically, Eddie Bauer's contractual benefits and obligations were irreparably impacted in that (1) it was forced to suspend all retail operations at the Store; (2) the sole purpose for entering into the Lease was frustrated; (3) performance under the Lease became impossible and impracticable; and (4) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

25. As a result of the unforeseeable COVID-19 pandemic, Eddie Bauer has been deprived of its use of the Store for the term that Eddie Bauer was promised under the Lease. Such a result damages Eddie Bauer, in part because the term of the Lease, and the expectation that Eddie Bauer would be able to use the Store for the entirety of the term, was the basis at the time of contracting for the parties' negotiations and calculations concerning Eddie Bauer's obligation to pay rent and other consideration under the Lease.

26. The COVID-19 pandemic and the related governmental orders affecting Eddie Bauer's ability to conduct retail operations at the Store also constitutes a casualty or taking under the Lease, entitling Eddie Bauer to an abatement of rent and other relief.

27. Because of the unprecedented and unforeseeable COVID-19 pandemic, Eddie Bauer was forced to temporarily cease paying rent to CP Commercial.

28. Despite the protections granted Eddie Bauer under the Lease, and Eddie Bauer's rights as a result of the frustration of purpose of the Lease, the failure of consideration, and the impossibility, illegality and impracticability of performance, rather than work with Eddie Bauer to

address the unprecedented impact of the COVID-19 pandemic, on April 3, 2020, CP Commercial, under Stark Enterprises letterhead, sent Eddie Bauer a purported notice of default.

29. Thus, CP Commercial has wrongly demanded that Eddie Bauer pay rent under the Lease for the period after Eddie Bauer was deprived of its use of the Store.

30. Then, on or about April 20, 2020, CP Commercial posted a Notice to Leave Premises on the door of the Store.

31. In mid-May 2020, Eddie Bauer was in the process of attempting to resume normal operations and bring its employees back to work, many of whom Eddie Bauer had been forced to furlough as a result of the pandemic.

32. Despite the unprecedented circumstances, and the fact that the parties were engaged in ongoing negotiations and discussions, on May 22, 2020, CP Commercial locked Eddie Bauer out of its Store.

33. Without access to its Store, Eddie Bauer is unable to revive its business and generate revenue.

34. In locking Eddie Bauer out of the Store without judicial process, CP Commercial resorted to self-help.

35. The Lease, however, does not contain a provision permitting CP Commercial to engage in self-help or waive judicial process. Instead, Section 26 of the Lease states that “Landlord may re-enter the Premises by summary proceedings or otherwise and dispossess the Tenant.”

36. Consistent with the Lease, CP Commercial’s Notice to Leave Premises, dated April 20, 2020, provided that if Eddie Bauer did not leave, “AN EVICTION ACTION MAY BE INITIATED AGAINST [Eddie Bauer].”

37. Despite the language in the Lease and CP Commercial's own notice, CP Commercial improperly resorted to self-help and did not initiate any action against Eddie Bauer before re-possessing the Store.

38. CP Commercial has refused to grant Eddie Bauer access to its Store despite the fact that the parties have been engaged in negotiations to resolve their outstanding Lease disputes.

39. CP Commercial is attempting to take advantage of the COVID-19 pandemic and coerce Eddie Bauer into accepting unreasonable lease modifications in order to re-enter the Store and restart operations.

40. The unlawful actions of CP Commercial pose an imminent harm to Eddie Bauer and to its employees.

41. Now, as a result of the unlawful actions of CP Commercial, Eddie Bauer's approximately 16 employees cannot return to work.

42. As a result of the unlawful actions of CP Commercial, CP Commercial has improperly taken possession of Eddie Bauer's inventory worth approximately \$300,000.

43. As a result of the unlawful actions of CP Commercial, Eddie Bauer cannot operate its Store, causing Eddie Bauer to lose at least \$40,000 in sales each week.

44. As a result of the unlawful actions of CP Commercial, Eddie Bauer has missed deliveries and suffered disruptions of its supply chain and relationships with other vendors.

45. As a result of the unlawful actions of CP Commercial, Eddie Bauer has suffered a loss in reputation with its customers, as it has been unable to re-open and provide services to its customers.

46. The unlawful actions of CP Commercial run counter to not only basic human decency during this pandemic, but also public guidance. On April 1, 2020, Ohio Governor Mike

DeWine issued Executive Order 2020-08D that recognized that “the economic impacts of COVID-19 on Ohio businesses have been significant” and that “during this public health emergency, commercial evictions and foreclosures destabilize local economies and threaten designated essential businesses and operations.” The Governor’s order requested that landlords suspend certain rent payments for 90 days and that lenders provide commercial real estate borrowers with a forbearance on mortgages as well.

47. On June 16, 2020, CP Commercial, again under Stark Enterprises letterhead, sent Eddie Bauer a purported notice of default, claiming that Eddie Bauer was “in default for failing to pay in full Gross Rent and Additional Rent for April, May and June 2020 and utilities billed March and April totaling \$59,681.16.”

48. On June 18, 2020, CP Commercial commenced this action seeking, *inter alia*, “a judgment for all monetary damages suffered by Crocker Park, including, but not limited to, (i) all of the rents and other charges and sums due to Crocker Park in an amount to be proven at trial, but for at least \$59,681.16.”

49. In the face of the COVID-19 crisis, CP Commercial has unlawfully breached its duty of good faith under the Lease and the Lease’s re-entry provisions by locking Eddie Bauer out of the Store. An injunction is necessary to prevent CP Commercial from inflicting further substantial harm on Eddie Bauer and to permit Eddie Bauer to operate the Store.

50. CP Commercial’s actions, including but not limited to locking out Eddie Bauer, declaring Eddie Bauer to be in default for non-payment of rent, and filing suit against Eddie Bauer, are in direct violation of Eddie Bauer’s rights under the Lease and Ohio law.

51. CP Commercial’s demands constitute a breach of the terms and conditions stated in the Lease, as well as Eddie Bauer’s rights pursuant to Ohio law.

52. Further, CP Commercial owes Eddie Bauer damages equal to the amount of rent and other expenses paid in advance for the month of March 2020 during which time Eddie Bauer was deprived of the use of the Store.

COUNT ONE – BREACH OF CONTRACT
(Improper Default and Demand for Rent)

53. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

54. Prior to the effective date of the Lease's termination and/or rescission, the Lease constituted a binding, enforceable contract.

55. CP Commercial breached the contract through, without limitation, the following acts:

- a. demanding Eddie Bauer pay rent and other expenses that were not owed under the Lease;
- b. demanding, collecting and subsequently failing to reimburse Eddie Bauer for excess charges paid in advance under the Lease before the COVID-19 pandemic;
- c. failing to reimburse Eddie Bauer for the prorated amount of the rent, charges and other expenses attributable to the period that Eddie Bauer has been deprived of its use of the Store;
- d. Serving improper purported default notices on Eddie Bauer; and
- e. taking such other actions as are inconsistent with Eddie Bauer's rights.

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

57. As a direct and proximate result of CP Commercial's breach of contract, Eddie Bauer suffered damages in excess of \$25,000.

58. Eddie Bauer is entitled to a judgment against CP Commercial in an amount in excess of \$25,000 to be proven at trial.

COUNT TWO – DECLARATORY RELIEF

59. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

60. Eddie Bauer's ability to operate as a retailer at the Store was the express purpose of the Lease.

61. Eddie Bauer's ability to operate as a retailer at the Store was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting. In fact, Eddie Bauer would not have entered into the Lease if not for the right to operate as a retailer. When Eddie Bauer was forced to suspend all retail operations at the Store, (1) the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Eddie Bauer; (2) the Lease's object and purpose became impossible and impracticable; and (3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

62. The sudden suspension of retail operations at the Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

63. An actual controversy exists between Eddie Bauer and CP Commercial concerning their respective rights under the Lease, and Eddie Bauer has no adequate remedy at law. Specifically, the parties dispute:

a. whether the Lease terminated as of no later than March 22, 2020 pursuant to the terms of the Lease and applicable law;

b. alternatively, whether the obligation to pay rent and expenses were abated from and after no later than March 22, 2020;

- c. alternatively, for what period from and after no later than March 22, 2020 the obligation to pay rent and expenses abated if the abatement was not permanent;
- d. whether there was a frustration of purpose of the Lease;
- e. whether the continued operation of the Lease was illegal, impossible, or impracticable;
- f. whether there was a failure of consideration under the Lease;
- g. whether a casualty occurred that rendered the Store unusable under the terms of the Lease;
- h. whether a taking occurred that rendered the Store wholly or partially unusable under the terms of the Lease;
- i. whether a co-tenancy event occurred that altered Eddie Bauer's obligations under the Lease; and
- j. whether the parties' obligations under the Lease must be modified or reformed based on the continuing effects of the pandemic.

