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

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Index No.: 652605/2020

VALENTINO U.S.A., INC.,

Plaintiff,

-against-

693 FIFTH OWNER LLC,

Defendant.

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MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION PURSUANT TO CPLR 3211(A)(1), 3211(A)(7) AND 3211(C) TO DISMISS THE COMPLAINT OF PLAINTIFF VALENTINO

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PRELIMINARY STATEMENT

Defendant 693 Fifth[1] respectfully submits this memorandum of law in further support of its motion pursuant to CPLR 3211(a)(1), 3211(a)(7) and 3211(c) to dismiss the complaint of plaintiff Valentino.

693 Fifth and Valentino, sophisticated parties, negotiated a complex retail lease – the Lease – affirmatively contemplating that cataclysmic events could detrimentally affect Valentino's use of the premises. The Lease allocated that risk to Valentino alone, including (i) expressly: governmental orders, and (ii) by conventional, broad, inclusive language: pandemics. As a matter of law, the Lease is controlling.

Even if the Lease did not allocate those risks to Valentino, as matter a matter of law, pandemics are deemed to have been reasonably foreseeable at Lease signing. That is true even if Valentino itself did not subjectively foresee that risk or its extent. Urban Archaeology, Ltd. v. 207 E. 57th St. LLC, 34 Misc.3d 1222(a), 2009 N.Y. Misc. LEXIS 6670 (Sup. Ct., N.Y. Cty.), aff'd, 68 A.D.3d 562 (1st Dep't 2009).

[1] The defined terms used herein are the same as those used in defendant's memorandum dated July 27, 2020 and submitted in support of the motion.

Especially as a sophisticated party, Valentino is deemed to have been able to require that the Lease guard against any or all perils, including the pandemic. Therefore, neither GOs nor the pandemic are a basis to avoid the Lease. Id.

On a motion to dismiss pursuant to CPLR 3211(a)(1), where provisions of the Lease undermine allegations of the Complaint, Lease provisions control and warrant granting the motion. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005).

The plain language of Section 9.1 of the Lease encompasses "all" governmental orders. The EOs indisputably fall within that category. Valentino erroneously treats the examples in Section 9.1 as exhaustive. The plain language of Section 9.1 contradicts this reading, prefacing the examples with conventional, broad, inclusive language: "including, without limitation." That plain language – overlooked by Valentino – broadens those examples further to GOs "whether contemplated or foreseen on the date hereof or not…." See pp. 5-6, below.

The plain language of Section 21.11 requires Valentino to continue to pay rent in the event of the exemplary events "or other reason of similar or dissimilar nature…." See pp. 6-9, below.

The law adhered to for decades is clear: the pandemic and attendant hardship are not a basis upon which Valentino may evade the Lease. In fact, there is no

established legal basis for Valentino's claims. Valentino effectively concedes this when it begs the Court "examine the parties' contractual arrangements with an open mind and heart." Valentino Memo., p. 23. Consequently, this action should be dismissed.

ARGUMENT

A. 693 Fifth Has Met The Applicable Standard for CPLR 3211 Motions.

Valentino argues the Complaint should survive, claiming it adequately pleads each element of each cause of action, and that for purposes of a CPLR 3211(a)(7) motion, all of its allegations are treated as true[2]. See, e.g., Valentino Memo., pp. 2, 10.

Critically, however, 693 Fifth's motion to dismiss rests largely on CPLR 3211**(a)(1)** and CPLR 3211**(c)**: the plain language of the Lease bars any claim of frustration or impossibility. It is well-settled that under CPLR 3211(a)(1), a court can consider documentary evidence to determine whether, as a matter of law, that evidence bars the cause of action a plaintiff asserts. If the document conclusively defeats the claim, dismissal is warranted. Goldman, 5 N.Y.3d 561, 571 (2005). In the context of frustration of purpose/impossibility of performance claims, courts

[2] Valentino's memorandum contains much hyperbole, describing its purported predicament in absolute terms ("impossible," "unable," "prevented"). We simply note that the Valentino boutique has been reopened for business for some time now.

have dismissed claims based on lease terms. Urban Archaeology; Noble Amers. Corp. v. CIT Group/Equip. Fin., Inc., 2009 WL 9087853 (Sup. Ct., N.Y. Cty.). (The only instance in which 693 Fifth relies, even in part, upon CPLR 3211(a)(7) is regarding Valentino's claim for constructive eviction. Valentino fails to allege a necessary element of its claim, namely, current abandonment or that 693 Fifth's conduct caused abandonment. The failure to plead necessary elements of the claim mandates dismissal under CPLR 3211(a)(7)).[3]

Consonant with the applicable CPLR provision, 693 Fifth has more than satisfied the standard for dismissal outlined above.

