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

850 THIRD AVENUE OWNER, LLC, *Plaintiff*, *-against-* DISCOVERY COMMUNICATIONS, LLC, *Defendant.*	Index No.: __________/2020 **VERIFIED COMPLAINT**

Plaintiff 850 Third Avenue Owner, LLC (the "Landlord") for its complaint against Defendant Discovery Communications, LLC ("Discovery"), the owner or producer of the Discovery Channel, alleges as follows:

NATURE OF THE COMPLAINT

1. This is a straightforward suit for unpaid commercial rent against Discovery, the company that owns or operates the Discovery Channel television network. Critically, Discovery does not claim that the COVID-19 pandemic impaired its financial ability to pay the rent. Nor could it—at a time when most people are home and using television and internet streaming as their main sources of entertainment. And in any event, Discovery fully paid its rent without fail or complaint from March through May 2020—during the worst period of the pandemic in New York City.

2. But unlike those commercial tenants truly suffering from financial hardship caused by the pandemic, Discovery—which decided not to renew its lease for the long term beyond May 31, 2020—decided at the last minute that it wanted to stay in its space for several additional months. Upon information and belief, this was because construction at Discovery's new headquarters had been delayed since before the COVID-19 pandemic, and Discovery

wanted to avoid incurring the expense of moving out of the Landlord's building, putting all of its property in storage, and then moving again to a new building,

3. And while Discovery initially engaged with the Landlord to work out a short-term extension agreement, Discovery then abruptly switched course, refused to negotiate further, and held over for two additional months after the end of its lease term ***without paying even the full base rent due, and claiming that it was entitled to free rent for this whole period.***

4. In support of its efforts to get over on the Landlord, Discovery used the COVID-19 pandemic as a convenient cover—falsely claiming that Governor Cuomo's executive orders prevented it from moving out and torturously and erroneously arguing that its commercial lease allowed it to stay in the space for two extra months without paying a dime. Thus, at a time when many people and companies were really suffering, Discovery was using the pandemic as an excuse to chisel money from its Landlord and pad its bottom line. In this way, Discovery is the worst type of nonpaying commercial tenant—making it all the more difficult for other commercial tenants that are truly struggling to get the relief they need.

5. In an effort to mitigate its damages, the Landlord drew down on a letter of credit supplied by Discovery as its security deposit. But Discovery still owes the Landlord most of the June and July 2020 rent. Indeed, because Discovery was a holdover, under its lease, it was required to pay 150% of the Base Rent and Additional Rent for June and July 2020. So after crediting Discovery for the amounts it paid in June 2020 and that the Landlord drew down from the letter of credit, Discovery still owes $843,971.81.

6. Alternatively, even if Discovery were not a holdover under the lease (it was), it was still required to pay the Base Rent and Additional Rent for these two months. Since Discovery has demanded the return of its June 2020 rent payment and the amount the Landlord

drew down from the letter of credit, the Landlord is entitled to a declaratory judgment that it is entitled to retain these amounts, and that Discovery has no right to this money. Landlord is also entitled to collect the balance due on the Base Rent and Additional (non-holdover) Rent alone, which even after the June 2020 payment and letter of credit drawdown is $8,164.87. And the Landlord is also entitled to statutory interest and attorneys' fees incurred in bringing this suit.

PARTIES

7. Plaintiff 850 Third Avenue Owner, LLC has its principal place of business at 1384 Broadway, New York, New York 10018, and was the Landlord under the Existing Lease.

8. Defendant Discovery Communications, LLC was the lessee under the Existing Lease. Discovery occupied several floors of the building at 850 Third Avenue, New York, New York 10022 from June 18, 2004 until July 31, 2020, and upon information and belief, is the owner or producer of the Discovery Channel and related networks—the self-described "new global leader in real life entertainment."

JURISDICTION AND VENUE

9. This Court has general personal jurisdiction over Discovery under C.P.L.R. § 301, because Discovery has continuous and systematic contacts with New York State. This Court also has specific personal jurisdiction over Discovery under C.P.L.R. § 302(a)(2) and (4), because Discovery transacted business within New York State and used or possessed real property situated within New York State, and Landlord's claims in this case arise from these contacts. Further, in the Existing Lease, Discovery "irrevocably consent[ed]" to jurisdiction in New York State. Ex. A ¶ 26.01. The Existing Lease also includes a choice-of-law provision in favor of New York law. *Id.*

10. Venue is proper in this county under C.P.L.R. § 503(a), because both Landlord and Discovery are residents of this county.

