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

850 THIRD AVENUE OWNER, LLC,	:	Index No. 654148/2020
Plaintiff,	:	**VERIFIED ANSWER WITH AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**
-against-	:	
DISCOVERY COMMUNICATIONS, LLC,	:	
Defendant.	:	

Defendant, Discovery Communications, LLC ("Tenant"), by and through its attorneys, Sills Cummis & Gross P.C., as and for its Verified Answer to the Verified Complaint (the "Complaint") of Plaintiff, 850 Third Avenue Owner, LLC ("Landlord"), respectfully alleges as follows:

NATURE OF THE ACTION

1. Tenant leased various floors of commercial office space at 850 Third Avenue in Manhattan pursuant to a lease with landlord that expired by its terms on May 31, 2020. Prior to the onslaught of the new coronavirus pandemic ("Covid-19 Pandemic") in New York State in early March 2020, many of Tenant's employees at the subject premises had already been working remotely. Tenant had already closed its offices at the subject premises with no intention of reoccupying them by the time Governor Andrew Cuomo issued Executive Order 202.8 on March 20, 2020 directing a 100% workforce reduction in all "non-essential" businesses in New York State (of which Tenant is one), and all of Tenant's employees thereafter worked remotely. A few employees deemed "essential" under Governor Cuomo's emergency orders continued to check the mail, maintain Tenant's IT systems, and secure the premises, as permitted by law.

2. Tenant complied with all emergency laws as required by law and its lease, and in order to protect the health, safety and welfare of its employees, which prevented Tenant's employees from entering the subject premises to remove Tenant's property and their own personal belongings prior to the lease's expiration. Although Tenant was prevented from using the subject premises, it dutifully paid Landlord all rent for March, April and May. And as a good corporate citizen and to avoid disputes like the instant action, Tenant also tried to work with Landlord on a short extension to permit its lawful entry into and removal of Tenant's property from the subject premises once Governor Cuomo lifted the emergency laws and ended the quarantine period.

3. Landlord, however, opportunistically sought in bad faith to bind Tenant to a longer extension than it needed and to extract unconscionable penalties from Tenant for any extension. When Landlord later feigned a willingness to consider a short extension, it tried to force Tenant to remove its property whether or not the emergency closure and quarantine laws had been lifted and commercial movers were permitted to operate. If Tenant failed to remove its property by Landlord's arbitrary deadline, Landlord wanted Tenant to be liable for ten million dollars in "consequential" damages, pay 200% or more of the monthly base rent amount for the entire multi-floor premises even if Tenant's property remained in a portion of the subject premises for a single day, re-write or replace sections of the lease, and waive its substantive rights. Tenant obviously could not agree to Landlord's extortionate demands.

4. The emergency quarantine, closure and work-from-home orders were in effect for ninety-four days beginning March 22, 2020 and ending June 22, 2020 (the "Quarantine Period") -- twenty-two days after the lease expiration date -- during which time Tenant's "non-essential" employees were prohibited by law and the lease from entering the subject premises to conduct

business in the ordinary course. From on or about March 20, 2020 to May 17, 2020, commercial moving companies were also prohibited by law from conducting business. Upon information and belief, they were first designated as an "essential" business on May 18th and permitted to operate where "necessary to maintain the safety, sanitation, and essential operations" of a business.

5. New York City was partially reopened for Phase 2 on June 22nd and, upon information and belief, commercial moving companies were then free to operate without these restrictions for those business that were permitted to reopen. As part of the Phase 2 reopening, offices were permitted to reopen for business at a fifty percent reduced workforce capacity, and Tenant's "non-essential" employees were therefore permitted to access the subject premises to begin to remove Tenant's property.

6. Because the Covid-19 Pandemic and the emergency quarantine, closure and work-from-home orders, among other things, were not within the parties' control and caused labor shortages (commercial moving companies), the lease's force majeure provision (Section 26.3) extended Tenant's time to remove its property from the subject premises on a day-for-day basis commensurate with the ninety-four day Quarantine Period (the "Force Majeure Extension Period"). Tenant therefore had an additional ninety-four days beyond the May 31st lease expiration date -- or until September 2, 2020 -- to remove its property from the subject premises.

7. Once the emergency quarantine, closure and work-from-home orders were lifted on June 22nd, Tenant moved post-haste and removed its property from the subject premises by July 27, 2020, well within the Force Majeure Extension Period, as per the lease. Tenant is not liable to pay June or July rent, in any amount, because it complied with the lease and did not holdover. Landlord, however, breached the lease by unlawfully retaining $833,869.59 that

Tenant inadvertently paid Landlord for June "rent," and unlawfully drawing-down Tenant's $829,581.42 letter of credit, which it purportedly applied to the July "rent" which was not due or owing.

8. Knowing full well that the Covid-19 Pandemic, the Governor's emergency shut down and quarantine orders, and the lease's compliance with laws provision prevented Tenant from removing its property from the subject premises by the May 31st lease expiration date, Landlord brought this action seeking to recover $843,971.81 in allegedly unpaid "holdover" penalty rent pursuant to Section 22 of the lease, and baselessly alleging that Tenant is trying to get over on Landlord and welch on its obligations.

9. At all times, however, Tenant acted in accordance with the law and its lease to protect the health, safety and welfare of its employees and invitees to the subject premises, and is not liable for these or any other sums. The Court should therefore issue a declaratory judgment that Tenant fully complied with the lease, was never a holdover, and owes no money to Landlord. It should also enter judgment for $1,663,449.01 in favor of Tenant on its counterclaims, because Tenant timely removed its property from the subject premises well within the Force Majeure Extension Period as per the lease, and Landlord unlawfully refuses to return Tenant's money.

ANSWER

10. Denies the allegations in Paragraphs 1, 2, 3, 4, 5, 6, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 34, 35, 38, 43, 47, 48, 49, 50, 51, 53, 61, 62, 63, 64, 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91 and 92 of the Complaint.

11. Admits the allegations in Paragraphs 71 and 82 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 7, 52, 54, 55, and 56 of the Complaint.

13. Denies the allegations in Paragraphs 11, 12, 13, 14, 27, 28, 29, 30, 31, 32, 33, 36, 37, 40, 41, 42, 43, 44, 45, 46, 57, 58, 59 and 60 of the Complaint, and respectfully refers the Court to the documents referenced for their contents, terms and/or provisions.

14. The allegations in Paragraphs 9, 10, 72, 73, 83, 84 and 89 of the Complaint state legal conclusions to which no response is required. To extent these paragraphs could be construed as requiring a response, denies those allegations.

15. Denies the allegations in Paragraph 8 of the Complaint, except admits that Tenant was a lessee of commercial office space at 850 Third Avenue, New York, New York pursuant to a lease with Landlord, and that Tenant, along with its affiliates, is a global mass media company, whose portfolio of networks includes prominent nonfiction television brands such as Discovery Channel, TLC, Animal Planet, Investigation Discovery, Science Channel, Food Network, HGTV, and Travel Channel, among others.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 39 of the Complaint, except admits that Landlord drew-down on Tenant's letter of credit in July 2020, and avers that same constitutes a breach of the lease by Landlord.

17. Denies the allegations in Paragraph 41 of the Complaint, except admits that Tenant paid Landlord $60,334.95 for extra charges for which it had been billed by Landlord.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in footnote 1 to Paragraph 46 of the Complaint, and respectfully refers the Court to the documents referenced for their contents, terms and/or provisions, except admits that Tenant removed all of its property from the Premises on or about July 27, 2020.

19. In response to Paragraphs 70 and 81 of the Complaint, Tenant repeats and realleges each of the response contained herein and incorporates same by reference as if fully set forth herein.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

20. The Complaint and each of the causes of action therein fail to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

21. The Complaint and each of the causes of action therein are barred in whole or in part by documentary evidence, including but not limited to, the lease.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

22. By reason the Covid-19 Pandemic and the emergency Executive Orders issued by New York State and New York City governmental authorities having jurisdiction over the subject premise and the building in which it is located, Section 26.03 of the lease (the force majeure provision) extended Tenant's time, if any, to remove its property from and to deliver the subject premises to Landlord in the condition required by the lease within the ninety-four day Force Majeure Extension Period, or by September 2, 2020.

