

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

THE GAP, INC.,

Plaintiff,

v.

PONTE GADEA NEW YORK LLC,

Defendant.

Case No. 20-cv-4541 (LTS) (KHP)

**DEFENDANT / COUNTER-PLAINTIFF PONTE GADEA NEW YORK LLC'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DAMAGES**

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Pursuant to the Court’s March 8, 2021 Memorandum Opinion and Order (“SJ Order”) [ECF No. 59] and the March 10, 2021 Inquest Scheduling Order (“Inquest Order”) [ECF No. 59], Defendant/Counterclaimant Ponte Gadea New York LLC (“Ponte Gadea”) respectfully submits these Proposed Findings of Fact and Conclusions of Law on Damages. Contemporaneously herewith, Ponte Gadea further submits its Memorandum of Law in Support of its Claims for Damages (“Inquest Memo”), the Declaration of Christopher Pavlick (Ponte Gadea’s Senior Controller) (“Pavlick Dec.”), the Declaration of Darryl R. Graham (counsel for Ponte Gadea) (“Graham Dec.”), along with the exhibits attached thereto, which are fully incorporated as if set forth herein.

I. PROPOSED FINDINGS OF FACTS

1. Plaintiff The Gap, Inc. (“Gap”), as tenant, and Ponte Gadea, as landlord, are parties to that certain Lease, dated as of February 18, 2005 (“Lease”), for premises located at 734 Lexington Avenue, New York, New York 10022 a/k/a Unit A, 130 East 59th Street, New York, New York, 10022 (the “Premises”). [ECF No. 9 ¶ 115]. *See also* Graham Dec. ¶ 6, Ex. 1 (attaching the Lease); SJ Order, p. 2.

2. Pursuant to Section 1.6 of the Lease, Gap was required to pay Fixed Rent to Ponte Gadea on the “first (1st) day of each calendar month during the Term.” [ECF No. 9 ¶ 117]. *See also* SJ Order, p. 26.

3. Gap failed to pay April 2020 Fixed Rent for the Premises, which was due and owing on April 1, 2020, pursuant to Section 1.6 of the Lease. [ECF No. 9 ¶¶ 156, 158] *See also* Pavlick Dec. ¶ 4; SJ Order, p. 26.

4. Pursuant to Section 21.1(A) of the Lease, on May 26, 2020, Ponte Gadea served Gap with a Notice to Cure Default. [ECF No. 9 ¶¶ 159-163]. *See also* SJ Order, p. 6].

5. Gap failed to cure the Notice to Cure Default, which resulted in an Event of Default. [ECF No. 9 ¶¶ 164-166]. *See also* SJ Order, p. 6.

6. On June 8, 2020, Ponte Gadea served Gap with a Notice of Termination of the Lease, which terminated the tenancy effective on June 15, 2020. [ECF No. 9 ¶ 168]. *See also* SJ Order, p. 26.

7. On June 15, 2020, the tenancy formally terminated. SJ Order, p. 26.

8. Nevertheless, Gap failed to vacate and surrender the Premises as required under the Lease. [ECF No. 9 ¶ 191]. *See also* SJ Order, p. 26; Pavlick Dec. ¶ 5.

9. Due to this failure, as set forth in Section 25.2 of the Lease, Gap was a holdover tenant, which entitled Gap to holdover rent commencing on June 15, 2020 until Gap vacated the Premises. *Id.* ¶ 192; SJ Order, p. 26.

10. Gap vacated the Premises on October 14, 2020. *See* Pavlick Dec. ¶ 5, Ex. 1. Consequently, Gap was a holdover tenant for the period of June 15, 2020 through October 14, 2020. *Id.*; SJ Order, p. 26.

11. Under the Lease, the Term of the Lease was to expire on January 31, 2021. Pavlick Dec. ¶ 7; Lease § 1.2.

12. Gap failed to pay Rental, including Fixed Rent, Additional Rent, Tax Payments, and all other rental and payment obligations due under the Lease for the period of April 2020 through the end of the Lease Term, which is January 31, 2021. Pavlick Dec. ¶ 4; *see also* SJ Order, p. 5.

13. During the remainder of the Lease Term through January 31, 2021, Ponte Gadea did not relet the Premises. Pavlick Dec. ¶ 6.

14. Ponte Gadea has not received any rental payments, compensation, or any other consideration from Gap or any other party or source to satisfy Gap's rental and other payment obligations due under the Lease for the period of April 2020 through the end of the Lease Term, which is January 31, 2021. *Id.* ¶ 7.

15. Ponte Gadea is owed all Rental payable under the Lease from Gap due to the date the Lease terminates, as well as all other Rental and other payment obligations due under the Lease for the remainder of the Lease Term through January 31, 2021. *See* Lease §§ 23.3(A), (C).

16. On March 8, 2021, the Court granted Ponte Gadea's summary judgment motion as to liability on its first and second counterclaims, dismissed Gap's Complaint, and denied Gap's motion for summary judgment in its entirety. *See* SJ Order, p. 26. In doing so, the Court held, "based on the undisputed facts of record, that the Lease was terminated by Ponte Gadea effective June 15, 2020, and that Ponte Gadea is entitled pursuant to section 25.2 of the Lease to payment for holdover occupancy from that date." *Id.* at 26.