64. The parties further dispute the effects of the foregoing on the Lease's terms, expiration, and continuing obligations, if any, of the parties.

65. Therefore, Eddie Bauer seeks a judgment declaring the following:

- a. that the Lease terminated as of no later than March 22, 2020 pursuant to the terms of the Lease and applicable law;
- b. alternatively, that the rent and expenses under the Lease abated from and after no later than March 22, 2020;

c. alternatively, if the abatement of rent and expenses was not permanent, that the rent and expenses abated for a period in the discretion of the Court from and after no later than March 22, 2020;

d. that there was a frustration of purpose of the Lease;

e. that the continued operation of retail services at the Store was illegal, impossible, or impracticable;

f. that there was a failure of consideration under the Lease;

g. that a casualty occurred that rendered the Store wholly or partially unusable;

h. that a taking occurred that rendered the Store wholly or partially unusable;

i. that a co-tenancy event occurred that altered Eddie Bauer's obligations under the Lease;

j. the effects of the foregoing on the Lease's term and expiration; and

k. that the parties have modified continuing obligations to one another under the Lease from and after no later than March 22, 2020 when Eddie Bauer was forced to suspend retail operations and its business was and continues to be impacted by the pandemic.

66. In addition, Eddie Bauer seeks a judgment declaring that Eddie Bauer's purported notices of default were ineffective and of no legal consequence, because Eddie Bauer was not in default under the Lease.

COUNT THREE – RESCISSION
(Rescission/Cancellation of Lease)

67. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

68. Eddie Bauer's ability to operate as a retailer at the Store was the parties' mutual purpose in entering into the Lease.

69. When Eddie Bauer was forced to suspend all retail operations at the Store, (1) the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Eddie Bauer; (2) the Lease's object and purpose became impossible and impracticable; and (3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

70. The sudden suspension of retail operations at the Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

71. An actual controversy exists between Eddie Bauer and CP Delaware concerning their respective rights under the Lease, and Eddie Bauer has no adequate remedy at law.

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

COUNT FOUR – REFORMATION OF LEASE

73. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

74. Eddie Bauer's ability to operate as a retailer at the Store was the parties' mutual purpose in entering into the Lease.

75. When Eddie Bauer was forced to suspend all retail operations at the Store, (1) the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Eddie Bauer; (2) the Lease's object and purpose became impossible and impracticable; and (3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

76. This sudden suspension of retail operations at the Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

77. The parties would not have entered into the Lease had they known that Eddie Bauer would not have been able to operate a retail store at the Property.

78. Eddie Bauer's ability to use the Store for its retail operations was the sole consideration Eddie Bauer received under the Lease.

79. It was the parties' intent that Eddie Bauer would not pay rent or other consideration for the Store if such use was rendered impossible or impracticable.

80. Had the parties been able to foresee the events of the COVID-19 pandemic at the time of contracting, the parties would have addressed it in writing in the Lease.

81. An actual controversy exists between Eddie Bauer and CP Commercial concerning their respective rights under the Lease, and Eddie Bauer has no adequate remedy at law.

82. In the alternative to Eddie Bauer's claims related to the termination and rescission of the Lease, Eddie Bauer is entitled to judicial reformation of the Lease to reflect the parties' true intent that Eddie Bauer would have no obligation to pay rent once it was deprived of the use of the Store. Moreover, the Lease would have included a provision dictating (1) automatic termination when Eddie Bauer was deprived of its use of the Store, or (2) that the amount of rent for the term would have otherwise been adjusted to account for the portion of the Lease's term during which Eddie Bauer could not operate as a retailer at the Store.

83. Further, the parties' obligations under the Lease must be modified or reformed based on the continuing effects of the pandemic.

COUNT FIVE – UNJUST ENRICHMENT

84. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

85. Eddie Bauer's ability to operate as a retailer at the Store was the parties' mutual purpose in entering into the Lease.

86. When Eddie Bauer was forced to suspend all retail operations at the Store, (1) the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Eddie Bauer; (2) the Lease's object and purpose became impossible and impracticable; and (3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

87. This sudden suspension of retail operations at the Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

88. The parties would not have entered into the Lease had they known that Eddie Bauer would not have been able to operate as a retailer at the Store.

89. Eddie Bauer's ability to use the Store for its retail operations was the sole consideration it received under the Lease.

90. Eddie Bauer conferred a benefit on CP Commercial through the payment of rent and other consideration under the Lease.

91. CP Commercial knew about the benefit conferred by Eddie Bauer.

92. Eddie Bauer has overpaid rent and other consideration to CP Commercial, in an amount to be proven at trial, for the period of time that Eddie Bauer was unable to operate within the terms of the Lease as a retailer at the Store.

93. CP Commercial was enriched as a result of these payments at Eddie Bauer's expense.

94. CP Commercial should not be allowed to retain the rent and other consideration paid for the period of time that Eddie Bauer was unable to operate as a retailer at the Store as originally contemplated by the Lease.

95. Eddie Bauer is entitled to restitution of the sums that Eddie Bauer has previously overpaid to CP Commercial as rent and as other consideration, in an amount to be proven at trial,

for the period of time that Eddie Bauer was unable to operate as a retailer at the Store as originally contemplated by the Lease.

COUNT SIX – BREACH OF CONTRACT
(Improper Use of Self-Help)

96. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

97. The Lease states that CP Commercial “may re-enter the Premises by summary proceedings or otherwise and dispossess the Tenant.”

98. The Lease does not expressly permit CP Commercial to utilize self-help to re-enter the Store, nor does it expressly waive judicial process to re-enter the Store.

99. Accordingly, Eddie Bauer did not voluntarily enter into the Lease with knowledge of a self-help provision.

100. CP Commercial breached the Lease by terminating Eddie Bauer’s possession of the Store without judicial process.

101. Further, the Lease, like all other contracts, contains an implied duty to act in good faith and deal fairly with each other.

102. The implied duty of good faith requires the parties to a contract to not only act in good faith and deal fairly with each other, but also requires honesty and reasonableness in the enforcement of a contract, and it prohibits a party from taking opportunistic advantage of the other party in a way not contemplated by the contract.

103. CP Commercial breached the implied duty of good faith in multiple ways, including, but not limited to: (1) unreasonably refusing to negotiate reasonable rent deferral or abatement during an unprecedented global pandemic not foreseen by the parties nor addressed by the Lease; (2) failing to permit access to the Store while the parties continued to negotiate; (3)

demanding unreasonable and onerous lease amendments in order to allow Eddie Bauer to access the Store; (4) locking the Store and preventing Eddie Bauer from continuing its business operations under the Lease after Eddie Bauer had been only temporarily unable to pay rent due to the COVID-19 pandemic; and (5) locking Eddie Bauer out of the Store without any judicial process when CP Commercial could not coerce concessions to the Lease.

104. The Lease contains an express covenant of quiet enjoyment.

105. The covenant of quiet enjoyment protects a tenant's right to a peaceful and undisturbed enjoyment of its leasehold and prevents landlords from obstructing, interfering with, or taking away from a tenant the beneficial use of the leasehold.

106. CP Commercial breached the covenant of quiet enjoyment by locking Eddie Bauer out of the Store – effectively evicting Eddie Bauer without judicial process and in direct contradiction of the Lease requirements – and preventing Eddie Bauer from continuing its business operations.

107. CP Commercial's unlawful dispossession of Eddie Bauer from the Store constitutes a breach of the Lease and is ongoing.

108. CP Commercial's breach of the implied duty of good faith constitutes a breach of the Lease and is ongoing.

109. CP Commercial's breach of the covenant of quiet enjoyment constitutes a breach of the Lease and is ongoing.

110. CP Commercial's ongoing breaches of the Lease will result in irreparable harm to Eddie Bauer and Eddie Bauer's employees.

111. Eddie Bauer is entitled to a temporary restraining order enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from the Store

or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer imminent and irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions. This temporary restraining order will allow Eddie Bauer to regain possession of the Store and restart business operations.

112. Eddie Bauer is entitled to a mandatory injunction ordering CP Commercial to immediately permit Eddie Bauer to access the Store and resume its business operations because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

113. Eddie Bauer is entitled to a preliminary injunction enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from its Store or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

114. Eddie Bauer is entitled to a permanent injunction enjoining CP Commercial from enforcing, or attempting to enforce, its constructive eviction of Eddie Bauer or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

115. Eddie Bauer is not required to pay rent or any other monetary obligations during the time that it was wrongfully locked out of the Store.