FACTUAL ALLEGATIONS

A. The Landlord and Tenant

11. Through the effect of various amendments substituting them for the original parties, Landlord and Discovery were the landlord and tenant, respectively, under an office lease agreement (the "Original Lease") made and entered into as of June 18, 2004. The Original Lease and all of its amendments (collectively, the "Existing Lease") are attached as Exhibit A.

12. The Original Lease was amended by a First Amendment, dated as of March 31, 2012, a Second Amendment dated as of June 21, 2012, a Third Amendment, dated as of September 27, 2012, a Fourth Amendment, dated as of January 30, 2015, a Fifth Amendment, dated as of March 27, 2017, a Sixth Amendment, dated as of October 1, 2017, and a Seventh Amendment, dated as of May 14, 2018. *See* Ex. A.

13. Under the Existing Lease, Discovery (and its predecessor in interest) rented a rentable portion of the Second Floor, the entire rentable portion of the Fifth Floor, the entire rentable portion of the Sixth Floor, the entire rentable portion of the Seventh Floor, the entire rentable portion of the Eight Floor, a rentable portion of the Tenth Floor, and a rentable portion of the Eleventh Floor (collectively, the "Premises"), within the building located at 850 Third Avenue, New York, New York 10022.

14. In accordance with the Seventh Amendment to the Existing Lease, dated May 14, 2018, Discovery's lease term ended on May 31, 2020. Under the Existing Lease, any lease renewal or extension required a formal, executed renewal agreement.

B. Discovery's Phony Negotiations to Extend the Existing Lease

15. Even before the COVID-19 pandemic, Discovery seemingly could not make up its mind about what it wanted to do as the May 31, 2020 expiration of its Existing Lease loomed. Initially, Discovery engaged the Landlord in a protracted period of negotiations for a long-term extension of the Existing Lease. But then, after deciding to relocate its New York headquarters to a new building, Discovery abruptly changed its mind just as the parties were about to enter into a renewal agreement, and instead requested a two-month extension of the Existing Lease—so the lease term would end on July 31, 2020, instead of May 31, 2020. Trying to accommodate its long-term tenant, the Landlord agreed to this two-month extension, subject to the execution of a formal, written extension agreement.

16. But Discovery continued to flip flop, and during the course of negotiations for the short-term extension, Discovery demanded the unilateral option to further extend the term of the lease for up to an additional month—through August 31, 2020. Again, in good faith, the Landlord agreed—subject, however, to the execution of a formal, written extension agreement.

17. As part of the negotiations for this short-term extension, the Landlord proposed charging Discovery an aggregate monthly rent that was roughly equal to the sum of the Base Rent and Additional Rent due for the last month of the term of the Existing Lease. Discovery initially agreed to this—which was much better for Discovery than the holdover rate under the Existing Lease of 150%.

C. Discovery Holds Over For Two Months After Its Lease Term Ends, and Fails to Pay the Full Rent For These Two Months

18. Counsel for the Landlord and Discovery engaged in lengthy negotiations over the language of the proposed extension agreement, and were down to a few minor issues—none of which involved the rent payable during the extension term.

19. But without any meaningful notice, Discovery abruptly changed course at the last minute and withdrew from any further negotiations.

20. Had it continued to negotiate with the Landlord in good faith, Discovery could have worked out an extension agreement along the lines preliminarily agreed to with the Landlord.

21. But sensing what it likely perceived as an opportunity created by the COVID-19 pandemic and executive orders temporarily limiting landlords' ability to evict tenants, Discovery chose not to. And instead, without any further efforts to negotiate a lease extension, Discovery unilaterally refused to surrender the Premises on May 31, 2020—the last day of the lease term under the Existing Lease—and continued to occupy the Premises until July 31, 2020.

22. Upon information and belief, this had nothing to do with the COVID-19 pandemic, and was instead because construction at Discovery's new headquarters had been delayed since before the pandemic even began and would not be ready by May 31. Thus, Discovery wanted to keep its Property in the Premises for a few extra months, rather than incur the expense of moving it to storage and then moving it again to its new headquarters. And Discovery saw an opportunity to do this for what it believed would be for free.