B. The Language of the Lease Itself Bars Valentino's Frustration and Impossibility Claims.

When a party contractually assumes the risk of an event occurring, the party may not later argue, when the event occurs, that it should be freed from the contract on frustration or impossibility grounds. See, e.g., Urban Archaeology (dismissing, based on lease language, common law frustration and impossibility defenses).

[3] Valentino poses a series of questions – some factual, some legal – that, it says, the Lease does not answer. Valentino Memo., p. 20. It is respectfully submitted that because the terms of the Lease flatly undercut the frustration and impossibility claims, the questions are legally irrelevant.

Here, the Lease itself bars both the frustration and impossibility claims. In Section 9.1, Valentino agreed to comply with all governmental orders:

> Tenant, at its sole cost and expense, shall comply with all…orders…of all…state…governments (collectively, 'Laws') (whether any Laws are in effect on, or enacted or made effective after, the date hereof, whether contemplated or foreseen on the date hereof or not) which shall impose any…duty upon Landlord or Tenant with respect to the Premises or the use or occupancy thereof….

The EOs initially led Valentino to temporarily shutter its boutique; now, they temporarily limit occupancy capacity. Those EOs were/are, in the words of Section 9.1, "orders of …[a] state[] government[]," precisely the risk that Valentino assumed in negotiating and entering the Lease. Valentino agreed to obey those orders, again, in the words of Section 9.1, "at its sole cost and expense" (emphasis supplied).[4]

Section 21.11 states that even in the event of unavoidable delay – even a cataclysmic, supervening event – Valentino must continue to pay rent. Again, by the Lease's plain language, Valentino assumed the risk that a cataclysmic event would not excuse its rental obligation.

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[4] It is hornbook law that, except in the case of ambiguity, contract interpretation is a matter of law for the court to determine. Valentino argues in a conclusory manner that Sections 9.1 and 21.11 are ambiguous. Valentino Memo., p. 20. However, it adduces no evidence whatsoever and gives no specifics demonstrating any ambiguity in those Sections. Absent the production of such evidence – and it cannot because there is no ambiguity – the Court should reject this argument. Bensons Plaza v. Great Atl. & Pac. Tea Co., Inc., 44 N.Y.2d 791, 793 (1978).

Even given the above, Valentino claims that reliance upon Sections 9.1 and 21.11 is somehow flawed because, per Valentino, they do not: (i) expressly refer to pandemics, (ii) waive frustration of purpose/impossibility of performance claims, (iii) concern voiding/termination of the lease (merely payment of rent), and (iv) bar Valentino from relying on other sections of the Lease. Valentino Memo., p. 6.

1. Sections 9.1 and 21.11 Apply to Pandemics.

Seeking asylum from Section 9.1 (Compliance with Laws), Valentino argues that this Section does not apply to governmental orders, etc., arising out of a pandemic. Valentino Memo., p. 5.

The plain language of Section 9.1 encompasses "all" governmental orders, which would include the EOs. Further, Valentino treats the examples in Section 9.1 as exhaustive. Section 9.1 contradicts such treatment, prefacing the listed examples with conventional, broad, inclusive language: "including, without limitation." The *coup de grace* is further plain language of Section 9.1 – overlooked by Valentino – that Valentino must obey orders "whether contemplated or foreseen on the date hereof or not…."

Valentino argues similarly regarding Section 21.11 (Unavoidable Delays and Postponement of Performance). Valentino Memo., p.6. That section lists a series of cataclysmic events, stating that if any delay a party's performance – for other than

rental obligations – the party need not perform during the pendency of the event. Again, Valentino asserts that the absence of the word "pandemics" mean they are not covered by this Section.