116. Eddie Bauer has suffered damages as a result of CP Commercial's breaches, including but not limited to, its lost profits during the time it was wrongfully locked out of the Store, in an amount in excess of \$25,000.

COUNT SEVEN- ABUSE OF PROCESS

117. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

118. CP Commercial has set in motion a legal process to purportedly evict Eddie Bauer from the Store.

119. The purpose of CP Commercial's action has been perverted to accomplish an ulterior purpose for which it was not designed. Specifically, CP Commercial is using the Court in an attempt to extract draconian and unreasonable Lease modifications from Eddie Bauer that it could not obtain through negotiations and that it cannot obtain from any Court.

120. Eddie Bauer has suffered damages as a result of CP Commercial's abuse of process including but not limited to lost sales, increased operating expenses, and legal fees, in an amount in excess of \$25,000.

COUNT EIGHT - CONVERSION

121. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

122. CP Commercial locked Eddie Bauer out of the Store, preventing Eddie Bauer from accessing the Store and its personal property located inside the Store.

123. Eddie Bauer has approximately \$300,000 of inventory inside the Store.

124. Eddie Bauer has invested over \$400,000 in improvements inside the Store.

125. CP Commercial's wrongful actions have prevented Eddie Bauer from receiving additional inventory and deliveries.

126. Eddie Bauer has demanded CP Commercial allow it to access the Store, but CP Commercial has refused to allow Eddie Bauer access and refused to deliver Eddie Bauer's personal property.

127. CP Commercial has wrongfully exercised control over Eddie Bauer's personal property in exclusion of Eddie Bauer's rights.

128. Eddie Bauer has been deprived of over \$40,000 in sales per week due to CP Commercial's wrongful actions.

129. Eddie Bauer is entitled to obtain possession of its personal property, including improvements, or in the alternative, damages of at least \$280,000 to compensate for its wrongfully converted personal property.

PRAYER FOR RELIEF

WHEREFORE, Eddie Bauer prays for relief and judgment as follows:

- a. awarding damages to Eddie Bauer in an amount in excess of \$25,000 to be proven at trial;
- b. declaring that the Lease terminated pursuant to law effective on or no later than March 22, 2020;
- c. alternatively, that the obligation to pay rent and expenses under the Lease abated from and no later than March 22, 2020;
- d. that the parties' obligations under the Lease are modified or reformed based on the continuing effects of the pandemic;
- e. that there was a frustration of purpose of the Lease;
- f. that the continued operation of the Lease was illegal, impossible, or impracticable on and no later than March 22, 2020;
- g. that there was a failure of consideration under the Lease;

- h. that a casualty occurred that rendered the Store wholly or partially unusable;
- i. that a taking for public use occurred that rendered the Store wholly or partially unusable;
- j. that a co-tenancy event occurred that altered Eddie Bauer's obligations under the Lease;
- k. that the parties had and have no continuing obligations to one another under the Lease from and no later than March 22, 2020;
- l. such other effects of the foregoing on the Lease's term and expiration as the Court deems just and proper;
- m. declaring that CP Commercial's purported notices of default were ineffective and of no legal consequence;
- n. alternatively, declaring that the Lease is equitably rescinded effective on or no later than March 22, 2020;
- o. alternatively, granting equitable reformation of the Lease to reflect the parties' true intent that (1) Eddie Bauer would have no obligation to pay rent while it was deprived of the use of the Store and that the Lease would terminate automatically when Eddie Bauer was deprived of its use of the Store as originally contemplated by the Lease, or (2) adjusting the amount of rent and expenses for the portion of the Lease's term during which Eddie Bauer could not operate as a retailer at the Store;
- p. ordering CP Commercial to reimburse and give restitution to Eddie Bauer for the payment of rent and other expenses paid for the period that Eddie Bauer was deprived of its use of the Store as originally contemplated by the Lease;

- q. awarding damages to Eddie Bauer in an amount in excess of \$25,000 to be proven at trial for CP Commercial's improper lockout and self-help;
- r. a temporary restraining order, preliminary injunction, and permanent injunction enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from the Store or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store such that Eddie Bauer is allowed to regain possession of the Store and resume operations at the Store;
- s. a preliminary and permanent mandatory injunction, requiring CP Commercial to immediately permit Eddie Bauer to access the Store and resume its operations at the Store;
- t. awarding Eddie Bauer attorneys' fees, paralegal fees and costs, expenses and disbursements pursuant to Section 43 of the Lease, as well as pre-judgment and post-judgment interest;
- u. such other and further relief that this Court may deem just and proper.

Dated: July 8, 2020

Respectfully submitted,

/s/ Jeffrey Mayer
Jeffrey Mayer (0069327)
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, IL 60606
Telephone: (312) 634-5700
Facsimile: (312) 424-1900
Jeffrey.Mayer@akerman.com

and

Joshua D. Bernstein (*pro hac vice* application to be filed)
Benjamin R. Joelson (*pro hac vice* application to be filed)

Haley C. Greenberg (*pro hac vice* application
to be filed)

Akerman LLP
520 Madison Avenue, 20th Floor
New York, New York 10022
Telephone: (212) 880-3800
Joshua.Bernstein@akerman.com
Benjamin.Joelson@akerman.com
Haley.Greenberg@akerman.com

and

/s/ Michael J. Matasich

Michael J. Matasich (0078333)
David L. Drechsler (0042620)
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
E-mail: mmatasich@mcdonaldhopkins.com
ddrechsler@mcdonaldhopkins.com

Attorneys for Eddie Bauer LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, a copy of the foregoing was filed electronically with the Court, which electronically notifies all counsel of record.

/s/ Michael J. Matasich

Michael J. Matasich (0078333)

Attorneys for Eddie Bauer LLC

EXHIBIT B

COUNTERCLAIM

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X		
<p>THE GAP, INC.,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v:</p> <p>PONTE- GADEA- NEW- YORK- LLC,</p> <p style="text-align: center;">D e f e n d a n t</p>	<p>÷</p> <p>÷</p> <p>÷</p> <p>÷</p> <p>÷</p> <p>÷</p>	<p>Case No.: 1:20-cv-4541</p> <p style="text-align: center;">COMPLAINT</p>
-----X		

Plaintiff The Gap, Inc. (“Gap” or “Tenant”), by and through counsel, as and for its complaint against Defendant Ponte Gadea New York LLC (“Landlord”), states as follows:

NATURE OF THE CLAIMS

1. The COVID-19 pandemic has presented unique and unprecedented circumstances that were unforeseeable indeed, unimaginable even just a few months ago. The disease is highly contagious and its spread has been rapid. The government’s reaction was profound and has prevented the Gap store at issue in this action from opening its doors for months. To protect the health and safety of its employees, customers, and the surrounding community, and comply with

~~applicable law, Gap was required to close this store and keep it closed. And like innumerable other companies, it was required to make the difficult decision to furlough this store's employees—and tens of thousands more for closed stores across the country—to preserve its finances while revenue from the stores dropped to zero overnight. Even now, as government restrictions begin to ease for some activities and types of businesses but not others, the disease remains virulent. The recommended guidelines for operations may provide some measure of protection, but will radically change the shopping experience for the few short months that~~

~~remain of what the parties expected would be the remaining term of the Lease. Even now, as the disease curves around the country evolve with each incremental phase of reopening, and social distancing guidelines are ignored by many, governments and industry experts have predicted one or more next waves of infection will occur. Indeed, shopping for apparel in physical stores will look nothing like what was contemplated by the lease when it was executed. In a world of unforeseeable events, the circumstances the store has faced are at the extreme end of unforeseeability.~~

~~2. These circumstances not only imposed severe and irreparable hardship on Gap, they frustrated the express purpose of the lease (the "Lease") Gap holds for retail space (the "Premises") at the building located at 130 East 59th Street, New York New York (the "Building") and made the principal object of the Lease illegal, impossible, and impracticable. Because few months remained on the term of the Lease at the time COVID-19 reached New York, the impairment of the purpose of the Lease, and Gap's interests in the Lease, became permanent and irreparable. Under such circumstances, the lease was terminated pursuant to law effective on or before March 19, 2020, both under the terms of the Lease and the laws of the State of New York, and Gap had no further obligation to pay rent or other consideration under it. Gap is entitled to a refund of a prorated portion of the rent and expenses it paid in advance for March 2020, declaratory relief regarding its obligations under the Lease, and the equitable remedies described below.~~ **PARTIES THE PARTIES, THE PROPERTY AND THE LEASE**

- ~~1. 3. Tenant Eddie Bauer LLC ("Eddie Bauer") is a Delaware corporation limited liability company with its principal place of business in San Francisco, California Washington.~~
- ~~2. Eddie Bauer is a retail company that sells apparel, footwear and gear, among other~~

merchandise.

