UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| THE GAP, INC.,<br><br>Plaintiff/ Counterclaim Defendant<br><br>-against-<br><br>PONTE GADEA NEW YORK LLC,<br><br>Defendant/Counterclaimant. | Case No. 20-cv-4541(LTS)(KHP) |

**THE GAP, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PONTE GADEA NEW YORK LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS CLAIMS FOR DAMAGES**

Pursuant to the Court's Inquest Scheduling Order (Dkt. No. 59), The Gap, Inc. ("Gap") respectfully submits this opposition to Ponte Gadea New York LLC's ("Ponte Gadea") inquest memorandum in support of its damages claims as follows:

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## INTRODUCTION

In this inquest, Ponte Gadea seeks a windfall – an amount nearly fifty percent greater than what it would have received if the Lease had simply continued through its natural expiration date. To get there, Ponte Gadea first ignores the Lease's damages provision that directly applies to the circumstances presented – Section 23.3. Then it adopts different dates as the Lease's termination date depending upon what suits it – June 15, 2020 or January 31, 2021 – both by disregarding the district court's order, and by misrepresenting the record. It also seeks to apply the Lease's damage provisions inconsistently, and contrary to the parties' intent and the custom and practice in the industry, all in service to seeking an illegal and unenforceable penalty. Compounding these errors, Ponte Gadea seeks interest contrary to the Lease and attorney's fees that no client would consent to pay.

While the court disagreed with Gap about the effects of COVID-19 and the government shutdown on the Lease, that does not entitle Ponte Gadea to a windfall that is contrary to the Lease's express language, the parties' intent, established law, and the district court's order. The court should award either (a) contract rent through October 14, 2020, or (b) contract rent through June 15, 2020 and holdover rent from then to October 14, 2020, plus contractual interest and reasonable attorney's fees. But no more.

## SUMMARY OF ARGUMENT

In its brief, Ponte Gadea tries to rewrite its default notice, its complaint, and the district court's order by urging that the lease terminated for one purpose on June 15, 2020, and for another purpose on January 31, 2021. To do so, it relies upon a term the district court did not use – the "Fixed Expiration Date" – and suggests the existence of a finding or conclusion found nowhere in the district court's order – about whether Ponte Gadea is entitled to contract rent

through January 31, 2021. However, the "Term" of the Lease ends on the "Expiration Date," not the Fixed Expiration Date. And the defined "Expiration Date" was advanced by the Lease's early termination, including after an Event of Default as Ponte Gadea pled and the Court found occurred here.

Only if the "Term" is consistently treated as ending on January 31, 2021 is Ponte Gadea entitled to contract rent through that date. Otherwise, the Lease terminated on June 15 (as the district court found), the Term ended on that date, and Ponte Gadea is only entitled to contract rent through June 15 and holdover rent through October 14, 2020 when Ponte Gadea retook possession. Ponte Gadea can't have it both ways.

The ambiguity Ponte Gadea creates about these terms, and well-settled contract interpretation principles, requires resort to the Lease provision that specifically addresses the amount Landlord can recover in the event of an early termination following an Event of Default. That provision is Section 23.3.

Ignoring the plain intent of Section 23.3, Ponte Gadea bounces back and forth, depending on the date, injecting the holdover provisions from Section 25.2 of the Lease when it suits its interests to gouge millions of dollars from Gap, in an attempt to profit from the COVID-19 pandemic. But Ponte Gadea's strained damages theory goes too far, including what would constitute an illegal, unenforceable penalty, and damages for a period after Gap surrendered the Premises. Neither Section 23.3, Section 25.2, nor the district court's order support such a windfall. Indeed, under the only intellectually honest interpretation of the Lease that could even possibly allow Ponte Gadea to seek rent for the period of October 15, 2020 to January 31, 2021, Ponte Gadea has not offered any evidence and thus failed to meet its burden of proof. (Even that reading, requires resolving an ambiguity about the "Term," and disregard of the district court's

order.)

Ponte Gadea extends its overreach by seeking to apply an interest rate of 9% to the rental obligations during the claimed holdover period, although it would not have expected that amount had the Lease been performed. The Lease provides an interest rate in the event of default – 5.25%. Anything more is an unauthorized windfall.

Ponte Gadea overreaches further by seeking interest on common area maintenance expenses ("CAM") from the invoice date although the Lease plainly provides they are not due until 30 days later.

Finally, Ponte Gadea also overreaches in the attorneys' fees and costs it seeks to recover. Indeed, when faced with a subpoena for the documentary basis for $46,365 in research expenses, it withdrew the claim. (Dkt 68.) For block billing and other overdoing, the attorneys' fees requested are excessive and should be halved, at least.

## FACTUAL BACKGROUND

Gap filed this case in a good faith attempt to determine the rights and obligations of the parties under the Lease. Decl. of Jennifer Rondholz ("Rondholz Decl.") ¶ 9. The Lease was originally entered into in 2005 and was set to expire on the "Fixed Expiration Date" of January 31, 2021. *Id.* ¶ 3. Then, the COVID-19 pandemic and the government shutdowns fundamentally reshaped retail in the United States and forced millions of stores nationwide to close and, later, severely restricted their operations to protect the health and safety of customers and employees, including the subject store operated by Gap. *Id.* ¶¶ 4-6. Denied the benefit it had bargained for, Gap elected to withhold rent payments beginning on April 1, 2020. *See id.* ¶ 7. Ponte Gadea responded by giving notice of a default and stating the Lease would terminate effective June 15, 2020. *Id.* ¶ 8.

Facing this untenable conflict, Gap sued on June 12, 2020 seeking a determination of the parties' rights and obligations, contending the Lease terminated on or before March 19, 2020 when it closed the store, or alternatively that Ponte Gadea breached the Lease by demanding improper rent and other payments. *See* Dkt. 1; Rondholz Decl. ¶ 9. Gap also sought rescission or reformation. *See* Dkt. 1. Two days later, Ponte Gadea sent a notice purporting to terminate the Lease effective June 15, 2020. Rondholz Decl. ¶ 8.