Here, too, the list of events is not exhaustive. The plain language of Section 21.11 (again overlooked by Valentino) concludes the list with the words: "or other reason of a similar or dissimilar nature…." This is sufficiently clear, broad and inclusive to bring a pandemic within the scope of Section 21.11.

Directly on point is Sage Realty Corp. v. Jugobanka, D.D. New York Agcy., 1998 U.S. Dist. LEXIS 15756 (S.D.N.Y.). There, the lease required the tenant to pay rent even if the landlord could not comply with its lease obligations "by reason of any order…of any government agency." Governmental orders directed the tenant's closure and the sealing of the rented space. Held the Court: "Section 33.01 requires the tenant to continue to pay rent where a government action prevents the landlord from performing any of its duties under the lease. While the language of the text is general, there is no uncertainty as to its meaning." Id. at *14-15 (emphasis supplied).

Here, the Lease allocates to Valentino alone the risks of compliance with governmental orders such as the EOs and the risk of perils such as pandemics. They do not excuse Valentino's performance.

2. Sections 9.1 and 21.11 Waive Other Claims.

Section 9.1 says that Valentino must comply with, inter alia, governmental orders. Section 22.11 says that Valentino must continue to pay rent even in the event of cataclysmic events. To the extent that the EOs or pandemic impaired Valentino's operations, Valentino contractually assumed that risk. Indeed, those Sections bar any "common law" claims that could conceivably arise outside of the Lease, including frustration of purpose and impossibility of performance. See Urban Archaeology.

3. By Virtue of Sections 9.1 and 21.11, Valentino Is Effectively Barred from Terminating The Lease.

As we noted above, the Lease allocates to Valentino alone the risks associated with impairment of operations due to perils including, without limitation, a governmental order or a pandemic. Valentino accordingly may not use either as a basis to escape the Lease.

4. No Other Sections of the Lease Supervene Sections 9.1 and 21.11.

Valentino maintains that it can rely on other Lease provisions to defeat Sections 9.1 and 21.11. Significantly, however, Valentino never names those "other" Lease provisions. That silence speaks volumes.

Sections 9.1 and 21.11 contractually bar Valentino's frustration and impossibility claims.

C. As A Matter of Law, A Pandemic Was Foreseeable.

1. The Test Is Reasonable, Not Subjective, Foreseeability.

Even if the Lease did not bar Valentino's frustration and impossibility claims (and it does), Valentino could not state a claim based on these doctrines because, at common law, a pandemic was reasonably foreseeable, if only in concept and no matter its extent. In a commercial transaction – such as the Lease – freely negotiated between sophisticated parties, Valentino is deemed to have been able to guard against perils like governmental orders and pandemics, among others.[5]

The foreseeability test is objective, not subjective. Thus, in Sage Realty, the tenant argued that it did not subjectively anticipate governmental sanctions resulting in forced closure. The court held that reasonable foreseeability was the standard:

> Jugobanka [the tenant] also asserts that the events in question must have actually been anticipated by Jugobanka's executives. This, however, is not the proper inquiry. The relevant question is whether the sanctions were reasonably foreseeable not whether they were in fact foreseeable.
>
> ...

[5] Frustration and impossibility are alike in that each requires unforeseeability of the event in question. Gander Mountain Co. v. Islip U-Slip LLC, 923 F.Supp.2d 351, 362-363 (N.D.N.Y.2013), aff'd, 561 Fed. Appx. 48 (2d Cir. 2014)(applying New York law).

> Therefore, whether Stoehr [tenant's officer] actually believed that the United States government would freeze Jugobanka's assets and close its offices is of no consequence.

Id. at *13 fn.5 (emphasis added).

Valentino begs the Court to stray from this well-settled standard and instead adopt Valentino's subjective estimation of the likelihood of a pandemic: "Defendant's fallback position – that the COVID-19 pandemic was somehow 'reasonably foreseeable' back in 2013 – only raises another material question of fact concerning the parties' knowledge and assumptions concerning pandemics at the time the Lease was executed." Ferrara Aff. ¶25. This argument squarely conflicts with Sage Realty, and is not the applicable standard.