23. Tenant fully complied with the lease by removing its property from the subject premises by July 27, 2020, or thirty-seven days before the expiration of the Force Majeure Extension Period on September 2, 2020.

24. By reason of the foregoing, Tenant did not "hold over" and no rent (in any amount) came or is due for June and/or July 2020.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

25. Section 22 of the lease, entitled "Holding Over," by its terms only applies "[i]f Tenant fails to surrender all or any part of the Premises at the termination of this Lease, . . ."

26. Landlord did not terminate the lease; the lease expired pursuant to its terms.

27. By reason of the foregoing, Section 22 of the lease is inapplicable and Tenant is not liable for any penalty "holdover" amounts.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

28. Section 25 of the lease, entitled "Surrender of Premises," by its terms only applies "[a]t the termination of this Lease or Tenant's right to possession."

29. The lease and Tenant's right to possession were not terminated; the lease expired pursuant to its terms.

30. By reason of the foregoing, Section 25 of the lease is inapplicable and Tenant is not liable for any rent or penalty "holdover" rent.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

31. Tenant was prevented by law and the lease from entering the subject premises to remove its property therefrom prior to the expiration of the lease term on May 31, 2020.

32. Tenant also was prevented by law and the lease from hiring commercial movers to remove its property for non "essential" purposes and from entering the subject premises at all times prior to June 22, 2020.

33. By reason of the foregoing, Tenant is not liable for any rent or penalty "holdover" rent for June and July 2020.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

34. The Complaint and each of the causes of action therein are barred in whole or in part by the doctrine of impossibility.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

35. The Complaint and each of the causes of action therein are barred in whole or in part by the doctrine of impracticability.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

36. The Complaint and each of the causes of action therein are barred in whole or in part by the doctrine of frustration of purpose.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

37. The Complaint and each of the causes of action therein are barred in whole or in part by the doctrine of unclean hands, waiver, estoppel, and/or ratification.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

38. Any alleged nonperformance by Tenant was excused by Landlord's own culpable conduct, nonperformance or breach of the lease.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

39. Any alleged breach of the lease by Tenant was immaterial.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

40. Landlord did not sustain any actual damages by reason of Tenant's alleged breach of the lease.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

41. The Complaint and each of the causes of action therein are barred in whole or in part due to Landlord's failure to mitigate any alleged damages it claims to have sustained which includes, but is not limited to, Landlord's failure to exercise its remedies to remove Tenant's property as per Section 25 of the lease.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

42. If, and only if, the Court finds the lease's force majeure provision to be inapplicable, then, among other things, Landlord's (i) acceptance of the base rent, without objection, for the month of June 2020; (ii) billing Tenant for the July 2020 base rent amount; (iii) requesting Tenant pay the July base rent amount; and (iv) draw-down of Tenant's letter of credit and application of same to the July base rent, created a month-to-month tenancy for the months of June and July 2020.

43. By reason of the foregoing, Tenant is not a holdover and is not liable for the holdover penalty amounts in Section 22 of the lease, or use and occupancy.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

44. If, and only if, the Court finds the lease's force majeure provision to be inapplicable: accord and satisfaction.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

45. If, and only if, the Court finds the lease's force majeure provision to be inapplicable: payment.

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

46. If, and only if, the Court finds the lease's force majeure provision to be inapplicable, then the alleged holdover provision and rent amount constitute a penalty and are unenforceable.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE

47. If, and only if, the Court finds the lease's force majeure provision to be inapplicable, then assuming Tenant held over in occupancy of the subject premises, Landlord is only entitled to recover the reasonable value of Tenant's use and occupancy of the subject premises, which is less than the amounts sought in the Complaint.

RESERVATION OF RIGHTS

48. Tenant reserves the right to modify or assert additional affirmative defenses as may be appropriate based upon the facts or issues disclosed or discovered during the course of additional investigation or discovery.

FACTS APPLICABLE TO ALL COUNTERCLAIMS

PARTIES

49. Tenant is a foreign limited liability company organized and existing under the laws of the State of Delaware and authorized to do business in the State of New York, with a place of business located at 8403 Colesville Avenue, Silver Spring, Maryland 20910.

50. Upon information and belief, Landlord is a foreign limited liability company organized and existing under the laws of the State of Delaware and authorized to do business in the State of New York, with a place of business at 1384 Broadway, New York, New York 10018.

A. The Lease

51. In or about June 2004, Tenant and Landlord and/or their predecessors-in-interest entered into that certain Office Lease Agreement, made and entered into as of June 27, 2004, as same was amended by that certain (i) First Amendment, made and entered into as of March 31, 2012; (ii) Second Amendment, made and entered into as of June 21, 2012; (iii) Third Amendment, made and entered into as of September 27, 2012; (iv) Fourth Amendment, made and entered into as of January 30, 2015; (v) Fifth Amendment to Office Lease Agreement, dated as of March 27, 2017; (vi) Sixth Amendment to Office Lease Agreement, dated as of October 1, 2017; and (vii) Seventh Amendment to Office Lease Agreement, dated as of May 14, 2018 (collectively, the "Lease"), for space on the second, fifth, sixth, seventh, eighth, tenth, and

eleventh floors, as well as certain storage space (collectively, the "Premises") in the building located at 850 Third Avenue, New York, New York (the "Property").

52. Section 4 of the Lease, entitled "Rent," provides in relevant part, as follows:

> Tenant shall pay Landlord, without any setoff or deduction, unless expressly set forth in this Lease, all Base Rent and Additional Rent due for the Term.

53. Section 1.06 of the Lease defines "Term" as:

> A period of 191 months. Subject to Section 3, the Term shall commence on July 1 2004 (the "Commencement Date") and, **unless terminated early in accordance with this Lease**, end on May 31, 2020 (the "Termination Date"). (emphasis added)

54. Section 5 of the Lease, entitled "Compliance with Laws; Use," provides in Section 5.01 in relevant part, as follows:

> . . . **Tenant shall comply with all** statutes, codes, ordinances, **orders, rules and regulations of any municipal or governmental entity**, city or borough department, boards, agencies, offices, commissions and subdivisions thereof, any public or quasi-public authority, **or as promulgated by any official thereof with jurisdiction over the Property and/or the parties whether in effect now or later,** including the American with Disabilities Act ("Laws") **regarding the operation of Tenant's business and the use,** condition, configuration **and occupancy of the Premises**. . . (emphasis added)

55. Section 18 of the Lease, entitled "Event of Default," provides in Section 18.01 in relevant part, as follows:

> Each of the following shall be a "Default:" (a) Tenant's failure to pay any portion of Rent when due, if the failure continues for 5 days after written notice to Tenant ("Monetary Default");

56. Section 19 of the Lease, entitled "Remedies," provides in Section 19.01 for Landlord's remedies in the event of a Default, in relevant part, as follows:

> Upon Default, Landlord shall have the right to pursue any one or more of the following remedies:

> (a) **Terminate this Lease**, in which case Tenant shall immediately surrender the premises to Landlord. . . .
>
> (b) **Terminate Tenant's right to possession of the Premises** and, in compliance with Law, remove Tenant, Tenant's Property and all parties occupying the Premises. . . . (emphasis added)

57. Section 22 of the Lease, entitled "Holding Over," provides:

> If Tenant fails to surrender all or any part of the Premises **at the termination of this Lease**, occupancy of the Premises **after termination** shall be that of a Tenancy at sufferance. Tenant's occupancy shall be subject to all the terms and provisions of this Lease, and (a) during the first 90 days of any such holdover Tenant shall 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 preceding the holdover…. (emphasis added)

58. Section 22 of the Lease, by its terms, applies only where the Lease has been "terminated."

59. The Lease permits Landlord to terminate the Lease pursuant to Section 19 only following a Default, as that term is defined in Section 18 of the Lease.