17. Further, the Court concluded and directed as follows:

Because the parties filed and briefed their cross-motions during the term of the Lease, which ended on January 31, 2021, the Court has by separate order entered simultaneously herewith referred this case to the Hon. Katherine H. Parker, United States Magistrate Judge, for an inquest on Ponte Gadea's damages, including outstanding unpaid rent from April 2020, holdover rent from June 15, 2020, and applicable costs and interest under Articles 23 and 24 of the Lease.

Id.

18. For the period of April 1, 2020 through January 31, 2021, Gap has failed to pay and thus owes Ponte Gadea for unpaid Rental and other payment obligations due under the Lease in the total amount of **\$9,337,998.95**, which includes prejudgment interest. Pavlick Dec. ¶ 8. The

factual summary of the constituent parts of this total amount are outlined below. *See also* Inquest Memo, *passim*; Pavlick Dec. ¶¶ 1-23; Graham Dec. ¶¶ 1-47.

19. Ponte Gadea is owed from Gap the unpaid Fixed Rent, which was fixed at the monthly amount of \$612,500, for the periods of April 1, 2020 through June 15, 2020, and October 15, 2020 through January 31, 2021. *See* SJ Order, p. 26; Lease §§ 1.4(B), 1.5(5), 21.2, 23.1(B), 23.3(A); Pavlick Dec. ¶ 9. The total amount of this unpaid Fixed Rent totals **\$3,704,637.10**. *Id.*

20. Ponte Gadea is owed from Gap the unpaid Holdover for the period of June 16, 2020 through October 14, 2020, in the total amount of **\$4,539,415.32**. *See* SJ Order, p. 26; Lease §§ 23.3, 25.2; Pavlick Dec. ¶¶ 10-11.

21. Ponte Gadea is owed from Gap the unpaid Additional Rent for the period of April 1, 2020 through January 31, 2021. *See* SJ Order, p. 26; Lease, §§ 1.4(B), 5.3, 5.4, 23.1, 23.3; Pavlick Dec. ¶ 12. The total amount of unpaid Additional Rent (relating to common area maintenance charges) totals **\$50,708.54**. Pavlick Dec. ¶ 12, Comp. Ex. 2.

22. Ponte Gadea is owed from Gap the unpaid Tax Payments for the period of April 1, 2020 through January 31, 2021, which includes the unpaid real estate taxes for January 2021 (\$240,427.40) and the unpaid fee for the preparation of certain necessary tax documents – specifically, completion of the TC 201 & TC 309 Forms, Income and Expenses Schedule – regarding Ponte Gadea’s tax appeal of the annual real estate taxes relevant to Gap’s Premises (\$1,354.79), which together total **\$241,782.19**. *See* Lease §§ 1.4(B), 2.1(G), 2.2(D), 2.4(A), 23.3(A), 23.3(C); Pavlick Dec. ¶¶ 13-17, Comp. Exs. 3-4.

23. Ponte Gadea is owed from Gap the Interest on Late Payments that accrued on all unpaid Rental during the period of April 1, 2020 through January 31, 2021. *See* SJ Order, p. 26; Lease §§ 23.3(C), 24.2. Pursuant to the Lease, the total Interest on Late Payments accrued on the

unpaid Rentals from their respective due dates through April 1, 2021 is **\$117,760.27**. Pavlick ¶¶ 18-19.

24. After April 1, 2021, the amount of Interest on Late Payments accruing on all of the outstanding Rental (Fixed Rent, Additional Rent, and Tax Payments) is \$571.87 per day. *Id.* ¶ 20.

25. Ponte Gadea is owed from Gap its attorneys' fees and disbursements that it incurred in connection with terminating the Lease, removing Gap from the Premises, and prosecuting its Counterclaims in this action. *See* SJ Order, p. 26; Lease §§ 23.3(A)(2), 24.1. As of February 28, 2021, Ponte Gadea has incurred recoverable attorneys' fees (\$382,614.00) and disbursements (\$46,565.60), which together total **\$429,179.60**. Pavlick Dec. ¶ 21; Graham Dec. ¶¶ 9-12, Ex. 3 (attaching invoices).

II. PROPOSED CONCLUSIONS OF LAW

A. Ponte Gadea is Entitled to Damages for All Unpaid Rental from April 1, 2020 through the Expiration of the Lease Term on January 31, 2021

Pursuant to the Lease, "the term 'Rental' shall mean, collectively, the Fixed Rent, the Tax Payment and the additional rent payable by Tenant to Landlord [as set forth in the lease]." *See* Lease, § 1.4(B).

As a general rule, "when the language of a contract is clear, the court will presume that the parties intended what they expressed." Joseph M. Perillo, *Calamari and Perillo on Contracts* § 3.10 (5th ed. 2003). The New York Court of Appeals has held that "[i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 634 N.Y.S.2d 669, 658 N.E.2d 715 (N.Y. 1995). Therefore, when the parties set down in clear terms their agreement, the court should not go outside the four corners of the document. *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 775 N.Y.S.2d 765, 807 N.E.2d 876 (N.Y. 2004) ("[C]ourts

may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.”). The interest served by this rule is that of commercial certainty. This is a particular concern when dealing with real property transactions where “the instrument was negotiated between sophisticated, counseled business people negotiating at arms length.” *Id.* (quoting *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 634 N.Y.S.2d 669, 658 N.E.2d 715 (N.Y. 1995)).