Ponte Gadea's Answer denied nearly every allegation and counterclaimed. Dkt. 9. It alleged, repeatedly, that the Lease terminated on June 15, 2020, declaring as of its July 7, 2020 pleading, "the Lease is terminated." *Id*. at ¶¶ 26, 85, 89, 92, 102, 168, 189, 190. Gap denied Ponte Gadea's factual allegations and asserted eighteen affirmative defenses including its Eleventh Affirmative Defense of Illegality. Dkt. 11.

Ponte Gadea moved for summary judgment on August 17, 2020 (prior to discovery commencing), contending the entire suit can be resolved by reference to the Parties' Lease. *See* Dkt. 17 at 1. On August 28, 2020, Gap filed a cross-motion. Dkt. 28. While Gap disputed Ponte Gadea's termination the Lease, that same day, Gap began its process of vacating the store. Rondholz Decl. ¶ 11.[1] Under normal circumstances, store closures take time. *Id.* They involve not only the removal of goods, but also fixtures and equipment. *Id.* It is not something which can be done overnight, or even within a week. *Id.* The parties completed summary judgment briefing on September 25, 2020. Dkt. 51. Gap completed its de-branding and store closure process by October 7, 2020, and turned the keys over to the Landlord on October 14, 2020, nearly three and a half months before the natural expiration of the Lease on January 31, 2021. Rondholz Decl. ¶ 12. Despite the passage of nearly six and a half months, Ponte Gadea has apparently not relet the

[1] For a short period of time, Gap tried to liquidate some inventory through curbside delivery and shipping some online orders, but the store itself never reopened to the public. *Id.* ¶¶ 7, 10.

space. *Id.* ¶ 17-18.

On March 8, 2021, the Court granted summary judgment in favor of Ponte Gadea "as to liability only and denied without prejudice in all other respects," referring the matter for an inquest on damages and other motions. Dkt. 56 at 26; Dkt 66.

## ARGUMENT

### I. The Specific Lease Provision Covering these Circumstances Entitles Ponte Gadea to Fixed Rent from April 1, 2020 to October 14, 2020, not Holdover Rent.

While Ponte Gadea's argument jumps around the Lease for support, Section 23.3 specifically addresses the amount and calculation of damages stemming from a termination resulting from an "Event of Default." Ponte Gadea claimed an Event of Default, was the *sole* basis for Ponte Gadea terminating the Lease, and Section 23.3 must control over the more general language of the holdover rent provision. *See* Graham Decl., Ex. 1 ("Lease") § 21.1; Dkt. 64 ¶¶ 5, 6; *cf.* Lease § 25.2. "[C]ourts construing contracts must give specific terms and exact terms . . . greater weight than general language." *Cnty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) (citation omitted); *see also John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 n.8 (2d Cir. 1983) ("New York law recognizes that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary.") Under the circumstances of this early termination, the attempt to assert anything else is improper because it would put the company "in a better position than they would have been in had the contract been satisfactorily performed." *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 649 (2d Cir. 1989) (recognizing prohibition on double recovery).

Section 23.3 addresses the precise circumstance involved here; it specifies Landlord's remedies in the event of a default, including for a failure to pay Fixed Rent. Decl. of Smita

Butala ("Butala Decl.") ¶ 9. In contrast, Section 25.2 applies only to a "holdover" tenant – a tenant who fails to vacate the Premises after the end of the original Lease Term (in this case, January 31, 2021). Butala Decl. ¶¶ 15b, 17-18. It is not intended to apply when the Lease terminates early, after an Event of Default. *Id.*

Under these circumstances, instead of the general language of Section 25.2, the more specific Section 23.3 controls and entitles Ponte Gadea to the following:

> (A) ***If this Lease terminates by reason of the occurrence of an Event of Default . . . then Tenant shall pay to Landlord, on demand, and Landlord shall be entitled to recover:***
>
> (1) ***all Rental payable under this Lease by Tenant to Landlord*** (x) to the date that this Lease terminates, or (y) ***to the date of re-entry upon the Premises by Landlord***, as the case may be;
>
> (2) the ***excess of*** (a) ***the Rental for the period which otherwise would have constituted the unexpired portion of the Term***, ***over (b) the net amount, if any, of rents collected under any reletting effected pursuant to the provisions of clause (2) of Section 23.1 (A) hereof for any part of such period (such excess being referred to herein as a "Deficiency"), as damages*** (it being understood that (x) such net amount described in clause (b) above shall be calculated by deducting from the rents collected under any such reletting 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, (y) any such Deficiency shall be paid in monthly installments by Tenant on the days specified in this Lease for payment of installments of Fixed Rent, and (z) Landlord shall be entitled to recover from Tenant each monthly Deficiency as it arises, and no suit to collect the amount of the Deficiency for any month shall prejudice Landlord's right to collect the Deficiency for any subsequent month by a similar proceeding); and
>
> (3) ***regardless of whether Landlord has collected any monthly Deficiency as aforesaid***, and in lieu of any further Deficiency, ***as and for liquidated and agreed final damages an amount equal to the excess of (a) the Rental for the period which otherwise would have constituted the unexpired portion of the Term*** (commencing on the date immediately succeeding the last date with respect to which a Deficiency, if any, was collected), ***over (b) the then fair and reasonable net effective rental value of the Premises for the same period*** (which is calculated by deducting from the fair and reasonable rental value of the Premises the expenses that Landlord would reasonably expect to incur in reletting the Premises, 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), both discounted to present value at the Base Rate.…

Lease § 23.3(A)(1)-(3) (emphasis added); Butala Decl. ¶¶ 10-12.