Objective evidence of pandemics at the 2013 Lease signing abounds. We respectfully request the Court take judicial notice that, in the century before the signing, pandemics had befallen the United States on three occasions with deadly consequences: 1918 (Spanish Influenza; 675,000 deaths); 1957-1958 (H2N2; 70,000 deaths); and, 1968 H3N2; 100,000 deaths). In the years preceding the Lease's signing, the United States faced two other pandemics: 2002 (SARS) and 2009 (H1N1). Earlier, legal periodicals and literature grappled with pandemics as a legal issue. See "Force Majeure Clauses: Drafting Advice for the CISG Practitioner," 17 Journal of Law & Commerce 381 (1998); "Gas and Oil Lease Force Majeure

Provisions," 46 A.L.R.4th 976 (1986); "Sales Contracts & Impracticability in a Changing World," 13 St. Mary's L.J. 247 (1981).

In fact, in the wake of the 2002 SARS outbreak, the insurance industry modified its standard business interruption insurance policies to exclude interruptions caused by viruses and bacteria:

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim. But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators....[M]any insurers added exclusions to standard commercial policies for losses caused by viruses or bacteria.

Frankel, "Insurers Knew The Damage A Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage," Washington Post, Apr. 2, 2020 (available at https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-so-they-excluded-coverage).

Valentino argues that the pandemics of 2002 (SARS) and 2009 (H1N1) were not nearly as severe as the current Covid-19 pandemic. Valentino Memo., p. 7. That argument flatly conflicts with the mandate of the case law: where, as here, the event is reasonably foreseeable, the extent does not matter:

> The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the

> precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed.

Urban Archaeology, 2009 N.Y. Misc. LEXIS 6670 at ***11-12 (emphasis added). Accord General Elec. Co. v. Metals Resources Group Ltd., 293 A.D.2d 417, 418 (1st Dep't 2002)("[F]inancial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified."(emphasis supplied)).

Here, the parties did contemplate perils that could disadvantage either of them. See: Sections 9.1 and 21.11. Valentino could have insisted that a pandemic be specifically addressed. Valentino chose to enter into the Lease without doing so, which dooms Valentino's claims.[6]

2. Valentino's Effort to Distinguish 693 Fifth's Cited Cases Fails.

In attempting to distinguish the cases relied upon in our opening memorandum of law, Valentino ostensibly identifies factual distinctions; however, none is

[6] Valentino's suggestion that it "is not exercising a contractual *force majeure* right," Valentino Memo., p. 8 (emphasis in original), is sufficient indication that the Lease contains no force majeure language that could rescue Valentino's claim from dismissal. Cf. General Elec., 293 A.D.2d at 418 (court should not supply force majeure clause where parties have omitted one).

material. See Valentino Memo., pp. 7-10. Rather, they apply the bedrock principle that an event reasonably foreseeable (or deemed so) forms no basis for a frustration/impossibility claim. The impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. Kel Kim Corp. v. Central Mkts., Inc., 70 N.Y.2d 900, 902 (1987).

Each of the other cited cases dealing with frustration and impossibility – 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275 (1968), Sage Realty, Urban Archaeology, United States v. General Douglas MacArthur Senior Vil., Inc., 508 F.2d 377 (2d Cir. 1974)(applying New York law) – applies the reasonable foreseeability test. In each case, the court held that the event asserted by the party invoking frustration or impossibility was, in fact, reasonably foreseeable. In 407, the Court noted the party asserting impossibility/frustration was aware of its own financial condition and could have insisted on a contract provision to protect itself. (There, the party was both subjectively aware and reasonably aware; only reasonable awareness is required.) In Sage Realty, the court held although the invoking party's officers were unaware of the impending breakup of Yugoslavia, they could have been reasonably aware from press reports. In Urban Archaeology, the court held that financial panics are reasonably foreseeable (and, incidentally also held that the lease contractually barred those claims). In MacArthur, the court held that events depriving a tax lien sale of value were, as a matter of law, within reasonable

contemplation of the parties. Finally, Maxton Bldrs., Inc. v. LoGalbo, 68 N.Y.2d 373 (1986), makes clear that a court should not relieve a contracting party from the consequences of its contract.

