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

A/R RETAIL LLC, Plaintiff, -against- HUGO BOSS RETAIL, INC., Defendant.	Index No. 158385/20 (Action No. 1) *Mot. Seq. No. 1*
HUGO BOSS RETAIL, INC., Plaintiff, -against- A/R RETAIL, LLC, Defendant.	Index No. 655166/20 (Action No. 2) *Mot. Seq. No. 1*

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LANDLORD'S MOTIONS FOR SUMMARY JUDGMENT

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LANDLORD'S MOTION FOR SUMMARY JUDGMENT

A/R Retail LLC ("Landlord"), by its attorneys, Rosenberg & Estis, P.C., submits this reply memorandum of law in further support of its motions for an order:

a. In Action 1:

- Pursuant to CPLR 3212, awarding Landlord summary judgment on its two causes of action set forth in its October 7, 2020 Verified Complaint, and entering a money judgment against defendant-tenant Hugo Boss Retail, Inc. ("Tenant") for the undisputed amounts due;
- Pursuant to 3211(b) and/or 3212, dismissing each of Tenant's affirmative defenses set forth in its Verified Answer, dated November 15, 2020; and
- Dismissing Tenant's Counterclaims set forth in its Answer; and

b. In Action 2, awarding Landlord summary judgment dismissing Tenant's Amended Complaint, except its sixth cause of action for breach of contract.[1]

PRELIMINARY STATEMENT

The facts are undisputed — the only issues before the Court are legal issues, which should all be resolved in Landlord's favor.

A. Landlord's Action No. 1

This is Landlord's action for the nonpayment of rent. Landlord is entitled to summary judgment because it established its *prima facie* entitlement to such relief as it is undisputed that (a) the Lease is binding, (b) Tenant failed to pay rent and additional rent starting with the month of May 2020 through the date hereof (except for a recent payment of $130,933.65 received on or about February 11, 2021 and the $1,990.759.36 "without prejudice" payment mentioned in Tenant's opposition papers that Landlord has received), (c) Landlord complied with its leasehold obligations, and (d) Landlord has suffered damages.

In addition, Tenant's affirmative defenses and counterclaims must be dismissed because they have no merit as established in Landlord's moving papers. Indeed, Tenant has failed to oppose Landlord's motion seeking to dismiss them. To the extent Tenant's defenses and counterclaims were asserted by Tenant in Action No. 2, they should be dismissed as established below.

Lastly, upon being awarded summary judgment on its claims for the amounts due under the Lease, the Court should enter a money judgment for the undisputed amounts due and a hearing should be set for all other amounts due.

[1] Any capitalized terms herein that have not been defined have the same meanings as ascribed to them in Landlord's moving papers in support of its motions for summary judgment.

B. Tenant's Action No. 2

In Action No. 2, Tenant seeks to be relieved from its obligations under the Lease as a result of the COVID-19 pandemic and the Governor's Executive Orders, notwithstanding the Lease's force majeure clause which explicitly requires Tenant to continue paying rent if there is a force majeure event. As established in Landlord's moving papers and below, the Lease "did not contemplate that [tenant] could simply walk away…and not pay any more rent." *35 East 75th St. Corp. v Christian Louboutin LLC*, 2020 WL 7315470 at * 5 (Sup Ct, NY Cnty, Dec. 9, 2020) ("*Louboutin*") (emphasis supplied).

Significantly, Tenant's counsel, Mr. Mack, failed to advise the Court of another very recent, directly on point decision in one of his own cases that involves another international, multi-billion retailer selling apparel in its Manhattan flagship store. Mr. Mack did not disclose the decision in *Victoria's Secret Stores, LLC v Herald Square Owner LLC*, 70 Misc3d 1206(A) (Sup Ct, NY Cnty, Jan. 7, 2021) ("*Victoria's Secret*") because it soundly defeats Tenant's Action No. 2.

The causes of action asserted by Victoria's Secret and Tenant in their respective complaints, which were both signed by Mr. Mack, are identical, to wit: (a) rescission based upon frustration of purpose, (b) rescission based upon impossibility of performance, (c) reformation of lease, (d) breach of contract (the lease), (e) money had and received, and (f) unjust enrichment. *See Victoria's Secret*, Complaint, Index No. 651833/20, NYSCEF Doc. No. 3.