23. Thus, Discovery was a holdover tenant from June 1, 2020 through July 31, 2020.

24. But even worse, and consistently with its efforts to try to beat the Landlord out of contractually required rent and make the Landlord pursue its rent in court, Discovery ***did not pay the Landlord any rent***—either under the 150% holdover rate or the base rate—for July 2020. And though it made a payment of base rent in June 2020, it later claimed that this payment was "made in error," and demanded it back. Thus, Discovery was a nonpaying holdover.

25. This was impermissible self help by Discovery, and a conscious business decision by it to refuse to negotiate with the Landlord yet simultaneously refuse to surrender the Premises. Indeed, Discovery's refusal to pay full rent for the two additional months it occupied the Premises had nothing to do with any claimed financial hardship arising out of the COVID-19 pandemic. To the contrary, Discovery continues to broadcast its shows across all of its networks, and most of America has remained at home watching or streaming television. And while it claimed it did not use the Premises since mid-March 2020, Discovery never once asserted it could not pay rent because of the pandemic, and instead continued to pay—and boasted about paying—all the rent due under the Existing Lease through May 31, 2020,

26. Thus, unlike other commercial tenants that have suffered financial hardship, Discovery was more than able to pay its rent. But it simply chose not to. And so this was a well-thought-out, planned business decision that Discovery made, and was an attempt to take advantage of the pandemic and pending executive orders to get over on the Landlord.

D. <u>The Relevant Lease Provisions</u>

27. Paragraph 22 of the Existing Lease, the holdover clause, states that if the tenant "fails to surrender all or any part of the Premises at the termination of this Lease," the tenancy becomes a tenancy at sufferance. And for the first 90 days of the holdover period, the tenant remains subject to all the terms of the Existing Lease, and the tenant is required to "pay an amount (on a per month basis without reduction for partial months during the holdover) equal to 150% of the sum of the Base Rent and Additional Rent due for the period immediately proceeding the holdover." *Id.*

28. Paragraph 26.03 of the Existing Lease, the force-majeure clause, states that "[w]henever a period of time is prescribed for the taking of an action by Landlord or Tenant ***(other than the payment of the Security Deposit or Rent)*** the period of time for the performance

of such action shall be extended by the number of days that the performance is actually delayed due to ***strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party***" (emphasis added).

29. Paragraph 26.02 of the Existing Lease, the fee-shifting clause, states that "[i]f either party institutes a suit against the other for violation of or to force any covenant, term or condition of this Lease, the prevailing party shall be entitled to all of its cost and expenses, including without limitation, reasonable attorneys fees."

E. Discovery Claims That the Existing Lease Entitled It To Hold Over Without Paying Rent, and Demands Return of June Rent Paid "In Error" and Its Security Deposit

30. On May 15, 2020, Discovery's general counsel wrote to the Landlord, claiming that "because of the COVID-19 Regulations (meaning the executive orders issued by Governor Cuomo), Tenant is currently legally prevented from removing Tenant's property from the Premises and has been unable to do so since at least March 20, 2020." Specifically, Discovery's general counsel claimed that "COVID-19 Regulations" precluded access to the Premises by Discovery, its employees, and its moving company, and so under the force-majeure clause, "any term in the Existing Lease requiring action to be taken by Tenant to vacate or surrender the Premises (including by removing Tenant's Property) by a date certain has been expressly extended" by the "number of days during which such action has been delayed due to causes beyond Tenant's reasonable control." Thus, according to Discovery, "any provisions in the Existing Lease relating to holdover rent, or other actions by the Landlord in connection therewith, do not apply."

31. Critically, Discovery did not claim that any financial hardship prevented it from paying rent during these two months. To the contrary, Discovery boasted that, despite the

COVID-19 pandemic and its purported inability to use its office space at the Premises, Discovery "continued to timely pay all rent due under the Existing Lease, including, without limitation, all rent due for May 2020—the last month in the term for the Existing Lease." A copy of this letter is attached as Exhibit B.

32. On May 20, 2020, the Landlord's representative, Michael Chetrit, responded, explaining that even if Discovery were not a holdover (it was), the force-majeure clause did not permit it to both occupy the Premises and not pay even the Base Rent and Additional Rent, since the force-majeure clause expressly carved out the "payment of rent" from the tenant obligations that could be excused by a purported force majeure. Mr. Chetrit also proposed that the parties resume negotiations on a short-term extension of the lease. A copy of this letter is attached as Exhibit C.