Here, for the reasons stated above, the EOs and the pandemic were reasonably foreseeable.

D. Valentino's Claim for Constructive Eviction Fails to State A Claim.

Valentino's claim for constructive eviction is legally deficient. As Valentino acknowledges, to state a claim, a tenant must allege that: (i) its use of the premises was disrupted by the landlord or that the landlord failed to remediate a condition the lease requires it to remediate, (ii) the disruption is substantial, and (iii) the disruption resulted in at least a partial abandonment of the premises. Valentino Memo., p. 14.

Valentino's claim fails under that standard. As a matter of law: (i) the condition causing Valentino's purported occupancy issues emanates not from 693 Fifth, but from the pandemic wholly outside of 693 Fifth's control, and (ii) Valentino does not allege it has abandoned the Premises as a result of that condition (and, in fact, it has not).

By letter of June 1, 2020 (Doc. No. 9) – to which the Complaint implicitly refers (see Complaint ¶ 26) – Valentino notified 693 Fifth it intended to vacate the Premises on December 31, 2020. The letter states no basis for the threatened

departure. However, the Complaint alleges the basis is 693 Fifth's purported failure to take necessary precautions to protect Valentino from the effects of the pandemic.

Neither the Lease nor the common law support this chimerical "duty of protection" that Valentino seeks to visit upon 693 Fifth. Notably, in each of the cases Valentino cites (see Valentino Memo., pp. 14-15), the tenant alleged that the landlord had created a condition or failed to correct a condition within the landlord's control. Valentino has neither made, nor could make, any such allegation here.

No act or failure to act on 693 Fifth's part caused any detriment suffered by Valentino. Under the EOs, all businesses – except those deemed "essential" – were temporarily prohibited from on-site staffing due to the pandemic. Valentino's boutique, with typical ground floor access from the street, relies upon 693 Fifth for little beyond the continued existence of the Building.

Finally, Valentino's June 1 letter contradicts the Complaint. Cf. Noble ("[W]here there is a conflict between allegations in a complaint and the provisions of an exhibit attached to it which forms the basis for the complaint, the exhibit controls."). The constructive eviction claim is legally insufficient and warrants dismissal.

E. The Frustration and Impossibility Claims Are Legally Deficient, Therefore the Rescission and Guaranty Claims, Which Derive Therefrom, Are Also Deficient.

Valentino's claims for rescission or voiding the Lease and Guaranty depend upon the underlying claims of frustration and impossibility. Consequently, dismissal of those causes of action (warranted as set forth above), leaves no pleaded basis for rescission or voiding of the Lease or the Guaranty.

Scrutiny of the Complaint paragraphs Valentino cites proves the point. For rescission, Valentino cites Complaint ¶64: "The COVID-19 pandemic, related EOs, and other governmental restrictions, have completely deprived Plaintiff, inter alia, of the beneficial use and occupancy of the Premises." Valentino Memo., p. 12. For the Guaranty, it cites Complaint ¶78: "The parties never contemplated that a world-wide COVID-19 pandemic and related EOs would utterly frustrate and/or render impracticable…and/or impossible Valentino's performance under the Lease." Valentino Memo., p. 16.

Common to each of these claims are allegations of frustration of purpose and impossibility in performance of the Lease. As demonstrated above, the frustration and impossibility causes of action are legally deficient, so, deprived of those

allegations, Valentino's rescission and Guaranty claims are deficient as well. The Court should dismiss them.[7]

F. Valentino Lacks A Basis for An Injunction.

It is undisputed that 693 Fifth has served no notice whatsoever upon Valentino that threatens the Lease or Valentino's possession of the Premises. Yet, Valentino seeks injunctive relief because "upon information and belief" 693 Fifth harbors that intention, and "the mere threat of eviction establishes a viable cause of action." Valentino Memo., p. 18.

Valentino cites a lone authority: Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19 (1984). While that Court did say: "The threat of termination of the lease and forfeiture, standing alone, has been sufficient to permit [issuance of a Yellowstone injunction]," context is essential. The "threat" there was landlord's service of a notice to cure! No such notice (or even similar notice) exists here; thus, no basis for injunctive relief.