3. 4. ~~Upon information and belief, Landlord~~ CP Commercial Delaware, LLC ("CP Commercial") is a ~~New York~~ Delaware limited liability company ~~that shares its principal place of business with its member, Ponte Gadea USA, Inc., a Florida corporation whose principal~~ with its primary place of business ~~is located at 270 Biscayne Boulevard Way, Suite 201, Miami, Florida 33131.~~ 629 Euclid Avenue, Suite 13000, Cleveland, Ohio 44114.

4. CP Commercial or its affiliate is the current owner of the Crocker Park shopping center in Cuyahoga County, Ohio (the "Property").

JURISDICTION AND VENUE

5. This Court has personal jurisdiction ~~under 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds \$75,000 and is between citizens of different states.~~ over the parties.

6. This Court possesses subject matter jurisdiction over all claims in this action.

7. 6. ~~Venue is proper under 28 U.S.C. § 1391(b)(2) because the Premises are within this District.~~ of this action properly lies in Cuyahoga County, Ohio pursuant to Ohio Rule of Civil Procedure 3(C).

STATEMENT OF FACTS

8. 7. ~~The Lease was originally entered between UJA FED Properties Inc. ("Original Landlord") and Tenant on February 18, 2005. Pursuant to its Article 32.20, the Lease is confidential.~~ 8. Landlord is the current landlord and successor in interest to the Original Landlord under the Lease. Prior to being unlawfully locked out of its store by CP Commercial, Eddie Bauer operated an Eddie Bauer store (the "Store") at the Property under a lease, as amended (the "Lease") with CP Commercial.

9. The parties' ² mutual and express purpose in entering into the Lease was to provide

Tenant Eddie Bauer with commercial retail space suitable for the operation of a retail store ~~selling~~

apparel.

For example, ~~Article 4.1 of the Lease states in relevant part that Tenant “shall use the Premises . . . only for the operation of first class retail businesses (i) under the Gap and Banana Republic trade names, for the sale of apparel and accessories and such other merchandise categories are consistent with other stores operating under the Gap trade name and the Banana Republic trade name as of the date hereof, and (ii) at [Tenant]’s or Banana Republic’s option, as the case may be, under such other trade names as are then being operated by Initial Tenant or Banana Republic, as the case may be, for the sale of such merchandise categories as are consistent with other stores operating under the Gap trade name and the Banana Republic trade name, as the case may be, as of the date hereof, and, in either case, for uses reasonably incidental thereto.”~~the Use-Operation clause within the Lease states in relevant part that Eddie Bauer shall use the Premises:

for the operation of a store selling at retail (i) men's, women's, and children's wearing apparel, outerwear, footwear, accessories and soft goods (including but not limited to backpacks, duffel bags, handbags, luggage, and miscellaneous outdoor equipment and accessories), (ii) first-quality furniture, home furnishings, housewares, household furniture and accessories (with the right to provide decorating and consulting service related to the sale of such items), (iii) novelty food items for off-premises consumption, or (iv) any other items branded with Tenant's brand name or carried from time to time in a majority of Tenant's similar stores within the United States or pursuant to Tenant's catalog or internet website or other electronic commerce offered by Tenant from time to time.

10. ~~But~~If not for the ability to operate a retail store at the ~~Premises, Tenant~~Property, Eddie Bauer would not have entered into the Lease. In fact, and Tenant'Eddie Bauer's ability to operate a retail store at the ~~Premises~~Property was the sole consideration ~~Tenant~~Eddie Bauer received in exchange for entering into the Lease, all other nominal benefits of the Lease being a part of, and subordinate and ancillary to, that consideration.

~~12. From the inception of the Lease until March 2020, Tenant maintained and operated a retail apparel store at the Premises pursuant to the Lease.~~

~~13. On March 7, 2020, the Governor of New York issued Executive Order 202 declaring a disaster in the State of New York.~~

~~14. On March 12, 2020, the Governor issued Executive Order 202.1, requiring any place of business to operate at no greater than fifty percent occupancy.~~

~~15. Also on March 12, 2020, the Mayor of New York City issued Emergency Executive Order No. 98, declaring a disaster in the City of New York.~~

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

~~11. 17. On March 18, 2020, the Governor issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. Tenant's store at the Premises is non-essential under this Order.~~Eddie Bauer maintained and operated the Store in conformity with the Lease's terms through March 2020.

12. Rent under the Lease is payable in advance and due on or before the first day of each month. Accordingly, Eddie Bauer remitted rent for March 2020 and was current on its monetary obligations under the Lease.

13. When open, Eddie Bauer employed approximately 16 individuals at its Store at the Property.

14. In March 2020, the COVID-19 pandemic began to spread throughout the United States, ushering in an unprecedented and unforeseeable time of uncertainty and change.

~~15. On March 20, 2020, the Governor of New York issued Executive Order 202.8, requiring~~
22, 2020, the Ohio Director of Health issued a Director's Order closing all non-essential businesses ~~to reduce their in-person work force by 100% no later than March 22, 2020 at 8:00 p.m. Tenant's store at the Premises is non-~~in Ohio.

16. Eddie Bauer was not considered an essential business under ~~this Order.~~
~~19. Also on March 20, 2020, the Mayor issued Emergency Executive Order No. 102, further restricting retail operations in the City.~~
~~20. Following the outbreak of COVID-19 in the United States, Tenant was forced to suspend all retail operations at the Premises on or before March 19, 2020, to comply with applicable governmental orders and guidelines and to protect the health and safety of its employees, customers, and the surrounding community. Between March 2020 and the present, Tenant was never able to resume normal operations at the Premises. And given the Lease term was scheduled to end soon, Tenant will never be able to resume operations in a manner contemplated by the Lease.~~
the Director's Order and was therefore required to close.

17. Eddie Bauer and other non-essential businesses were required to remain closed until May 12, 2020.

18. The pandemic, related government orders, restrictions, safety concerns, and public fear have been crippling to retail stores like Eddie Bauer.

19. Indeed, since March 2020, Eddie Bauer has been unable to resume normal operations at its stores in the United States, including the Store. And in light of a recent spike in COVID-19 infections and corresponding orders extending the restriction of non-essential operations, Eddie Bauer may never be able to resume operations in a manner contemplated by the Lease.

20. In fact, in comments to the Cleveland Jewish News, published on March 20, 2020 under the headline of "Shopping Centers working with tenants to ease pain amid mandated closures," Ezra Stark, Chief Operating Officer of Robert L. Stark Enterprises, Inc. d/b/a Stark Enterprises ("Stark Enterprises"), admitted that "everybody's hurting ... volume is down because people aren't leaving their homes."¹

21. As Mr. Stark further noted, retail tenants were "struggle[ing] to the point of closing their doors without any help" and that there was no question that some of these tenants would "go bankrupt" as a result of the pandemic. Mr. Stark further claimed that his company would "be the first one in line to help alleviate the rent component to our tenants." Stark Enterprises is a parent and/or affiliate of CP Commercial and its website claims that Crocker Park (<https://starkenterprises.com/portfolio/#retail>) is within its portfolio of properties. The purported notices of default that CP Commercial sent to Eddie Bauer were on Stark Enterprises letterhead.

¹See https://www.clevelandjewishnews.com/news/local_news/shopping-centers-working-with-tenants-to-ease-pain-amid-mandated-closures/article_3a27be1e-6ad4-11ea-abb4-97717e68af.html

22. ~~21.~~ As a result of the foregoing circumstances and orders, ~~and other applicable governmental orders and guidelines~~, all of which were unforeseeable at the time the Lease was entered into, and which resulted from no act of either party, the parties²¹ intended use of the PremisesStore was frustrated, and became impossible, illegal, and impracticable. ~~Specifically, Tenant~~

More specifically, Eddie Bauer's contractual benefits and obligations were irreparably impacted in that (1) it was forced to suspend all retail operations at the ~~Premises. Tenant's~~Store; (2) the sole purpose infor entering into the Lease was frustrated. ~~Tenant's;~~ (3) performance under the Lease became impossible and impracticable. ~~And Tenant;~~ and (4) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

