

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**EVERLAST WORLD’S BOXING
HEADQUARTERS CORP.,**
Plaintiff,

Case No. 1:20-cv-09095-RA

-against-

**TRANSFORM SR LLC, d/b/a SEARS,
TRANSFORM KM LLC, d/b/a KMART, and
TRANSFORM SR HOLDINGS LLC,**

REPLY TO COUNTERCLAIMS

Defendants.

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Plaintiff, Everlast World’s Boxing Headquarters Corp. (“Everlast” or “Plaintiff”), by its attorneys, Schlacter & Associates, as and for its Reply to the December 11, 2020 counterclaims (“Counterclaims”) of defendants, Transform SR LLC d/b/a Sears (“Sears”), Transform KM LLC d/b/a Kmart (“Kmart”), and Transform SR Holdings LLC (“Transform SR Holdings”) (collectively “Defendants”), respectfully alleges as follows:

**COUNTERCLAIM OF TRANSFORM SR LLC, d/b/a SEARS, TRANSFORM KM LLC,
d/b/a KMART, and TRANSFORM SR HOLDINGS LLC**

NATURE OF THE COUNTERCLAIM

124. To the extent the allegations of paragraph 124 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations as stated. Plaintiff further avers that the allegations in paragraph 124 of the Counterclaims refer to the License Agreement, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

JURISDICTION AND VENUE

125. To the extent the allegations of paragraph 125 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff admits that this Court would have supplemental jurisdiction as to a valid state law claim.

126. Admits the allegations of paragraph 126.

THE LICENSE AGREEMENT AND PERFORMANCE BOND

127. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 127, and on that basis denies same.

128. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 128, and on that basis denies same.

129. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 129, and on that basis denies same.

130. Plaintiff avers that the allegations in paragraph 130 of the Counterclaims refer to the License Agreement, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

131. Plaintiff avers that the allegations in paragraph 131 of the Counterclaims refer to the License Agreement, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied. Plaintiff specifically denies that the License Agreement sets forth that the retail stores referred to therein are “first and foremost.”

132. Plaintiff avers that the allegations in paragraph 132 of the Counterclaims refer to the License Agreement, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

133. Admits the allegations of paragraph 133.

134. Admits the allegations of paragraph 134.

135. Plaintiff avers that the allegations in paragraph 135 of the Counterclaims refer to the Performance Bond executed by Transform SR Holdings on or about June 20, 2019, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

136. Plaintiff avers that the allegations in paragraph 136 of the Counterclaims refer to the Performance Bond executed by Transform SR Holdings on or about June 20, 2019, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

**THE COVID-19 CORONAVIRUS, GOVERNMENT-MANDATED STORE CLOSURES,
AND THE IMPACT ON SEARS AND KMART**

137. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 137, and on that basis denies same, except admits that COVID-19 has spread around the United States and the World.

138. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 138, and on that basis denies same, except admits that COVID-19 is highly contagious.

139. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 139, and on that basis denies same.

140. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 140, and on that basis denies same.

141. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 141, and on that basis denies same, except admits that those infected with COVID-19 may experience severe symptoms and/or die.

142. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 142, and on that basis denies same.

143. Admits the allegations of paragraph 143.

144. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 144, and on that basis denies same.

145. Plaintiff avers that the allegations in paragraph 145 of the Counterclaims refer to Executive Order 202.8 issued by New York State Governor Andrew Cuomo, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

146. Plaintiff avers that the allegations in paragraph 146 of the Counterclaims refer to Executive Order N-33-20 issued by California Governor Gavin Newsom, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied. Plaintiff denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 146 not related to Executive Order N-33-20, and on that basis denies same.

147. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 147, and on that basis denies same.

148. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 148, and on that basis denies same.

149. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 149, and on that basis denies same.

150. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 150, and on that basis denies same.

151. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 151, and on that basis denies same.

152. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 152, and on that basis denies same.

153. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 153, and on that basis denies same.

154. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 154, and on that basis denies same.

155. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 155, and on that basis denies same.

156. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 156, and on that basis denies same.

157. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 157, and on that basis denies same.

158. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 158, and on that basis denies same.

159. Admits the allegations of paragraph 159.

160. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the vague allegations of paragraph 160, and on that basis denies same.

TRANSFORM INVOKES THE FORCE MAJEURE TERM

161. Plaintiff avers that the allegations in paragraph 161 of the Counterclaims refer to a letter dated April 22, 2020, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

162. Plaintiff avers that the allegations in paragraph 162 of the Counterclaims refer to a letter dated April 22, 2020, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

163. Plaintiff avers that the allegations in paragraph 163 of the Counterclaims refer to a letter dated April 22, 2020, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

164. Plaintiff avers that the allegations in paragraph 164 of the Counterclaims refer to a letter dated April 22, 2020, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

165. Plaintiff avers that the allegations in paragraph 165 of the Counterclaims refer to a letter dated April 22, 2020, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

166. Denies the allegations of paragraph 166, except admits that a teleconference between Plaintiff, Defendants, and their representatives was conducted on or around May 13, 2020.

