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

VICTORIA'S SECRET STORES, LLC, successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC., Plaintiffs, v. HERALD SQUARE OWNER LLC, successor in interest to 1328 BROADWAY, LLC, Defendant.	Index No. 651833/2020 Justice Andrew Borrok **Motion Sequence No. 002**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

MEISTER SEELIG & FEIN LLP
125 Park Avenue, 7th Floor
New York, New York 10017
Phone: (212) 655-3500

STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.
675 Third Avenue, 31st Floor
New York, New York 10017
Phone: (212) 681-6500

Attorneys for Defendant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Treatises

Defendant Herald Square Owner LLC ("Landlord"), ground lessee of 2 Herald Square, New York, NY (the "Building"), submits this memorandum of law in support of Landlord's motion for partial summary judgment on its counterclaims, pursuant to CPLR 3212, against Plaintiffs Victoria's Secret Stores, LLC ("VS" or "Tenant") and L Brands Inc. ("L Brands" or "Guarantor" and, together with Tenant, "Plaintiffs"). Landlord seeks a judgment: (1) against — (a) VS and L Brands, jointly and severally, in the amount of $19,979,593.08 (the "Retail Judgment Amount"), and (b) VS only in the additional amount of $2,754,846.10 (the "Office Judgment Amount"), and (2) dismissing all of Plaintiffs' affirmative defenses.

Given partial payments of $14,514,226.90 and $504,169.00[1] by Tenant on February 8, 2021 (after Landlord submitted its proposed Joint Statement of Undisputed Facts to Tenant) and February 11, 2021 (respectively, the "February 8 Payment" and "February 11 Payment" and collectively the "February Payments"), Landlord now seeks only its remaining balance of holdover damages — Tenant has not yet surrendered possession though the Lease has been terminated — and statutory interest thereon accrued through February 20, 2021, exclusive of its claim for attorneys' fees, electric charges, and signage rent (the "Severed Counterclaims"). Landlord reserves the right to seek, either by subsequent motion as permitted in *315 Hudson LLC v. Five Bells, Inc.*, 2016 WL 2988994, at *4 (Sup. Ct. N.Y. Cnty. May 24, 2016) — or conceivably a

[1] Tenant's February Payments were tendered without a restrictive endorsement nor any requested allocation of funds. Although the Lease explicitly permits Landlord to accept payments of less than all that is due without prejudice (Lease section 24), Landlord followed with a letter to Tenant stating that Landlord was accepting Tenant's payment without prejudice and reserving its remaining claims. *See* Affirmation of Stephen B. Meister dated February 16, 2021 ("Meister Affirm."), Exs. E & F. Tenant did not object thereto.

Landlord gave Tenant the maximum benefit of its February 8 Payment by applying that entire payment solely to Tenant's "principal" obligations (*i.e.*, not to interest), and by first allocating funds to the oldest (pre-termination) "rent" obligations, as they take a higher (contractual) interest rate than the holdover damages accrued post-termination, which take the lower 9% statutory rate. In addition, in the month partially paid by Tenant's payment (September 2020), Landlord first allocated Tenant's funds to the Retail Premises obligations, as those obligations are the only obligations covered by the Guaranty by L Brands. Because Tenant designated its February 11 Payment for interest, Landlord applied that payment to contract rate interest charges.

subsequent action if the Court so directs — further damages accruing thereafter, as the Lease runs through March 31, 2022. To be clear, Landlord is not here seeking "accelerated" rent. To ease the burden on the Court, Landlord's final application for damages will include all Landlord's legal fees (the remaining portion of Landlord's Counterclaims, the "Remaining Counterclaims").[2]

PRELIMINARY STATEMENT

Plaintiffs sued for a declaration that the COVID-19 pandemic, and related emergency orders, excused it from paying rent and permitted it to rescind its Lease. Defendants counterclaimed for unpaid rent and charges, along with holdover damages, due under the Lease and Guaranty.[3] By Decision and Order entered January 7, 2021 (the "Order"), the Court granted Landlord's motion for summary judgment dismissing Plaintiff's complaint ("Complaint" or "Compl.") in its entirety with prejudice.

All that remains are Landlord's two counterclaims, which seek damages for breach of Lease and Guaranty. It is undisputed that VS paid Landlord no rent or any other Lease charges after making the rent payment due March 1, 2020, until making the February Payments when Tenant paid $15,018,395.90 in the aggregate, without restrictive endorsement. Until the February 8 Payment, VS had withheld these payments because it claimed the Lease's purpose had been frustrated or that Tenant's performance had been rendered impossible. The Order rejected those theories. Yet, despite seeking rescission of the Lease, VS remained in possession of the Premises.

Landlord's application of the February 8 Payment to principal obligations only, in the order incurred, had the effect of paying off pre-termination rent and tax escalations, as well as holdover

[2] While Tenant has not yet vacated either the Premises, it is in the process of moving out and has stated that it intends to surrender possession on February 20, 2021; as such, once Tenant surrenders the Premises, Landlord's Remaining Claims will not include holdover damages following the surrender date.

[3] These capitalized terms are defined below. Capitalized terms not defined herein shall have the meanings ascribed to them in Landlord's Counterclaims. Meister Affirm., Ex A.

damages accrued through part of September 2020. Landlord applied the February 11 Payment to contractual interest provided for in the Lease at Tenant's request.