[7] The Complaint also claims failure of consideration. Valentino's memorandum contains no defense of that claim beyond a sentence fragment indirectly addressing it. "Defendant offers not one scintilla of evidence that Valentino… anticipated a global pandemic [sic] would decimate its unique, retail boutique…." Valentino Memo., p. 13. As demonstrated above, a party's subjective understanding or estimation is not the measure. See p. 9, above. Regardless, the Lease allocates risk of a pandemic to Valentino.

G. 693 Fifth and Valentino Have No Agreement to Defer Rent.

Valentino's baseless claim of an agreement to defer two months of rent warrants refutation. The affidavit of Laurent Bergamo, Valentino's CEO, includes an email purporting to evidence the parties' agreement to defer rent. (See Bergamo Aff. ¶11 and Exhibit C; Valentino Memo., p. 22).

The Lease states: "This Lease sets forth the entire agreement between the parties…and may not be altered or modified except in writing signed by both parties." Section 21.4.

No signed writing modified Valentino's rental obligations. Even so, any such "agreement," would be barred by the Lease.

The accompanying affirmation of Thomas Piquemal, Deputy CEO of 693 Fifth, confirms there was never a meeting of the minds or understanding or agreement between 693 Fifth and Valentino as to any modification of Valentino's rental obligations. In fact, Valentino rejected the proposal in Exhibit C, making a counterproposal[8] which Mr. Piquemal verbally rejected. Neither the proposal made

[8] See Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310 (1915) (offer does not ripen into contract unless acceptance exactly matches offer's terms).

in Exhibit C, nor any communication before or after, depicts a meeting of the minds or any agreement or understanding between the parties.

H. Public Policy Strongly Favors Performance of Leases, Even in The Face of Covid-19.

Valentino misguidedly claims that the pandemic was unforeseeable and that public policy therefore favors the Valentino's release from the Lease. See Valentino Memo., pp. 9-10. Such a policy would jeopardize every lease in the State of New York. Every tenant faces the pandemic and/or the resulting EOs. A release of tenants from their lease obligations would imperil landlords and lenders who have duly bargained for, and relied upon, the resulting income streams. This is not hyperbole: it would therefore imperil municipal tax bases and the ability of municipalities to provide essential services.

Tellingly, the authority that Valentino champions for this proposition – Seawright v. Board of Elections in City of New York, 2020 N.Y. Slip. Op. 02993 (Ct. of Appeals May 21, 2020) (see Valentino Memo., pp. 11, 19, 22) – directly undercuts Valentino's very position. There, the Court of Appeals declined to allow the pandemic to excuse a candidate for public office from failing to timely file nominating petitions: "The COVID-19 pandemic has undoubtedly presented uniquely challenging circumstances for…countless … candidates for public office.

Nonetheless…we remain constrained by the express directive of the Election Law…."

So too here: the pandemic offers Valentino no excuse to escape the Lease. As a matter of law: (i) the Lease, which controls, allocates to Valentino the risk of pandemics and GOs, (ii) the risks were objectively foreseeable, and (iii) since other perils were expressly contemplated in the Lease, Valentino could have guarded against them as well.[9]

[9] In its public policy argument, Valentino requests the Court take judicial notice of *pending* legislation in the State Senate that *would* require commercial landlords to mitigate damages when tenants prematurely vacate. Valentino Memo., p. 23. (There is now no such duty. Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc., 87 N.Y.2d 130 (1995) and none may ever exist).

CONCLUSION

The Court should grant the motion, together with such other appropriate relief as the Court deems just or proper.

Dated: New York, New York
September 28, 2020

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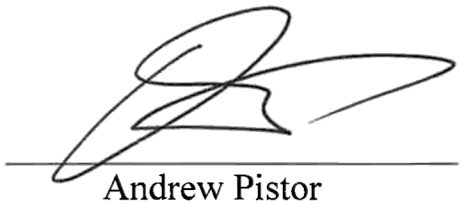
CERTIFICATION OF COMPLIANCE

WITH WORD COUNT LIMIT

I do hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table or authorities, and signature block, is 4155 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word county limit set forth in Rule 17.

Dated: New York, New York
September 28, 2020



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