167. Denies the allegations of paragraph 167.

168. Denies the allegations of paragraph 168.

169. To the extent the allegations of paragraph 169 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

170. Denies the allegations of paragraph 170, except admits that, by letter dated August 27, 2020, Plaintiff terminated the License Agreement.

171. Denies the allegations of paragraph 171.

172. Denies the allegations of paragraph 172, except admits that one royalty payment for \$84,064.35 was made on or about November 30, 2020.

173. Admits the allegations of paragraph 173.

174. Denies the allegations of paragraph 174.

175. Denies the allegations of paragraph 175.

COUNT I
BREACH OF CONTRACT

176. Plaintiff incorporates by reference the responses contained in the prior paragraphs with the same force and effect as if set forth at length herein.

177. Admits the allegations of paragraph 177.

178. Denies the allegations of paragraph 178.

179. Admits the allegations of paragraph 179.

180. Denies the allegations of paragraph 180.

181. Denies the allegations of paragraph 181.

182. Denies the allegations of paragraph 182.

183. Denies the allegations of paragraph 183, and specifically denies that the Defendants are entitled to any purported relief.

COUNT II
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

184. Plaintiff incorporates by reference the responses contained in the prior paragraphs with the same force and effect as if set forth at length herein.

185. To the extent the allegations of paragraph 185 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations, except admits that New York law recognizes an implied duty of good faith and fair dealing in contracts.

186. Denies the allegations of paragraph 186, except admits that the parties agreed to the Force Majeure clause in the License Agreement, which speaks for itself. To the extent the allegations vary from that document, the allegations are denied.

187. Denies the allegations of paragraph 187, except admits that Defendants attempted to invoke the Force Majeure clause in the License Agreement to avoid their obligation to pay royalties pursuant to the License Agreement.

188. To the extent the allegations of paragraph 188 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

189. To the extent the allegations of paragraph 189 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

190. To the extent the allegations of paragraph 190 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

191. To the extent the allegations of paragraph 191 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

192. To the extent the allegations of paragraph 192 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

193. Denies the allegations of paragraph 193.

COUNT III
DECLARATORY JUDGMENT

194. Plaintiff incorporates by reference the responses contained in the prior paragraphs with the same force and effect as if set forth at length herein.

195. Plaintiff avers that the allegations in paragraph 195 of the Counterclaims refer to 28 U.S.C. § 2201, which speaks for itself.

196. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 196. Plaintiff denies the balance of the allegations of paragraph 196.

197. To the extent the allegations of paragraph 197 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

198. To the extent the allegations of paragraph 198 are deemed to be allegations of law, Plaintiff is not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Plaintiff denies the allegations.

199. Denies the allegations of paragraph 199.

200. Denies the allegations of paragraph 200.

201. Denies the allegations of paragraph 201 and upon information and belief, denies that Defendants are entitled to a trial by jury.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

202. The Counterclaims fail, in whole or in part, to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

203. The Force Majeure clause contained in Section 20 of the License Agreement does not apply to the facts or circumstances of this case, and does not exempt Defendants from having to pay Plaintiff the royalties pursuant to the License Agreement.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

204. By way of defense, Plaintiff repeats and reincorporates by reference herein, its Complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

205. By pleading the Counterclaims, Defendants do not succeed in shifting any burden of proof applicable to any of the claims in either the Complaint or the Counterclaims.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

206. Defendants Counterclaims are barred, in whole or in part, by the equitable doctrines of unclean hands, laches, waiver, mistake, and/or estoppel.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

207. At all times relevant, Plaintiff acted reasonably and in good faith and without any malice or intent to injure Defendants or to violate any applicable law.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

208. Count III of the Counterclaims is moot because the alleged controversy underlying the request for declaratory judgment is already before the jurisdiction of this Court.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

209. To the extent Defendants suffered any damages, which damages are denied, any such damages are barred and/or must be reduced on account of Defendants' failure to take reasonable steps to mitigate damages.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

210. To the extent Defendants suffered any damages, which damages are denied, any such damages were proximately and solely caused by acts or omissions of others for whom Plaintiff is neither liable nor responsible.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

211. The Counterclaims should be dismissed as duplicative of Defendants' affirmative defenses.

ADDITIONAL DEFENSES

212. Plaintiff reserves the right to assert additional defenses based on information learned or obtained during discovery and/or after investigation is complete.

WHEREFORE, Plaintiff respectfully requests this Court to dismiss the Counterclaims in their entirety, with prejudice, and award Plaintiff all of the remedies sought in the Complaint, and for such other and further relief as this Court deems just and proper.

Dated: December 30, 2020

Respectfully submitted,

SCHLACTER & ASSOCIATES
Attorneys for Plaintiff

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