To be clear, Landlord is not now seeking "accelerated" damages over the unexpired balance of the original Lease term, but rather only holdover damages accrued through February 20, 2021, and interest thereon (exclusive of attorneys' fees, electric charges and signage rent, defined above as the "Severed Counterclaims").

Computing Landlord's damages on the Severed Counterclaims is simply a matter of arithmetic. The Lease sets forth the precise dollar amounts VS must pay Landlord and under what circumstances. Applying these unambiguous Lease terms shows that Plaintiffs, *i.e.*, Tenant and Guarantor (jointly and severally), owe Landlord the Retail Judgment Amount, and that VS (the Tenant) owes Landlord an additional sum, *i.e.*, the Office Judgment Amount (the Guaranty does not extend to the Office Premises).

Damages will continue to accrue after February 2021, and Landlord reserves the right to pursue those damages, including all attorneys' fees, electric charges and signage rent (*i.e.*, the Remaining Counterclaims), either by subsequent motion or, if the Court so directs, by separate action.

Because computing Landlord's damages is simply a matter of reading the Lease, and performing computations, Landlord now moves for summary judgment on the Severed Counterclaims in sum certain amounts. The Court should grant this motion and direct the Clerk to enter judgment in these amounts.

The only "live" dispute (on the motion) is whether Landlord may recover holdover damages as provided by Section 21(A) of the Lease. Defendants contend that collection of

holdover damages was prohibited by Governor Cuomo's COVID-19 pandemic Executive Orders and, in any event, the holdover damages specified by the Lease are unenforceable.

Defendants are mistaken. Governor Cuomo's Executive Orders ("EO's") only impose a moratorium on eviction *proceedings*. They do not bar the exercise of contractual rights such as the sending of a notice terminating a lease. At least two courts have addressed this issue. Both have held for the Landlord. In *135 East 57th St., LLC v. Saks Inc.*, 2021 WL 305771, at *5 (Sup. Ct. N.Y. Cnty. Jan. 29, 2021), the court denied a guarantor's motion to dismiss a claim for unpaid rent holding that "neither the executive nor the legislative branches have proscribed the type of contractual remed[ies]" in leases. In *138-77 Queens Blvd LLC v. QB Wash LLC*, Index No. 715701/2021, NYSCEF No. 59, at p. 3 (Sup. Ct. Queens Cnty. Jan. 15, 2021), the court held that the EO's applied only to summary proceedings in landlord-tenant courts, and did not bar a Supreme Court ejectment action; that the EO's tolled only "procedural laws of the state" and do not address "contractual deadlines including the sending of notices."

Plaintiffs' new position is hopelessly contradictory. Plaintiffs sought rescission. Yet now, having had their Complaint dismissed, Plaintiffs contend that Landlord had no right to terminate the very Lease Plaintiffs sought to rescind.

Controlling law holds that a liquidated damages clause fixing holdover damages at three times the monthly rent is enforceable. There is no reason the Court should not enforce the Lease, entered into by sophisticated parties, as written.

SUMMARY OF UNDISPUTED FACTS[4]

A. Underlying Lease

On or about August 22, 2001, Tenant entered into a lease, for store/retail space in the Building (the "Retail Premises") with a predecessor-in-interest to Landlord. That lease has subsequently been amended by 10 amendments and various letter agreements (altogether, the "Lease"). In the Ninth Amendment, entered into on or about April 23, 2013, Landlord's predecessor-in-interest and Tenant agreed to an expansion of the premises to include the 4th and 5th Floors of the Building (the "Office Premises" and, together with the Retail Premises, the "Premises") and to surrender possession of other office space. Copies of the original Lease and its amendments are attached as Exhibits B and C to the Affidavit of Neil S. Kessner, sworn to February 16, 2021 ("Kessner Aff.").

The Lease obligates Tenant to pay the "Minimum Rent" for the Retail Premises and the Office Premises on the first day of each calendar month. *See* original Lease § 1(A), and Tenth Am. ¶ 2. The Lease obligates Tenant to pay additional rent and/or "percentage rent" charges. If Tenant defaults in payment of any rent, Landlord can issue a five day notice to cure. *See* Lease § 17(A). If Tenant fails to cure within that time, Landlord may terminate the Lease as it pertains to the Retail Premises or Office Premises, as applicable, on three days' notice. *Id.*

Lease § 18(B)(i)(a) provides that "Tenant shall pay to Landlord all Rent, additional rent and other charges payable under this Lease by Tenant to Landlord to the date upon which this Lease and the Term shall have expired and come to an end or to the date of re-entry upon the

[4] The pleadings are closed, and there is no genuine dispute about any material facts, which are taken from the pleadings and controlling lease documents, as summarized in the Kessner Aff. (Plaintiffs have not responded to Defendant's proposed Joint Statement of Undisputed Facts). The parties do not dispute the controlling lease documents, that Tenant remains in possession, or that Tenant did not pay rent after March 2020, until making the February Payments. The action fundamentally concerned Tenant's frustration and impossibility defenses, which have been rejected. There is no genuine dispute about the rent and other charges now being sought. Only issues of law remain.

Premises by Landlord, as the case may be[.]"

