

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

BROADWAY/72ND ASSOCIATES II,
LLC,

Plaintiff,

v.

BLOOMINGDALE'S, LLC (formerly
BLOOMINGDALE'S, INC.) AND
MACY'S, INC.,

Defendants.

Index No. 653760/2020

**ANSWER, SEPARATE
DEFENSES AND
COUNTERCLAIM**

Defendants Bloomingdale's, LLC (hereinafter "Bloomingdale's") and Macy's, Inc. (hereinafter "Macy's") (collectively, hereinafter occasionally the "Defendants"), through their undersigned counsel, by way of Answer to Plaintiff Broadway/72nd Associates II, LLC's (hereinafter "Plaintiff" or "Landlord") Complaint, respond as follows:

PARTIES

1. Defendants admit that Plaintiff is, on information and belief, a New York limited liability company but lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

2. Defendants admit only that at the time of filing of the Complaint, Bloomingdale's, LLC was an Ohio limited liability company. Defendants deny the remaining allegations in this paragraph.

3. Defendants admit the allegations in this paragraph.

BACKGROUND

4. Defendants admit only that Plaintiff and Bloomingdale's, Inc. were parties to a certain Lease Agreement dated March 3, 2015 (the "Lease") for certain Premises as set forth in this paragraph, but state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

5. Defendants admit only that some provisions of the Lease contain language concerning monthly payments of certain fixed annual rent, but state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

6. Defendants admit only that Article 2(B) of the Lease is quoted in part in this paragraph, but state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

7. Defendants admit only that Article 2 of the Lease contains language concerning "Additional Rent", but state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

8. Defendants admit only that Article 21(A) of the Lease contains certain language regarding certain defined "force majeure" events, but deny that such language is enforceable or requires the payment of rent in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State New York and the Mayor of the City of New York and as a matter of law, as further detailed in the Answering Defendants' Separate Defenses and Counterclaims. Defendants further state the legal import of the language, terms and provisions of the Lease involve

questions to be determined by the Court.

9. Defendants admit only that Article 21(A) of the Lease contains certain language regarding certain monetary obligations, but deny that such language is enforceable or requires the payment of rent in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

10. Defendants admit only that Article 21(A) of the lease contains certain language regarding “force majeure”, but deny that such language is enforceable or requires the payment of rent in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

11. Defendants admit only that portions of Article 21(A) of the Lease are recited in this paragraph, but deny that such language is enforceable or requires the payment of rent in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

12. Defendants admit only that portions of Article 42 of the Lease are

recited in this paragraph, but deny that such language is enforceable or requires the payment of liquidated damages in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

13. Defendants admit only that portions of the Lease refer to Plaintiff's attorney's fees or other expenses, but deny that such language is enforceable or requires the payment of such attorney's fees or other expenses in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

14. Defendants admit only that portions of Article 6(D) of the Lease are recited in this paragraph, but deny that such language is enforceable or requires the payment of attorney's fees or other expenses in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease involve questions to be determined by the Court.

15. Except to admit only that Macy's, Inc. entered into certain "guarantees", Defendants state that that the legal import of the language, terms

and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

16. Except to admit only that one “guarantee” refers to Bloomingdale’s alleged monetary obligations under the Lease, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantee involve questions to be determined by the Court.

17. Except to admit that one of the guarantees limits the amount of that guarantee to \$6,562,500, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

18. Except to admit that Section 5.13 of the two referenced guarantees contain certain language referenced in this paragraph, Defendants deny that such language is enforceable in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

19. Except to admit that Section 5.13 of the referenced guarantee contain certain language referenced in this paragraph, Defendants state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

20. Except to admit only that Section 3.1 of the referenced guarantee

contains certain language regarding Macy's alleged monetary obligations under the referenced guarantee in connection with the Lease, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantee involve questions to be determined by the Court.

21. Except to admit only that Section 3.1(b) of the referenced guarantee contains certain language recited in this paragraph, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantee involve questions to be determined by the Court.

22. Except to admit only that Section 3.1(d) of the referenced guarantee contains language referenced in this paragraph, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantee involve questions to be determined by the Court.

23. Except to admit only that Section 5.2 of the referenced guarantee contains in part the language recited in this paragraph, Defendants state that that the legal import of the language, terms and provisions of the Lease and the referenced guarantee involve questions to be determined by the Court.

24. Defendants admit only that Bloomingdale's, Inc. took possession of the Premises in 2015.

25. Defendants deny the allegations in this paragraph, and state that no payments of Rent, Additional Rent or Common Charges are due for such periods in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law.

