NYSCEF DOC. NO. 36

INDEX NO. 150164/2021

RECEIVED NYSCEF: 02/11/2021

SUPREME COURT OF THE CITY OF NEW YORK COUNTY OF NEW YORK

----X

LITTLE FISH CORP. a/k/a LITTLE FISH INC., Index No. 150164/21 Plaintiffs,

-against-

VERIFIED REPLY

PARAMOUNT LEASEHOLD LP,

Defendant.

----X

TAKE NOTICE that plaintiff interposes the following verified reply to defendant's counterclaims:

- Plaintiff incorporates by reference all allegations contained in the verified complaint dated January 7, 2021.
- $\hbox{ 2. Plaintiff lacks knowledge or information to} \\$  respond to  $\hbox{f1.}$ 
  - 3. Plaintiff admits ff31 & 32.
- 4. Plaintiff denies ff33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 45, 46, 47, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 76 & 77.
- 5. Plaintiff avers that the lease language excerpted in ff40, 44, 45,48, 49, 50 & 51 speaks for itself and plaintiff reserves all rights as to the effect, if any, of said language.

NYSCEF DOC. NO. 36

INDEX NO. 150164/2021 RECEIVED NYSCEF: 02/11/2021

# FIRST AFFIRMATIVE DEFENSE

6. The counterclaims do not state a cause of action.

## SECOND AFFIRMATIVE DEEFENSE

7. Defendant's claims are barred by documentary evidence, including but not limited to, the Lease.

# THIRD AFFIRMATIVE DEFENSE

- 8. Plaintiff has been prevented from operating its business as a result the unprecedented COVID-19 pandemic including, but not limited to, governmental directives barring operation, in whole or in part.
- 9. The pandemic and associated governmental orders constitute a casualty under f9 of the Lease.
- 10. Accordingly, plaintiff's obligations, if any, under the Lease, including, without limitation, the payment of rent and additional rent, installation of a sprinkler system and continuous operation, are suspended, in whole or in part.

#### FOURTH AFFIRMATIVE DEFENSE

- 11. The pandemic and associated governmental orders have rendered the parties' respective performance under the Lease impossible.
- 12. Accordingly, plaintiff's obligations, if any, under the Lease, including, without limitation, the payment of

NYSCEF DOC. NO. 36

RECEIVED NYSCEF: 02/11/2021

INDEX NO. 150164/2021

rent and additional rent, installation of a sprinkler system and continuous operation, are suspended, in whole or in part.

## FIFTH AFFIRMATIVE DEFENSE

- 13. The pandemic and associated governmental orders constitutes a force majeure per f63 of the Lease.
- 14. Accordingly, plaintiff's obligations, if any, under the Lease, including, without limitation, the installation of a sprinkler system and continuous operation, are suspended, in whole or in part.

#### SIXTH AFFIRMATIVE DEFENSE

- 15. The pandemic and associated governmental orders has substantially frustrated the purpose of the Lease as a full service restaurant.
- 16. Accordingly, plaintiff's obligations, if any, under the Lease, including, without limitation, the payment of rent and additional rent, installation of a sprinkler system and continuous operation, are suspended, in whole or in part.

# SEVENTH AFFIRMATIVE DEFENSE

- 17. Per f6 of the Lease, plaintiff must obey all requirements of law.
- 18. Multiple governmental edicts barred plaintiff from operating as a full service restaurant, in whole or in part.
  - 19. Such edicts constitute a requirement of law.

NYSCEF DOC. NO. 36

RECEIVED NYSCEF: 02/11/2021

INDEX NO. 150164/2021

20. Accordingly, defendant is barred from collecting rent and additional rent or enforcing the continuous operation provision for any period plaintiff was obeying the requirements of law by ceasing operation, in whole or in part.

## EIGHTH AFFIRMATIVE DEFENSE

21. Defendant, not plaintiff, is obligated to install the sprinkler system per Local Law 26 and f29 of the Lease.

#### NINTH AFFIRMATIVE DEFENSE

- 22. The Non Operation Per Diem Rent purportedly due per f7(g) of the Second Amendment to the Lease is not reasonably related to defendant's actual damages.
  - 23. Accordingly, it is an unenforceable penalty.

# TENTH AFFIRMATIVE DEFENSE

24. The Non Operation Per Diem Rent, if any is in fact due, must be prorated for any period in which plaintiff was legally barred from operating, n whole or in part.

Wherefore, plaintiff demands judgment dismissing the counterclaims and granting such other and further relief as may be just and proper.

NYSCEF DOC. NO. 36

INDEX NO. 150164/2021

RECEIVED NYSCEF: 02/11/2021

Dated: New York, New York February 11, 2021

> HIMMELSTEIN McCONNELL GRIBBEN DONOGHUE & JOSEPH LLP Attorneys for Plaintiff 15 Maiden Lane - Suite 1700 New York, New York 10038-4003

By:

212.349.3000

David Frazer David E. Frazer, of counsel

ROBERT M. OLSHEVER, PC Attorneys for Plaintiff 148 West 24<sup>th</sup> Street, 4<sup>th</sup> floor New York, New York 10011 212.741.3510

To: ROSENBERG & ESTIS PC Attorneys for Defendant 733 Third Avenue New York, New York 10017 212.867.6000

NYSCEF DOC. NO. 36

RECEIVED NYSCEF: 02/11/2021

INDEX NO. 150164/2021

Dated: Ne

New York, New York February 11, 2021

HIMMELSTEIN McCONNELL GRIBBEN DONOGHUE & JOSEPH LLP Attorneys for Plaintiff 15 Maiden Lane - Suite 1700 New York, New York 10038-4003 212.349.3000

By:

David Frager

David E. Frazer, of counsel

ROBERT M. OLSHEVER, PC Attorneys for Plaintiff 148 West 24<sup>th</sup> Street, 4<sup>th</sup> floor New York, New York 10011

212.741.3510

By:

To: ROSENBERG & ESTIS PC

Attorneys for Defendant

733 Third Avenue

New York, New York 10017

212.867.6000

NYSCEF DOC. NO. 36

INDEX NO. 150164/2021

RECEIVED NYSCEF: 02/11/2021

# **VERIFICATION**

State of New York

SS.:

County of New York)

Jeffrey Bank, being sworn, deposes and says:

I am CEO of plaintiff LITTLE FISH CORP. a/k/a LITTLE FISH INC. I have read the attached reply and know its contents to be true. As to those items stated upon information and belief, I believe them to be true.

Jeffrey Bank

**Notary Public** 

ROBERT M. OLSHEVER Notary Public, State of New York No. 02OL4643583 Qualified in New York County Commission Expires 05/31/2023