Damages for breach of contract are determined by calculating the “amount necessary to put the plaintiff in the same economic position he would have been in had the defendant fulfilled his contract.” *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 495 (2d Cir. 1995) (citing *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 92 (2d Cir. 1984)). Where the breach of contract was a failure to pay money, the plaintiff is entitled to recover the unpaid amount due under the contract plus interest. *See Scavenger, Inc. v. GT Interactive Software Corp.*, 289 A.D.2d 58, 58–59 (1st Dep’t 2001). Generally, when a tenant abandons the premises prior to the expiration of a lease, the landlord may exercise one of three options: (1) do nothing and collect the full rent due under the lease; (2) accept the tenant’s surrender, reenter the premises and relet them, thereby releasing the tenant from further liability for rent; or (3) notify the tenant that it is entering and reletting the premises for the tenant's benefit. *See Holy Prop. Ltd. v. Kenneth Cole Prod.*, 87 N.Y.2d 130, 133–34 (1995) (citations omitted). When a tenant is removed from the premises, the lease contract terminates. *Int’l Publs. v. Matchabelli*, 260 N.Y. 451, 454 (1933). However, parties may contract as they please, and “if the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable.” *Holy Prop.*, 87 N.Y.2d at 34 (citations omitted).

Here, Gap was obligated to pay all Rental obligations, as well as all other monetary obligations, under the Lease through the expiration of the Lease Term, which was January 31,

2021. However, as the Court has found, Gap failed to pay all Rental and other payment obligations as obligated under the Lease, and Ponte Gadea has confirmed that it has not received any unpaid Rental due and owing under the Lease for the relevant period of April 1, 2020 through January 31, 2021. *See* Pavlick Dec. ¶¶ 4-7. As a consequence, Ponte Gadea is entitled to recover all unpaid Rental. *See* Lease §§ 21.2, 23.1(B), 23.3(A)(1), (2). Each of these categories of Rental and the relevant amounts that Ponte Gadea is entitled to recover from Gap are set forth below.

1. *Fixed Rent – April 1 2020 to June 14, 2020; October 15, 2020 to January 31, 2021*

Based on the competent evidence that Ponte Gadea submitted, the record establishes that Ponte Gadea is entitled to unpaid Fixed Rent in the monthly amount of \$612,500, *see* Lease, § 1.5(5), for the months of April, May, November, December 2020, and January 2021 (\$3,062,500), and \$20,416.67 for each day from June 1 through June 15 (\$306,250.00), and \$19,758.06 for each day from October 15 through October 31 (\$335,887.10), which constitutes the period from when Gap ceased paying Rental and the expiration of the Lease Term, but excluding the dates that Gap held over in the Premises. *See* Pavlick Dec. ¶¶ 4-7.

In sum, Ponte Gadea is entitled to an award of contract damages for Fixed Rent from Gap in the total amount of **\$3,704,637.10**. *Id.* ¶ 9; *Holy Prop.* 87 NY2d at 134 (landlord is entitled to recover unpaid rent through expiration of lease term); *Rios v Carrillo*, 53 A.D.3d 111, 114 (2d Dept 2008); *Joint Venture v Solcoor*, 177 A.D.2d 465, (2d Dep’t 1991) (landlord is entitled to recover all unpaid rent from the date of tenant’s breach through expiration of lease term); *see also* Inquest Memo, p. 6-8.

2. *Additional Rent – April 1, 2020 through January 31, 2021*

Based on the competent evidence that Ponte Gadea submitted, in addition to Fixed Rent, the record establishes that Ponte Gadea is entitled to unpaid Additional Rent, which the Lease

specifically includes in the definition of Rental, *see* Lease 1.4(B), for the period of April 1, 2020 through January 31, 2021. *See also* Lease, §§ 1.4(B), 5.3, 5.4, 25.2.

Pursuant to the Lease, and as Ponte Gadea has established, Gap was obligated to pay its share of the relevant common area maintenance (“CAM”) charges for the building in which the Premises is located, which related to heating fuel, water, and maintenance fees for the Premises. *See* Pavlick Aff. ¶¶ 12, Comp. Ex. 2; *see also* Lease, §§ 5.3, 5.4. As set for in the Pavlick Declaration, the specific amount of the monthly CAM was based on the annual budget from the ultimate owner of the Building, UJA-Federation of NY. Pavlick Dec. ¶ 12, Comp. Ex. 2. For the months of April 2020 through June 2020, the portion of the monthly CAM that accrued and passed to Gap equaled \$5,216.93, and for the months of July 2020 through January 2021, the monthly CAM charge that accrued and passed to Gap equaled \$5,008.25, which Gap has failed to pay to date. *Id.*

Consequently, Ponte Gadea is entitled to an award of contract damages for Additional Rent relating to the unpaid monthly CAM charges in the aggregate amount of **\$50,708.54** for the months of April 2020 through January 2021. *Id.*; SJ Order, p. 26; *see also Holy Prop.*, 87 NY2d at 134; *Rios*, 53 A.D.3d at 114; *Solcoor*, 177 A.D.2d at 465; *One Whitehall Co. v Wang Labs., Inc.*, 87 CIV. 2118 (JEL), 1990 WL 3945, at *1 (S.D.N.Y Jan. 18, 1990) (recognizing that, if provided under the terms of the lease, landlord is entitled to recover “additional rent and other charges payable under th[e] Lease”).]