In that case, like here, the landlord moved for summary judgment seeking to dismiss the tenant's complaint. On January 7, 2021, Justice Borrok granted the landlord's motion because:

> The [tenant's] Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law. This is contrary to the express allocation of these risks set forth in … the Lease Agreement …. It 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 tenant's business. … The parties agreed that this would not relieve the tenant's obligation to pay rent. Thus, the Complaint must be dismissed in its entirety. *Victoria's Secret*, 70 Misc3d 1206(A) at *1-2 (internal citations omitted; emphasis supplied).

Based upon, *inter alia*, that decision and others requiring tenants to live up to their leasehold obligations during the COVID-19 pandemic, Landlord is entitled to summary judgment dismissing all of Tenant's causes of action, except the sixth which is not related to the pandemic.

THE FACTS ARE UNDISPUTED

Tenant has failed to raise any genuine issues of material facts.

A. Action No. 1

In response to Landlord's 19-a Statement in Action No. 1 ("Action No. 1 19-a Statement"), Tenant admitted 27 of the 36 facts asserted therein. Tenant's purported denial of the other nine statements of fact are improper as they are not supported by any evidence or citation to Tenant's "client affidavit." (Mr. Born's affidavit in opposition [the "Born Aff."]). Such improper denials are considered admissions. Commercial Division Rule 19-a (c), (d).

For example, Landlord's 19-a Statement (no. 33) in Action No. 1 states that "Tenant admitted that it failed to pay … $697,026.07 per month for the months of May through October 2020" as set forth in the chart setting forth the amount of fixed rent and amounts of individual components of additional rent. Putting aside the fact that Tenant's denial directly contradicts its admission in its Complaint in Action No. 2 (¶ 2, fn. 2), Tenant responded by merely "[d]eny[ing] the amounts claimed to be owed." This conclusory denial constitutes as admission of fact.

Again, without any evidentiary support, Tenant denied five of Landlord's statements of fact (Action No. 1 19-a Statement, nos. 7, 9, 34-36) because they do not assert "a fact but a legal opinion." More specifically, no. 35 states that Tenant failed to pay the rent. This is obviously a fact — either Tenant did or did not pay the rent. Yet, to avoid this critical admission, Tenant disingenuously claims that Landlord seeks a legal opinion.

Another example of Tenant's gamesmanship to avoid admitting actual facts that cannot be disputed, in Action No. 1 19-a Statement (no. 16), Landlord states, "[t]he Lease's force majeure clause states that, should a force majeure event occur, 'Tenant's obligations to pay any sums of money due under the terms of' the Lease are not excused." Again, without any evidentiary support, Tenant merely denies the quote from the Lease and claims that such clause does not apply. This naked denial also constitutes an admission.

B. Action No. 2

Landlord's Action No. 2 19-a Statement (no. 21), asserts that "neither the Store nor the Shops has been damaged or destroyed." Again, without any evidentiary support, Tenant merely denied the statement because it allegedly did not assert "a fact but a legal opinion." Again, whether there was any destruction or damage cannot be up for debate. Because Tenant knows that there was no physical damage and an admission would defeat its argument that it can avoid it obligations to pay rent pursuant to the Lease's casualty provisions, Tenant, in bad faith, improperly denied this statement of fact.

Based upon Landlord's moving papers, its 19-a Statements and Tenant's responses thereto, there are no genuine issues of material facts in dispute.

ARGUMENT

POINT I

IN LANDLORD'S ACTION NO. 1 FOR BREACH OF LEASE AND ATTORNEYS' FEES, LANDLORD IS ENTITLED TO SUMMARY JUDGMENT AND ENTRY OF A MONEY JUDGMENT

Tenant does not contest Landlord's establishment of its *prima facie* case for summary judgment in Action No. 1. It is thus undisputed that (a) the Lease is binding, (b) Tenant failed to pay rent and additional rent each month starting with the month of May 2020, (c) Landlord complied with its leasehold obligations, and (d) Landlord has suffered damages.