60. Section 22 of the Lease, by its terms, does not apply where the Lease Term has expired.

61. The Lease expired pursuant to its terms on May 31, 2020.

62. The Lease was not terminated by Landlord on or before May 31, 2020.

63. By reason of the foregoing, Section 22 is inapplicable and Landlord may not invoke or rely upon it to recover penalty holdover rent from Tenant.

64. Section 25 of the Lease, entitled "Surrender of Possession," provides in relevant part, as follows:

> **At the termination of this Lease or Tenant's right of possession,** Tenant shall remove Tenant's Property from the Premises, and quit and surrender the Premises to Landlord, broom clean, and in good order, condition and repair, ordinary wear and

> tear excepted. **If Tenant fails to remove any of Tenant's Property within 5 Business Days after termination of this Lease or Tenant's right to possession,** Landlord, at Tenant's sole cost and expense, shall be entitled (but not obligated) to remove and store Tenant's Property. Landlord shall not be responsible for the value, preservation or safekeeping of Tenant's Property. Tenant shall pay Landlord, upon demand, the expenses and storage charges incurred. If Tenant fails to remove Tenant's Property from the Premises or storage, within 30 days after notice, Landlord may deem all or any part of Tenant's Property to be abandoned and title to Tenant's Property shall vest in Landlord. (emphasis added)

65. The language in Section 25 of the Lease, i.e., "the termination of this Lease or Tenant's right of possession," tracks verbatim the language of Section 19 of the Lease providing for Landlord's remedies in the event of a Default.

66. Section 25 of the Lease, by its terms, applies only when the Lease or Tenant's right to possession has been "terminated."

67. Section 25 of the Lease, by its terms, does not apply when the Lease Term has expired.

68. Landlord did not terminate the Lease or Tenant's right to possession on or before May 31, 2020.

69. The Lease expired by its terms on May 31, 2020.

70. By reason of the foregoing, Section 25 of the Lease is not applicable and Landlord may not invoke or rely upon Section 25 of the Lease to recover rent or penalty holdover rent from Tenant.

71. Even if Section 25 of the Lease was applicable to lease expiration, Tenant's time to remove its Property is not coextensive with Tenant's possession of the Premises.

72. Section 25 of the Lease affords Tenant an additional five (5) business day grace period to remove its Property from the Premises past the termination of its right to possession or a termination of the Lease.

73. Upon information and belief, both Landlord and its predecessors were sophisticated entities represented by able and competent counsel during the negotiation and drafting of the Lease.

74. Upon information and belief, the Lease was drafted by Landlord.

75. Upon information and belief, when Landlord intended a provision of the Lease to apply to both the termination and expiration of the Lease, Landlord expressly provided for same in unequivocal language within the body and the four corners of the Lease.

76. Such provisions of the Lease include, but are not limited to, Section 5.02 ("The Report and any copies made from the Report are the Property of Landlord and shall be returned by Tenant or destroyed by Tenant upon **the termination or expiration of the Lease**"); Section 26.06 ("The expiration of the Term, whether by lapse of time, termination or otherwise, shall not relieve either party of any obligations which accrued prior or which may continue to accrue after **the expiration or termination of this Lease**"); Exhibit F to Lease, at Section 3.06 ("The Dish/Antenna, the appurtenances and the Aesthetic Screening, if any, shall remain the property of the Tenant, and shall be removed by Tenant at its own expense at **the expiration or earlier termination of the Lease or Tenant's right to possession hereunder**"); Exhibit F to Lease, at Section 5.02 ("Landlord, upon **the expiration date or sooner termination of this Lease**. . ."); and Exhibit F to Lease, at Section 6.03 ("Notwithstanding anything herein to the contrary, **if the Existing Lease terminates (or the existing tenant's right to possession is terminated) prior to its stated expiration date** due to a default by the tenant under the Exhibit Lease, . . ."). (emphasis added).

77. Even if Section 25 of the Lease was applicable to the expiration of the Lease, Section 26.03 of the Lease contains a force majeure provision which extends the time for which Tenant is required to take any action that may be required by the Lease, providing as follows:

> Whenever 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)

78. Upon information and belief, the provision "and other causes beyond the reasonable control of the performing party" was included as a force majeure event to deal with any situation not specifically enumerated therein that was beyond the reasonable control of the performing party.

79. Upon information and belief, nothing in Section 26.03 specifically limits the provision "and other causes beyond the reasonable control of the performing party" to the items previously enumerated therein, and such a construction would render it meaningless and superfluous.

80. Exhibit F to the Lease, in Section 1.01, deals with Tenant's letter of credit as security, and provides in pertinent part, as follows:

> Concurrently with Tenant's execution of this Lease, Tenant shall deliver to Landlord, as collateral for the full performance by Tenant of all its obligations under the Lease and for all losses and damages Landlord may suffer as a result of any Monetary Default by Tenant under the lease ….a 'Letter of Credit'" (the "Letter of Credit").

81. Exhibit F to the Lease, in Section 1.01, provides that the original face amount of the Letter of Credit was $1,659,162.83.

82. Exhibit F to the Lease, in Section 1.06, provides for a reduction in the original face amount of the Letter of Credit to $829,581.42, effective as of August 1, 2010 (the "Letter of Credit Amount").

83. Exhibit F to the Lease, in Section 1.02, provides in relevant part that "Landlord shall have the immediate right to draw upon the Letter of Credit, in whole or in part, at any time and from time to time (i) if a material Default or Monetary Default occurs . . ."

84. The Lease does not define the term "material Default."

85. Section § 18.01 of the Lease, in subsection (b), generally defines the term "Default" as "Tenant's failure (other than a Monetary Default) to comply with any material term, provision, condition or covenant of this Lease, if the failure is not cured within 30 days after written notice to Tenant…."

86. Section 26.02 of the Lease provides in relevant part that "if either party institutes a suit against the other for violation of or to enforce any covenant, term or condition of the Lease, the prevailing party shall be entitled to all of its costs and expenses, including, without limitation, reasonable attorneys' fees."

B. Tenant's Pre-Covid-19 Pandemic Plans to Consolidate its Offices Prior to the Expiration Date of the Lease on May 31, 2020

87. Long before the onset of the Covid-19 Pandemic, Tenant began exploring its long term real estate needs, which included the possibility of consolidating its various offices in Maryland and New York into a single building located in New York City for use as its headquarters. Tenant explored other alternatives, such as consolidating some of Tenant's offices into the Property for use as a sub-headquarters, or subleasing other space.

88. Contrary to the allegations in the Complaint, Tenant did not repeatedly "change its mind" or "flip-flop" in its dealings with Landlord or with respect to the Premises. Tenant

pursued a rational and methodical determination of its space needs, and was willing and prepared to remove its property from the Premises prior to the stated Lease expiration date of May 31, 2020 had it not been prevented from doing so by the Covid-19 Pandemic, labor shortages (unlawful for commercial moving companies to operate), and events beyond the parties' control.

89. As part of investigating its real estate needs and requirements, in or about July 2019 Tenant submitted an RFP to Landlord for the possibility of taking additional space at the Property and for extending the Lease.

90. In or about September 2019, Tenant determined that the Property was insufficient for its long term space needs, and determined not to renew the Lease or take additional space at the Property.

91. Tenant leased space at 230 Park Avenue South in Manhattan for a planned occupancy in May 2020, or before the stated Lease expiration date of May 31, 2020.

92. At or about this time, Tenant's employees at the Premises and elsewhere started to work remotely.

93. Due to the possibility of construction delays at its newly leased space, in or about December 2019 Tenant sought to extend the Lease for two months to July 31, 2020 for only a portion of the Premises (two floors), since it no longer needed the entire Premises and intended to vacate the remainder of the Premises by the lease expiration date.