3. *Tax Payments – January 2021 Real Estate Taxes and Tax Audit Cost for 2020/2021*

Based on the competent evidence that Ponte Gadea submitted, in addition to Fixed Rent and Additional Rent, the record establishes that Ponte Gadea is entitled to unpaid Tax Payments, which the Lease specifically includes in the definition of Rental, *see* Lease 1.4(B), for the period of April 2020 through January 31, 2021. *See* Lease § 23.3(A)(2) (recognizing that Gap remains

liable for Rental after termination); *see also id.*, §§ 2.1(G), 2.2(D); 23.3(A), 23.3(C); *ReliaStar Life Ins. Co. of New York v Home Depot U.S.A., Inc.*, 00-CV-676 (TCP)(ARL), 2006 WL 8443286, at *8 (E.D.N.Y. Oct. 11, 2006) (recognizing that Landlord may recover unpaid real estate taxes as provided for in the relevant lease, which makes tenant liable for real estate taxes).

As the record establishes, Gap paid real estate taxes for the entirety of 2020, including over \$1 million on September 24, 2020, but failed to make the Tax Payment for January 2021. *See Pavlick Dec.* ¶¶ 13-14, 22, Ex. 5. Accordingly, Ponte Gadea is entitled to recover from Gap the prorated amount of real estate taxes for January 2021, which is calculated as 31 of the 180 days for the tax period from January through June 2021 or 17% of the taxes owed for the first half of 2021. *Id.* ¶ 14, Comp. Ex. 3. After adjusting for portions of the tax bill that are non-recoverable from Gap, the relevant tax bill for the period of January 2021 through June 2021 is \$1,403,785.80. *Id.* Based on Gap's obligation to pay the prorated portion of the real estate taxes for January 2021, Ponte Gadea is entitled to recover from Gap contract damages for this unpaid Tax Payment in the amount of **\$240,427.40**. *Id.*

Additionally, the record demonstrate that Gap failed to pay for the cost of the tax audit filing fee for the tax assessment year 2020/2021, which is \$2,300, as required under the Lease. *See Lease*, § 2.4(A); *Pavlick Dec.* ¶¶ 15-16, Comp. Ex. 4 (confirming that the Gap had paid the same fee in 2019 and attaching proof of payment). As the 2020/2021 fee relates to the period of July 2020 to June 2021, the prorated amount Gap owes to Ponte Gadea for the period of July 2020 through January 2021 (215 out of 365 days) is **\$1,354.79**. *Id.* ¶ 16, Comp. Ex. 4.

Consequently, Ponte Gadea is entitled to an award of contract damages from Gap for Tax Payments relating to the unpaid real estate taxes for January 2021 and the prorated portion of the

tax audit filing fee for 2020/2021 in the aggregate amount of **\$241,782.19**. *Id.* ¶ 17; *see also Holy Prop.*, 87 NY2d at 134; *ReliaStar Life Ins. Co. of New York*, 2006 WL 8443286, at *8.

B. Ponte Gadea is Entitled to Damages for All Unpaid Holdover Rent for the Period of June 16, 2020 through October 14, 2020

As the Court held in the SJ Order, Ponte Gadea is entitled to holdover starting on June 16, 2020 through Gap's vacatur of the Premises, which occurred on October 14, 2020. *See* SJ Order, p. 26 ("Ponte Gadea is entitled pursuant to section 25.2 of the Lease to payment for holdover occupancy from [June 15, 2020]."); Lease §§ 23.3, 25.2 (imposing Holdover for the period Gap continued to use and occupy the Premises after expiration and termination of the Lease); Pavlick Dec. ¶ 5, Ex. 1 (confirming that Gap vacated the Premises on October 14, 2020).

Section 25.2 of the Lease sets forth the Holdover amounts to be charged. Specifically, for the first thirty days that Gap held over in the Premises, the agreed upon holdover amount pursuant to the Lease is "one and one-half (1½) times the Fixed Rent and one hundred percent (100%) of the Additional Rent." *See* Lease § 25.2.¹ For "any period of time thereafter," Gap owes Ponte Gadea "the greater of (i) two (2) times the aggregate Rental that was payable under this Lease during the last month of the Term, and (ii) the then fair market rental value of the Premises." *Id.*; Pavlick Dec. ¶ 11 (confirming that fair market rental value is the lesser alternative).

Based on the established holdover period, the amount of holdover rent that Ponte Gadea seeks is as follows: \$459,375.00 for June 16 through June 30; \$1,076,814.51 for the month of July; \$1,225,000.00 for the month of August (\$612,500 * 2); \$1,225,000.00 for the month of September; and, \$553,225.81 for October 1 through October 14, 2020, which together totals **\$4,539,415.32**. *See* Pavlick Dec. ¶ 11.