Lease § 21(A) provides that Landlord may recover as liquidated damages three times the amount of monthly rent due in the event Tenant fails to surrender the Premises after the Lease expires or is terminated:

> [T]he parties recognize and agree that the damage to Landlord resulting from any failure by Tenant to timely surrender possession of the Premises as aforesaid will be substantial, will exceed the amount of the monthly installments of the Rent theretofore payable hereunder, and will be impossible to accurately measure. Tenant therefore agrees that if possession of the Premises is not surrendered to Landlord within twenty-four (24) hours after the Expiration Date or sooner termination of the Term, in addition to any other rights or remedy Landlord may have hereunder . . ., Tenant shall pay to Landlord for each month and for each portion of any month during which Tenant holds over in the premises after the Expiration Date or sooner termination of this Lease, a sum equal to three (3) times the aggregate of that portion of the Rent and the additional rent which was payable under this Lease during the last month of the Term. . . .

B. Guaranty for Retail Premises

Concurrent with Lease execution, the predecessor-in-interest of L Brands executed a written Guaranty dated August 22, 2001, which was amended and reaffirmed by L Brands as guarantor on April 23, 2013 (together, the "Guaranty"). Copies of the original Guaranty and its amendment are attached as Exhibits D and E to the Kessner Aff.

The Guaranty provides that Guarantor absolutely, unconditionally, and irrevocably guaranties payment of "all obligations, now or hereafter existing, of Tenant under the Lease" in respect of the Retail Premises. *See* original Guaranty, ¶ 2. The Guaranty is binding upon Guarantor's successors, notwithstanding any "merger, consolidation, reorganization or absorption." *Id.* ¶ 15. Like the Lease, the Guaranty provides that Guarantor shall pay all reasonable attorneys' fees incurred by Landlord in enforcing Guarantor's obligations. *Id.* ¶ 13.

In the amended and reaffirmed Guaranty, dated April 23, 2013, Guarantor and Landlord's predecessor-in-interest agreed that "the provisions of the Guaranty shall not apply to any obligations of Tenant relating to the Office Premises." Amended Guaranty, ¶ 2.

C. Tenant's Default and Landlord's Termination of Lease

Until the February 8 Payment, Tenant's most recent rent payment under the Lease was made on or about March 1, 2020. Tenant did not pay the monthly Minimum Rent that came due on April 1, 2020 or any other payments due under the Lease thereafter, save for the February Payments. Kessner Aff. ¶ 33.

Following Tenant's failure to make rent payments on April 1 and May 1, 2020, Landlord served a notice to cure with respect to the Retail Premises dated May 11, 2020, stating that Tenant's time to cure, by paying its (then) arrears, would end on May 18, 2020. Kessner Aff, Ex. F. Tenant did not cure its arrears with respect to the Retail Premises by May 18, 2020. On June 4, 2020, Landlord issued a notice of termination of Lease with respect to Retail Premises, effective June 9, 2020, and reserved all rights. *Id.*, Ex. G.

On June 4, 2020, Landlord issued a notice to cure with respect to Office Premises, stating that Tenant's time to cure, by paying its arrears on the Office Premises, ended on June 11, 2020. *Id.*, Ex. H. Tenant failed to cure its arrears with respect to the Office Premises by June 11, 2020. On June 18, 2020, Landlord issued a notice of termination of the Lease in respect of Office Premises effective June 23, 2020, and again, reserved all rights. *Id.*, Ex. I.

By letter dated May 18, 2020, Landlord's counsel informed Guarantor that Tenant defaulted on its rent obligations, and that Landlord would seek to enforce Guarantor's liability under the Guaranty with respect to the Retail Premises. *Id.*, Ex. J. Hence, Guarantor has been on notice of Tenant's default, but Guarantor has failed to make any payment on account of the charges

due to Landlord with respect to the Retail Premises.

Following the Court's Order on January 7, 2021, the parties engaged in settlement conversations. Because they did not bear fruit, on February 5, 2021, Landlord, following the Court's rules, submitted a proposed Joint Statement of Facts to Tenant, in anticipation of this motion. Then, on February 8, 2021, Tenant made the February 8 Payment without restrictive endorsement. The wire advice (*see* Kessner Aff, Ex. A) contains only a reference reading in relevant part "LIMITED BRANDS … HERALD SQUARE SUBLESSE." Nor did Tenant seek any particular allocation of the February 8 Payment.

Then, on February 11, 2021, Tenant made a second payment to Landlord by wire transfer in the amount of $504,169.00. This second payment was also made without restrictive endorsement but Tenant designated the payment for interest. *See* Kessner Aff., Ex. A.

Section 24 of the Lease provides:

> No payment by Tenant or receipt by Landlord of a lesser amount than the monthly Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, or as Landlord may elect to apply same, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such Rent or pursue any other remedy in this Lease provided.

D. Tenant Has Not Surrendered Possession

To date, Tenant has not surrendered, and continues in possession of, the Premises (*i.e.*, both Retail Premises and Office Premises) despite Landlord's termination of Lease with respect to both Retail Premises (effective June 9, 2020) and Office Premises (effective June 23, 2020). Nevertheless, Landlord has at all times continued to provide Tenant all required Building services. Kessner Aff., ¶ 45. Tenant's counsel has informed Landlord's counsel that Tenant is in the process

of vacating the Premises and expects to surrender possession on February 20, 2021. Meister Affirm., ¶ 7.