As to the amount of Landlord's breach of Lease damages, Tenant admitted in its Complaint in Action No. 2 (¶ 2, fn. 2) that the monthly rent is $692,026.07. In opposition, Mr. Born does not dispute this amount and Tenant's mere denial in response to the Action No. 1 19-a Statement (no. 37), without any citation to any evidence or to the Born Aff., constitutes an admission. Thus, the Undisputed Monthly Rent is $692,026.07 from May 2020 and Tenant has not denied that is has not paid any rent since that time (except for a $130,933.65 payment received on February 11, 2021 and a $1,990.759.36 "without prejudice" payment received on March 1, 2021). There is no need for a trial/hearing on those undisputed amounts due. *Louboutin* (landlord awarded summary judgment and the Court entered a money judgment against the tenant for more than $1.6 million plus pre-judgment interest); *Maesa LLC v TPR Holdings LLC*, 2020 WL 5499231 (Sup Ct, NY Cnty, Sept. 9, 2020) ("*Maesa*") (landlord awarded summary judgment and the Court entered a money judgment against the tenant for almost $2.5 million plus pre-judgment interest).

Accordingly, and assuming the motion is granted expeditiously, a money judgment should be entered in Landlord's favor and against Tenant in the amount of $5,490,593.76 ($692,026.07 x 11 months [5/20-3/21] less Tenant's recent payments totaling $2,121,693.01),

plus pre-judgment interest on such amount at the statutory rate from the mid-way point, or from October 15, 2020, pursuant to CPLR 5001(b).[2] As for all other amounts due, such as attorneys' fees, the Court should set the matter down for a hearing to determine the amount thereof.

POINT II

TENANT'S AFFIRMATIVE DEFENSES IN ACTION NO. 1 MUST BE DISMISSED

In its motion for summary judgment in Action No. 1, Landlord sought to dismiss all of Tenant's affirmative defenses asserted therein. Such relief must be granted because Tenant did not contest such relief.

POINT III

TENANT CONTRACTED AWAY ANY RIGHT IT MAY HAVE HAD TO AVOID PAYING RENT ON ACCOUNT OF THE PANDEMIC OR THE GOVERNOR'S EXECUTIVE ORDERS

The Lease's force majeure clause explicitly states that if a force majeure event were to occur, including an "order…by any governmental authority," Tenant would not be excused from paying rent. Lease §§ 1.2, 29.6; *see also* Lease § 26.15(a) (requiring Tenant to pay all Rent "without deduction, set-off, or counterclaim whatsoever").

Tenant does not dispute that the pandemic is a force majeure event and admits that, as a result of the pandemic, governmental orders closed the Store from mid-March to September 9, 2020 (*see, e.g.*, Mack affirmation in opposition, Ex. B [NYSCEF Doc. No. 29]; Born Aff., ¶ 9). There can be no doubt that the force majeure clause applies, and it does not relieve Tenant from paying rent because the sophisticated parties agreed to allocate the risk to Tenant. In fact, in several recent decisions involving tenants seeking to avoid paying rent due to the pandemic,

[2] Should Landlord's motions be granted after the month of March 2021, the Undisputed Monthly Amount should be added to the amount of the judgment for each month until the date of entry of the judgment and the amount of pre-judgment interest should be increased accordingly.

lease provisions similar to the force majeure clause here were the basis for dismissal of the tenant's meritless claims. The result should be the same here.

For example, in Mr. Mack's *Victoria's Secret* case, Justice Borrok granted landlord summary judgment and dismissed the very same COVID-19 defenses/claims that Tenant raises herein based upon a substantially similar clause (*Victoria's Secret*, 70 Misc 3d 1206(A)), which states:

> [T]he obligation of Tenant to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord …. *Victoria's Secret*, Index No. 651833/20 at NYSCEF Doc. No. 9, ¶ 26 (emphasis supplied).

Based thereon, Justice Borrok held:

> The [tenant's'] Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law. This is contrary to the express allocation of these risks set forth in … the Lease Agreement … It is of no moment that the specific laws 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 tenant's business …. The parties agreed that this would not relieve the tenant's obligation to pay rent. Thus, the Complaint must be dismissed in its entirety. *Victoria's Secret*, 70 Misc3d 1206(A) at *1-2 (emphasis supplied) (internal citations omitted).