¹ The Additional Rent for the Holdover period is calculated above in the "Additional Rent" section as the amount of Additional Rent is unchanged during the holdover period.

In New York, the “well established” rule is that “[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.” *Truck Rent–A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 393 N.Y.S.2d 365, 361 N.E.2d 1015, 1018 (1977); *see also 136 Field Point Circle Holding Co., LLC v. Invar Int’l Holding, Inc.*, 644 F. App’x 10, 12 (2d Cir. 2016) (same).

Here, the record demonstrates that the contractual holdover amounts, which were agreed to by two sophisticated commercial parties, are “reasonable” and are not “plainly or grossly disproportionate to the probable loss.” Indeed, the holdover amounts far greater than those set forth in the Leas are typical in commercial leases and courts consistently enforce them. *See, e.g., Koylum, Inc. v Peksan Realty Corp.*, 99 CV 3793 (ADS), 2004 WL 5599307, at *9 (E.D.N.Y. Dec. 2, 2004) (concluding that holdover rent of twice the base rent was a “reasonable estimate” of damages and thus recoverable by the landlord); *Federal Realty L.P. v. Choices Women’s Med. Ctr.*, 289 A.D.2d 439 (2d Dep’t 2001) (granting summary judgment enforcing treble-rent provision against non-vacating tenant); *Thirty-third Equities Co., LLC v. Americo Group, Inc.*, 294 A.D.2d 222, 222 (1st Dep’t 2002) (enforcing a liquidated-damages clause obligating the holdover tenant to pay two and one-half times the monthly rent).²

² In any event, even if the law did not clearly demonstrate that the holdover rent provisions in the Lease were enforceable and even if Gap were to now argue that those provisions somehow constituted a penalty, Gap long ago waived the right to make such an argument. Indeed, Gap has failed, as a matter of law, to satisfy its burden that the Lease’s holdover provision is a penalty insofar as Gap failed to assert this as an affirmative defense. *See* [ECF No. No. 11]. Under New York law, “[t]he assertion that a liquidated damages clause is in fact an unenforceable penalty is an affirmative defense.” *See Bell v. Ramirez*, No. 13-CV-7916, 2014 WL 7178344, at *3 (S.D.N.Y. Dec. 9, 2014) (collecting cases)). If it is not raised, as the case is here, this defense is waived. *See Howard v. City of New York*, No. 02-CV-1731, 2006 WL 2597857, at *6 (S.D.N.Y. Sept. 6, 2006) (“When an affirmative defense is not raised in an answer, as required by Rule 8(c) of the Federal Rules of Civil Procedure, it is waived.”).

Accordingly, Ponte Gadea is entitled to an award of contract damages from Gap for the full measure of Holdover rent for the period of June 16, 2020 through October 14, 2020, which is **\$4,539,415.32**. Pavlick Dec. ¶¶ 10-11.

C. Ponte Gadea is Entitled to Damages for Interest on Late Payments on All Unpaid Rental for the Period of April 1, 2020 through January 31, 2021

As the Court held in the SJ Order, Ponte Gadea is entitled to “interest under [Section 24.2] of the Lease. SJ Order, p. 26. Therefore, Ponte Gadea is entitled to recover interest that has accrued on unpaid Rental – *i.e.*, Fixed Rent, Additional Rent, and Tax Payments – during the period of April 1, 2020 through January 31, 2021. Lease §§ 23.3(C), 24.2; *see also ReliaStar Life Ins. Co. of New York*, 2006 WL 8443286, at *8 (recognizing that, based on the “clear and unambiguous language of the Lease,” landlord was entitled to recover interest of 18% on unpaid rental obligations); *In re J.W. Mays, Inc.*, 30 BR 769, 772 (Bankr. S.D.N.Y. 1983) (“Under New York law, where there is a default in payment of rent, [a] tenant is bound to pay interest on installments of rent from the time they become due.”) (citations omitted).

Pursuant to Section 24.2 of the Lease, Interest on Late Payments is calculated as follows:

If Tenant fails to pay any item of Rental on or prior to the fifth (5th) day after the date that such payment is due, then Tenant shall pay to Landlord, in addition to such item of Rental, as a late charge and as additional rent, an amount equal to interest at the Applicable Rate on the amount unpaid, computed from the date such payment was due to and including the date of payment. Nothing contained in this Section 24.2 limits Landlord’s rights and remedies, by operation of law or otherwise, after the occurrence of an Event of Default.