Defendants further state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

26. Defendants deny the allegations in this paragraph.

27. Defendants deny the allegations in this paragraph.

28. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

29. Defendants deny the allegations in this paragraph, and state that no payments of rent are due for such periods in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

30. Defendants deny that any payments of rent or Common Charges are due from Defendants in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and Guarantees involve questions to be determined by the Court.

31. Defendants deny the allegations in this paragraph.

32. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

33. Defendants admit only that Plaintiff has commenced this action against Bloomingdale's, but deny the remaining allegations in this paragraph, and state that no payments of rent are due for such periods in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

34. Defendants admit only that Plaintiff has commenced this action against Macy's, Inc., but deny the remaining allegations in this paragraph, and state that no payments of rent are due for such periods in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and Guarantees involve questions to be determined by the Court.

35. Defendants deny the allegations in this paragraph.

AS TO THE FIRST CLAIM
(Breach of Lease)

36. Defendants repeat and incorporate by reference as if set forth in full their responses to the allegations in paragraph 1-35 of the Complaint.

37. Defendants deny the allegations in this paragraph.

38. Defendants deny the allegations in this paragraph.

39. Defendants deny the allegations in this paragraph.

40. Defendants admit only that Plaintiff seeks to recover a money

judgment against Bloomingdale's, but deny that Plaintiff is entitled to a monetary judgment or any other relief (including attorney's fees and expenses), in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and the referenced guarantees involve questions to be determined by the Court.

AS TO THE SECOND CLAIM
(Breach of Guarantee)

41. Defendants repeat and incorporate by reference as if set forth in full their responses to the allegations in paragraph 1-40 of the Complaint.

42. Defendants deny the allegations in this paragraph.

43. Defendants deny the allegations in this paragraph.

44. Defendants admit only that Plaintiff seeks to recover a money judgment, but deny that Plaintiff is entitled to a monetary judgment or any other relief (including attorney's fees and expenses) against Macy's, in light of the COVID-19 pandemic, various Executive Orders of the Governor of the State of New York and the Mayor of the City of New York and as a matter of law. Defendants further state the legal import of the language, terms and provisions of the Lease and referenced guarantees involve questions to be determined by the Court.

WHEREFORE, Defendants Bloomingdale's, LLC and Macy's, Inc. demand judgment in their favor, dismissing Plaintiff's Complaint with prejudice, together with Defendants' counsel fees, costs, and such other relief as the Court deems just and proper.

SEPARATE AND OTHER DEFENSES

First Separate Defense

Any payments of rent, taxes or other monies claimed by Plaintiff to be due it from Defendants under the Lease or the referenced guarantees from March 17, 2020 until at least June 22, 2020 to date are not due to Plaintiff, or alternatively should be fully suspended, abated or excused, based on the doctrine of frustration of purpose, given the impact of the COVID19 pandemic and certain Executive Orders of the Governor of New York in response to the COVID19 pandemic.

Second Separate Defense

Any payments of rent, taxes or other monies claimed by Plaintiff to be due it from Defendants under the Lease or the referenced guarantees from March 17, 2020 until at least June 22, 2020 are not due to Plaintiff, or alternatively should be fully suspended, abated, or excused based on the doctrine of impossibility of performance, given the impact of the COVID19 pandemic and certain Executive Orders of the Governor of New York in response to the COVID19 pandemic.

Third Separate Defense

Any payments of rent, taxes or other monies claimed by Plaintiff against Defendants is barred or reduced by the doctrine of unjust enrichment.

Fourth Separate Defense

For the reasons set forth in the Counterclaims of Defendants, the Lease and referenced guarantees should be reformed by the Court to reflect that Defendants do not owe any moneys, whether for rent, additional rent or other amounts, to

Plaintiff under the Lease or referenced guarantees for the period commencing March 17, 2020 until at least June 22, 2020.

Fifth Affirmative Defense

Discovery and investigation may show that Plaintiff has failed to mitigate its alleged damages.

Reservation of Rights

Defendants reserve the right to further respond and to assert any additional affirmative and separate defenses as they become known through discovery or investigation, including any equitable defense.

WHEREFORE, Defendant Bloomingdale's, LLC and Macy's, Inc. demand judgment in their favor and against Plaintiff, dismissing the Complaint as against Defendants with prejudice, together with Defendants' counsel fees, costs, and such other relief as the Court deems just and proper.