23. ~~22.~~ Indeed, although the Lease specifically contemplated that Tenant would benefit from its use for a fixed term, as a result of the unforeseeable COVID-19 ~~erisis,~~ Tenant ~~pandemic,~~ Eddie Bauer has been deprived of its use of the PremisesStore for the ~~full~~ term that ~~Tenant~~ Eddie Bauer was promised under the Lease. Such a result ~~is inequitable and~~ damages ~~Tenant~~ Eddie Bauer, in part because the term of the Lease, and the expectation that ~~Tenant~~ Eddie Bauer would be able to use ~~it~~ the Store for ~~its entire~~ the entirety of the term, was the basis at the time of contracting for the parties²¹ negotiations and calculations ~~at the time of contracting~~ concerning ~~Tenant'~~ Eddie Bauer's obligation to pay rent and other consideration under the Lease. ~~Thus, for the additional fact and reason that the Premises were not usable for the entire term of the Lease, it is impossible and impracticable for the Landlord and Tenant to continue performing their obligations under the Lease, the parties' mutual purpose for entering into the Lease has been frustrated, and the consideration Tenant was to receive under the Lease has failed.~~

24. ~~23.~~ The COVID-19 ~~erisis and the civil orders affecting Tenant's ability to operate a retail store at the Premises constitute a casualty under Article 16.4 of the Lease that rendered the Premises unusable, such that Tenant was entitled to a complete abatement of rent beginning on or before March 19, 2020. Article 16.4 of the Lease states: "If, as a result of a fire or other~~

~~casualty, all or any portion of the Premises shall not be usable by Tenant, for a period of more than fourteen (14) consecutive days, for the conduct of Tenant's business therein in substantially the same manner as prior to such fire or other casualty, the Fixed Rent and the Tax Payment that is otherwise due and payable hereunder for the Premises shall be reduced in the proportion that the number of square feet of usable area of the Premises that is not usable by Tenant by reason of such fire or other casualty for more than such fourteen (14) day period, bears to the total usable area of the Premises immediately prior to such fire or other casualty, which reduction of the Fixed Rent and Tax Payment shall be in effect for the period commencing on the date of~~
the pandemic and the related governmental orders affecting Eddie Bauer's ability to conduct retail operations at the Store also constitutes a casualty or taking under the Lease, entitling Eddie Bauer to an abatement of rent and other relief

~~applicable fire or other casualty, and ending on the date that Landlord Substantially Completes the restoration work described in Section 16.2 hereof.”~~

25. ~~24.~~ Because the Landlord was not able to restore the Premises, the abatement of rent was permanent and, indeed, the Lease terminated pursuant to law on the date Tenant closed its business in the Premises, March 19, 2020, of the unprecedented and unforeseeable COVID-19 pandemic, Eddie Bauer was forced to temporarily cease paying rent to CP Commercial.

~~25. Landlord had notice, and Tenant has given the Landlord sufficient written notice, of all the rights and remedies demanded in this complaint, including Article 16.~~

26. ~~26.~~ Despite the protections granted Tenant under Article 16 of the Lease, and Tenant's rights as a result of the frustration of purpose of the Lease, the failure of its consideration, and the impossibility, illegality and impracticability of performance, Landlord has

~~wrongly demanded that Tenant pay rent under the Lease for the period after Tenant was deprived of its use of the Premises, including, without limitation, a notice to cure default dated March 26, 2020, and a purported three day notice of termination dated June 8, 2020.~~ Eddie Bauer under the Lease, and Eddie Bauer's rights as a result of the frustration of purpose of the Lease, the failure of consideration, and the impossibility, illegality and impracticability of performance, rather than work with Eddie Bauer to

address the unprecedented impact of the COVID-19 pandemic, on April 3, 2020, CP Commercial, under Stark Enterprises letterhead, sent Eddie Bauer a purported notice of default.

27. Thus, CP Commercial has wrongly demanded that Eddie Bauer pay rent under the Lease for the period after Eddie Bauer was deprived of its use of the Store.

28. Then, on or about April 20, 2020, CP Commercial posted a Notice to Leave Premises on the door of the Store.

29. In mid-May 2020, Eddie Bauer was in the process of attempting to resume normal operations and bring its employees back to work, many of whom Eddie Bauer had been forced to furlough as a result of the pandemic.

30. Despite the unprecedented circumstances, and the fact that the parties were engaged in ongoing negotiations and discussions, on May 22, 2020, CP Commercial locked Eddie Bauer out of its Store.

31. Without access to its Store, Eddie Bauer is unable to revive its business and generate revenue.

32. In locking Eddie Bauer out of the Store without judicial process, CP Commercial resorted to self-help.

33. The Lease, however, does not contain a provision permitting CP Commercial to engage in self-help or waive judicial process. Instead, Section 26 of the Lease states that "Landlord may re-enter the Premises by summary proceedings or otherwise and dispossess the Tenant."

34. Consistent with the Lease, CP Commercial's Notice to Leave Premises, dated April 20, 2020, provided that if Eddie Bauer did not leave, "AN EVICTION ACTION MAY BE INITIATED AGAINST [Eddie Bauer]."

35. Despite the language in the Lease and CP Commercial's own notice, CP Commercial improperly resorted to self-help and did not initiate any action against Eddie Bauer before re-possessing the Store.

36. CP Commercial has refused to grant Eddie Bauer access to its Store despite the fact that the parties have been engaged in negotiations to resolve their outstanding Lease disputes.

37. CP Commercial is attempting to take advantage of the COVID-19 pandemic and coerce Eddie Bauer into accepting unreasonable lease modifications in order to re-enter the Store and restart operations.

38. The unlawful actions of CP Commercial pose an imminent harm to Eddie Bauer and to its employees.

39. Now, as a result of the unlawful actions of CP Commercial, Eddie Bauer's approximately 16 employees cannot return to work.

40. As a result of the unlawful actions of CP Commercial, CP Commercial has improperly taken possession of Eddie Bauer's inventory worth approximately \$300,000.

41. As a result of the unlawful actions of CP Commercial, Eddie Bauer cannot operate its Store, causing Eddie Bauer to lose at least \$40,000 in sales each week.

42. As a result of the unlawful actions of CP Commercial, Eddie Bauer has missed deliveries and suffered disruptions of its supply chain and relationships with other vendors.

43. As a result of the unlawful actions of CP Commercial, Eddie Bauer has suffered a loss in reputation with its customers, as it has been unable to re-open and provide services to its customers.

44. The unlawful actions of CP Commercial run counter to not only basic human decency during this pandemic, but also public guidance. On April 1, 2020, Ohio Governor

[Mike](#)

DeWine issued Executive Order 2020-08D that recognized that "the economic impacts of COVID-19 on Ohio businesses have been significant" and that "during this public health emergency, commercial evictions and foreclosures destabilize local economies and threaten designated essential businesses and operations." The Governor's order requested that landlords suspend certain rent payments for 90 days and that lenders provide commercial real estate borrowers with a forbearance on mortgages as well.

45. On June 16, 2020, CP Commercial, again under Stark Enterprises letterhead, sent Eddie Bauer a purported notice of default, claiming that Eddie Bauer was "in default for failing to pay in full Gross Rent and Additional Rent for April, May and June 2020 and utilities billed March and April totaling \$59,681.16."

46. On June 18, 2020, CP Commercial commenced this action seeking, *inter alia*, "a judgment for all monetary damages suffered by Crocker Park, including, but not limited to, (i) all of the rents and other charges and sums due to Crocker Park in an amount to be proven at trial, but for at least \$59,681.16."

47. In the face of the COVID-19 crisis, CP Commercial has unlawfully breached its duty of good faith under the Lease and the Lease's re-entry provisions by locking Eddie Bauer out of the Store. An injunction is necessary to prevent CP Commercial from inflicting further substantial harm on Eddie Bauer and to permit Eddie Bauer to operate the Store.

48. CP Commercial's actions, including but not limited to locking out Eddie Bauer, declaring Eddie Bauer to be in default for non-payment of rent, and filing suit against Eddie Bauer, are in direct violation of Eddie Bauer's rights under the Lease and Ohio law.

49. ~~27.Landlord'~~CP Commercial's demands constitute a breach of the terms and conditions stated in ~~Article 16 and related provisions~~the Lease, as well as ~~Tenant'~~Eddie Bauer's

rights pursuant to [Ohio](#) law.

~~28.~~ Further, Landlord CP Commercial owes Tenant Eddie Bauer damages equal to the amount of rent and other expenses paid in advance for the month of March 2020 during which Tenant time Eddie Bauer was deprived of the use of the Premises, as well as damages for excess charges of rent and other expenses prior to the COVID-19 crisis Store.

COUNT ONE - BREACH OF CONTRACT
(Improper Default and Demand for Rent)

50. ~~29. Tenant repeats, realleges, and incorporates all prior paragraphs~~ Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

51. ~~30. Prior to the effective date of the Lease's termination and/or rescission, which occurred on or before March 19, 2020,~~ the Lease constituted a binding, enforceable contract.