Louboutin, which Tenant attempts to distinguish, also did not provide the tenant with any rent relief as a result of the pandemic because the lease there stated:

> In the event that Owner or Tenant shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, fire or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of Owner in performing work or

> doing acts required under the terms of this Lease, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this Article shall not operate to excuse Tenant from prompt payment of Rent or Additional Rent or any other payments required by the terms of this Lease and shall not be construed or interpreted to extend the Term (emphasis supplied). *Louboutin*, Index No. 154883/20, NYSCEF Doc. No. 11, ¶ 26(c) (emphasis supplied).

Based thereon, Justice Bluth held:

> [T]he parties actually included a force majeure clause in the lease that specifically provided that it would not excuse [tenant] from having to pay rent … Instead, it purported to extend the period of performance for what the delay may have been. [The lease] did not contemplate that defendant could simply walk away…and not pay any more rent. *Louboutin*, 2020 WL 7315470 at *3 (citations omitted; emphasis suppled).

In a more recent case in this Court, *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 2021 WL 668788 (Sup Ct, NY Cnty, Jan. 27, 2021), that lease had another similar clause — "nothing contained in … the Lease including 'restrictive governmental laws or regulations,' certain cataclysmic events, 'or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required' shall excuse the payment of rent." *Id.* at *1. Accordingly, the landlord's motion to dismiss the tenant's complaint, which is substantially similar to Tenant's Complaint, was granted.

Based upon those cases, and cases cited by Landlord that Tenant did not bother to contest (*e.g.*, *Urban Archeology, Ltd. v 207 E. 57th St. LLC*, 68 AD3d 562 [1st Dept 2009]), Tenant's causes of action have no merit as a matter of law.

Rather than face the express language in the Lease, Tenant disingenuously claims that the Lease's force majeure provision does not apply because it relates only to the delay of performance, not an excuse not to perform. This absurd argument is completely unsupported by both the plain text of the Lease and relevant case law, including the above cases. Moreover, by

making the argument that these provisions permit a party only to delay performance of its obligations (as opposed to excusing performance of the obligation), Tenant concedes that it cannot avoid paying rent.

As a result, Tenant, a sophisticated party, agreed to assume the risk and it cannot now simply walk away and not pay any rent.

POINT IV

TENANT'S FIRST AND SECOND CAUSES OF ACTION FOR RESCISSION MUST BE DISMISSED

Tenant's first and second causes of action seek rescission of the Lease based upon the doctrines of frustration of purpose and impossibility of performance, respectively. Commercial tenants, like Tenant, that have asserted these doctrines to avoid paying their rent during the COVID-19 pandemic have been shot down. Landlord is aware of at least seven decisions where a landlord's motion for summary judgment seeking to dismiss the tenant's "COVID-19" impossibility of performance and frustration of purpose claims as a way to avoid rent liability during the pandemic was granted. *Maesa*; *Louboutin*; *1140 Broadway LLC v Bold Food LLC* (Sup Ct, NY Cnty, Index No. 652674/20, NYSCEF Doc No. 30) (granting landlord's motion for summary judgment as to liability and rejecting tenant's reliance on doctrines of impossibility and frustration of purpose); *CAB Bedford LLC v Equinox Bedford Ave, Inc.*, 2020 WL 7629593 (Sup Ct, NY Cnty, Dec. 22, 2020); *Victoria's Secret*; *111 Fulton Street Investors, LLC v Fulton Quality Foods LLC*, 2021 WL 408238 (Sup Ct, NY Cnty, Feb. 5, 2021); *The Gap Inc. v Ponte Gadea New York LLC*, 2021 WL 861121 (SDNY, March 8, 2021) ("*Ponte Gadea*").