COUNTERCLAIMS

Defendants-Counterclaimants Bloomingdale's, LLC ("Bloomingdale's") and Macy's, Inc. ("Macy's") (collectively, "Defendants" or "Counterclaimants"), by way of Counterclaims against Plaintiff Broadway/72nd Associates II, LLC ("Plaintiff" or "Landlord"), alleges as follows:

Nature of the Counterclaims

1. The Counterclaims are an action for a declaratory judgment and declaratory relief from provisions of that certain Lease between Landlord and Bloomingdale's and those certain guarantees between Landlord and Macy's

(hereinafter, the “referenced guarantees”), referred to in the Landlord’s Complaint in this action.

2. Because of the COVID-19 global pandemic, the declaration of a national public health emergency by the President of the United States, the Executive Orders of New York State Governor Andrew M. Cuomo and New York City Mayor Bill de Blasio, Bloomingdale’s was ordered by government mandates to vacate and to abandon for a significant period of time Bloomingdale’s use of the premises at 2085 Broadway, New York, New York (the “Premises” or “Store”) referenced in the Lease between Landlord and Bloomingdale’s, Inc. dated as of March 13, 2015 (the “Lease”) as a retail store open to members of the public.

3. The clear purpose of the Lease between Bloomingdale’s and Landlord was for the purpose of Bloomingdale’s operating on the Premises a retail store, open to members of the public, known as “Bloomingdale’s The Outlet.”

4. Bloomingdale’s complied with those directives and was unable to use the Premises as a retail store open to members of the public commencing on March 17, 2020 through at least June 22, 2020. Consequently, Bloomingdale’s is entitled to an abatement, suspension or excuse of rent (whether base rent or additional rent) and all other monetary and non-monetary obligations under the Lease for that period.

5. Notwithstanding, Bloomingdale’s Landlord here, the Plaintiff Broadway/72nd Street Associates II, LLC, has refused to acknowledge Bloomingdale’s rights to abate, suspend or be excused from rent and all other

monetary and non-monetary obligations under the Lease, and instead has commenced this action against Bloomingdale's and Macy's seeking the payment of rent, additional rent and other charges (hereinafter, occasionally the "Rent Abatement") and other putative monetary damages Landlord claims.

6. With this Counterclaim, Counterclaimants seek, pursuant to CPLR § 3001, a judgment on the Counterclaims declaring the rights, duties and obligations of the parties with respect to the Rent Abatement, the terms, provisions and conditions of the Lease between Landlord and Bloomingdale's, and the terms, provisions and conditions of the referenced guarantees between Landlord and Macy's. Bloomingdale's further seeks a declaration that it is entitled to the Rent Abatement during the pendency of the COVID-19 pandemic and/or application of the Executive Orders of the Governor of the State of New York and the Mayor of the City of New York, or any other applicable governmental mandates that preclude Bloomingdale's from using the Premises as a retail store open to the public without limitation on number of employees and occupants in the Premises at any time (except such occupancy limitations as may exist under regulations of the N.Y.C. Fire Department or Department of Buildings). Counterclaimants further seeks a declaration that no monies are currently owed to Landlord from Macy's under the guarantees referenced in the Complaint.

Jurisdiction Over The Counterclaims

7. Jurisdiction in this Court over the Counterclaims is proper under the CPLR because Landlord claims it is located in New York County and this

Counterclaim seeks a declaratory judgment in connection with the Premises located in New York, New York.

8. These Counterclaims falls within the jurisdiction of the Commercial Division of this County pursuant to Sections 202.70(a) and 202.70(b)(3) of the Rules of the Commercial Division of the Supreme Court, because this Counterclaim (and the Complaint) involves a transaction with respect to commercial real property, and the amount in controversy, exclusive of punitive damages, interest, costs, disbursements and counsel fees, exceeds \$500,000.

9. Venue of the Counterclaims is proper in this County because Plaintiff alleges its principal office is in New York County and, on information and belief, Plaintiff and its counsel were in New York County when Plaintiff drafted and Plaintiff executed the Lease.

The Emergence of Covid-19 As A Deadly Global Pandemic

10. In early 2020, the World Health Organization (“WHO”) became aware that a cluster of viral pneumonia cases had been reported in Wuhan, Hubei Province, in the People’s Republic of China.

11. On January 4, 2020, the WHO tweeted that investigations to identify the cause of those pneumonia cases were underway. WHO then reported on January 9, 2020 that Chinese authorities had determined that the outbreak was caused by a “novel coronavirus.” The WHO and other international health organizations promptly began a coordinated effort to investigate the infectious hazards that the novel coronavirus (COVID-19) could pose to global health security.