E. Arrears Owed Pursuant to Lease and Guaranty

1. Retail Premises

Through February 20, 2021 (the date Tenant said it will surrender possession), Tenant owes Landlord $19,979,593.08 (*i.e.,* the Retail Judgment Amount) with respect to rent and other charges for the Retail Premises. Attached as Ex. K to the Kessner Aff. is a chart computing Tenant's arrears for Retail Premises. In computing the Retail Judgment Amount, which required Landlord to apply the February Payments, Landlord considered the following items:

a) Base rent (*i.e.*, Minimum Rent) owed for period April 1, 2020 to June 9, 2020, the termination date of the Lease with respect to Retail Premises [*see* Tenth Amendment to the Lease, ¶ 2(A)];

b) Additional charges for Real Estate Taxes for period of April 1, 2020 to June 9, 2020 [*see* Lease § 28)];

c) Liquidated holdover damages for period June 10, 2020 to February 20, 2021, the date Tenant said it will surrender possession [*see* Lease § 21(A)];

d) Interest accrued at the rate of 1.5% per month on unpaid rent through June 9, 2020 [*see* Lease § 19(B)]; and

e) Statutory interest, calculated on a simple basis, of 9% per annum on outstanding holdover damages owed from June 10, 2020 to February 20, 2021.

Landlord applied the February 8 Payment solely to principal charges due under the Lease, namely Base Rent and Tax Escalations, in the order in which they became due, and, thereafter, to the extent available, to holdover damages. This Tenant-favorable application of the February 8 Payment resulted in the payment of all principal charges through part of September 2020. The February 11 Payment was applied to contract rate interest as Tenant requested. Thus, all that remains on Landlord's Severed Counterclaims are holdover damages and statutory interest

thereon.[5] Landlord, again to favor Tenant, allocated the February 8 Payment first to the holdover damages accrued in respect of Retail Premises (through September 2020), so as to limit the remaining guaranty liability of L Brands, which only extends to the charges due in respect of Retail Premises.

Guarantor is jointly and severally liable for the total sum owed to Landlord in respect of Retail Premises pursuant to the terms of the Guaranty. Accordingly, Tenant and Guarantor are jointly and severally liable for the Retail Judgment Amount.

2. Office Premises

Through February 20, 2021 (Tenant's expected surrender date), Tenant owes Landlord $2,754,846.10 (*i.e.*, the Office Judgment Amount) with respect to rent and other charges for Office Premises. Attached as Ex. K to the Kessner Aff. is a chart computing Tenant's arrears under the Lease for Office Premises. In computing the Office Judgment Amount, Landlord considered the following items:

a) Base rent (*i.e.*, Minimum Rent) owed for period April 1, 2020 to June 23, 2020, the termination date of the Lease with respect to Office Premises [*see* Tenth Amendment to the Lease, ¶ 2(A)];

b) Additional charges for Real Estate Taxes for period April 1, 2020 to June 23, 2020 [*see* Lease § 28];

c) Liquidated holdover damages for period June 24, 2020 to February 20, 2021, the date Tenant said it will surrender possession [*see* Lease § 21(A)];

d) Interest accrued at the rate of 1.5% per month on unpaid rent through June 23, 2020 [*see* Lease § 19(B)]; and

e) Statutory interest, calculated on a simple basis, of 9% per annum on outstanding holdover damages owed from June 24, 2020 to February 20, 2021.

[5] Unlike Minimum Rent payments, holdover damages are payable only for the period the Tenant actually holds over. Thus, Landlord has computed holdover damages for the month of February 2021 only through February 20 (rather than the entire month). *See* Kessner Aff., Ex. K. Landlord reserves its rights should Tenant surrender later.

Landlord is entitled to collect prejudgment interest on holdover damages. *See Rose Assocs. v. Lenox Hill Hosp.*, 262 A.D.2d 68, 69 (1st Dep't 1999); *Goldman v. Rosen*, 9 Misc. 3d 778, 782 (Civ. Ct. N.Y. Cnty. 2005), *aff'd*, 13 Misc. 3d 143(A) (1st Dep't 2006); *see also* CPLR 5001 and 5004.

Section 19(B) of the Lease provides that the contract rate interest of 1.5% per month is applicable to Minimum Rent or any additional rent. Section 21(A) of the Lease does not include holdover rent in the definition of Minimum Rent or additional rent. Hence, interest on holdover damages is computed at the statutory 9% annual rate (*i.e.*, interest of 0.75% per month).

As noted, the Guaranty does not apply to Office Premises. Accordingly, only Tenant, but not Guarantor, is liable for the Office Judgment Amount.[6] Thus, together with the Retail Judgment Amount, Tenant's total liability, exclusive of legal fees, as of the motion date, is $22,734,439.18, *i.e.*, the sum of the Retail Judgment Amount ($19,979,593.08) plus the Office Judgment Amount ($2,754,846.10).

ARGUMENT

I. LANDLORD IS ENTITLED TO SUMMARY JUDGMENT ON ITS SEVERED COUNTERCLAIMS

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b). Actions for enforcement of a lease and guaranty are precisely the types of actions suited to summary judgment.