As such, and based on the record, Ponte Gadea is entitled to recover Interest on Late Payments calculated from the relevant due date for each of the various portions of unpaid Rental at the “Applicable Rate,” which Ponte Gadea established is 5.25%. Pavlick Dec. ¶ 18.³ Based on

³ The Lease establishes that the amount of interest charged is the “Applicable Rate,” which is 200 basis points above the Base Rate (3.25%), or 5.25%. *Id.* §§ 1.7(B), (D); *see also*

the relevant due dates, and calculated at 5.25%, Ponte Gadea is entitled to recover as damages from Gap the amount of accrued Interest on Late Payments in the amount of **\$117,760.27** through April 1, 2021, which is more fully set forth in the below chart:

Description	Amount	Invoice Date	Interest Accrued as of	Accrual Days to 4/1/21	Interest Accrued
April 2020 Fixed Rent	\$ 612,500.00	4/1/2020	4/1/2020	365	\$ 32,156.25
April 2020 CAM	\$ 5,216.93	4/1/2020	5/1/2020	335	\$ 251.38
May 2020 Fixed Rent	\$ 612,500.00	5/1/2020	5/1/2020	335	\$ 29,513.27
May 2020 CAM	\$ 5,216.93	5/1/2020	5/31/2020	305	\$ 228.87
June 2020 Fixed Rent (Prorated 6/1-6/15/20)	\$ 306,250.00	6/1/2020	6/1/2020	304	\$ 13,391.10
June 2020 CAM (Prorated 6/1-6/15/20)	\$ 2,608.47	6/1/2020	7/1/2020	274	\$ 102.80
October 2020 Fixed Rent (Prorated 10/15-10/31/20)	\$ 335,887.10	10/1/2020	10/1/2020	182	\$ 8,792.88
October 2020 CAM (Prorated 10/15-10/31/20)	\$ 2,746.46	10/1/2020	10/31/2020	152	\$ 60.05
November 2020 Fixed Rent	\$ 612,500.00	11/1/2020	11/1/2020	151	\$ 13,303.00
November 2020 CAM	\$ 5,008.25	11/1/2020	12/1/2020	121	\$ 87.16
December 2020 Fixed Rent	\$ 612,500.00	12/1/2020	12/1/2020	121	\$ 10,660.02
December 2020 CAM	\$ 5,008.25	12/1/2020	12/31/2020	91	\$ 65.55
January 2021 Fixed Rent	\$ 612,500.00	1/1/2021	1/1/2021	90	\$ 7,928.94
January 2021 CAM	\$ 5,008.25	1/1/2021	1/31/2021	60	\$ 43.22
Prorated 2nd Half 2020/2021 RET	\$ 240,427.40	1/27/2021	2/26/2021	34	\$ 1,175.79
Total Interest Accrued as of 4/1/21					\$ 117,760.27

See also Pavlick Dec. ¶ 19.

Furthermore, Ponte Gadea is entitled to recover from Gap as additional damages for Interest on Late Payments the amount of interest accruing at the daily amount of \$571.87 from April 1, 2021 until entry of final judgment. *Id.* ¶ 20.

D. Ponte Gadea is Entitled to Damages from Gap for its Reasonable Attorney's Fees and Disbursements

As noted above, Ponte Gadea is also entitled to an award of attorneys' fees and disbursements that it incurred in connection with terminating the Lease, removing Gap from the Premises, and prosecuting its Counterclaims in this action pursuant to Sections 23.3(A)(2) and 24.1 of the Lease. SJ Order, p. 26; see also *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993).

<https://www.jpmorganchase.com/about/our-business/historical-prime-rate> (Base Rate is 3.25%) (last accessed March 26, 2021).

1. Entitlement to Attorneys' Fees Under the Lease

Pursuant to Sections 23.3(A)(2) and 24.1 of the Lease, Ponte Gadea is entitled to an award of the attorneys' fees that it incurred in terminating the Lease and removing Gap from the Premises, which necessarily include the attorneys' fees Ponte Gadea incurred in this action.

a. **Ponte Gadea's Attorneys' Fees Were Incurred "in Connection with the Termination of [the] Lease" and Ponte Gadea's "Re-Entry Upon the Premises"**

In Section 23.3(A)(2) of the Lease, the parties agreed that Ponte Gadea would be entitled to recover "*all of Landlord's expenses in connection with the termination of this Lease, Landlord's re-entry upon the Premises and such reletting, including but not limited to, all repossession costs, brokerage commissions, legal expenses, attorneys' fees and disbursements, alteration costs, contributions to work and other expenses of preparing the Premises for such reletting.*" See Lease § 23.3(A)(2) (emphasis added).

As the record evidence establishes, as a consequence of Gap's breaches of the Lease and litigation strategy, including, but not limited to seeking to establish and transfer this landlord-tenant dispute to a multi-district litigation,⁴ Ponte Gadea expended more than \$400,000 in legal fees and disbursements to terminate the Lease and remove Gap from the Premises. See *490 Owners Corp. v. Israel*, 189 Misc. 2d 34, 35-36 (N.Y. , 35, 729 N.Y.S.2d 819 (N.Y. App. Term 2001) (reversing trial court's denial of attorneys' fees incurred for summary proceeding where lease provided Landlord was entitled to the costs of obtaining possession and re-renting the premises); *Bunny Realty v. Miller*, 180 A.D.2d 460, 461 (N.Y. App. Div. 1992) (holding "the subject lease clearly permits the landlord to recover legal fees for obtaining possession of the

⁴ The expanded procedural history relevant to this dispute and Ponte Gadea's efforts to expeditiously bring this matter to a summary resolution is more fully set forth in Ponte Gadea's Inquest Memorandum of Law and Graham Declaration. See Inquest Memo, p. 14-25; Graham Dec. ¶¶ 1-47, Ex. 3.

apartment ... [and] is sufficiently broad to allow the landlord to procure counsel fees for any reason, including breach of lease, so long as the ultimate result would be to take possession or re-rent the apartment”).