94. Landlord expressed interest in extending the Lease for two floors (7 and 8), but wanted a longer four month term ending on September 30, 2020, which was embodied in a draft proposed Eighth Amendment to the Lease that Landlord sent to Tenant in January 2020.

95. Even though Tenant would be vacating five of the seven floors it occupied, Landlord's proposed lease extension agreement required Tenant (i) to keep in place the entire

Letter of Credit Amount for the entire Premises throughout the extended Lease term; (ii) to agree to re-write and replace Section 22 (holdover provision) to waive Tenant's procedural and substantive rights and to pay increased holdover penalties; and (iii) to permit Landlord to expand the scope of Section 22 by making it applicable in certain respects to the expiration of the Lease (not just to termination, as presently drafted).

96. Upon information and belief, any short term Lease extension required only a simple amendment providing for the extended term, identifying the floors to be occupied during the extended term, and a pro-rata reduction in the Letter of Credit Amount to cover only the occupied floors.

97. While Tenant was considering the draft, Landlord abruptly changed its position and insisted on a seven month extension period ending on December 31, 2020, even though Tenant had no need for the space.

98. While Tenant continued to follow up about a short extension, Landlord indicated on February 14, 2020 that it might be agreeable to one if Tenant agreed to pay $10,000,000.00 in consequential damages and other sever penalties in the event Tenant failed to timely vacate. Tenant refused to assume such an exorbitant liability for a short extension for two floors, and the negotiations ended.

99. As events would later show, this was a harbinger of things to come once the Covid-19 Pandemic took hold in New York, and the emergency lockdowns orders were issued and in place. During the Quarantine Period, Tenant tried in good faith to negotiate a short lease extension for the removal of its property until the emergency orders were lifted to avoid disputes like the instant action. Landlord, however, sought to impose unconscionable penalties on Tenant if it did not remove its property even if the emergency lockdown orders were still in effect and

commercial moving companies were still prohibited from operating, and would repeatedly agree to things verbally only to renege time and again in its written proposed draft lease extension agreements.

C. Events Occur Beyond the Parties' Control and Commercial Moving Companies Are Prohibited From Operating (Labor Shortages): The Covid-19 Pandemic And Emergency Lockdown Orders

100. Soon thereafter, events took place outside of the parties' control which also produced labor shortages -- the COVID-19 Pandemic slammed the nation, with New York State and City as its epicenter.

101. Beginning in late January 2020, the global Covid-19 Pandemic suddenly emerged as a historically unprecedented public health crisis with world-wide repercussions. The United States' west coast bore the initial brunt of the pandemic, but in a few short weeks the epicenter of the pandemic had shifted to New York State and the City.

102. In March 2020, New York State imposed unprecedented and drastic limitations and lockdowns on such day-to-day activities such as going to work, school, eating at restaurants, going to public parks, etc., to protect the health, life and safety of its inhabitants and visitors. Businesses, schools, courts, government, recreational facilities, Broadway and sporting events, among other things, were closed, radically disrupting society and everyday life as we knew it.

103. Hospitals were overwhelmed and overflowing with the sick and dying. Mobile morgues were set up. The streets of New York City were like a ghost-town, with MTA ridership plunging by 90% or more, hotels shuttered, and retail store windows boarded up. Common everyday items like toilet paper, paper towels, cleaning supplies, pasta, and canned and frozen goods were in short supply if they could be found at all. Construction was halted. All non-essential employees were directed to stay home and work remotely if possible.

104. Recognizing the Covid-19 Pandemic as a serious threat to human health, life and safety, on March 7, 2020 Governor Cuomo issued Executive Order 202 declaring a State disaster emergency for the entire State of New York.

105. On March 12, 2020, Mayor Blasio declared a state of emergency for New York City.

106. And, on March 13, 2020, President Donald Trump declared a national state of emergency.

107. New York City public schools closed as of March 16, 2020. All nonessential businesses in New York were quickly shuttered by a series of executive orders issued shortly thereafter by Governor Cuomo.

108. On March 18, 2020, Governor Cuomo issued Executive Order 202.6, taking the historically unprecedented step of directing all businesses in New York State, except for certain businesses deemed "essential," to reduce their in-person workforce by fifty percent beginning March 20, 2020 at 8:00 p.m. and through April 17, 2020, and directing that all "non-essential" employees telecommute or work from home to the maximum extent safely possible.

109. Recognizing that this Executive Order did not go far enough, Governor Cuomo issued Executive Order 202.7 the next day on March 19, 2020 requiring all nonessential businesses to reduce their in-person workforce by seventy-five percent beginning on March 21, 2020 at 8:00 p.m. through April 18, 2020, and again directing that all "non-essential" employees telecommute or work from home.

110. The following day, March 20, 2020, Governor Cuomo issued his most comprehensive shut down order yet -- Executive Order 202.8 -- requiring all "non-essential" businesses to reduce their in-person workforce by one-hundred percent beginning March 22,

2020 at 8:00 p.m. through April 19, 2020, and again directing that all "non-essential" employees telecommute or work from home (the "100% Workforce Reduction Requirement").

111. The 100% Workforce Reduction Requirement was extended by, inter alia, Executive Orders 202.14, 202.18, 202.31 and remained in effect for business offices until June 22, 2020. Thus, during the Quarantine Period (March 22, 2020 through June 22, 2020), all "non-essential" business offices in New York State (including Tenant's) were under lockdown, and all "non-essential" employees were directed to work remotely.

112. The Executive Orders also placed a 90-day moratorium on all commercial and residential evictions (which has since been extended), and implicitly limited the use of public transportation to "essential" workers in order to protect them while they commuted to and from their critical health, safety and sanitation jobs for the common good.

113. Ninety-four days after the Governor's emergency shut down order was issued, on June 22, 2020 the Quarantine Period was partially lifted, New York City was permitted to enter Phase 2 Reopening, and "non-essential" business offices were permitted to reopen subject to a fifty percent workforce reduction requirement and certain health monitoring guidelines.

D. The Emergency Lockdown Orders Prevent Tenant From Removing its Property From the Premises Prior to the Lease Expiration Date

114. Even before Governor Cuomo issued his first emergency shut down order (EO 202.6), on March 16, 2020 Tenant ceased operations at the Premises and implemented a remote work-from-home policy for its employees in order protect the lives, health and safety of its workforce.

115. Even if it wanted to remain open, Tenant was prevented from doing so because it is not an "essential" business and did not qualify for an exemption from the 100% Workforce Reduction Requirement. *See* Empire State Development, Guidance for Determining Whether a

Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders (last updated September 25, 2020), *available at* https://esd.ny.gov/guidance-executive-order-2026 (the "Essential Business Guidance").

116. The Essential Business Guidance did, however, permit "non-essential" businesses such as Tenant's to have certain employees and vendors continue to show up for work and to enter the Premises to perform limited services deemed "essential," such as maintenance, security, checking mail, sanitation and/or technology support.

117. Tenant complied with all Executive Orders, including the 100% Workforce Reduction Requirement because it is not an "essential" business as defined by the Essential Business Guidance. As a result, Tenant was prevented by both the law and the Lease from permitting its "non-essential" employees to access the Premises during the Quarantine Period for the purpose of preparing to remove Tenant's property from the Premises.

118. Upon information and belief, if Tenant permitted its "non-essential" employees to enter the Premises for this purpose or to actually remove Tenant's property from the Premises during the Quarantine Period, it would have violated the Executive Orders, the law and the Lease. It also would have, in Tenant's view, represented an unacceptable threat to the life, health and safety of its employees, which Tenant was not going to risk,

119. Landlord's Complaint asserts that hundreds of Tenant's employees entered the Premises during the Quarantine Period, such that Tenant could have moved its property out by the May 31st Lease expiration date if it so chose. However, only Tenant's "essential" employees and vendors entered the Premises to check mail, provide IT support, and to engage in other permitted essential services in a safe, socially distant and limited basis, as permitted by law.