33. But on May 27, 2020, Discovery's general counsel responded to the Landlord, rejecting Mr. Chetrit's offer to negotiate further. Discovery then doubled down on its claim that it could continue to occupy the Premises without paying rent—claiming that its time to move out of the Premises was extended, even though it was not required to pay any rent during this time. According to Discovery, its obligation to pay rent under the Existing Lease ran only through May 31, 2020, even though its time to surrender the Premises was extended to July 31, 2020. A copy of this letter is attached as Exhibit D.

34. Despite its posturing, and in contradiction to its stated position, in June 2020, Discovery paid almost all of its base (but not holdover) rent for June 2020. And when it made this payment, Discovery did not state that it was without prejudice to its previously stated position or its right to later seek return of this payment. Indeed, Discovery appeared to have

(temporarily) recognized that the most basic principle of landlord-tenant law applied to the extent it continued to occupy the Premises: it must pay rent.

35. In July 2020, however, Discovery failed to pay even its base rent for that month.

36. On July 7, 2020, Mr. Chetrit e-mailed Discovery to state that its July rent payment was late, and needed to be processed right away. A copy of this e-mail (without attachment) is attached as Exhibit E.

37. In response, later in the day on July 7, Discovery's general counsel again wrote to Mr. Chetrit, repeating its position that the force-majeure clause excused it from paying rent after May 31 because Discovery was "legally prevented from removing [its] Property from the Premises by May 31, 2020," stating that its June rent payment was "made in error," and refusing to pay any further rent. Critically, Discovery's general counsel acknowledged that it did not even "commence[] the removal process" until June 8, 2020, since it believed it was not permitted to do so until then. A copy of this letter is attached as Exhibit F.

38. Consistently with this position, Discovery held over for two months—June and July 2020. And while Discovery fully moved out of the Premises on July 31, 2020, it refused to pay July base rent or June or July holdover rent—which was an additional 50% per month under paragraph 22 of the Existing Lease.

39. To mitigate its damages, and as permitted under paragraph 1 of Exhibit G to the Existing Lease, on July 22, 2020, the Landlord drew down on the letter of credit issued in its favor by Discovery as a Security Deposit. The Landlord's total drawdown from the letter of credit was $829,581.42.

40. On August 20, 2020, in accordance with section 18.01 of the Existing Lease, the Landlord sent Discovery a Five-Day Notice of Failure to Pay Rent Due Under Lease. This notice calculated Discovery's rent obligations as follows:

June 2020 Holdover Rent (150% of base and additional rent):	$1,253,710.41
June 2020 Extra Charges (Electric, Chargebacks, etc.):	$3,909.35
July 2020 Holdover Rent (150% of base and additional rent):	$1,253,710.41
July 2020 Extra Charges (Electric, Chargebacks, etc.):	$62,696.25
TOTAL DUE PAST MAY 2020:	$2,574,026.42
Payment in June 2020	($833,867.59)
Letter of Credit Drawdown	($829,581.42)
BALANCE DUE	**$910,577.41**

The notice stated that, in accordance with section 18.01 of the Existing lease, if Discovery failed to pay this amount within five days, it would be deemed in Default under the Existing lease. In accordance with paragraph 24 of the Existing lease, this notice was served by overnight Federal Express. A copy of this notice, with affidavit of service, is attached as Exhibit G.

41. On August 21, 2020, Discovery paid the Landlord $60,334.95, purportedly toward the "Extra Charges" listed in the notice. But Discovery did not pay any additional amounts demanded by the notice.

42. Instead, on August 24, 2020, Discovery's outside counsel at Proskauer Rose LLP wrote to the Landlord's outside counsel at Schlam Stone & Dolan LLP doubling down on its position that it had no obligation to pay any rent, holdover or base, after May 31. Specifically, Discovery claimed that Executive Order 202.8, dated March 20, 2020, required all nonessential

businesses to reduce their in-person workforces by 100% by March 22, 2020 at 8:00 p.m. Critically, however, and contrary to the positions its took in its May 15 and 27 letters, Discovery conceded that commercial movers were deemed essential workers as early as ***May 18, 2020—*** almost two weeks before Discovery was obligated to move out of the Premises.

43. Despite conceding that it was legally permitted to move on the date it was required to move out, and was permitted to do so for the preceding two weeks, Discovery claimed that it could not "begin the process of hiring a commercial moving company" until May 18, and could not "allow its employees to enter the Premises and make preparations to move" until June 8—when New York City entered Phase One of reopening.