Paragraph (A)(1) plainly applies and establishes that Ponte Gadea is entitled to Fixed Rent until October 14, 2020—"the date of re-entry upon the Premises by Landlord." *Id.* § 23.3(A)(1); Butala Decl. ¶ 13a; Dkt. 63 at 17-18.

Whether (A)(2) or (A)(3) applies to the period after Landlord's re-entry depends on the facts. Paragraph (A)(2) provides the calculation if the Premises are relet "***pursuant to the provisions of clause (2) of Section 23.1 (A).***" Lease § 23.3 (A)(2) (emphasis added). If that occurred, Landlord could claim a "Deficiency." Because the Premises were never relet, Paragraph (A)(2) does not apply. Dkt. 64 ¶ 13; Butala Decl. ¶ 13b. There's no "Deficiency" to calculate.[2]

By contrast, Paragraph (A)(3) applies "***regardless*** of whether Landlord has collected any monthly Deficiency as aforesaid, and in lieu of any further Deficiency, ***as and for liquidated and agreed final damages***" as a result of an Event of Default. Lease § 23.3(A)(3) (emphasis added). Those "liquidated and agreed final damages" are calculated using the "fair and reasonable . . . rental value" for the unexpired period of the Lease, here, January 31, 2021. *See id.* Paragraph (A)(3), however, offers no help to Ponte Gadea because it has not offered any evidence or met its burden to show "the then fair and reasonable . . . rental value of the Premises for the same period," or that the fair market rental value exceeded the rent owed for remainder of term, or by how much. *Id.*; Butala Decl. ¶ 13c.

There is no dispute Ponte Gadea served Gap with a Notice to Cure Default on May 26,

[2] Ponte Gadea relies on Section 23.3(A)(2) for the recovery of attorney's fees. But it is Section 24 that provides for the recovery of attorney's fees after an Event of Default, as the district court found occurred here.

2020. Dkt. 64 ¶ 4. Gap did not provide the cure demanded; Ponte Gadea terminated the tenancy effective June 15, 2020 based upon the claimed Event of Default. *Id.* ¶¶ 5, 6. And there is no dispute Gap vacated the Premises on October 14, 2020. *Id.* ¶ 10. Accordingly, the Fixed Rent plus interest and taxes owed to Ponte Gadea from April 1, 2020 through October 14, 2020 is $3,984,550.23. *See* Decl. of Bryan Dyer ("Dyer Decl.") ¶ 4, Ex. A. Because Ponte Gadea did not meet its burden to show any additional "liquidated" damages after it regained possession on October 14, 2020, no additional rent is owed under the plain language of Section 23.3. *See* Butala Decl. ¶ 15a-b.

## II. In the alternative, Ponte Gadea is only entitled to Fixed Rent from April 1, 2020 to June 14, 2020 and Holdover Rent from June 16, 2020 to October 14, 2020, at the latest.

Although not focused on the distinction between Section 23.3 and 25.2, the district court found the Lease terminated as of June 15, 2020 and that Ponte Gadea is entitled to holdover rent from that date. Dkt. 56 at 26. But Ponte Gadea is not entitled to additional Fixed Rent after Gap surrendered the Premises. Thus, unless Section 23.3 governs, *supra*, Gap only owes Fixed Rent until the Term ended on June 15, 2020, and holdover rent under Section 25.2 through the date of surrender, October 14, 2020, at the latest in light of the difficulty of moving out. *See* Dkt. 64 ¶ 10; Rondholz Decl. ¶¶ 11-12.

While the wisdom of Ponte Gadea's strategic real estate and litigation decisions to terminate the Lease can be debated, the effect of termination cannot be. Distinct from Ponte Gadea's resort to "***Fixed*** Expiration Date" of January 31, 2021, the "Expiration Date" is defined under Section 1.2 of the Lease as "such earlier or later date that the term of this Lease expires, ***or otherwise terminates pursuant to the terms hereof*** or pursuant to law[.]" Lease § 1.2 (emphasis added). Thus, the early termination advanced the Expiration Date to June 15, 2020 under Section 1.2, and that's when the defined "Term" ended under that same provision. *Id.*

More simply, Ponte Gadea can't have it both ways. The Lease could not have terminated on June 15, 2020 such that Gap was a holdover tenant until October 14, 2020, and yet the Lease somehow continued through the now-irrelevant "Fixed Expiration Date" to reignite an obligation to pay Fixed Rent. Dkt 64 ¶¶ 7-12. This construction contradicts the plain language of the Lease. Section 1.6 concerns the "Payments of Fixed Rent," and subsection (A) states in relevant part: "Tenant shall pay the Fixed Rent … on the first (1st) day of each calendar month ***during the Term***…." Whether as a result of Ponte Gadea's "Notice of Termination" concerning the Event of Default or otherwise, the district court found the Lease terminated and the Term ended on June 15, 2020. Dkt. 64 ¶¶ 3-6, 7. The Lease does not require the payment of Fixed Rent after that.

Having pursued a termination strategy, Ponte Gadea must accept its consequences. It cannot claim holdover rent for a period of time based on one "Expiration Date" and then Fixed Rent through a later, different "Expiration Date." Fixed Rent plus interest and taxes between April 1, 2020 and June 15, 2020, together with Holdover Rent (calculated under Section 25.2) between June 16, 2020 and October 14, 2020, at the latest, is $6,103,602.65. *See* Dyer Decl. ¶ 6, Ex. C. Awarding any rent after Gap surrendered the Premises unjustifiably departs from the Lease's plain language, and provides an unsupportable windfall to Ponte Gadea.