120. In addition to preventing Tenant's non-essential employees from entering the Premises, the 100 % Workforce Reduction Requirement also resulted in Tenant being subjected to labor shortages because commercial movers were not permitted to operate, which also prevented Tenant from removing its property from the Premises prior to the May 31st Lease expiration date.

121. Upon information and belief, the Essential Business Guidance initially exempted only residential moving companies from the 100% Workforce Reduction Requirement, but only to the extent they were "necessary to maintain the safety, sanitation and essential operations of residences."

122. Upon information and belief, the Essential Business Guidance were later updated and revised on May 18, 2020 to specifically designate commercial moving companies as an "essential" business, but only to the extent they were "necessary to maintain the safety, sanitation and essential operations of . . . businesses."

123. Upon information and belief, if commercial moving companies had been designated an "essential" business in the Essential Business Guidelines prior to May 18th, there would have been no need to amend the guidelines to add them as a specifically designated "essential" business at that time.

124. Removal of Tenant's property from the Premises was not "necessary to maintain the … safety, sanitation and essential operations" of Tenant's business prior to Phase 2 reopening.

125. As a result, upon information and belief, it would have been unlawful for a commercial moving company to remove Tenant's property during the Quarantine Period.

126. Tenant therefore suffered labor shortages and was otherwise prevented for causes beyond Tenant's reasonable control from lawfully engaging a commercial moving service to remove its property from the Premises at all times during the Quarantine Period.

127. Once the Quarantine Period was lifted on June 22nd, Tenant was still required by law and the Lease to ensure that its employees entered the Premises in a safe and socially distant manner for these purposes, to avoid any risk to the health, life and safety of Tenant's employees and vendors.

E. Tenant's Attempts to Negotiate a Short-Term Lease Extension During the Quarantine Period and 100% Workforce Reduction Requirement

128. Tenant recognized the extraordinary and unprecedented nature of the Covid-19 Pandemic and the effects it and the Governor's emergency lock-down orders had and would have on its business and employees, New York City, New York State, the nation and the world.

129. Upon information and belief, Landlord, however, myopically viewed these events through the prism of its own self-interest and to see how it could make more money in the face of the emergency shut down orders and their effect on the New York commercial real estate market.

130. Tenant has never asserted that the Covid-19 Pandemic or force majeure suspended its obligation to pay rent. Despite the fact that Tenant ceased business operations at the Premises in mid-March 2020 and that all of its employees worked remotely (except those deemed "essential"), Tenant timely paid Landlord the rent each month for March, April and May 2020.

131. On or about March 18, 2020, Tenant reached out to Landlord to discuss a short term extension of the Lease in the event the emergency shut down orders prevented it from removing its property from the Premises by the May 31st Lease expiration date. Tenant sought

such an extension as a good corporate citizen and to avoid a dispute with the Landlord (such as the instant action), and to give it time to remove its property within a reasonable time once it became legally permissible for Tenant's employees to safely enter the Premises.

132. In exchange for a short extension, Tenant was willing to pay Landlord rent while its property remained in the Premises, although Tenant had no legal obligation to do so.

133. In April 2020, Tenant initially suggested a sixty day extension to July 31, 2020 on the assumption that the 100% Workforce Reduction Requirement would not be extended beyond mid-June 2020. Landlord, however, initially insisted on a six month extension to December 31, 2020 in an attempt to obtain additional rents in what clearly was a down if not dead commercial office lease market.

134. Landlord then seemingly was willing to give a two month extension, but again on onerous, unconscionable and punitive terms, such as requiring Tenant to (i) increase the Letter of Credit Amount by $912,222.17 to $1,714,804.16; (ii) agree to rewrite and replace Section 22 (holdover provision); and (iii) be liable for consequential damages.

135. As the negotiations continued, Landlord would seemingly verbally agree to one thing, but then send a proposed lease amendment including new and different punitive terms that the parties never discussed.

136. On or about April 29, 2020 Tenant wrote to remind Landlord that it had closed its offices at the Premises and that it had no plans to reoccupy the space. Tenant further advised Landlord that its employees would continue to work remotely until its new space was ready, and that its plans for the Premises were simple: Tenant would have movers in the Premises to remove Tenant's property as soon as the law permitted it to do so.

137. Consistent with the law and this approach, on April 24, 2020 Tenant proposed, among other things, an extension that would terminate on the later to occur of July 31, 2020 or sixty days after the date Tenant is first permitted by law to enter and to engage others to enter the Premises for the purposes of removing Tenant's property therefrom.

138. Landlord, however, gave no thought to the life, health and safety of Tenant's or its vendors' employees, and insisted on a firm, set expiration date notwithstanding that Tenant was prohibited by law from entering the Premises or hiring a commercial moving company. Landlord also sought to extract even greater penalties (200% base rent) if Tenant failed to vacate by Landlord's arbitrary deadline whether or not the law allowed.

139. Even though Tenant needed a minimum of sixty days to remove its property once it became legally permissible to do so, Tenant offered to shorten the period to forty-five days and to pre-pay the June and July rental. Landlord feigned sympathy to the predicament the Covid-19 Pandemic and emergency shut down orders put Tenant in, but still insisted on a short fixed two month extension to July 31, 2020 despite the fact that the Covid-19 Pandemic was raging and decimating New York City and its inhabitants, and wanted the parties to "reevaluate " the situation later under the threat of a 200% rent penalty if no further extension agreement could be reached.

140. Landlord's next extension proposal would permit Tenant to remove its Property no later than August 31st (three months), but if Tenant stayed even one day longer for any reason (including complying with Governor Cuomo's Emergency Orders or any other laws), then Tenant would need to agree that it would be "deemed" to be holding over and that it would be liable to pay 200% of the base rent amount for the entire month.

141. Landlord's proposed lease amendments consistently tried to expand the scope of Section 22 by making it applicable to Lease "expiration," thereby implicitly conceding that it currently applies only to a Lease "termination." Landlord also sought to remove the force majeure provision's coverage then in effect and to the corresponding extension of Tenant's time, if any, to comply with Section 25, thereby implicitly conceding its applicability to the situation in which Tenant was thrust beyond its control.

142. Landlord also sought to add a new provision to Section 25 of the Lease by making Tenant's removal of its property "time of the essence." While the Complaint contains page after page of unsupportable allegations that Tenant tried to take advantage of Landlord during the 100% Workforce Reduction Requirement, in April 2020 -- when the coronavirus was killing approximately 300-500 New Yorkers per day -- Landlord proposed fixed extensions requiring Tenant to choose between breaking the law and endangering the lives of its employees and vendors or making Tenant pay unconscionable exorbitant financial penalties if Tenant for whatever reason failed to remove its property -- even if the Covid-19 Pandemic worsened in the Summer of 2020 and the 100% Workforce Reduction Requirement remained in place.

143. Landlord's repeated opportunistic and punitive overreaching led Tenant to conclude that further negotiations would be pointless. Accordingly, by letter dated May 15, 2020, Tenant advised Landlord that: (a) it was terminating the parties' negotiations to extend the Lease; (b) it would have removed all personal property from the Premises by May 31, 2020 but for the 100% Workforce Reduction Requirement; (c) the force majeure provision in the Lease (Section 26.03) extended Tenant's time to take any actions, including removing Tenant's Property; and (d) the holdover provision in the Lease (Section 22) was not applicable in the event Tenant was unable to remove Tenant's property by May 31, 2020. Tenant's letter concluded by

stating that once it "is legally able to remove Tenant's Property and perform the necessary actions to surrender the Property, Tenant intends to do so promptly."

144. Landlord responded by letter dated May 20, 2020, which contains an inaccurate, self-serving and revisionist history of the parties' prior negotiations and asserts that the force majeure provision of the Lease did not apply to excuse Tenant's obligation to pay holdover rent.