44. Discovery further claimed that the force-majeure clause extended its obligation to move out, and reiterated its prior claim that its June payment was "made in error." And so, according to Discovery, "no Rent was due for the months of June and July," so it was not in Default for nonpayment for those months.

45. Discovery thus demanded that the Landlord "(a) withdraw its claim for holdover rent; (b) return the $833,867.59 that we advised you on July 7, 2020 was inadvertently paid to Landlord; and (c) return the $829,581.42 that was drawn down on the letter of credit in violation of the express terms of the Existing Lease." Discovery also noted that its August 21 $60,334.95 payment was for "incident[al] charges" reflected in the Landlord's notice. A copy of this letter is attached as Exhibit H.

F. Discovery's Claim That The Existing Lease Permitted It To Hold Over Without Paying Any Rent Is Erroneous and Intentionally Contorted

46. Under paragraph 25 of the Existing Lease, at the "termination of this Lease"— which Discovery concedes was May 31, 2020—Discovery was required to remove all of its property from the Premises and "quit and surrender" the Premises to the Landlord. Indeed, even

leaving Property in the Premises without any employees would be considered occupancy of the Premises. Discovery does not dispute this, and indisputably failed to remove its Property from or quit and surrender the Premises by May 31, 2020—not doing so until July 31, 2020.[1]

47. As explained above, under paragraph 22 of the Existing Lease, Discovery's failure to surrender all or any part of the Premises at the "termination of this Lease," *i.e.*, May 31, 2020, made Discovery a holdover, and thus liable for 150% of the Base Rent and Additional Rent. Discovery indisputably did not pay this holdover rent, and has demanded the return of the partial base rent it paid and its Security Deposit (which Landlord drew down under the letter or credit).

48. But contrary to Discovery's claim, the force-majeure clause did not extend its time to remove its property from or quit and surrender the Premises, and so Discovery was a holdover and thus liable for holdover rent.

49. ***First***, the force-majeure clause applies only in the event of "strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party." Ex. A ¶ 26.03. Unlike many other force-majeure clauses in commercial leases, this clause does not apply to governmental acts, orders, laws, or regulations. This omission is fatal to Discovery's argument, since under New York Law (which applies to the Existing Lease), force-majeure clauses are interpreted narrowly, and a claimed force-majeure event must be expressly included in a force-majeure clause to fall within that

[1] Discovery claims it moved out on July 27, not July 31. Ex. I. But which date Discovery completely moved out does not matter, since paragraph 22 of the Existing Lease states that Discovery must pay holdover rent for the entire month of any holdover period, "without reduction for partial months during the holdover."

clause's coverage. And critically, if Discovery—a sophisticated business entity—wanted to include this language in the force-majeure clause, it knew how to do so but chose not to.

50. Discovery argues that the catch-all language at the end of this clause—"other causes beyond the reasonable control of the performing party"—covers the COVID-19 executive orders it claims prevented it from moving its Property out of the Premises. But under the canon of contractual interpretation *ejusdem generis* ("of the same kind"), catch-all phrases in a list of specifically identified events refers only to events of the same kind as those expressly listed. And New York courts have held that when a catch-all like the one here follows a list of specific events, the list of specific events is to be construed as the most comprehensive, and the catch-all language refers only to events of the same kind as those listed.

51. In the force-majeure clause here, the events that give rise to a force majeure under the Existing Lease are acts of disorder (acts of God, war, terrorism, civil disturbances, shortages of labor or materials, and strikes). But the "COVID-19 Regulations" that Discovery claims prevented it from moving out of the Premises are of a completely different class. Indeed, the specified events in the force-majeure clause here refer to events of ***disorder***, beyond the control of organized civil society. But government regulations, like the "COVID-19 Regulations," are events or acts of ***law and order***—the opposite of what is covered by the specific events in the force-majeure clause.

52. Further, as explained above, many commercial leases include force-majeure clauses that expressly include governmental acts, orders, laws, or regulations. But this clause did not. Indeed, New York City imposes many regulations on real property and businesses, so if Discovery wanted protection in the event governmental acts, orders, laws, or regulations

prevented its performance, it should have negotiated for this in this clause. That it did not does not allow it to renegotiate this clause now by trying to backdoor it in through the catch-all clause.