[6] Charges for Minimum Rent and additional rent for Retail Premises, and Minimum Rent and additional rent for Office Premises, are allocated by the Lease. Landlord's damages computations reflect this allocation. *See* Exhibit A to the Tenth Amendment of the Lease (Kessner Aff., Ex. L); Section 3 of the Ninth Amendment of the Lease (Kessner Aff., Ex. C).

See, *e.g.*, *Murray Hill Mews Owners Corp. v. Rio Rest. Assocs. L.P.*, 92 A.D.3d 453, 454 (1st Dep't 2012).

On a motion for summary judgment, movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, eliminating the need for trial. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once movant's burden has been met, the party opposing summary judgment must supply admissible evidence which demands an adjudication of material facts at trial; "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to warrant denial of the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Kuzyns v. City of New York*, 191 A.D.2d 169, 169 (1st Dep't 1993).

A landlord makes a *prima facie* showing for entitlement to summary judgment under the terms of a commercial lease by furnishing evidence of the lease, tenant's non-payment of rent and other amounts due, and itemization of the outstanding amounts owed by the tenant. *See, e.g.*, *Chip Fifth Ave. LLC v. Quality King Distribs., Inc.*, 158 A.D.3d 418, 418 (1st Dep't 2018).

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional Guaranty, the underlying debt, and the guarantor's failure to perform under the Guaranty." *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dep't 1998). Thereafter, the burden shifts to defendants to prove that summary judgment is inappropriate. *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 137-38 (1st Dep't 1968), *aff'd*, 29 N.Y.2d 617 (1971).

II. LANDLORD HAS MADE ITS *PRIMA FACIE* CASE

Because the terms of the Lease and the Guaranty are unambiguous and unconditional, and Landlord has submitted an affidavit of non-payment (which Plaintiffs cannot dispute), Landlord

easily makes out its *prima facie* case. *See New 24 W. 40th St. LLC v. XE Capital Mgmt., LLC*, 104 A.D.3d 513, 514 (1st Dep't 2013)); *Bank of Am., N.A. v. Solow*, 59 A.D.3d 304, 304-05 (1st Dep't 2009)).

While Plaintiffs have asserted as "affirmative defenses" the affirmative claims of "frustration of purpose" and "impossibility" raised in their Complaint, those claims have now been dismissed by final order of the Court, and that order has not been stayed.[7] Because all the other "affirmative defenses" raised by Tenant and Guarantor are "boilerplate" affirmative defenses utterly lacking in merit as a matter of law, there is no impediment now to entry of summary judgment in Landlord's favor on its Severed Counterclaims.

Landlord asserts no waiver by Tenant based on the February Payments, and the Severed Counterclaims do not include any even potentially controversial sum. Given the application of the February Payments, the partial awards now sought (for Retail Premises and Office Premises) include only contractually specified holdover damages and statutory interest. These sums are based on the Lease and the CPLR, and none of them are or can be in genuine dispute. Attorneys' fees, which are potentially subject to dispute, have been reserved.

III. THE HOLDOVER DAMAGES CLAUSE IS ENFORCEABLE

A. The Governor's Emergency Order does not Ban Lease Termination Notices

Tenant, by its counsel's letter, contends that Landlord's notices of termination were proscribed by Governor Cuomo's Executive Order ("EO"), and as such are invalid. *See* Meister Affirm. Ex. D. Because, according to Tenant, Landlord's termination notices were invalid, holdover damages are not owed.

[7] While Plaintiffs have filed a notice of appeal with respect to the Order, they have not sought or obtained a stay thereof from either this Court or the Appellate Division. In consequence, the Court's Order remains unstayed and in full force and effect. CPLR 5519; *Dworetzky v. Ball*, 50 A.D.2d 615, 616 (3d Dep't 1975).

EO 202.28 states, in relevant part, "[t]here shall be no initiation … or enforcement of … an eviction of any … commercial tenant, for nonpayment of rent[.]" *See* Meister Affirm., Ex. H. Landlord has not initiated an eviction proceeding, nor does it seek to enforce a previously issued warrant of eviction.

EO 202.28 does not bar contractual remedies including lease termination notices, and has no application here. The two courts which, to Landlord's knowledge, have considered this issue, agree with Landlord. *See 135 East 57th St., LLC*, 2021 WL 305771, at *4-*5 (noting that EO's "do not provide guidance regarding corporate guaranties in connection with commercial tenancies" and that "neither the executive nor the legislative branches have proscribed" contractual remedies available under the terms of commercial lease and corporate guaranty); *see also 138-77 Queens Blvd LLC*, Index No. 715701/2021, NYSCEF No. 59, at p. 3 (holding that EO's toll only "procedural laws of the state"; they do not address "contractual deadlines, including the sending of notices").

Notably, a predecessor of EO 202.28 and the termination notices were both before the Court when it issued its Order dated January 7, 2021. While Tenant did not explicitly argue in the prior sequence that the EO proscribed Landlord's termination notices, Landlord believes it is unlikely the Court would have dismissed Plaintiff's Complaint — observing that the "Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business…." if it believed the termination notices were barred by the EO's and invalid. *See* Meister Affirm., Ex. C.