145. Tenant responded by letter dated May 27, 2020, stating in pertinent part that:

> Tenant stands by the positions set forth in my May 15, 2020 letter. In short, the global coronavirus pandemic, of which New York City has been the epicenter, resulted in Governor Cuomo issuing a number of Executive Orders that have precluded Tenant from taking various actions required under the Existing Lease. In particular, Tenant has been precluded from taking the necessary steps to "remove Tenant's Property from the Premises, and quit and surrender the Premises to Landlord, broom clean, and in good order, condition and repair" by May 31, 2020. Since, for reasons beyond Tenant's control, it was precluded from taking such actions, the time period to do so has been extended pursuant to § 26.03 of the Existing Lease by the number of days that Tenant's performance has been delayed. The extended time to undertake such tasks, however, does not require Tenant to pay ***additional*** rent or make Tenant a holdover tenant subject to the provisions of § 22 of the Existing Lease.
>
> In your May 20th letter, you state that you "have been advised by counsel that the force majeure clause in the Existing Lease specifically provides that Tenant's obligation to pay Rent shall not be affected by Force Majeure and it does not extend the stated end of the term of the Existing Lease." This statement, however, misses the mark. Tenant is not claiming that its obligation to pay rent has been affected by the Existing Lease's force majeure provision. Indeed, Tenant has paid rent through the end of the lease term, *i.e.*, May 31, 2020. Moreover, Tenant is not claiming that the lease term has been extended beyond May 31, 2020. Rather, Tenant is simply pointing out, as the Existing Lease clearly provides, that Tenant's time to "remove Tenant's Property from the Premises, and quit and surrender the Premises to Landlord, broom clean, and in good order, condition and repair" has been extended pursuant to § 26.03 of the Existing Lease. And, as I stated in my May 15th letter, "once Tenant is legally able to remove Tenant's Property and perform the necessary actions to surrender the Premises, Tenant intends to promptly do so."

146. At all relevant times, Tenant complied with the law and the Lease, and sought in good faith to work out a reasonable, equitable Lease extension to deal with the dire social, economic and health upheavals caused by the Covid-19 Pandemic and the pertinent emergency shut-down orders.

F. Tenant Legally and Safely Removes its Property From the Premises Once Permitted by Law, in Compliance With the Lease

147. At the time the Lease expired, the 100% Workforce Reduction Requirement was still in effect, and Tenant was prevented by both the law and the Lease from entering the Premises for the purpose of removing Tenant's and its employees' property therefrom.

148. At all relevant times after May 31, 2020, Landlord did not object to Tenant's property being at the Premises.

149. At all relevant times after May 31, 2020, Landlord did not serve any notice upon Tenant demanding that Tenant remove its property from the Premises, or asserting that Tenant was in Default of the Lease, or asserting that Tenant was holding over in possession of the Premises by reason of Tenant's property remaining therein.

150. On June 22, 2020, New York City entered Phase 2 Reopening during which non-essential business offices were permitted to reopen, subject to a fifty percent workforce reduction requirement and health monitoring and social distancing guidelines.

151. Tenant did not reopen its offices at the Premises for the purpose of conducting business, but instead began the process of removing Tenant's property.

152. On or about June 24 , 2020, Tenant contracted with a third-party vendor who, upon information and belief, hired a commercial moving company, to remove Tenant's property from the Premises, and to put it in storage because Tenant's new leased premises was not yet ready for occupancy.

153. As of the date hereof, Tenant's property is still in storage.

154. Contrary to the Complaint's allegations, Tenant did not leave its property in the Premises during the Quarantine Period because Tenant's new space was not ready and Tenant did not want to have to move twice. Rather, Tenant's property remained in the Premises during the Quarantine Period only because it was unlawful for Tenant to enter the Premises for the purpose of removing same.

155. The actual removal of Tenant's property commenced on or about June 30, 2020.

156. On July 23, 2020, Tenant had a final walkthrough of the Premises with the Building's engineer, who advised Tenant that everything looked fine and was satisfactory.

157. On July 27, 2020 all of Tenant's Property had been removed from the Premises, which was in the condition required by the Lease.

158. The Covid-19 Pandemic and governmentally mandated closures, the 100% Workforce Reduction Requirement, and the shortages of labor due to the shutdown of commercial moving companies, together with the occurrence of events beyond the parties' control, are force majeure events that extended Tenant's time to remove its property from the Premises after the May 31, 2020 Lease expiration date for the ninety-four day Force Majeure Extension Period.

159. Once the 100% Workforce Reduction Requirement was lifted and the Quarantine Period ended on June 22nd, Tenant removed its property from the Premises in thirty-five days, or thirty-seven days before the Force Majeure Extension Period expired.

160. By reason of the foregoing, Tenant complied with the Lease, Tenant did not holdover, and Tenant is not liable to Landlord for any base or holdover rent after May 31, 2020.

G. Tenant's Inadvertent Payment of June 2020 Rent, and Landlord's Breach of the Lease by Refusing to Refund Same, and its Unlawful Draw-Down on Tenant's Letter of Credit in the Absence of a Monetary Default

161. Prior to the expiration of the Lease on May 31, 2020, Tenant's accounting department automatically paid the monthly regularly recurring rental for the Premises each month.

162. Although no rent was due and owing for June 2020, Tenant's accounting department automatically and inadvertently paid the base rent to Landlord for June 2020, in the amount of $833,867.59.

163. Landlord accepted and retained this payment, without objection.

164. Tenant demanded that Landlord return the funds.

165. Landlord refused, and still refuses, to return these funds.

166. On or about June 22, 2020, Landlord sent Tenant a rent invoice for the Premises' July 2020 base rent, in the amount set forth in the Lease.

167. Landlord's July rent invoice did not bill Tenant at the penalty holdover rate.

168. By email dated July 7, 2020, Landlord's representative advised Tenant that it had not received the July rent, which it alleged usually was processed by the first of the month.

169. Thereafter, on or about July 24, 2020 Landlord sent an amended invoice to Tenant (the "Amended July Invoice") in which it alleged for the first time that Tenant owed the sum of $1,742,812.66, representing (1) the balance of the June 2020 holdover rent amount; (2) the entire July 2020 base and holdover "penalty" rent amounts; and (3) various additional incidental charges such as freight elevator and trash removal.

170. Subtracted from the total rental claimed to be due in the Amended July Invoice was Tenant's inadvertent June 2020 base rent payment, and Landlord's draw-down of the Letter

of Credit Amount ($829,581.42) which Landlord applied to the July 2020 base rent, leaving an alleged balance of $913,231.24.

171. Upon information and belief, on or about July 22, 2020 Landlord drew-down Tenant's Letter of Credit in the amount of $829,581.42, although no Monetary Default existed, and Landlord had not served upon Tenant a written five day notice for nonpayment of rent.

172. Upon information and belief, the first time Landlord served upon Tenant a written five day notice based on Tenant's alleged nonpayment of rent was almost a month later on or about August 19, 2020.

AS AND FOR A FIRST COUNTERCLAIM
(For Declaratory Judgment)

173. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 172 hereof as if set forth fully herein.

174. Section 26.03 of the Lease contains a force majeure provision that extends Tenant's time to take any action that may be required under the Lease, including any obligation to remove its property from the Premises at the termination of the Lease, by the same number of days that it is delayed or prevented from doing so by reason of, among of the things, "shortages of labor or materials, or "any other causes beyond the reasonable control" of Tenant ("Force Majeure").

175. The Covid-19 Pandemic, Governor Cuomo's emergency shut down orders for all non-essential businesses in New York State, including Tenant's business and commercial moving companies, and the 100% Workforce Reduction Requirement, among others, constitute Force Majeure events that caused shortages of labor or materials and were beyond the reasonable control of Tenant, that delayed and/or prevented Tenant from complying with any obligation

Tenant may have had under the Lease to remove its property from the Premises on or before May 31, 2020.