53. ***Second***, even if Governor Cuomo's "COVID-19 Regulations" could be considered a force majeure under the Existing Lease (they cannot), Discovery's claim that these orders prevented it from moving out is wrong. Indeed, under Executive Order 202.8 (the shutdown order), issued on March 20, 2020, "any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions." And commercial-moving companies were considered essential businesses well before Discovery was required to move out.

54. As a threshold matter, though New York State's initial guidance did not expressly list residential- or commercial-moving companies as essential businesses, many real-estate-law experts believed they fit within the State's general categories of essential businesses from the outset. Indeed, in a detailed presentation published on March 24, 2020 by ***Discovery's own counsel at Proskauer Rose***, Proskauer advised clients and businesses about how to safely conduct commercial moves, and wrote, ***"We have received word that moving companies have been deemed essential under the Executive Order."*** A copy of this presentation deck is attached as Exhibit J, and this reference is on page 28.

55. Proskauer's advice was consistent with the advice of other real-estate professionals. *See* 6sqft, *Can you move in NYC during the coronavirus outbreak?*, dated Mar. 27, 2020 ("moving companies are considered an essential service, according to New York City and State officials"), copy of which is attached as Exhibit K.

56. And Proskauer's advice was also consistent with the fact that commercial-moving companies were working all throughout the pandemic. Indeed, one Manhattan-based moving

company advised clients early on that it was considered an essential business under the categories of "logistics" and "storage" in the State's initial guidance. Ex. L. And one Brooklyn-based moving company was recently quoted in a *New York Times* article stating that its moving business got "insane" in May to the point it "had to hire some more movers." Ex. M. And another Manhattan-based moving company recently published a detailed account of how, other than a short pause during which it sought and received an "essential business letter" from the State, it completed a warehouse move ***between February 26 and late May*** for international law firm Simpson, Thacher & Bartlett so the firm "would not be in violation of their lease." Ex. N. And in this same publication, this moving company also explained how it moved casino-gaming company High 5 Games out of its New York City office and into storage until High 5 Games could get a new lease. *Id.* Thus, commercial-moving companies were working throughout the pendency of the "COVID-19 Regulations"—some of which with an "essential business letter" from the State and all of which with the apparent approval of New York's top real-estate professionals, including Discovery's own counsel at Proskauer. Discovery could have thus engaged one of these companies between March and May if it wanted to.

57. But critically, to resolve any doubt (if any existed), on ***May 17, 2020***, New York State updated its guidance to include ***"commercial moving services"*** as essential businesses. A copy of this updated guidance is attached as Exhibit O.

58. In its counsel's August 24 letter, Discovery conceded that commercial movers were essential as early as May 18 (Discovery's counsel got the date wrong by one day). Ex. H. Thus, since commercial movers were indisputably permitted to move Discovery out of the Premises on May 31—the date by which Discovery was obligated to move out—and for at least the two preceding weeks, the "COVID-19 Regulations" of which Discovery complains did not

prevent it from moving out. And to the extent Discovery claims that it would have been a tall order to move out in only two weeks (which is doubtful on its face), this is an issue of performance merely being more difficult or expensive—which is not an excuse for performance under a force-majeure clause.

59. Discovery claims that it could not "begin" the process of hiring a commercial-moving company until May 18. *Id.* But as explained above, this is false, since commercial movers were working since March. Nor was there any reason, other than lack of will, that Discovery could not have hired a moving company and made arrangements concerning its move remotely before May 18. Indeed, Discovery has apparently been able to continue running its own broadcast business, despite its lack of physical office space, throughout the pandemic. And so there is no reason it could not have made moving arrangements the same way.

60. Discovery also claims that it could not "allow its employees to enter the Premises and make preparations to move until June 8, 2020 when New York City entered Phase One of Reopening." But this is false as well. Indeed, nothing in the "COVID-19 Regulations" prevented employees from directing a move out. To the contrary, it would make no sense for commercial movers to be able to move companies in and out of buildings if a few select employees could not access the building to assist and direct.

61. Moreover, Discovery's claim that it could not allow ***any*** of its employees to access the Premises before June 8 is belied by building records showing that Discovery employees or agents entered the Premises ***83 times*** between March 23 and May 17, 2020, and an additional ***173 times*** between May 18 and June 7, 2020. A copy of the records showing these entries to the Premises is attached as Exhibit I. Thus, if Discovery wanted to access the Premises

to "make preparations" for or assist in its move out, it could have. That it did not had nothing to do with the "COVID-19 Regulations."