Based on this record, and given that Ponte Gadea’s attorneys’ fees were incurred in connection with the termination of the Lease and Ponte Gadea’s re-entry of the Premises (which did not occur until October 2020), Ponte Gadea is entitled to recover as damages from Gap \$382,614.00 in attorneys’ fees and \$46,565.60 in disbursements, representing “all” of its “legal expenses, attorneys’ fees and disbursements” pursuant to Section 23.3(A)(2) of the Lease. *See* Graham Dec. ¶¶ 9-12, Ex. 3; Pavlick Dec. ¶ 21.

b. Ponte Gadea Is Also Entitled to Recover the Attorneys’ Fees It Incurred in Prosecuting its Counterclaims Pursuant to Section 24.1 of the Lease

In addition to the foregoing, Gap is also required to “pay to Landlord an amount equal to the costs that Landlord incurs in instituting or prosecuting any legal proceedings against Tenant ... after the occurrence of an Event of Default....” *See* Lease § 24.1; *see also Boulevard Assocs. v. Sovereign Hotels, Inc.*, 868 F. Supp. 70, 71 (S.D.N.Y. 1994) (finding plaintiff entitled to recover reasonable costs and attorneys’ fees pursuant to Lease where tenant defaulted on its rent obligation); *1044 Madison Assocs., L.L.C. v. Sirene One, L.L.C.*, 369 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2005) (finding plaintiff entitled to reasonable attorneys’ fees pursuant to terms of commercial lease).

Here, the record demonstrates that Ponta Gadea incurred litigation costs in prosecuted its Counterclaims against Gap for a declaratory judgment that the Lease had terminated due to Gap’s non-payment of rent and for breach of the Lease. *See* Graham Dec. ¶¶ 7-47, Ex. 3; Pavlick Dec. ¶ 21. Further, Ponte Gadea expressly put Gap on notice in its Notice of Default, Notice of Termination, and in the Counterclaims that Ponte Gadea would seek reimbursement of its legal

fees incurred as a result of Gap's actions. *See* Counterclaims ¶¶ 163, 169, 205, 214. As such, Ponte Gadea is entitled to recover \$382,614.00 in attorneys' fees and \$46,565.60 in disbursements against Gap.

2. *Akerman's Hourly Rates and Hours Expended on this Matter Were Reasonable*

On an attorneys' fees application, "[t]he reasonable hourly rate is the rate a paying client would be willing to pay." *Ekukpe v. Santiago*, No. 16 CIV. 5412 (AT), 2020 WL 7027613, at *2 (S.D.N.Y. Nov. 30, 2020) (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections*, 522 F.3d 182, 190 (2d Cir. 2008)). In determining the "reasonable hourly rate," the Court must consider certain case-specific variables. *Id.* (citation omitted) Such variables include:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the level of skill required to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to acceptance of the case;
- (5) the attorney's customary hourly rate;
- (6) whether the fee is fixed or contingent;
- (7) the time limitations imposed by the client or the circumstances;
- (8) the amount involved in the case and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

Id. (citation omitted). "There is a presumption that 'a reasonable, paying client would in most cases hire counsel from within his district, or at least counsel whose rates are consistent with those charged locally,' and so in ordinary circumstances courts may rely on typical fees within the district as a measure of reasonableness. *Id.* (citation omitted).

With respect to the reasonableness of hours expended, "courts must consider both "contemporaneous time records . . . specifying, for each attorney, the date, hours expended, and nature of the work done, in addition to its own familiarity with the case and its experience generally as well as . . . the evidentiary submissions and arguments of the parties," *CDA Realty Corp. v.*

Fuller, No. 09 CIV. 7473 KMK LMS, 2010 WL 9115498, at *4 (S.D.N.Y. Dec. 2, 2010), *report and recommendation adopted as modified sub nom; Fuller v. RHR Enterprises, LLC*, No. 09-CV-7473 KMK, 2013 WL 594233 (S.D.N.Y. Feb. 14, 2013) (citing *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992)).