176. Pursuant to the Lease and the Force Majeure provision, the time, if any, in which Tenant may have been obligated to remove its property from the Premises was extended by the Force Majeure Extension Period (the number of days the 100% Workforce Reduction Requirement and/or Quarantine Period was in effect from March 22, 2020 through June 22, 2020), or ninety-four days from June 1, 2020 to September 2, 2020.

177. Tenant removed all its property from the Premises on or before July 27, 2020, or thirty-seven days before the expiration of Force Majeure Extension Period.

178. Upon information and belief, Landlord knew and understood that the Covid-19 Pandemic, Governor Cuomo's emergency shut down orders for all non-essential businesses in New York State, including Tenant's and commercial moving companies, the 100% Workforce Reduction Requirement and/or Quarantine Period, among other things, constitute Force Majeure events that delayed and/or prevented Tenant from complying with any obligation Tenant may have had under the Lease to remove its property from the Premises on or before May 31, 2020, which is why one of its proposed draft lease amendments sought to exclude Force Majeure application to Tenant's obligations, if any, under Section 25 of the Lease.

179. By reason of the foregoing, the Lease expired on May 31, 2020, Tenant complied with the Lease and was not a holdover, the June and July 2020 rent (whether base or holdover "penalty" amounts) never became due and owing, and Tenant is not liable for same.

180. By reason of the foregoing, Landlord is obligated and required to return Tenant's inadvertent payment of $833,867.59, and the Letter of Credit Amount of $829,581.42 which Landlord unlawfully drew-down and retained in violation of the Lease.

181. Landlord has taken the position that Tenant is a holdover by reason of its failure to remove its personal property from the Premises by May 31, 2020, in violation of Section 25 of the Lease, and that Tenant is obligated to pay the holdover "penalty" rent amount for June and July 2020 pursuant to Section 22 of the Lease.

182. By reason of the foregoing, a justiciable controversy exists between the parties.

183. By reason of the foregoing, Tenant is entitled to a declaratory judgment declaring and adjudging that (i) the Covid-19 Pandemic, Governor Cuomo's emergency shut down orders for all non-essential businesses in New York State, including Tenant's business and commercial moving companies, the 100% Workforce Reduction Requirement and the Quarantine Period, among other things, constitute Force Majeure events; (ii) the time, if any, in which Tenant may have been obligated to remove its property from the Premises was extended by the Force Majeure Extension Period; (iii) Tenant complied with the Lease by timely removing its property from the Premises prior to the expiration of the Force Majeure Extension Period; (iv) Tenant was not a holdover; (v) the June and July 2020 rent (whether base or holdover "penalty" amounts) never became due and owing, and Tenant is not liable for same, or for use and occupancy for June and July 2020; and (vi) Landlord is obligated and required to return Tenant's payment of $833,867.59 and the Letter of Credit Amount draw-down in the amount of $829,581.42.

184. Tenant has no adequate remedy at law.

AS AND FOR A SECOND COUNTERCLAIM
(Declaratory Judgment)

185. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 184 hereof as if set forth fully herein.

186. Section 22 of the Lease, entitled "Holding Over," by its terms applies only in the event where the Lease has been "terminated" by Landlord.

187. Section 25 of the Lease, entitled "Surrender of Possession," by its terms applies only in the event where Landlord terminated the Lease or Tenant's right to possession.

188. Landlord did not terminate the Lease or Tenant's right to possession.

189. The Lease expired by its terms.

190. Landlord has taken the position that Sections 22 and 25 of the Lease also apply in the event the Lease expires by its terms.

191. By reason of the foregoing, a justiciable controversy exists between the parties.

192. By reason of the foregoing, Tenant is entitled to a declaratory judgment declaring and adjudging that (i) Section 22 of the Lease applies only if the Lease has been terminated by Landlord; (ii) Landlord cannot invoke or utilize Section 22 of the Lease to recover holdover rent from Tenant because the Lease was not terminated by Landlord but expired by its terms; (iii) Section 25 of the Lease applies only where the Lease or Tenant's right to possession has been terminated by Landlord; (iv) Landlord cannot invoke or utilize Section 25 of the Lease to recover rent or holdover "penalty" rent against Tenant because the Lease or Tenant's right to possession were not terminated by Landlord, but expired pursuant to its terms; and (v) Tenant is not liable for rent, holdover "penalty" rent, or use and occupancy for June and July 2020, by reason of any alleged failure to remove its property from the Premises upon the stated expiration date of the Lease on May 31, 2020.

193. Tenant has no adequate remedy at law.

AS AND FOR A THIRD COUNTERCLAIM
(In the Alternative For a Declaratory Judgment)

194. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 172 hereof as if set forth fully herein.

195. Should the Court find the Force Majeure provisions of Section 26.3 of the Lease to be inapplicable, Tenant timely paid the June base 2020 rent, in the amount of $833,867.59, which Landlord accepted and retained, without objection, and refused to return.

196. In addition, on or about June 22, 2020, Landlord billed Tenant for the July base rent, and thereafter on July 7, 2020 requested that Tenant pay the July base rent.

197. Landlord collected the July base rent by reason of its draw-down on the Letter of Credit Amount, in the amount of $829,581.42, on or about July 22, 2020, which Landlord has retained.

198. By reason of the foregoing, a month-to-month tenancy between Tenant and Landlord was created beginning on June 1, 2020, and said month-to-month tenancy continued and existed at all times until Tenant removed its property from the Premises no later than July 27, 2020.

199. By reason of the foregoing, Tenant did not hold over in possession of the Premises subsequent to May 31, 2020 without Landlord's permission and consent.

200. By reason of the foregoing, Tenant is not liable for any holdover rent pursuant to Section 22 of the Lease or use and occupancy.

201. Landlord contends that Tenant is a holdover and is obligated to pay holdover "penalty" rent pursuant to Section 22 of the Lease for the months of June and July 2020.

202. By reason of the forgoing, a justiciable controversy exists between the parties.

203. By reason of the foregoing, Tenant is entitled to a declaratory judgment declaring and adjudging that (i) Tenant was a month-to-month tenant of Landlord from June 1, 2020 to July 27, 2020; (ii) Tenant was not a holdover and is not liable for any holdover "penalty" rent pursuant to Section 22 of the Lease or to pay use and occupancy for June and July 2020; and (iii)

Tenant paid and Landlord accepted the June and July base rent, and Tenant is only obligated to pay any base rent that remains properly due unpaid for these periods.

204. Tenant has no adequate remedy at law.

AS AND FOR A FOURTH FIFTH COUNTERCLAIM
(Breach of the Lease)

205. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 193 hereof as if set forth fully herein.

206. The Lease provides that Tenant is only required to pay rent during the Term.

207. The Lease Term expired on May 31, 2020, and therefore, Tenant has no obligation under the Lease to pay rent (in any amount) for the months of June and July 2020.

208. In June 2020, Tenant inadvertently and mistakenly paid Landlord the sum of $833,867.59 for June rent.

209. Landlord was not entitled or permitted to receive rent for June 2020, and breached the Lease by refusing to refund said payment to Tenant.

210. In addition, Exhibit F of the Lease, in Sections 1.01 and 1.02, provides that Landlord could draw-down Tenant's Letter of Credit only in the event of a Monetary Default.

211. On or about July 22, 2020 Landlord breached the Lease by drawing-down Tenant's Letter of Credit, in the amount of $829,581.42, when no Monetary Default existed or was continuing.

212. By reason of the foregoing, Tenant has sustained damages in the amount of $1,663,499.01, plus interest at the statutory rate.

213. By reason of the foregoing, Tenant is entitled to judgment against Landlord in the amount of $1,663,499.01, plus interest at the statutory rate.

AS AND FOR A FIFTH COUNTERCLAIM
(Conversion)

214. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 193 hereof as if set forth fully herein.