62. Indeed, as explained above, Discovery had long planned to move out of the Premises, and it was behind on construction of its new headquarters well before the pandemic hit. Thus, Discovery had no intention of moving out of the Premises on May 31, and held over not because it couldn't move (it could), but because it sought to take advantage of the pandemic to try to get two months of free Property storage before moving into its new headquarters.

63. Further, even if the force-majeure clause applied here to extend Discovery's time to remove its Property from and quit and surrender the Premises (it does not), the effect of this was only that the lease term was extended. Thus, even if Discovery were not considered a holdover after May 31, it was still required to pay monthly Base Rent and Additional Rent for the additional time it occupied the Premises.

64. Indeed, as explained above, the force-majeure clause carves out the payment of rent from the tenant obligations that could be excused by a purported force majeure. So even crediting Discovery's flawed interpretation, this carve out would be meaningless.

65. Moreover, by paying all rent due through May 31, 2020 and paying June base rent—all without a reservation of rights—Discovery waived any claim that it was not required to pay rent or was otherwise entitled to an abatement during the lease term—even though it was supposedly not regularly using the Premises during that time.

66. Further, that Discovery paid $60,334.95 toward June and July additional rent, also without a reservation of rights, shows that it acknowledges that it was required to pay at least base rent (or additional rent unconnected to holdover rent) during this period. Indeed, if Discovery truly believed the force-majeure clause relieved it of the obligation to pay ***any*** rent

after May 31—the position it took in its various letters—then it would not have made a payment toward June and July base or additional rent.

G. The Landlord's Damages

67. Discovery unlawfully held over for two months (June and July 2020). The Base Rent and Additional Rent for these two months totaled $1,671,613.88. Applying paragraph 22 of the Existing Lease to this amount, since Discovery was a holdover, this amount increased by 150% to $2,507,420.82.

68. As explained above, in June 2020, Discovery paid $833,867.59 in rent, which the Landlord properly accepted, retained, and refused to return. And as also explained above, to mitigate its damages and as permitted under paragraph 1 of Exhibit G to the Existing Lease, on July 22, 2020, the Landlord drew down $829,581.42 on the letter of credit Discovery gave to it as a Security Deposit. Putting aside the $66,605.60 in additional charges for June and July—which Discovery primarily paid on August 21, and for the sake of convenience, the balance of which the Landlord does not seek here—this brought Discovery's outstanding balance due and owing to **$843,971.81**.

69. And even if Discovery were not treated as a holdover for June and July 2020, it must still pay base rent and additional (non-holdover) rent for these months. Thus, the Landlord is entitled to keep the June payment Discovery claims was "made in error" and the money it drew down from the letter of credit—both of which Discovery has demanded the Landlord return—and is further entitled to collect the difference between the $1,671,613.88 in base and additional (non-holder) rent (excluding extra charges) for these two months and Discovery's payment and the drawdown (excluding credit payments), which equals $8,164.87.

FIRST CAUSE OF ACTION
(Breach of Contract)

70. Landlord repeats the allegations above as if fully set forth here.

71. The Landlord and Discovery were parties to the Existing Lease. *See* Ex. A.

72. The Existing Lease was a valid and binding contract between Landlord and Discovery.

73. The mutual exchange of promises in the Existing Lease was sufficient consideration.

74. The Landlord materially complied with all of its obligations under the Existing Lease.

75. Discovery materially breached its obligations under the Lease by failing to pay full rent for June and July 2020, including the holdover rent premium.

76. On August 20, 2020, the Landlord gave Discovery written notice of its failure to pay rent for this period. Discovery's failure to pay rent continued for more than five days from receipt of notice, as calculated under paragraph 24 of the Existing Lease. Thus, Discovery committed a Monetary Default under the Existing Lease. *See* Ex. A ¶ 18.01.

77. As alleged above, paragraph 26.03 of the Lease did not prevent Discovery from being a holdover, because on its face, that provision does not apply to the circumstances cited by Discovery as its purported excuse for not complying with paragraphs 22 and 25 of the Existing Lease.

78. Alternatively, even if paragraph 26.03 of the Lease does apply, and effectively prevented Discovery from being a holdover in these circumstances, that provision on its face expressly required Discovery to pay the Base Rent and Additional Rent for the two months it continued to occupy the Premises.