## III. Ponte Gadea's interpretation of the Lease and calculation of rent owed results is an unenforceable penalty.

Ponte Gadea's theory of damages – bouncing back and forth between Lease provisions under the guise of liquidated damages – not only twists the terms of the Lease and provides a windfall, but also would constitute an unlawful penalty. The Court of Appeals of New York recently reiterated that liquidated damages provisions in leases that constitute unlawful penalties cannot be enforced. *Trustees of Columbia Univ. in City of New York v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 75, 162 N.E.3d 727, 731 (2020). Indeed, it has long been settled 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-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425, 393 N.Y.S.2d 365, 369, 361 N.E.2d 1015, 1018 (1977). Therefore, a liquidated damages provision can only be upheld if: (1) the amount is a reasonable measure of the probable actual loss in the event of a breach; and (2) the actual loss suffered is difficult to determine. *Irving Tire Co., Inc. v. Stage II Apparel Corp.*, 230 A.D.2d 772, 773, 646 N.Y.S.2d 528, 530 (2d Dep't 1996). Also, if "the amount of actual damages that would be suffered upon a breach is readily ascertainable when the contract is entered, or the amount fixed as liquidated damages is conspicuously disproportionate to the foreseeable losses, the liquidated damages provision is unenforceable as a penalty [internal citations omitted]." *Central Irrigation Supply v. Putnam Country Club Associates, LLC*, 57 AD3d 934, 935 (2d Dep't 2008). Moreover, "where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty." *Pyramid Centresand Co. Ltd. v. Kinney Shoe Corp.*, 244 A.D.2d 625, 627, 663 N.Y.S.2d 711, 713 (3d Dep't 1997) (citations omitted).

a. **Ponte Gadea is not entitled to a multiple of Fixed Rent after the Lease terminated on June 15, 2020.**

Here, Ponte Gadea seeks holdover rent that is a multiple of base rent from June 16, 2020 through October 14, 2020 while Gap was still in the Premises, plus additional Fixed Rent from October 15, 2020 to January 31, 2021 (the "Fixed Expiration Date" of the Lease). *See* Dkt. 63 at pp. 10-14. Specifically, the holdover provision provides that if Gap overstays the expiration of the Lease, it must pay 150% of Fixed Rent for the first month, and 200% for every month after that. Lease § 25.2. However, holdover provisions are intended to compensate landlords when

tenants refuse to leave after the natural expiration of a lease for interfering with the opportunity to lease the premises to others. Butala Decl. ¶ 15b, 17-18. Here, the holdover period occurred before the Lease's "Fixed Expiration Date" on January 31, 2021, only by virtue of an early termination.[3] Thus, Ponte Gadea's reading of the Lease is not only wrong, (*see* supra § II) it also seeks to impose an illegal penalty, which Gap is not required to pay as a matter of law.

Gap's Eleventh Affirmative Defense – Illegality – contemplates the imposition of illegal penalties that are unenforceable as a matter of law. It states, "Gap's obligation to perform any of its obligations under the Lease was excused because the purpose, object, and performance of the Lease became illegal." Dkt. 11. Among the obligations the Lease required Gap to perform was the payment of rent. Under Ponte Gadea's interpretation of the Lease as applied to the circumstance of an early termination, that provision imposes a penalty that is not recoverable as a matter of law and public policy. Cases involving holdovers after the termination of the original fixed term simply do not apply to the facts presented. The Court's March 8, 2021 Memorandum and Order did not address, much less dispose of, Gap's Eleventh Affirmative Defense; it only granted summary judgment "as to liability only and denied without prejudice in all other respects." See Dkt. 56. Accordingly, arguments regarding whether the holdover rent provision of the Lease is an unenforceable penalty are ripe to consider at the inquest or otherwise. And the holdover provision must be interpreted as allowing only the amount of Fixed Rent in the event of an early termination, as occurred here.[4]

[3] As discussed in further detail above, the Expiration Date under the Lease is no longer January 31, 2021. Instead, the Expiration Date is June 15, 2020 – the date Ponte Gadea terminated the Lease. However, for purposes of this section, Gap must assume *arguendo* Ponte Gadea's period of damages extends until January 31, 2021.

[4] In the event that the Court disagrees that the scope of the defense embraces this issue, as Ponte Gadea has advised Gap and the Court (Dkt. 65), Gap is simultaneously requesting leave to amend and supplement its answer, and requests that the court consider the amended and supplemented answer in this proceeding under Rule 1.

b. **Ponte Gadea is not entitled to Fixed Rent after vacating the Premises.**

Ponte Gadea's proposed interpretation of the Lease – returning to Fixed Rent, after the holdover period would also be an illegal penalty. First, this combination is not a measure of Ponte Gadea's actual loss, much less a reasonable measure in the event of an early termination. Section 23.3 provided that calculation. Thus, Ponte Gadea could not have had any expectation it would be entitled to relet the premises before January 31, 2021. Seven months later, it has still not done so. Rondholz Decl. ¶ 18.

Second, not only is the actual loss resulting from an early termination easy to calculate. The parties set forth its calculation in Section 25.2. If Ponte Gadea's claim for Fixed Rent through January 31, 2021 is given any credence, it can only be based upon the Lease not expiring before then (by termination or otherwise). In that case, no holdover rent could be owed, and Gap would owe $6,416,135.94 (including all Fixed Rent, CAM, and prorated real estate taxes) for the period April 2020 through January 31, 2021. Dyer Decl. ¶ 5, Ex. B. This represents the sum total of all amounts which Ponte Gadea would have received under the Lease but for the alleged breach. *Id.*

But to claim that Gap owes not only holdover rent but also Fixed Rent after it surrendered the Premises until the "Fixed Expiration Date," is to ask the Court to impose an illegal penalty that is prohibited by New York law. Indeed, a case Ponte Gadea recently cited to this court, (Dkt 67), the court in *Federal Realty L.P. v. Choices Women's Med. Ctr.*, 289 A.D.2d 439 (2d Dep't 2001) held that enforcing the holdover/ liquidated damages provision "bars [Landlord] from recovery of its alleged actual and consequential damages," noting that "a clause which is reasonable precludes any recovery of actual damages" (citing *J.R. Stevenson Corp. v. County of Westchester*, 113 A.D.2d 918, 921, and other cases). Indeed, "this is so even though the stipulated sum may be less than the actual damages sustained by the injured party" (*J.R.*