215. Tenant retains and has a superior right to Landlord with respect to the funds constituting its inadvertent payment of $833,867.59 and the Letter of Credit Amount.

216. By reason of Landlord's unlawful retention of Tenant's inadvertent payment of $833,867.59, and its unlawful draw-down of Tenant's Letter of Credit and retention of the Letter of Credit Amount of $829,581.42, Landlord has converted and has exercised unlawful dominion and control over Tenant's property for its own uses, in violation of Tenant's rights.

217. By letter dated August 24, 2020 Tenant's attorneys demanded that Landlord return Tenant's payment of $833,867.59 and Landlord's draw-down of the Letter of Credit amount in the sum of $829,581.42.

218. Landlord failed and refused to return said sums to Tenant despite due demand therefor.

219. By reason of the foregoing, Tenant has sustained damages in at least the amount of $1,663,449.01.

220. By reason of the foregoing, Tenant is entitled to judgment against Landlord in at least the amount of $1,663,499.01 as and for compensatory damages, plus interest at the statutory rate.

221. Landlord's acts and omissions, as aforesaid, were committed knowingly, maliciously, willfully, recklessly, and in conscious disregard of Tenant's rights.

222. By reason of the foregoing, Tenant is entitled to recover punitive damages in an amount to be determined at trial.

AS AND FOR A SIXTH COUNTERCLAIM
(Money Had And Received)

223. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 193 hereof as if set forth fully herein.

224. Landlord received $1,663,499.01, which belongs to Tenant.

225. At all relevant times, Landlord has the retained, used and has benefitted from the receipt of Tenant's monies.

226. Principles of equity and good conscience do not permit Landlord to keep and retain Tenant's monies.

227. By reason of the foregoing, Tenant has sustained damages in the amount of $1,663,449.01, plus interest at the statutory rate.

228. By reason of the foregoing, Tenant is entitled to judgment against Landlord in the amount of $1,663,499.01, plus interest at the statutory rate.

AS AND FOR A SEVENTH COUNTERCLAIM
(Unjust Enrichment)

229. Tenant repeats and realleges each and every allegation contained in paragraphs 1 through 193 hereof as if set forth fully herein.

230. Landlord has been enriched by the receipt and retention of $1,663,499.01 of Tenant's monies, at Tenant's expense.

231. Principles of equity and good conscience do not permit Landlord to keep and retain Tenant's monies.

232. By reason of the foregoing, Tenant has sustained damages in the amount of $1,663,449.01, plus interest the statutory rate.

233. By reason of the foregoing, Tenant is entitled to judgment against Landlord in the amount of $1,663,499.01, plus interest at the statutory rate.

AS AND FOR AN EIGHTH COUNTERCLAIM
(For Costs and Expenses, including Attorneys' Fees)

234. Tenant repeats and realleges each and every allegations contained in paragraphs 1 through 193 and 205 through 213 hereof as if set forth fully herein.

235. Section 26.02 of the Lease provides that if either Landlord or Tenant institutes a suit against the other to enforce any covenant, term or condition of the Lease, the prevailing party shall be entitled to all of its costs and expenses, including, without limitation, reasonable attorneys' fees.

236. Landlord brought this action against Tenant, and Tenant has asserted meritorious defenses and counterclaims to enforce the terms of the Lease.

237. By reason of the foregoing, in the event Tenant is the prevailing party in this action, Tenant is entitled to judgment awarding Tenant its costs and expenses, including, without limitation, reasonable attorneys' fees, in an amount to be determined at a trial.

WHEREFORE, Tenant demands JUDGMENT, as follows

ON THE FIRST COUNTERCLAIM: a declaratory judgment declaring and adjudging that (i) the Covid-19 Pandemic, Governor Cuomo's emergency shut down orders for all non-essential businesses in New York State, including Tenant's business and commercial moving companies, the 100% Workforce Reduction Requirement and the Quarantine Period, among other things, constitute Force Majeure events; (ii) the time, if any, in which Tenant may have been obligated to remove its property from the Premises was extended by the Force Majeure Extension Period; (iii) Tenant complied with the Lease by timely removing its property from the Premises prior to the expiration of the Force Majeure Extension Period; (iv) Tenant was not a holdover; (v) the June and July 2020 rent (whether base or holdover "penalty" amounts) never became due and owing, and Tenant is not liable for same, or for use and occupancy for June and

July 2020; and (vi) Landlord is obligated and required to return Tenant's payment of $833,867.59 and the Letter of Credit Amount draw-down in the amount of $829,581.42;

ON THE SECOND COUNTERCLAIM: A declaratory judgment declaring and adjudging that (i) Section 22 of the Lease applies only if the Lease has been terminated by Landlord; (ii) Landlord cannot invoke or utilize Section 22 of the Lease to recover holdover rent from Tenant because the Lease was not terminated by Landlord but expired by its terms; (iii) Section 25 of the Lease applies only where the Lease or Tenant's right to possession has been terminated by Landlord; (iv) Landlord cannot invoke or utilize Section 25 of the Lease to recover rent or holdover "penalty" rent against Tenant because the Lease or Tenant's right to possession were not terminated by Landlord, but expired pursuant to its terms; and (v) Tenant is not liable for rent, holdover "penalty" rent, or use and occupancy for June and July 2020, by reason of any alleged failure to remove its property from the Premises upon the stated expiration date of the Lease on May 31, 2020;

ON THE THIRD COUNTERCLAIM: In the alternative, a declaratory judgment declaring and adjudging that (i) Tenant was a month-to-month tenant of Landlord from June 1, 2020 to July 27, 2020; (ii) Tenant was not a holdover and is not liable for any holdover "penalty" rent pursuant to Section 22 of the Lease or to pay use and occupancy for June and July 2020; and (iii) Tenant paid and Landlord accepted the June and July base rent, and Tenant is only obligated to pay any base rent that remains properly due and unpaid for these periods;

ON THE FOURTH COUNTERCLAIM: Judgment against Landlord the amount of $1,663,499.01, plus interest at the statutory rate;

ON THE FIFTH COUNTERCLAIM: Judgment in at least the amount of $1,663,449.01 as and for compensatory damages, plus statutory interest, together with an award of punitive damages in an amount to be determined at trial;

ON THE SIXTH COUNTERCLAIM: Judgment in the amount of $1,663,449.01, plus interest the statutory rate;

ON THE SEVENTH COUNTERCLAIM: Judgment in the amount of $1,663,449.01, plus interest the statutory rate

ON THE EIGHTH COUNTERCLAIM: Judgment awarding Tenant its costs and expenses, including, without limitation, reasonable attorneys' fees, in an amount to be determined at a trial; and

ON ALL COUNTERCLAIMS: Awarding Tenant such other and further relief which the Court deems just and proper, including its attorneys' fees, and the costs, expenses and disbursements in this action.

Dated: New York, New York
October 23, 2020

SILLS CUMMIS & GROSS P.C.

By: _____
MITCHELL D. HADDAD, ESQ.

101 Park Avenue, 28th Floor
New York, NY 10178
(212) 643-7000

Attorneys for Defendant
Discovery Communications, LLC

VERIFICATION

STATE OF TENNESSEE)
) ss.:
COUNTY OF KNOX)

LARRY LAQUE, being duly sworn, deposes and says:

1. I am the Executive Vice President - Global Real Estate & Facilities of defendant Discovery Communications, LLC, and have read the Verified Answer with Affirmative Defenses and Counterclaims, and know the contents thereof to be true, except as to those matters which are alleged upon information and belief, and as to those matters, I believe them to be true.

2. The source of my knowledge is, among other things, based on my personal knowledge, public records, and the books and record of defendant.

Larry Laque
Larry Laque

Sworn to before me this
23 day of October, 2020

Notary Public

BETTY KRACHEY
STATE OF TENNESSEE NOTARY PUBLIC
KNOX COUNTY
Online Notary Public
My Commission Expires:
Sep 26, 2023