12. Thereafter, the coronavirus spread rapidly throughout the world. On January 13, 2020, the Ministry of Health of Thailand reported the first confirmed case of the novel coronavirus. The first confirmed case within the United States was reported on January 21, 2020. Shortly thereafter, Europe, and specifically Italy, was designated as the global epicenter of the rapidly spreading novel coronavirus.

13. By January 30, 2020, four countries had evidence of human-to-human transmission of the novel coronavirus (Germany, Japan, the United States and Vietnam), and the United States Secretary of Health and Human Services declared that the novel coronavirus presented a public health emergency. On that same date, the Director-General of the WHO declared the novel coronavirus a Public Health Emergency of International Concern (“PHEIC”).

14. On February 11, 2020, the WHO, following its best practices guidelines, named the disease caused by the novel coronavirus as “COVID-19.” On March 7, 2020, the WHO issued a statement, following confirmation of over 100,000 cases globally, calling for action to stop, contain, control, delay and reduce the impact of the virus at every opportunity.

15. Soon thereafter, the coronavirus and resulting COVID-19 cases swept into the United States and into New York. On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202, declaring a State disaster emergency for the entire State of New York as a result of COVID-19. On March 11, 2020, deeply concerned both by the alarming levels of spread and severity, and by the alarming

levels of inaction, WHO made the assessment that COVID-19 could be characterized as a pandemic.

16. On March 12, 2020, New York City Mayor Bill DeBlasio issued Emergency Executive Order No. 98, declaring a state of emergency in the City of New York due to the public health threat posed by the COVID-19 global pandemic, and the next day, March 13, 2020, President Donald J. Trump issued the “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,” declaring a national public emergency as a result of COVID-19.

17. On April 2, 2020, the WHO reported on evidence that coronavirus could be transmitted from a pre-symptomatic case before symptom onset, and on April 4, 2020, the WHO reported that there had been over one million cases globally.

18. As of the end of July 2020, the number of COVID-19 cases across the globe had expanded more than tenfold since the WHO’s April 4 report to over 16 million reported cases of COVID-19 throughout the world. In the United States, the WHO and the CDC in late July reported over 4.1 million cases with over 145,000 deaths. In New York State, there now have been over 416,000 reported cases and over 32,000 deaths, and in New York City there now have been over 228,000 confirmed cases and over 22,900 deaths. As of September 14, 2020, the CDC reports that there were more than 194,000 deaths involving COVID-19 in the United States since February 1, 2020.

**New York Issues Orders Closing Retail Establishments
Like the Subject Premises and Bloomingdale's Complies**

19. In response to the foregoing and the COVID-19 pandemic, effective March 17, 2020 Bloomingdale's closed the retail store, known as Bloomingdale's The Outlet (the "Store") , at the Premises due to the COVID-19 pandemic, which closure was mandated by and guided from quasi-governmental authorities such as WHO and the Centers for Disease Control ("CDC"), and the New York State Governor's and the New York City Mayor's Emergency Orders.

20. On March 18, 2020, in response to the COVID-19 pandemic, New York State Governor Andrew M. Cuomo issued Executive Order ("EO") No. 202.6 ("EO 202.8"), entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency." EO 202.6, among other things, mandated that the Store at the Premises be closed from March 20, 2020 at 8:00 p.m. local time through April 17, 2020 (the "Retail Store Closure Order), and the Retail Store Closure Order was further extended by additional EOs issued by Governor Cuomo.

21. The authority to issue the Retail Store Closure Order resulted from rights granted to the Governor by the New York Legislature under Section 29-a of Article 2-B of the New York Executive Law, which authorizes the Governor to temporarily suspend or modify (*i.e.*, to preempt), "any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster."

22. In issuing EO 202.6, as well as in prior and subsequent Executive Orders relating to the COVID—19 pandemic, the Governor expressly referenced Section 29-a of Article 2-B of New York Executive Law. The Governor’s EO No. 202.6, and subsequent EOs by the Governor of New York, left Bloomingdale’s with no choice - closing the subject Store and vacating the Premises was mandated by operation of law.

23. In compliance with those governmental orders, and New York State law, Bloomingdale’s was required to vacate the Premises, and did so, vacating as of March 17, 2020.

24. Subsequent to EO 202.6, Governor Cuomo issued further Executive Orders, extending the time that the Store was required to be closed.

25. On April 26, 2020, Governor Cuomo announced a phased approach to reopening industries and businesses in the State, the City of New York, and specifically New York County.

26. On June 22, 2020, New York County officially entered “Phase 2” of the Governor’s EO phased reopening, on which date Bloomingdale’s was lawfully permitted to reopen the Store at the Premises for the first time since March 17, 2020.