*Stevenson Corp.* 113 A.D.2d at 921). An example, on similar facts is *Pyramid Centres and Co., Ltd. v. Kinney Shoe Corp.*, where on appeal from a summary judgment order, the court held that a liquidated damages provision requiring the defaulting tenant to continue paying the monthly rent and pay liquidated damages of double the fixed base rent for the remaining portion of the lease, *i.e.*, triple rent, was an unenforceable penalty. 244 A.D.2d 625 (N.Y. App. Div. 1997). The facts are strikingly similar to those presented here. The tenant agreed to pay Fixed Rent and at some point closed its store. *Id.* at 626. If the tenant vacated, a default, it still remained liable to pay rent for the remainder of the lease period, but the lease also gave the landlord the right to pursue liquidated damages:

> "In the event [defendant] ceases operation prior to the termination date of this lease, landlord shall have the option . . . to require [defendant] to pay as liquidated damages and not as a penalty the sum equal to the greater of the average annual percentage rent paid by [defendant] during the expired portion of the term or double the fixed minimum rent for the remainder or unexpired portion of the term."

*Id.* Landlord sought to collect double the fixed minimum rent through the expiration of the Lease. After the trial court dismissed the action in its entirety, finding the liquidated damages provision was a penalty, disproportionate to any subsequent loss suffered by the landlord, the appellate court modified the ruling, affirming the denial of liquidated damages and holding landlord could only recover actual damages. *Id.*

As in *Pyramid Centres*, Ponte Gadea seeks an unlawful penalty that is grossly disproportionate to the actual loss incurred.[5] Ponte Gadea had no expectation to receive holdover rent ***in addition to*** Fixed Rent through January 31, 2021. Butala Decl. ¶¶ 17-18. At a minimum, it has not offered any evidence of that. And if Ponte Gadea had anticipated holdover rent before

[5] As a practical matter, holdover clauses are enforceable only if they require a tenant to pay holdover rent at a rate that represents a reasonable estimate of what a replacement tenant would pay. *See, e.g., Thirty-Third Equities Company LLC v. Americo Group, Inc.*, 294 A.D.2d 222, 743 N.Y.S.2d 10 (N.Y. App. Div. 2002).

January 31, 2021, it could only have reasonably expected that to the exclusion of Fixed Rent after an early termination. It cannot have expected both. The Lease's definitions don't support it. And it cannot be awarded consistent with the rules against illegal penalties.

Indeed, such an award would contradict Ponte Gadea's Proposed Findings of Fact and Conclusions of Law which affirm the Lease terminated on June 15, 2020 and that Gap surrendered the Premises on October 14, 2020. *Id.* ¶¶ 7, 10. January 31, 2021 is no longer the "Expiration Date" and cannot be used to calculate damages. Any other interpretation would result in a windfall and illegal penalty under New York law.

## IV. Ponte Gadea's request for 9% interest on holdover rent must be denied.

Whatever amount the Court awards for the period after the Lease's termination, prejudgment interest on that amount may only be awarded at the Lease's contractual interest rate of 5.25%. New York's default interest rate of 9% per year (N.Y. CPLR § 5004) only applies "[i]f the parties failed to include a provision in the contract addressing the interest that governs . . . in the event of a breach." *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258, 952 N.E.2d 482, 488 (N.Y. 2011). But if the parties' contract "provides that the interest shall be at a specified rate . . . then the contract rate governs until payment of the principal, or until the contract is merged in a judgment." *Id.* at 258-59; *see also European Am. Bank v. Peddlers Pond Holding Corp.*, 185 A.D.2d 805, 806 (2d Dep't 1992) ("It is well established that when a contract provides for interest to be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the statutory rate set forth in CPLR § 5005 [9%], governs until the payment of the principal or until the contract is merged into a judgment."); *Nuera Commc'ns, Inc. v. Telron Commc'ns USA, Inc.*, No. 00 Civ. 9167 (RMB) (FM), 2002 WL 31778796, at *3 (S.D.N.Y. Nov. 15, 2002) (contractual rate, not statutory rate, governs).

Here, Section 24.2 of the Lease provides for Landlord's recovery of "Interest on Late

Payments" at the "Applicable Rate" when "Tenant fails to pay any item of Rental on or prior to the fifth (5th) day after the date that such payment is due," "computed from the date such payment was due and including the date of payment." Lease § 24.2. Gap agrees with Ponte Gadea's conclusion (Dkt 63 at 16) that the Applicable Rate is 5.25% – to wit, 200 basis points over JP Morgan Chase's historical prime lending rate of 3.25%. Lease §1.7(B) and (D). However, Gap disagrees with Ponte Gadea's assertion that that provision does not apply to holdover rent. It does. Particularly under the circumstances at issue here involving a termination of the Lease before its Fixed Expiration Date.

Among other things, *first*, the amount to be paid for the holdover period is a multiple of Fixed Rent and Additional Rent, i.e. based upon a monthly period of occupancy. *Second*, the term "additional rent" is not defined in the Lease; but it is used in a circular fashion in Section 24.2 (the interest clause) by providing for the payment of interest as additional rent in the same sentence that uses the term "Rental," the definition of which includes "additional rent." *See* Lease §1.4. (It is also used throughout the Lease, and in custom and practice, to refer to every other charge to Tenant.) This definition thus sets up an award of "interest on interest," a result prohibited under New York law. See *Empire Tr. Co. v. Equitable Off. Bldg. Corp.*, 167 F.2d 346, 348–49 (2d Cir. 1948); see also *Matter of Carla Leather, Inc.*, 44 B.R. 457, 466 (Bankr. S.D.N.Y. 1984), *aff'd sub nom. In re Carla Leather, Inc.*, 50 B.R. 764 (S.D.N.Y. 1985) (citing *Newburger-Morris Co. v. Talcott*, 219 N.Y. 505, 114 N.E. 846 (1916) (Cardozo, J.)).