Prestige Deli & Grill Corp. v. PLG Bedford Holdings LLC, 2020 WL 4059137 (Sup. Ct. Kings Cnty. July 17, 2020), cited in Plaintiffs' counsel's December 10, 2020 letter (*see* Meister Affirm., Ex. D), does not help Plaintiffs. In *Prestige Deli*, the court issued a Yellowstone

injunction; however, under Plaintiffs' logic, the Yellowstone injunction would have been superfluous, because, according to Plaintiffs, a notice to terminate cannot now be issued. Regardless, the *Prestige* court *rejected* the argument now advanced by Tenant: as framed by Prestige, that "due to various executive and administrative orders promulgated during the COVID 19 pandemic, the notice to cure and notice to terminate were invalid [sic]." *Id.* at *1. Thus, *Prestige* supports Landlord's position.

The *Prestige* court merely held that since "*enforcement* of a termination of a commercial lease" was stayed by the EO's (*Id.* at *3), the court would grant tenant Yellowstone relief even though a notice to terminate had already issued. That is, normally a tenant cannot seek Yellowstone relief once its landlord has issued a notice to terminate. But the timing leniency granted by the *Prestige* court does not help Plaintiffs here. Plaintiffs never sought Yellowstone relief, and are not seeking such relief now — on the contrary, they are in the process of moving out. Plus, Tenant sued for rescission. That claim by its nature is inconsistent with any claim to continued possession. *See also* Meister Affirm., Ex. D containing additional discussion of the *Prestige* case.

In sum, Landlord brought no eviction proceeding; EO 202.28 has no application here, the termination notices were not barred, and are valid.

B. Three-Times Holdover Clauses have been Repeatedly and Consistently Enforced

Plaintiffs — uber-sophisticated tenants, operating thousands of stores — expressly agreed to a liquidated damages provision governing the calculation of Landlord's damages should Tenant fail to pay rent and other charges. Section 21(A) of the Lease benefits both parties by liquidating difficult-to-compute damages, thus capping Tenant's liability. Section 21(A) provides that Tenant shall pay Landlord — for each month while Tenant is holding over — a sum equal to three (3)

times the aggregate of that portion of the Rent and the additional rent which was payable under this Lease during the last month of the Term.

Three-times liquidated damages provisions have been repeatedly and consistently upheld in this Department. *See, e.g.*, *Teri-Nichols Institutional Food Merchants, LLC v. Elk Horn Holding Corp.*, 64 A.D.3d 424 (1st Dep't 2009); *Wassel Corp. v. Islamaj*, 2018 WL 2009359, at *1 (Sup. Ct. N.Y. Cnty. Apr. 25, 2018); *Ninety-Five Madison Co., L.P. v. Karlitz & Co.*, 2014 WL 832744, at *14 (Sup. Ct. N.Y. Cnty. Feb. 27, 2014); *see also Fed. Realty L.P. v. Choices Women's Med. Ctr., Inc.*, 289 A.D.2d 439, 441-42 (2d Dep't 2001); *Amster Co. v. Peter Sharp & Co., Inc.*, N.Y.L.J., Oct. 18, 1995 at 27, col. 2 (Civ. Ct. N.Y. Cnty. 1995); and *4 Third Ave. Leasehold, LLC v. Permanent Mission of the U.A.E. To The U.N.*, 133 F. App'x 768 (2d Cir. 2005).

C. Protected Settlement Negotiations Cannot be Used to Advance a Waiver Argument

Showing desperation, Plaintiffs, though their counsel's letter, contend that Landlord "endorsed" Tenant's continued possession, by negotiating for a possible lease extension and therefore, Landlord cannot seek holdover damages. *See* Meister Affirm., Ex. D at p. 2. This position is frivolous, and worse, smacks of bad faith.

As a threshold matter, the notices of termination were never withdrawn, and the Lease contains an enforceable no-waiver clause (*see* original Lease § 24).

Second, it was Tenant who signaled a desire to negotiate a modified lease by holding over, remaining in possession, and engaging in negotiations. It takes two to tango.

Third, the parties' negotiations were fully protected by a Pre-Negotiation Agreement, which in relevant part states that neither party "shall be bound by any oral understanding or agreement, and no rights or liabilities, either express or implied, shall arise on the part of any Party on account of any oral agreement or understanding, unless and until the agreement on any given

issue has been reduced to a Written Agreement" as defined in the agreement and "executed and delivered by each Party made a party to such Written Agreement." Meister Affirm., Ex. G, § 2; *see also id.* § 4 (stating in pertinent part that "[u]nder no circumstance shall any Discussions be binding unless and until a definitive written agreement memorializing same has been fully executed" by the parties).

In short, Tenant, knowing the Lease it signed contained a three-times holdover damages provision, nevertheless remained in possession following receipt of notices of termination and now, only after its Complaint was dismissed, "got religion" and tendered payments of "rent."[8] That is, Tenant paid nothing to Landlord From April, 2020 to February, 2021, knowing that Landlord, during that 11-month period, would have to pay mortgage interest and real estate taxes, that by virtue of Tenant's holding over, Landlord would be precluded from re-letting, and correspondingly, Tenant would retain the optionality of reopening its store.