79. Landlord has been directly and proximately damaged by Discovery's breaches of the Existing Lease.

80. Accordingly, even accounting for the June 2020 payment and the Security Deposit that the Landlord took from the letter of credit as a permissible mitigation of damages, Discovery is liable to the Landlord for an amount to be determined at trial, but which is no less than the holdover rent of $843,971.81, or alternatively, if Discovery is not deemed a holdover, the Base Rent and Additional Rent for June and July 2020 that remains outstanding, in the amount of $8,164.87; plus pre- and post-judgment statutory interest, plus the Landlord's reasonable attorneys' fees and expenses incurred in prosecuting this action.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

81. Landlord repeats the allegations above as if fully set forth here.

82. The Landlord and Discovery were parties to the Existing Lease. See Ex. A.

83. The Existing Lease was a valid and binding contract between Landlord and Discovery.

84. The mutual exchange of promises in the Existing Lease was sufficient consideration.

85. The Landlord materially complied with all of its obligations under the Existing Lease.

86. Discovery materially breached its obligations under the Lease by failing to pay any rent for July 2020.

87. Discovery has erroneously demanded the return of the $833,867.59 it claimed it paid "in error" in June 2020 and the $829,581.42 that the Landlord drew down from the letter of credit.

88. Even if Discovery were not a holdover under the Existing Lease, the Landlord correctly received, accepted, and refused to return Discovery's June 2020 rent payment. And the Landlord also correctly drew down on the letter of credit, having given Discovery notice on July 7, 2020 by e-mail that its July 2020 rent was due and owing.

89. Given Discovery's demand that the Landlord return these amounts on the basis of its claim that it was not required to pay any rent for June or July 2020, whether the Landlord is permitted to retain these amounts is a justiciable dispute.

90. The Landlord has no adequate remedy at law.

91. The equities are balanced in the Landlord's favor.

92. This Court should issue a declaratory judgment that the Landlord is entitled to the $833,867.59 Discovery paid in June 2020 and the $829,581.42 it drew down from the letter of credit, and that Discovery has no right to this money.

WHEREFORE, Landor respectfully requests that this Court enter judgment in its favor against Discovery on all of its Causes of Action, awarding Landlord damages in an amount to be determined at trial, but no less than $843,971.81, or alternatively, if Discovery is not deemed a holdover, $8,164.87, plus any consequential damages, and pre- and post-judgment statutory interest, and reasonable attorneys' fees and expenses incurred in prosecuting this action; and enter a declaratory judgment that the Landlord is entitled to the $833,867.59 Discovery paid in June 2020 and the $829,581.42 it drew down from the letter of credit, and that Discovery has no right to this money; and such other and further relief as may be just and proper.

Dated: August 31, 2020
New York, New York

Respectfully submitted

SCHLAM STONE & DOLAN LLP

By: /s/ Jeffrey M. Eilender_______
Jeffrey M. Eilender
Jonathan Mazer
Joshua Wurtzel
26 Broadway
New York, New York 10004
Tel.: (212) 344-5400
Fax: (212) 344-7677
E-Mail: jeilender@schlamstone.com
E-Mail: jmazer@schlamstone.com
E-Mail: jwurtzel@schlamstone.com

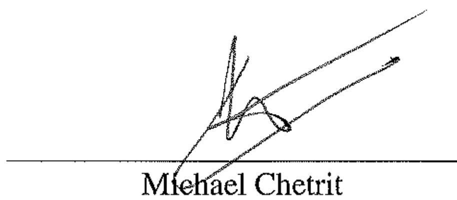
Attorneys for Plaintiff 850 Third Avenue Owner, LLC

VERIFICATION

STATE OF NEW YORK }
} ss:
COUNTY OF NEW YORK }

MICHAEL CHETRIT, being duly sworn, deposes and says:

I am an authorized represent of Plaintiff 850 Third Avenue Owner, LLC. I have read the attached Verified Complaint, and it is true to the best of my knowledge, information, and belief.



Michael Chetrit

Sworn to before me this
31st day of ~~September~~ August 2020

Notary Public

MARIANNA VAYNER
NOTARY PUBLIC-STATE OF NEW YORK
No. 02VA6341063
Qualified In New York County
My Commission Expires 05-02-2024