*Third*, Ponte Gadea itself refers repeatedly to "holdover rent" and "holdover fixed rent" in its Answer and counterclaim, and even now while focused on the precise issue. (Dkt. 9, ¶¶ 85, 97, 110, 132, 192, 194, 203, 209, 212, and p.31 at ¶d; Dkt. 63 at 6, 13-14, 29-30.) The court's orders on the motion for summary judgment and referral for this inquest likewise refer to the

amount of "holdover rent from June 15, 2020." (Dkt 56 at 26; Dkt 59 at 1.) Treating it otherwise defies its plain reading.

*Fourth*, although the Expiration Date was advanced and the Term was shortened, the period of the holdover ended before Gap's occupancy was originally scheduled to end. Indeed, it ended long before the original, Fixed Expiration Date, during a period when Ponte Gadea could not have expected to be deprived of use and occupancy had the Lease been performed without any default. As above, awarding interest on payments for a period of occupancy during the original lease term at a higher rate of interest than if the Lease had been performed according to its terms would create a windfall that is prohibited by New York law. *Ostano Commerzanstalt*, 880 F.2d at 649.

Here, the Lease can only reasonably be read to require the 5.25% interest rate to be applied to late payments of Rental, including holdover rent as "additional rent payable by Tenant to Landlord hereunder." The court should not diverge from this contractually agreed upon interest rate. The correct interest amount is $157,790.27 on holdover rent from June 15, 2020 through October 14, 2020 and daily interest in amount of $655.79 from April 1, 2021 through judgment. *See* Dyer Decl. ¶ 7, Ex. D.

## V. During the holdover period, Ponte Gadea is only entitled to interest accrued on common area maintenance from 30 days after the invoice date.

The proper period of time to begin calculating interest on common area maintenance ("CAM") costs is 30 days after Gap's receipt of the invoice summarizing those fees. Under the Lease, Gap is only obligated to pay CAM costs associated with maintenance of the exterior of the Premises, fuel-heating, taxes-water and sewer, and water meter adjustments. *See* Lease, §§ 1.4(B), 5.3, 5.4.

Both Section 5.3 (relating to water) and Section 5.4 (relating to steam) require that

Tenant shall pay for those items "on or prior to ***thirty (30) days after Tenant's receipt of a reasonably substantiated statement therefor*** from time to time given to Tenant by Landlord (it being agreed that Landlord shall not give Tenant more than one such statement in any given thirty (30) day period of time)." Lease, §§ 5.3, 5.4 (emphasis added). Ponte Gadea ignores this plain language and starts the CAM interest calculation on the date of the invoice, thirty days sooner than the obligation accrued. The correct date to calculate CAM interest during the holdover over period is 30-days *after* the June 1, 2020 invoice date – July 1, 2020. *See* Dyer Decl. ¶ 7, Ex. D.

## VI. Ponte Gadea's inflated and unreasonable attorneys' fees must be slashed.

The amount of fees and costs Ponte Gadea requests is not reasonable and must be significantly reduced. Once it is determined that fees will be awarded, courts in the Second Circuit use the lodestar or "presumptively reasonable fee" approach in determining awards, which is derived by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 522 F.3d 182, 190 (2d Cir. 2007). The second half of this analysis asks whether the amount of time spent by the prevailing party's counsel was reasonable. *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992). A court must review the hours claimed by counsel with an eye toward the value of the work product to the client's case, and should exclude any expenditure of time that is unreasonable. *See Lunday v. City of Albany*, 42 F.3d 131, 133 (2d Cir. 1994).

A review of Akerman's billing records reveals the amount of time claimed to have been expended is grossly unreasonable. Even a cursory review of the time records shows duplication of tasks by multiple timekeepers, time spent on vaguely described tasks, and an inordinate amount of time that is block-billed. Where billing is "excessive, redundant or otherwise unnecessary," a district court may reduce the award accordingly. *E.S. v. E.S. v. Katonah-*

*Lewisboro Sch. Dist.*, 796 F. Supp. 2d 421, 431 (S.D.N.Y. 2011); *Lane Crawford LLC v. Kelex Trading (CA) Inc.*, 12 Civ. 9190, 2013 WL 6481354 at *10 (S.D.N.Y. Dec. 3, 2013) (reducing attorneys' fees by 15% for excessive time and vague, duplicative billing entries), *report & rec. adopted*, 2014 WL 1338065 (S.D.N.Y. Apr. 3, 2014). Faced with this kind of excess, it is appropriate to simply cut a fee request by a set percentage to "trim[] fat from a fee application." *McDonald ex rel. Prendergast v. Pension Plan of the NYSAILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006).

As a benchmark, Gap's co-counsel Davis & Gilbert LLP and Robins Kaplan LLP expended substantial time and labor in this instant dispute to prove up the unique and extraordinary nature of the COVID-19 pandemic's effects. It included drafting the Complaint, replying to Ponte Gadea's Counterclaim, filing for an MDL, requesting a stay of the proceedings, and opposing and cross-moving for summary judgment with a substantial evidentiary record that included five substantial declarations. Dkts. 31-35. But, combined, Davis & Gilbert and Robins Kaplan billed just over 450 hours to the case and charged attorneys' fees of $222,601. Decl. Michael A. Geibelson ("Geibelson Decl."), ¶¶ 2-5. By contrast, Akerman claims over 638 hours billed at $382,614. Dkt 63 at 27. The overage of nearly 200 hours and nearly $160,000 does not square with Ponte Gadea's claim that its "goal was to always bring this matter to judgment quickly and efficiently." Dkt. 63 at 27. Closer review reveals a large swath of counsel's time was unreasonable, and spent on overlapping work by multiple attorneys, including multiple partners.