The Court should have no sympathy for this transparent attempt at economic coercion by L Brands, an $11 billion publicly traded company, against Landlord, while L Brands strategically maintained the option of reopening its store.

The Court should not hesitate to enforce the bargained-for remedy.

IV. ALL PLAINTIFFS' AFFIRMATIVE DEFENSES FAIL

Plaintiffs' Reply to Landlord's Counterclaims alleges seven affirmative defenses. None have any merit.

[8] Following the position outlined in the December 10, 2020 letter sent by Tenant's counsel (Meister Affirm., Ex. D), Tenant's February 8 Payment of $14,514,226.90 seems to be based on "rent" payments through February 2021.

(i) Plaintiffs' First Affirmative Defense

Plaintiffs' first affirmative defense is that the Counterclaims fail to state a claim upon which relief may be granted. In the Reply, Plaintiffs do not particularize which specific allegations in the Counterclaims are supposedly deficient, nor do they explain why the Counterclaims are supposedly deficient. The rule is clear that "bare legal conclusions and no factual basis for allegations [are] insufficient to raise affirmative defenses." *Glenesk v. Guidance Realty Corp.*, 36 A.D.2d 852 (2d Dep't 1971); *Blenheim LLC v. Il Posto LLC*, 14 Misc. 3d 735, 739 (Civ. Ct. N.Y. Cnty. 2006). In any event, contrary to Plaintiffs' conclusory defense, Landlord easily makes its *prima facie* case for entitlement to summary judgment.

Plaintiffs' first affirmative defense should therefore be dismissed.

(ii) Plaintiffs' Second Affirmative Defense

Plaintiffs' second affirmative defense alleges latches, waiver, and equitable estoppel. Each fails.

Laches. As a matter of law, laches is not a defense in a dispute concerning nonpayment of rent in a commercial context. *See, e.g.*, *U.B.O. Realty Corp. v. Fulton*, 9/8/93 N.Y.L.J. p. 21, col. 1 (App. Term, 1st Dep't 1993); *see also*, Finkelstein and Ferrara, Landlord and Tenant Practice in New York § 14:351 (titled: "Laches — Not a defense in commercial disputes").

It is undisputed that Tenant is a commercial tenant, and that the Lease is for commercial space. As such, the purported defense of laches is, as a matter of law, inapplicable, and in any event, Landlord did not delay in asserting its counterclaims.

Landlord asserted the Counterclaims on June 29, 2020, just 21 days after Plaintiffs filed the Complaint on June 8, 2020. The statute of limitations for breach of contract is six years. CPLR 213(2). Prejudice is an essential element of a laches defense. *Dwyer by Dwyer v. Mazzola*, 171

A.D.2d 726, 727 (2d Dep't 1991). Here, Plaintiffs do not — and cannot — allege any undue delay by Landlord or any prejudice resulting from such alleged delay. Plaintiffs' laches defense fails for this separate reason as well.

Waiver. Plaintiffs have failed to allege any particular facts relevant to the familiar elements of a defense of waiver.[9] *See Blenheim LLC*, 14 Misc. 3d at 739. Nor has Landlord done anything to waive its right to collect the rent owed. Indeed, Section 24 of the Lease contains broad language limiting any defense of waiver. Section 24 provides: "No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by Landlord." Plaintiffs' waiver defense fails and should be dismissed.

Equitable Estoppel. For estoppel to exist, three elements are necessary: "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts." *BWA Corp. v. Alltrans Express USA, Inc.*, 112 A.D.2d 850, 853 (1st Dep't 1985). Additionally, the party asserting estoppel "must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position. *Id.* None of these elements are present, or even alleged. Additionally, the defense as alleged is insufficient because it is conclusory. *See Glenesk*, 36 A.D.2d 852.

[9] On the standard for waiver, *see, e.g.*, *A & V Holding Corp. v. Elmore*, 6/24/83 N.Y.L.J. 6 (col. 1) (App. Term, 1st Dep't 1983) (conduct alleged to constitute a waiver must be so "inconsistent with [the landlord's] purpose to stand upon his rights as to leave no opportunity for reasonable interference to the contrary").

Plaintiffs' affirmative defenses of laches, waiver, and equitable estoppel should be dismissed.

(iii) Plaintiffs' Third, Fourth, and Sixth Affirmative Defenses

Plaintiffs' third and fourth defenses allege, respectively, that the Counterclaims are barred by the doctrines of frustration of purpose and impossibility of performance. Plaintiffs' sixth affirmative defense alleges that granting the relief sought by Landlord in the Counterclaims would result in unjust enrichment. Each of these defenses was asserted affirmatively, as a cause of action, by Plaintiffs in their Complaint. In the Order, the Court rejected and dismissed each of these causes of action. *Victoria's Secret Stores, LLC v. Herald Square Owner LLC*, 70 Misc. 3d 1206(A) (Sup. Ct. N.Y. Cnty. 2021) (citation omitted).

There is no basis for treating Plaintiffs' affirmative defenses in the Reply differently than Plaintiffs' causes of action in the Complaint. Because these theories were rejected in the Order, that holding is now law of the case and these same theories must fail when asserted as affirmative defenses in the Reply. *Matter of Koegel*, 184 A.D.3d 764, 765-66 (2d Dep't 2020)); *Strujan v. Glencord Bldg. Corp.*, 137 A.D.3d 1252, 1253 (2d Dep't 2016).