52. ~~31. Landlord CP Commercial breached the contract by, among other things, through, without limitation, the following~~ acts:

a. demanding Tenant Eddie Bauer pay rent and other expenses that were not owed under the Lease;

b. demanding, collecting and subsequently failing to reimburse Tenant Eddie Bauer for excess charges paid in advance under the Lease before the COVID-19 ~~crisis; later~~ pandemic;

c. failing to reimburse Tenant Eddie Bauer for the prorated amount of the rent, charges and other expenses attributable to the period that Tenant Eddie Bauer has been deprived of its use of the ~~Premises; serving a~~ Store;

d. ~~Serving improper purported notice to cure default and a purported three-day termination notice in violation of Tenant's rights and the notice provisions of the Lease; and~~ default notices on Eddie Bauer; and

e. taking such other actions as are inconsistent with Tenant' Eddie Bauer's rights.

53. ~~32. Tenant Eddie Bauer~~ performed all of its obligations under the Lease except those that were waived, excused or rendered impossible and/or impracticable.

54. ~~33.~~ As a direct and proximate result of ~~Landlord~~: CP Commercial's breach of contract, ~~Tenant~~ Eddie Bauer suffered ~~the~~ damages ~~alleged hereinabove.~~ in excess of \$25,000.

55. ~~34.~~ Tenant Eddie Bauer is entitled to a judgment against ~~Landlord~~ CP Commercial in an amount in excess of \$25,000 to be proven at trial.

COUNT TWO= DECLARATORY RELIEF

56. ~~35. Tenant repeats, realleges, and incorporates all prior paragraphs~~ Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

~~36. Tenant~~ Eddie Bauer's ability to operate ~~a retail store~~ as a retailer at the ~~Premises~~ Store was the express purpose of the Lease.

57. ~~37. Tenant~~ Eddie Bauer's ability to operate ~~a retail store~~ as a retailer at the ~~Premises~~ Store was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, ~~and but for its right to operate such a retail store, Tenant.~~ In fact, Eddie Bauer would not have entered into the Lease. ~~Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense. When Tenant~~ if not for the right to operate as a retailer. When Eddie Bauer was forced to suspend all retail operations at the ~~Premises, Store.~~ (1) the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Eddie Bauer; (2) the Tenant, The Lease's object and purpose became impossible and impracticable; and ~~Tenant~~ (3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

58. ~~38. Although necessary, the~~ The sudden suspension of retail operations at the ~~Premises~~ Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

59. ~~39.~~ An actual controversy exists between ~~Tenant~~ Eddie Bauer and ~~Landlord~~ CP Commercial concerning their respective rights under the Lease, and ~~Tenant~~ Eddie Bauer has no adequate remedy at law. Specifically, the parties dispute:

- a. ~~Whether~~ whether the Lease terminated as of no later than March ~~19, 22,~~

2020 pursuant to the terms of the Lease and applicable law;

b. ~~Alternatively~~alternatively, whether the obligation to pay rent and expenses were abated from and after no later than March ~~19, 2020,~~22, 2020;

c. ~~Alternatively~~alternatively, for what period from and after no later than March ~~19,22~~, 2020 the obligation to pay rent and expenses abated if the abatement was not permanent ~~despite the few remaining months left on the term of the Lease and the interruption or impairment of Tenant's use of the Premises;~~

~~Whether~~whether there was a frustration of purpose of the Lease;

d. ~~Whether~~whether the continued operation of the Lease was illegal, impossible, or impracticable;

e. ~~Whether~~whether there was a failure of consideration under the Lease;

f. ~~Whether~~whether a casualty occurred that rendered the ~~Premises~~Store unusable under ~~Article 16 of the~~ terms of the Lease;

g. whether a taking occurred that rendered the Store wholly or partially unusable under the terms of the Lease;

i. whether a co-tenancy event occurred that altered Eddie Bauer's obligations under the Lease; and

J. whether the parties' obligations under the Lease must be modified or reformed based on the continuing effects of the pandemic.

60. ~~40.~~ The parties further dispute the effects of the foregoing on the Lease's ~~Term~~terms, expiration, and ~~the~~ continuing obligations, if any, of the parties.

61. ~~41.~~ Therefore, ~~Tenant~~Eddie Bauer seeks a judgment declaring the following:

a. ~~That~~that the Lease terminated as of no later than March ~~19,22~~, 2020 pursuant to the terms of the Lease and applicable law;

b. ~~Alternatively~~alternatively, that the rent and expenses under the Lease

abated from and after no later than March ~~19, 2020~~, 22, 2020;

c. ~~Alternatively~~alternatively, if the abatement ~~of rent~~of rent and expenses was not permanent ~~despite the few remaining months left on the term of the Lease and the interruption or impairment of Tenant's use of the Premises~~, that the rent and expenses abated for a period in the discretion of the Court from and after no later than March ~~19, 2020~~19, 22, 2020;

d. ~~That~~that there was a frustration of purpose of the Lease;

e. ~~That~~that the continued operation of retail services at the Lease Store was illegal, impossible, or impracticable;

f. ~~That~~that there was a failure of consideration under the Lease;

g. ~~That~~that a casualty occurred that rendered the Premises Store wholly or partially unusable;

h. that a taking occurred that rendered the Store wholly or partially unusable;

i. that a co-tenancy event occurred that altered Eddie Bauer's obligations

under ~~Article 16 of~~ the Lease;

~~h. The~~l. the effects of the foregoing on the Lease's ~~Term~~term and expiration; and

~~i. That~~k. that the parties have ~~no~~modified continuing obligations to one another under the Lease from and after no later than March ~~19, 2020~~19, 22, 2020 ~~(or another date in the discretion of the Court) when Tenant~~when Eddie Bauer was forced to suspend retail operations, ~~which occurred on or before March 19, 2020, and at all times thereafter~~ and its business was and continues to be impacted by the pandemic.

62. ~~42.~~ In addition, ~~Tenant~~Eddie Bauer seeks a judgment declaring that ~~Landlord~~Eddie Bauer's purported ~~notice to cure~~notices of default ~~and notice of termination~~ were ineffective and of no legal consequence, because ~~Tenant~~Eddie Bauer was not in default, ~~because the Lease had already terminated, and because Landlord failed to respect the notice provisions of~~ under the Lease.

**COUNT THREE - RESCISSION
(Rescission/Cancellation of Lease)**

63. ~~43. Tenant repeats, realleges, and incorporates all prior paragraphs~~ Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

64. ~~44. Tenant~~ Eddie Bauer's ability to operate ~~a retail store~~ as a retailer at the ~~Premises~~ Store was the parties' mutual purpose in entering into the Lease, ~~as both parties understood at the time of contracting, and but for its right to operate such a retail store, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.~~

65. ~~45.~~ When ~~Tenant~~Eddie Bauer was forced to suspend all retail operations at the ~~Premises,Store, (1)~~ the purpose of the Lease was frustrated and impossible to effectuate due to no fault of ~~the Tenant, Eddie Bauer;~~

~~(2)~~ the Lease's object and purpose became impossible and impracticable; and ~~Tenant(3)~~Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease.

~~46.~~ The sudden suspension of retail operations at the ~~Premises,Store~~ was unforeseeable and not contemplated by the parties at the time the Lease was executed.

66. ~~47.~~ An actual controversy exists between ~~Tenant~~Eddie Bauer and ~~Landlord CP Delaware~~ concerning their respective rights under the Lease, and ~~Tenant Eddie Bauer~~ has no adequate remedy at law.

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

COUNT FOUR REFORMATION OF LEASE

68. ~~49. Tenant repeats, realleges, and incorporates all prior paragraphs~~Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

69. ~~50. Tenant's~~Eddie Bauer's ability to operate ~~a retail store~~as a retailer at the ~~Premises~~Store was the parties' mutual purpose in entering into the Lease, ~~as both parties understood at the time of contracting, and but for its right to operate such a retail store, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises for a retail store, the transaction between the parties that resulted in the Lease makes no sense.~~

70. ~~51.~~ When ~~Tenant~~Eddie Bauer was forced to suspend all retail operations at the

~~Premises,Store, (1)~~ the purpose of the Lease was frustrated and impossible to effectuate due to no fault of ~~the Tenant,Eddie Bauer;~~

~~(2)~~ the Lease's object and purpose became impossible and impracticable; and ~~Tenant(3) Eddie Bauer~~ was deprived of the consideration it received in exchange for entering into the Lease.

71. ~~52.~~ This sudden suspension of retail operations at the ~~PremisesStore~~ was unforeseeable and not contemplated by the parties at the time the Lease was executed.

72. ~~53.~~ The ~~Parties~~parties would not have entered into the Lease had they known that ~~Tenant~~Eddie Bauer would not have been ~~unable~~able to operate a retail ~~apparel~~store at the ~~Premises, and Tenant's~~Property.