For example, Akerman employed three partners, one senior associate, one junior associate, and one paraprofessional to move for summary judgment. Dkt. 63 at 22-23. Consistent with its view that the motion could be granted based solely on the Lease as a matter of law, the motion was supported only by a two-page declaration from its lawyer (Dkt 16), and a three-page

declaration from its vice president with four exhibits for authentication and concerning the amount of the award that remains to be decided (Dkt 16-1). And yet, Ponte Gadea's summary judgment briefing consumed over 300 hours (Dkt. 63 at 27)– the equivalent of one person working for more than seven weeks, and supposedly cost over $193,000. Gap's substantially more evidence-laden papers were about half that.

Akerman's excessive billing practices are most clearly exemplified by the fees claimed for its opposition to Gap's motion to transfer this action to an MDL. (Case MDL No. 2960, Dkt. 38.) While no client would consent to its lawyer spending 217.4 hours or $135,365.50 on an opposition (Dkt. 63 at 27), or on a transfer motion generally, particularly where other parties are also opposing, Mr. Graham's claimed time for preparation can only be described as overzealous and excessive. After learning on September 8 that the Judicial Panel on Multidistrict Litigation had allocated him just two (2) minutes for oral argument (Geibelson Decl., ¶ 12, Ex. C), Mr. Graham spent 47.3 hours over seven (7) days preparing for the hearing according to his time sheets:

| Date | Service | Initials | Hours |
|---|---|---|---|
| 15-Sep-20 | Attend mandatory zoom prep session for JPML hearing on MDL transfer. | DRG | 1.0 |
| 17-Sep-20 | Prepare for MDL transfer motion hearing. | DRG | 3.00 |
| 20-Sep-20 | Prepare for MDL transfer motion hearing. | DRG | 7.00 |
| 21-Sep-20 | Prepare for MDL transfer motion hearing. | DRG | 6.80 |
| 22-Sep-20 | Prepare for hearing on Gap's motion to transfer before Judicial Panel on Multidistrict Litigation. | DRG | 14.00 |
| 23-Sep-20 | Prepare for hearing on Gap's motion to transfer before Judicial Panel on Multidistrict Litigation. | DRG | 11.00 |
| 24-Sep-20 | Final preparation, appear, and argue in opposition to Gap's motion to transfer before Judicial Panel on Multidistrict Litigation.[6] | DRG | 4.50 |
| Total | | | 47.3 |

[6] A portion of Mr. Graham's time on September 24, 2020 was allocated to attending the MDL hearing. Given, Mr. Bernstein's entry on September 24, 2020 of 1.5 hours to "prepare for and attend MDL panel hearing on Gap's motion to transfer to MDL," the Court may infer that only a little more than one third (1/3) of Mr. Graham's 4.5 hours billed on September 24, 2020 were actually allocated to attending the hearing.

*See* Graham Decl., Ex. 3 (Dkt. 63-4, pp. 40-41). For the same reasons as those above, the Court must discount Akerman's fees related to the MDL briefing.

Moreover, Akerman's time entries are almost uniformly block billed for numerous, usually distinct and segregable items, made more difficult to ascertain by redactions that defy any ground for secrecy (i.e. referring to a particular portion of the motion). As a result, it is impossible to ascertain precisely the amount of time spent on specific tasks with certainty. Although this is but one example defying a conceivable way to distinguish compensable from noncompensable fees, it is why the use of block-billing is frowned upon and warrants a reduction all by itself. *See Sea Spray Holdings, Ltd. v. Pali Fin. Grp., Inc.*, 277 F.Supp.2d 323, 326 (S.D.N.Y.2003) (reducing fees by 15%).

An example of Akerman's obfuscatory block-billing is the number of hours spent on writing and revising the fact section of the summary judgment brief, as distinct from those spent drafting the Rule 56.1 statement. One is a cut and paste of the other and almost entirely excerpts lease provisions and the three-page vice-president's declaration. *See* Dkt 17 at 3-8, and Dkt 18. Yet, these tasks supposedly consumed nearly 20 hours of time by experienced attorneys. As illustration, Ms. Admire and Ms. Prytwosky billed the following time to these tasks, although they largely duplicate each other:

| Date | Service | Initials | Hours |
|---|---|---|---|
| 28-Jul-20 | Research [REDACTED] for drafting motion [REDACTED]. Draft facts and [REDACTED] section of motion [REDACTED]. Review Gap's answer to Ponte Gadea's counterclaims. | MMA | 4.2 |
| 12-Aug-20 | Work on motion for summary judgment, including drafting Rule 56.1 Statement, A. Toyos Declaration, and D. Graham Declaration, researching and compiling exhibits, and revising memorandum of law; correspondence and conferences with D. Graham and M. Admire regarding revisions | KMP | 6.6 |

| | | | |
|---|---|---|---|
| | [REDACTED]. | | |
| 14-Aug-20 | Revise Rule 56.1 statement and declaration in support of motion for summary judgment. Pull and prepare exhibits in support of motion for summary judgment. Draft Notice of Motion for summary judgment. | MMA | 2.7 |
| 17-Aug-20 | Review, revise and finalize Declaration of A. Toyos, 56.1 statement and memorandum of law in support of summary judgment motion; correspondence with A. Toyos, C. Pavlick, D. Graham, and M. Admire regarding [REDACTED]; conference with A. Toyos [REDACTED]; conference with D. Graham and M. Admire regarding opposition to motion to transfer to MDL and opposition to stay motion. | KMP | 2.7 |
| 17-Aug-20 | Revise citations in Rule 56.1 statement and brief. Review and prepare motion and supporting documents in preparation of filing. Call with D. Graham and K. Prystowsky to discuss [REDACTED] | MMA | 1.7 |
| Total | | | 17.9 |

Graham Decl., Ex. 3 (Dkt. 63-4, pp. 21, 27-29.)