Here, Ponte Gadea has adequately supported its claim for reasonable attorneys' fees and disbursements based on a fulsome summary of the relevant tasks in Ponte Gadea's Inquest Memo, the submission of an attorney declaration regarding and expounding on same, contemporaneous time records, the biographies of the attorneys for Ponte Gadea, charts identifying the billing rates for the each professional and paraprofessional and summarizing the hours expended on the major tasks, which, upon review of the services and noting the average hourly rate of \$599.05, are reasonable and consistent with the local market for legal services for this commercial landlord-tenant dispute, especially given the novel COVID-19 related issues implicated in this dispute. *See* Inquest Memo, p. 13-25; Graham Dec. ¶¶ 7-47, Ex. 2 (attorney biographies), Ex. 3 (time records). *See also Metropolitan Lofts of NY, LLC v. Metroeb Realty 1, LLC*, No. 503441/2012, 2015 NY Slip Op. 50251(U) (Sup. Ct. Kings Cty. Feb. 27, 2015) (finding that rates ranging from \$675 to \$725 per hour were "generally consistent with those charged in matters of the complexity and monetary value at issue," and that rates charged were "prevailing rate charged by experienced commercial litigators" in New York County"); *see also* Graham Dec. ¶ 36, Ex. 4 at 9-10 (identifying hourly rates for Akin Gump Strauss Hauer & Feld LLP's New York attorneys and paraprofessionals to range from \$205 to \$1,124 per hour in 2019); *id.* Ex. 5 at 6 (identifying hourly rates for Kirkland & Ellis LLP's attorneys and paraprofessionals to range from \$245 to \$1,845 per hour in 2020); *id.* Ex. 6 at 23 (identifying hourly rates for Weil, Gotshal & Manges LLP's attorneys and paraprofessional to range from \$240 - \$1,600 per hour in 2019).

Based on this record, given the time constraints, novel issues at play, and lean staffing employed on this matter, Ponte Gadea has demonstrated that Akerman's average hourly rate of \$599.05 and expenditures of 638.70 hours in this matter are reasonable and recoverable. Accordingly, Ponte Gadea is entitled to recover as damages from Gap its attorneys' fees and disbursements incurred in this dispute, which, as of February 28, 2021 is **\$429,179.60**.

E. Ponte Gadea is Entitled to Damages for Pre-Judgment Interest on Holdover Rent

Ponte Gadea is also entitled to an award of prejudgment interest on unpaid Holdover rent from June 15, 2020 through the date of entry of judgment. *See* Lease § 23.3(C). Under New York State law, "a plaintiff who prevails on a claim for breach of contract is entitled to prejudgment interest as a matter of right." *U.S. Naval Inst. v. Charter Commc'n, Inc.*, 936 F.2d 692, 698 (2d Cir. 1991); *see also* N.Y. C.P.L.R. §§ 5001, 5002. Interest is calculated at the New York State statutory rate of nine percent per annum, N.Y. C.P.L.R. § 5004, unless the agreement contract provides a different rate. *See Nuera Commc'n v. Telron Commc'n USA, Inc.*, 00-CV-9167 (RMB)(FM), 2002 WL 31778796, at *3 (S.D.N.Y. Nov. 15, 2002).

While the Lease provides a specific interest rate to accrue on unpaid Rental, the Lease omits this limitation regarding Holdover. *See* Lease § 24.2 (limiting interest on late payments to "Rental"); § 1.4(B) (limiting "Rental" to "Fixed Rent, the Tax Payment and the additional rent payable" only); 23.3(C) (acknowledging that Ponte Gadea is otherwise entitled to all other damages permitted under New York law). With respect to Holdover, these payment obligations are ascertainable and came due upon Gap's decision to remain on the Premises after termination and these payment obligations were incurred on the first and each subsequent day of each month that Gap continued to holdover the Premises until the date of vacancy on October 14, 2020. Lease

§ 25.2; *see also* N.Y. C.P.L.R. § 5001(b); *TIS Ins. Co. v. Newmont Mining Corp.*, No. 04 Civ. 4105 (SAS), 2005 WL 2446234, at *3 (S.D.N.Y. Oct. 4, 2005).

Consequently, Ponte Gadea is entitled to an award of prejudgment interest on Gap's unpaid Holdover, for the period of June 15, 2020 through October 14, 2020, in the total amount of \$270,644.77. Further, Ponte Gadea is entitled to additional prejudgment interest on Gap's unpaid Holdover from April 1, 2021 through entry of the final judgment on damages in the daily amount of \$1,696.09.

CONCLUSION

Based on the foregoing, and as a result of Gap's breach of the Lease (Count II of the Counterclaim), Ponte Gadea is entitled to recover damages in the total amount of **\$9,337,998.95**, as of April 1, 2021, from Gap as follows:

1. Unpaid Rental, including Fixed Rent in the amount of \$3,704,637.10, Additional Rent in the amount of \$50,708.54, Tax Payments in the amount of \$241,782.19, and Interest on Late Fees in the amount of \$117,760.27, which, as of April 1, 2021 is a total amount of **\$4,098,759.26**,⁵ and which continues to accrue interest at the daily rate of \$571.87;
2. Unpaid Holdover rent in the total amount of **\$4,539,415.32**;
3. Attorneys' fees and disbursements in the total amount of **\$429,179.60**;
4. Prejudgment interest on Gap's Holdover Rent, which, as of April 1, 2021, is the total amount of **\$270,644.77**, and which continues to accrue interest at the daily rate of \$1,696.09; and,
5. Post-judgment interest pursuant to 28 U.S.C. § 1961.

⁵ This calculation is reduced by a set off to Gap in the amount of \$16,128.84. Pavlick Dec. ¶¶ 22-23, Ex. 5

Dated: New York, New York
April 1, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2021 a true and correct copy of the foregoing document was served on all counsel of record, by electronic filing on the CM/ECF filing system. Parties may access this filing through the Court's system.

/s/ Darryl R. Graham
Darryl R. Graham