Eddie Bauer's ability to use the ~~Premises as a~~Store for its retail ~~apparel store~~operations was the sole consideration ~~Tenant~~Eddie Bauer received under the Lease.

73. ~~54.~~ It was the ~~Parties'~~true parties' intent that ~~Tenant~~Eddie Bauer would not pay rent or other consideration for the ~~Premises~~Store if such use was rendered impossible or impracticable.

74. Had the ~~Parties~~parties been able to foresee the events of the COVID-19 ~~crisis~~pandemic at the time of contracting, the ~~Parties~~parties would have ~~provided language stating their true intent expressly~~addressed it in writing in the Lease.

75. ~~55.~~ An actual controversy exists between ~~Tenant~~Eddie Bauer and ~~Landlord~~CP Commercial concerning their respective rights under the Lease, and ~~Tenant~~Eddie Bauer has no adequate remedy at law.

76. ~~56.~~ In the alternative to ~~Tenant's~~Eddie Bauer's claims related to the termination and rescission of the Lease, ~~Tenant~~Eddie Bauer is entitled to judicial reformation of the Lease to reflect the ~~Parties'~~parties' true intent that ~~Tenant~~Eddie Bauer would have no obligation to pay rent once it was deprived of the use of the ~~Premises and that~~Store. Moreover, the Lease would ~~terminate automatically when Tenant~~have included a provision dictating (1) automatic termination when Eddie Bauer was deprived of its use of the ~~Premises as originally contemplated by the Lease, or~~Store, or (2) that the amount of rent for the ~~Term~~term would have otherwise been adjusted to account for the portion of the Lease's ~~Term~~term during which ~~Tenant~~Eddie Bauer could not operate ~~a retail store in~~as a retailer at the ~~Premises~~Store.

77. Further, the parties' obligations under the Lease must be modified or reformed

based on the continuing effects of the pandemic.

COUNT FIVE ~~MONEY HAD AND RECEIVED~~

~~57. Tenant repeats, realleges, and incorporates all prior paragraphs.~~

~~58. Tenant's ability to operate a retail store at the Premises was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, and but for its right to operate such a retail store, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.~~

~~59. When Tenant was forced to suspend all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.~~

~~60. This sudden suspension of retail operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.~~

~~61. The Parties would not have entered into the Lease had they known that Tenant would have been unable to operate a retail apparel store at the Premises, and Tenant's ability to use the Premises as a retail store was the sole consideration it received under the Lease.~~

~~62. Tenant has previously paid rent and other consideration to the Landlord, in an amount to be proven at trial, for a period of time that Tenant was unable to operate a retail store at the Premises.~~

~~63. The Landlord benefited from these payments to Tenant's detriment.~~

~~64. Under principles of good conscience, Landlord should not be allowed to retain the rent and other consideration paid for the period of time that Tenant was unable to operate a retail store at the Premises as originally contemplated by the Lease.~~

~~65. Tenant is entitled to a judgment in its favor equal to the sums that Tenant has overpaid as rent and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a retail store at the Premises as originally contemplated by the Lease or after which the Lease terminated pursuant to law.~~ **COUNT SIX** UNJUST ENRICHMENT

78. ~~66. Tenant repeats, realleges, and incorporates all prior paragraphs~~ Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

79. ~~67. Tenant'~~ Eddie Bauer's ability to operate ~~a retail store~~ as a retailer at the ~~Premises~~ Store was the parties' mutual purpose in entering into the Lease, ~~as both parties understood at the time of contracting, and but for its right to operate such a retail store, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.~~

80. ~~68.~~ When ~~Tenant~~Eddie Bauer was forced to suspend all retail operations at the ~~Premises, Store, (1)~~ the purpose of the Lease was frustrated and impossible to effectuate due to no fault of ~~the Tenant, Eddie Bauer;~~

~~(2)~~ the Lease's object and purpose became impossible and impracticable; and ~~Tenant~~(3) Eddie Bauer was deprived of the consideration it received in exchange for entering into the Lease. ~~As a result, the Lease terminated and became void.~~

81. ~~69.~~ This sudden suspension ~~of retail~~of retail operations at the ~~Premises~~Store was unforeseeable and not contemplated by the parties at the time the Lease was executed.

82. ~~70.~~ The ~~Parties~~parties would not have entered into the Lease had they known that ~~Tenant~~Eddie Bauer would not have been ~~unable~~able to operate ~~a retail apparel store~~as a retailer at the ~~Premises, and Tenant's~~Store.

83. Eddie Bauer's ability to use the ~~Premises as a~~Store for its retail ~~store~~operations was the sole consideration it received under the Lease.

84. Eddie Bauer conferred a benefit on CP Commercial through the payment of rent and other consideration under the Lease.

85. CP Commercial knew about the benefit conferred by Eddie Bauer.

86. ~~71.~~ ~~Tenant~~Eddie Bauer has overpaid rent and other consideration to ~~the~~LandlordCP Commercial, in an amount to be proven at trial, for the period of time that ~~Tenant~~Eddie Bauer was unable to operate ~~a retail store~~within the terms of the Lease as a retailer at the ~~Premises~~Store.

~~72.~~ ~~The Landlord~~CP Commercial was enriched as a result of these payments at ~~Tenant's~~Eddie Bauer's expense.

87. ~~73.~~ ~~Under principles of good conscience, Landlord~~CP Commercial should not be allowed to retain the rent and other consideration paid for the period of time that ~~Tenant~~Eddie

Bauer was unable to operate ~~a retail store~~as a retailer at the ~~Premises~~Store as originally contemplated by the Lease.

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

for the period of time that Eddie Bauer was unable to operate as a retailer at the Store as originally contemplated by the Lease.

COUNT SIX - BREACH OF CONTRACT
(Improper Use of Self-Help)

89. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

90. The Lease states that CP Commercial "may re-enter the Premises by summary proceedings or otherwise and dispossess the Tenant."

91. The Lease does not expressly permit CP Commercial to utilize self-help to re-enter the Store, nor does it expressly waive judicial process to re-enter the Store.

92. Accordingly, Eddie Bauer did not voluntarily enter into the Lease with knowledge of a self-help provision.

93. CP Commercial breached the Lease by terminating Eddie Bauer's possession of the Store without judicial process.

94. Further, the Lease, like all other contracts, contains an implied duty to act in good faith and deal fairly with each other.

95. The implied duty of good faith requires the parties to a contract to not only act in good faith and deal fairly with each other, but also requires honesty and reasonableness in the enforcement of a contract, and it prohibits a party from taking opportunistic advantage of the other party in a way not contemplated by the contract.

96. CP Commercial breached the implied duty of good faith in multiple ways, including, but not limited to: (1) unreasonably refusing to negotiate reasonable deferral or abatement during an unprecedented global pandemic not foreseen by the parties nor addressed by the Lease; (2) failing to permit access to the Store while the parties continued to negotiate; (3)

demanding unreasonable and onerous lease amendments in order to allow Eddie Bauer to access the Store; (4) locking the Store and preventing Eddie Bauer from continuing its business operations under the Lease after Eddie Bauer had been only temporarily unable to pay rent due to the COVID-19 pandemic; and (5) locking Eddie Bauer out of the Store without any judicial process when CP Commercial could not coerce concessions to the Lease.

97. The Lease contains an express covenant of quiet enjoyment.

98. The covenant of quiet enjoyment protects a tenant's right to a peaceful and undisturbed enjoyment of its leasehold and prevents landlords from obstructing, interfering with, or taking away from a tenant the beneficial use of the leasehold.

99. CP Commercial breached the covenant of quiet enjoyment by locking Eddie Bauer out of the Store - effectively evicting Eddie Bauer without judicial process and in direct contradiction of the Lease requirements- and preventing Eddie Bauer from continuing its business operations.

100. CP Commercial's unlawful dispossession of Eddie Bauer from the Store constitutes a breach of the Lease and is ongoing.

101. CP Commercial's breach of the implied duty of good faith constitutes a breach of the Lease and is ongoing.

102. CP Commercial's breach of the covenant of quiet enjoyment constitutes a breach of the Lease and is ongoing.

103. CP Commercial's ongoing breaches of the Lease will result in irreparable harm to Eddie Bauer and Eddie Bauer's employees.

104. Eddie Bauer is entitled to a temporary restraining order enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from the

[Store](#)

or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer imminent and irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions. This temporary restraining order will allow Eddie Bauer to regain possession of the Store and restart business operations.