Similarly in excess, Akerman spent approximately 192 hours on its opposition to Gap's cross-motion for summary judgment over the span of eighteen days. *See* Graham Decl., Ex. 3 (Dkt. 63-4, pp. 37-41). To put it in perspective, this amounts to an attorney working nearly 10.6 hours a day, every one of those eighteen days. Upon review of the billing entries, it is difficult to understand how the tasks described could possibly have taken the amount of time billed.

Among the more egregious entries are those relating to Akerman's opposition. It appears two associates assumed the task of the initial draft. Ms. Admire, a fifth year associate, billed nearly 20 hours while Ms. Prystowsky, an eighth year associate at the time, now partner, billed nearly 23 hours on the first draft. Graham Decl., Ex. 3 (Dkt. 63-4, pp. 37-39). Then, Akerman's highest billing timekeepers on the case, John B. Wood at $725, Darryl R. Graham at $690, Joshua D. Bernstein at $690, and Kathleen M. Prystowsky at $535 (*see* Dkt. 63 at 22-23) purported to bill an additional 108.9 hours reviewing and revising the draft Opposition[7] – the

[7] This amount does not include the time spent drafting supporting documentation and internal correspondence regarding the Opposition.

equivalent of a partner working for two and a half weeks on nothing else. By choosing to have three partners and one senior associate revise a 25-page Opposition, Akerman failed to exercise prudent billing judgment, and its claim for attorneys' fees should be reduced accordingly. *See Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 53 (S.D.N.Y. 2015) (stating "there is ample authority" where time spent "fell unusually heavily on partners with high hourly rates," and citing cases). This includes multiple, whole days just "working on" the Opposition. Block billing defies refinement of the excess:

| Date | Service | Initials | Hours |
|---|---|---|---|
| 11-Sep-20 | Continue working on Reply and Response to Gap's Cross-Motion for Summary Judgment. | DRG | 8.5 |
| 11-Sep-20 | Review and revise Kang Declaration and Toyos Declaration, incorporating comments from J. Bernstein and D. Graham; prepare exhibits for Kang Declaration; review [REDACTED] filing in MDL; research [REDACTED]; review and revise arguments regarding [REDACTED]; conferences and correspondence with P. Gonzalez, D. Graham, and M. Admire regarding [REDACTED]. | KMP | 7.2 |
| Total | | | 15.7 |
| 15-Sep-20 | Continue working on summary judgment reply/response | DRG | 9.0 |
| 15-Sep-20 | Review/revise reply brief on motion for summary judgment and supporting declaration. | JDB | 3.7 |
| 15-Sep-20 | Review and revise memorandum of law in further support of summary judgment motion and in opposition to Gap's crossmotion; conferences and correspondence with D. Graham regarding [REDACTED]; review and revise H. Kang declaration [REDACTED]. | KMP | 7.4 |
| Total | | | 20.1 |
| 16-Sep-20 | Continue working on summary judgment response/reply. | DRG | 7.5 |
| 16-Sep-20 | Continued reviewing/revising reply brief on summary judgment motion. | JDB | 2.4 |
| 16-Sep-20 | Review and revise summary judgment papers, including revising memorandum of law, Toyos Declaration, Kang Declaration, the Counter-Statement and Statement of Additional Undisputed Material Facts, and Ponte Gadea's Response to Gap's 56.1 Statement; correspondence and conferences with J. Bernstein, D. Graham, and P. Gonzalez regarding [REDACTED]. | KMP | 6.3 |

| | | | |
|---|---|---|---|
| Total | | | 16.2 |
| 17-Sep-20 | Continue working on summary judgment reply/response brief and related filings. | DRG | 6.3 |
| 17-Sep-20 | Review motions and papers with litigation team. | JBW | .9 |
| 17-Sep-20 | Revise summary judgment reply. | JDB | 1.3 |
| 17-Sep-20 | Continue to work on and begin finalizing summary judgment papers, including reviewing and revising response to Gap's 56.1 Statement, reviewing and revising memorandum of law, and preparing exhibits; conferences and correspondence with P. Gonzalez, A. Toyos, D. Graham and M. Admire regarding [REDACTED]. | KMP | 3.7 |
| Total | | | 12.2 |
| 18-Sep-20 | Review, revise, finalize, and file reply in support of summary judgment and response to cross-motion for summary judgment. | DRG | 7.00 |
| 18-Sep-20 | Revise/finalize reply brief | JDB | 3.2 |
| 18-Sep-20 | Review, revise, and finalize memorandum of law, 56.1 response, and 56.1 additional statement of facts in further support of Ponte Gadea's motion for summary judgment and in opposition to Gap's cross-motion; correspondence with J. Bernstein, D. Graham, and M. Admire regarding [REDACTED]. | KMP | 2.1 |
| Total | | | 12.3 |

Graham Decl., Ex. 3 (Dkt. 63-4, pp. 39-41.) Even this cursory review of the voluminous time records shows that the amount of time expended on the Opposition is unreasonable particularly given the amount of skill and expertise of these attorneys lauded by Mr. Graham's declaration. *See* Graham Decl. ¶ 39.

Because the block billing and redactions defy ascertaining what was actually done, a substantial, across-the-board percentage reduction is necessary to comply with the Second Circuit's mandate to award only what is reasonable.

**CONCLUSION**

For the foregoing reasons, the amount owed for Fixed Rent and CAM (common area maintenance) for the period of April 2020 through October 14, 2020 is **$3,984,550.23**, together with interest calculated at the Lease rate of 5.25% through April 1, 2021, together with a daily

interest rate from that date forward. Additionally, because only "reasonable" attorney's fees can be awarded, under the circumstances and procedures pursued, discretion must be exercised to at least halve the amount sought.

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Respectfully submitted,

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