FIRST CAUSE OF ACTION

(Declaratory Judgment of Frustration of Purpose – Rent Abatement)

27. Counterclaimants repeat and re-allege each and every allegation contained in the preceding paragraphs of the Counterclaims as if they were set forth at length herein.

28. The COVID-19 pandemic and/or the related EOs prevented Bloomingdale's from occupying the Premises and operating its business as a Store as contemplated under the Lease, from March 17, 2020 until at least June 22, 2020. The occupancy and operation by Bloomingdale's on the Premises as the Bloomingdale's The Outlet Store is the Lease's principal, if not sole, purpose.

29. The COVID-19 pandemic and/or the related EOs were not caused by Bloomingdale's or Macy's, or by any of Counterclaimants' acts or omissions.

30. As a result of the foregoing, there has been a frustration of the Lease's purposes for at least the period March 17, 2020 until at least June 22, 2020.

31. As a result of the foregoing, there has been a frustration of the Lease's purpose, and any and all of Bloomingdale's obligations under the Lease and Macy's obligations under the referenced guarantees (including all rent, additional rent, taxes, charges, and/or other monetary or non-monetary obligations) are minimally suspended, abated and/or fully excused from March 17, 2020 until at least June 22, 2020, when Bloomingdale's was legally permitted to reopen the Store at the Premises.

32. By letter to Landlord dated March 24, 2020, Bloomingdale's and Macy's informed Landlord that Bloomingdale's was forced by the COVID-19 pandemic, advise by quasi-governmental authorities (e.g., WHO and the CDC) and governmental orders, to close the Store at the Premises on March 17, 2020. Landlord has nevertheless disputed Bloomingdale's and Macy's contention that no rent, additional rent, taxes, charges, and/or other monetary or non-monetary

obligations are due to Landlord for the period commencing March 17, 2020 until at least June 22, 2020. Instead, Landlord commenced this action, first and improperly in the U.S. District Court for the Southern District of New York, and now in this Court, against Bloomingdale's for alleged breach of the Lease and against Macy's under the referenced guarantees.

33. Prior to the events delineated above arising out of the COVID-19 pandemic, Counterclaimants fully complied with all of their respective obligations to Landlord under the Lease and referenced guarantees by Macy's.

34. An actual and justiciable controversy exists between Landlord and Counterclaimants since Landlord has commenced this civil action claiming Bloomingdale's is in breach of the Lease and further claiming that Macy's owes Landlord monies under the referenced guarantees.

35. Counterclaimants lack an adequate remedy at law.

SECOND CAUSE OF ACTION
(Declaratory Judgment of Impossibility of Performance – Rent Abatement)

36. Counterclaimants repeat and re-allege each and every allegation contained in the preceding paragraphs of the Counterclaims as if they were set forth at length herein.

37. As a direct and proximate result of the COVID-19 pandemic and/or the EOs, performance of Bloomingdale's obligations under the Lease during the period from March 17, 2020 until at least June 22, 2020 was rendered impossible, as Bloomingdale's was not able to fully use, occupy, or viably conduct its business as a Store from the Premises, as originally contemplated by the parties under the Lease.

38. Based on such impossibility of performance, any and all of Bloomingdale's obligations under the Lease and Macy's obligations under the referenced guarantees (including all rent, additional rent, taxes, charges, and/or other monetary or non-monetary obligations) are minimally suspended, abated and/or fully excused from March 17, 2020 until at least June 22, 2020, when Bloomingdale's was legally permitted to reopen the Store at the Premises.

39. Alternatively, the impossibility of performance, as described above, has rendered the Lease void, voidable or otherwise unenforceable as a matter of law.

40. Prior to the events delineated above arising out of the COVID-19 pandemic, Counterclaimants fully complied with all of their respective obligations to Landlord under the Lease and referenced guarantees by Macy's.

41. An actual and justiciable controversy exists between Landlord and Counterclaimants since Landlord has commenced this civil action claiming Bloomingdale's is in breach of the Lease and further claiming that Macy's owes Landlord monies under the referenced guarantees.

42. Counterclaimants lack an adequate remedy at law.

WHEREFORE, Defendants/Counterclaimants Bloomingdale's, LLC (formerly Bloomingdale's, Inc.) and Macy's, Inc., demand judgment in their favor and against Plaintiff, Broadway/72nd Associates II, LLC, on the Counterclaims, for the following relief:

(a) On the First Cause of Action, a declaration by this Court that (1) the purpose of the Lease has been frustrated, and (2) that Bloomingdale's Lease

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