Plaintiffs' third, fourth, and sixth affirmative defenses should be dismissed.

(iv) Plaintiffs' Fifth Affirmative Defense

Plaintiffs' fifth affirmative defense alleges failure to mitigate damages by Landlord. Like Plaintiffs' other affirmative defenses, Plaintiffs' fifth affirmative defense is conclusory, and fails on this independent basis. *See Blenheim LLC*, 14 Misc. 3d at 739; *Glenesk*, 36 A.D.2d 852.

In addition, Plaintiffs' fifth affirmative defense is illogical in light of the undisputed facts. It cannot be disputed that Tenant failed to surrender the Premises even after Landlord terminated the Lease, and that Tenant continues to retain possession of the Premises to this day. Kessner Aff.,

¶ 44. As such, Tenant prevented Landlord from mitigating its damages by reletting the Premises to a new tenant. In any event, Tenant's continued occupation of the Premises requires Tenant to continue to abide by its obligations. *See Towers Org.. Inc. v. Glockhurst Corp. N.V.*, 160 A.D.2d 597, 599 (1st Dep't 1990).

Moreover, Landlord has no duty to mitigate its damages. *See Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130 (1995). The point is simply that Tenant denied Landlord the *option* to mitigate its damages by remaining in possession after Landlord terminated the Lease, and despite Tenant's rescission claim, which required Tenant to vacate the Premises.

In any event, Landlord is now only seeking *past* due undisputed charges. Though it could have, Landlord is not seeking "accelerated" damages for the unexpired balance of the original term. Had Landlord sought such accelerated damages, though it has no duty to actually mitigate damages, the computation of damages in respect of accelerated rent would have required consideration of the present fair rental value of the Premises. But, again, Landlord is not seeking accelerated damages, so the mitigation issue is simply not before the Court.

Plaintiffs' fifth affirmative defense should be dismissed.

(v) Plaintiffs' Seventh Affirmative Defense

Plaintiffs' seventh affirmative defense alleges that the Counterclaims are barred by reason of Landlord's failure to deliver performance that served as a condition for the contract. Once again, this defense is conclusory and identifies neither the performance Landlord supposedly failed to deliver nor the Lease provisions establishing such performance as a condition of Tenant's obligation to pay charges due under the Lease. It is indisputable (and Tenant affirmatively alleges) that the temporary closure of Tenant's store resulted from *government* action rather than Landlord's actions, and that under the plain terms of the Lease such government action did not

excuse Tenant from its rent obligations. As this Court wrote, "[i]t is of no moment that the specific cause for the government law was not enumerated by the parties because the Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business." *Victoria's Secret Stores, LLC*, 70 Misc. 3d 1206(A).

Nor can Plaintiffs rely on the doctrine of constructive eviction in support of their seventh affirmative defense, as this doctrine applies only if a tenant's "abandonment" is due to some wrong by the landlord itself, which, as noted, is not the case here. *See, e.g.*, *Grammer v. Turits*, 271 A.D.2d 644 (2d Dep't 2000) (noted in N.Y. Pattern Jury Instructions § 6:13).

Plaintiffs' seventh affirmative defense should be dismissed.

CONCLUSION

Landlord has made a *prima facie* case for breach of the Lease and enforcement of the Guaranty. There is no genuine controversy over the sums Landlord now seeks, which consist solely of remaining holdover damages and statutory interest.

The emergency orders issued by Governor Cuomo bar commencement of an eviction proceeding, not the exercise of contractual remedies such as sending a lease termination notice. They therefore have no application here.

The Lease's "three-times" holdover damages clause has been repeatedly and consistently enforced by New York courts, including the Appellate Division, First Department.

The Court should: (1) grant Landlord's motion for partial summary judgment on the Severed Counterclaims; (2) enter a judgment in favor of Landlord (a) against Plaintiffs, jointly and severally, in the amount of $19,979,593.08 with respect to the Retail Premises, and (b) against Tenant only in the additional amount of $2,754,846.10 with respect to the Office Premises; and (3) dismiss Plaintiffs' affirmative defenses.

Landlord also respectfully requests that the Court indicate in its order resolving Landlord's motion whether Landlord should pursue the Remaining Counterclaims by way of future motion within this action or by way of a separate action.

Dated: New York, New York
February 16, 2021

MEISTER SEELIG & FEIN LLP

By: /s/ Stephen B. Meister
Stephen B. Meister, Esq.
Howard S. Koh, Esq.
Amit Shertzer, Esq.

125 Park Avenue, 7th Floor
New York, New York 10017
Tel: (212) 655-3500

Attorneys for Defendant
Herald Square Owner LLC

Richard L. Claman, Esq.
STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.
675 Third Avenue, 31st Floor
New York, New York 10017
Tel: (212) 681-6500

Of Counsel for Defendant

CERTIFICATE OF COMPLIANCE

The total number of words in the foregoing memorandum of law, inclusive of headings and footnotes and exclusive of the caption, table of contends, table of authorities, and signature blocks, is 6,947 and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court, effective October 1, 2018.

Dated: New York, New York
February 16, 2021

/s/ Stephen B. Meister
STEPHEN B. MEISTER