105. Eddie Bauer is entitled to a mandatory injunction ordering CP Commercial to immediately permit Eddie Bauer to access the Store and resume its business operations because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

106. Eddie Bauer is entitled to a preliminary injunction enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from its Store or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

107. Eddie Bauer is entitled to a permanent injunction enjoining CP Commercial from enforcing, or attempting to enforce, its constructive eviction of Eddie Bauer or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store because Eddie Bauer, and its employees, will suffer irreparable harm if the unlawful dispossession remains in effect or if CP Commercial takes any other unlawful actions.

108. Eddie Bauer is not required to pay rent or any other monetary obligations during the time that it was wrongfully locked out of the Store.

109. Eddie Bauer has suffered damages as a result of CP Commercial's breaches, including but not limited to, its lost profits during the time it was wrongfully locked out of the Store, in an amount in excess of \$25,000.

COUNT SEVEN- ABUSE OF PROCESS

110. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

111. CP Commercial has set in motion a legal process to purportedly evict Eddie Bauer from the Store.

112. The purpose of CP Commercial's action has been perverted to accomplish an ulterior purpose for which it was not designed. Specifically, CP Commercial is using the Court in an attempt to extract draconian and unreasonable Lease modifications from Eddie Bauer that it could not obtain through negotiations and that it cannot obtain from any Court.

113. Eddie Bauer has suffered damages as a result of CP Commercial's abuse of process including but not limited to lost sales, increased operating expenses, and legal fees, in an amount in excess of \$25,000.

COUNT EIGHT - CONVERSION

114. Eddie Bauer repeats the allegations set forth in the foregoing paragraphs as if fully restated herein.

115. CP Commercial locked Eddie Bauer out of the Store, preventing Eddie Bauer from accessing the Store and its personal property located inside the Store.

116. Eddie Bauer has approximately \$300,000 of inventory inside the Store.

117. Eddie Bauer has invested over \$400,000 in improvements inside the Store.

118. CP Commercial's wrongful actions have prevented Eddie Bauer from receiving

additional inventory and deliveries.

119. Eddie Bauer has demanded CP Commercial allow it to access the Store, but CP Commercial has refused to allow Eddie Bauer access and refused to deliver Eddie Bauer's personal property.

120. CP Commercial has wrongfully exercised control over Eddie Bauer's personal property in exclusion of Eddie Bauer's rights.

121. Eddie Bauer has been deprived of over \$40,000 in sales per week due to CP Commercial's wrongful actions.

122. Eddie Bauer is entitled to obtain possession of its personal property, including improvements, or in the alternative, damages of at least \$280,000 to compensate for its wrongfully converted personal property.

PRAYER FOR RELIEF

WHEREFORE, ~~Tenant respectfully requests that this Court enter~~ Eddie Bauer prays for relief and judgment: as follows:

a. ~~Awarding~~ awarding damages to ~~Plaintiff~~ Eddie Bauer in an amount in excess of \$25,000 to be proven

at trial;

b. ~~Declaring~~ declaring that the Lease terminated pursuant to law effective on or ~~before~~ no later than March ~~19, 22,~~ 19, 22, 2020;

c. ~~Alternatively~~ alternatively, that the obligation to pay rent and expenses under the Lease abated from and ~~after~~ no later than March ~~19, 2020, 22, 2020;~~

d. ~~Alternatively, if the abatement of rent and expenses was not permanent despite the few remaining months left on the term of the Lease and the interruption or impairment of Tenant's use of the Premises, that the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020;~~ that the parties' obligations under the Lease are modified or reformed based on the continuing effects of the pandemic;

- e. ~~That~~that there was a frustration of purpose of the Lease;
- f. ~~That~~that the continued operation of the Lease was illegal, impossible, or impracticable on and ~~after~~no later than March ~~19~~22, 2020;
- g. ~~That~~that there was a failure of consideration under the Lease;

h. ~~That that~~ a casualty occurred that rendered the ~~Premises unusable under Article 16 of the~~ Store wholly or partially unusable;

i. that a taking for public use occurred that rendered the Store wholly or partially unusable;

J. that a co-tenancy event occurred that altered Eddie Bauer's obligations under the Lease;

k. ~~i. That that~~ the parties had and have no continuing obligations to one another under the Lease from and ~~after no later than~~ March ~~19, 2020 (or another date in the discretion of the Court)~~ 22, 2020;

l. ~~j. Such such~~ other effects of the foregoing on the Lease's ~~Term~~ term and expiration as the Court deems just and proper;

m. ~~k. Declaring~~ declaring that ~~Landlord's CP Commercial's~~ purported ~~notice to cure~~ notices of default and notice of termination were ineffective and of no legal consequence, ~~because Tenant was not in default, because the Lease had already terminated, and/or because Landlord failed to respect the notice provisions of the Lease;~~

n. ~~l. In the alternative~~ alternatively, declaring that the Lease ~~was~~ is equitably rescinded effective on or ~~before no later than~~ March ~~19;~~ 22, 2020;

o. ~~m. In the alternative~~ alternatively, granting equitable reformation of the Lease to reflect the ~~Parties'~~ parties' true intent that ~~Tenant~~ (1) Eddie Bauer would have no obligation to pay rent while it was deprived of the use of the ~~Premises~~ Store and that the Lease would terminate automatically when ~~Tenant~~ Eddie Bauer was deprived of its use of the ~~Premises~~ Store as originally contemplated by the Lease, or (2) adjusting the amount ~~of rent~~ of rent and expenses for the portion of the Lease's ~~Term~~ term during which ~~Tenant~~ Eddie Bauer could not operate ~~a retail store in a~~

retailer at the PremisesStore;

p. n.Ordering Landlordordering CP Commercial to reimburse and give restitution to TenantEddie Bauer for the payment of rent and other expenses paid for the period that TenantEddie Bauer was deprived of its use of the PremisesStore as originally contemplated by the Lease;

q. awarding damages to Eddie Bauer in an amount in excess of \$25,000 to be proven at trial for CP Commercial's improper lockout and self-help;

r. a temporary restraining order, preliminary injunction, and permanent injunction enjoining CP Commercial from enforcing, or attempting to enforce, its unlawful dispossession of Eddie Bauer from the Store or from taking other action, or attempting to take other action, that interferes with Eddie Bauer's operations at the Store such that Eddie Bauer is allowed to regain possession of the Store and resume operations at the Store;

s. a preliminary and permanent mandatory injunction, requiring CP Commercial to immediately permit Eddie Bauer to access the Store and resume its operations at the Store;

t. awarding Eddie Bauer attorneys' fees, paralegal fees and costs, expenses and disbursements pursuant to Section 43 of the Lease, as well as pre-judgment and post-judgment interest;

u. ~~e.Such~~such other and further relief that this Court may deem just and proper.

Dated: July 8, 2020

Respectfully submitted,

Isl Jeffrey Mayer
Jeffrey Mayer (0069327)
AKERMANLLP
71 South Wacker Drive, 47th Floor
Chicago, IL 60606
Telephone: (312) 634-5700
Facsimile: (312) 424-1900
Jeffrey.Mayer@akerman.com

and

Joshua D. Bernstein (*pro hac vice*
application to be filed)
Benjamin R. Joelson (*pro hac vice*
application to be filed)

Haley C. Greenberg (*pro hac vice* application
to be filed)

AkermanLLP

520 Madison Avenue, 20th Floor

New York, New York 10022

Telephone: (212) 880-3800

Joshua.Bernstein@akerman.com

Benjamin.Joelson@akerman.com

Haley.Greenberg@akerman.com

and

Isl Michael J Matasich

Michael J. Matasich (0078333)

David L. Drechsler (0042620)

McDonald Hopkins LLC

600 Superior Avenue, East, Suite 2100

Cleveland, Ohio 44114

Telephone: (216) 348-5400

Facsimile: (216) 348-5474

E-mail: mmatasich@mcdonaldhopkins.com

ddrechsler@mcdonaldhopkins.com

Attorneys for Eddie Bauer LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, a copy of the foregoing was filed electronically with the Court, which electronically notifies all counsel of record.

Isl Michael J Matasich
Michael J. Matasich (0078333)
Attorneys for Eddie Bauer LLC

~~Dated: June 12, 2020~~

~~**DAVIS & GILBERT LLP**~~

~~By: /s/ Joshua H. Epstein — Joshua H. Epstein (JE-2187) Jes
New York, NY
10019 212 468 4800~~

~~**ROBINS KAPLAN LLP**~~

~~Lisa M. Coyle (LC-6750)
Robins Kaplan LLP 399
Park Avenue, Suite 3600
New York, NY 10022
212 980 7400~~

~~Michael A. Geibelson (*pro hac vice* pending)
Daniel Allender (*pro hac vice* pending)
Robins Kaplan LLP
2049 Century Park East Ste.
3400 Los Angeles, CA 90067
310 550 0130~~

~~*Attorneys for The Gap, Inc.*~~

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