In contrast, Landlord is aware of only one summary judgment motion that was decided in the tenant's favor (*Int'l Plaza Assocs. L.P. v Amorepacific US, Inc.*, 2020 WL 7416598 [Sup Ct,

NY Cnty, Dec. 14, 2020]), and which was cited by Tenant, Landlord, respectfully submits, was wrongfully decided by Acting Justice Feinman.[3]

Perhaps the best explanation as to why these doctrines do not provide tenants with any relief during the COVID-19 pandemic was set forth by Justice Bluth in her well-reasoned decision in *Louboutin*. There, she held:

> There is no doubt that the ongoing pandemic has decimated retail stores across New York City. It has made it nearly impossible for some businesses to pay the rent and the Court empathizes with the difficulties facing these establishments. But this Court is tasked with assessing whether any of the doctrines defendant has identified raise an issue of fact that might compel the Court to deny the instant motion. As discussed below, the Court finds that defendant has not raised a valid issue of fact and the Court grants the motion.
>
> The doctrine of frustration of purpose requires that 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense' (*Crown IT Services, Inc. v Koval-Olsen,* 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). '[T]his doctrine is a narrow one which does not apply unless the frustration is substantial' (*id.*).
>
> Contrary to defendant's argument, this doctrine has no applicability here. This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic. But market changes happen all the time. Sometimes businesses become more desirable (such as the stores near the newly-completed Second Avenue subway stops) and other times less so (such as the value of taxi medallions with the rise of ride-share apps). But unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties….
>
> Similarly, the impossibility doctrine does not compel the Court to deny the instant motion. The subject matter of the contract—

[3] That case is also factually distinguishable because the tenant was a service business selling and/or applying beauty products, which involves close contact with customers not wearing masks.

> the physical location of the retail store—is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough to pay the rent. That does not implicate the impossibility doctrine. As the First Department found in connection with a case about the failure to pay under a commodity swap contract, 'Defendant's performance may have been rendered financially disadvantageous by circumstances unforeseen by the parties at the time of the contract's making. However, financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified. In any event, it is not a basis for reliance upon the impossibility of performance doctrine' (*Gen. Elec. Co. v Metals Resources Group Ltd.*, 293 AD2d 417, 418, 741 NYS2d 218 [1st Dept 2002]). *Louboutin*, 2020 WL 7315470 at *2-3 (emphasis supplied).[4]

See also *1140 Broadway LLC v Bold Food LLC* (Sup Ct, NY Cnty, Index No. 652674/20, NYSCEF Doc. No. 30) (landlord awarded summary judgment against the tenant); *Maesa*; *Dr. Smood N.Y. LLC v Orchard Houston, LLC*, 2020 WL 6526996 at *2 (Sup Ct, NY Cnty, Nov. 2, 2020), *quoting* *Robitzek Inv. Co. v Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943).

A. Frustration of Purpose

Despite the foregoing cases, Tenant claims that "[t]he COVID-19 shutdown presents the classic frustration scenario. Here, an unforeseeable government proscription has indefinitely banned the use of the Premises (in full or in part) as a retail store." Action No. 2, NYSCEF Doc. No. 44 ("Tenant's Opp.") at p. 13 (emphasis supplied).

Tenant is "grasping at straws." First, the shutdown by governmental order or regulation was foreseeable — indeed, it is explicitly mentioned in the Lease. Second, use of the Store has not been "indefinitely banned" — Tenant has undisputedly had full use of the Store without interruption since 1993 through today, except for the temporary closure from mid-March 2020

[4] Tenant attempts to distinguish the *Louboutin* because the lease clause at issue there was much broader than the Lease and that Justice Bluth's decision was incorrect. Tenant is wrong on both fronts.

through early September 2020. Third, contrary to Tenant's claim, the pandemic is not worsening, but actually getting better because restrictions are continuing to be eased (*e.g.*, restaurants have been opened for in-dining eating in Manhattan and fans are attending New York Rangers and New York Knicks at Madison Square Garden).[5]

Tenant's claim that it raises "classic issues of fact" (Tenant's Opp. at p. 14 [emphasis supplied]) as to whether the pandemic was foreseeable and whether the Lease has been frustrated is not only belied by the terms of the Lease, but by law and reality. As Landlord argued previously on its motion, the pandemic was foreseeable, as supported by Landlord's undisputed references to (a) the movie *Contagion*, which achieved world-wide acclaim, and (b) insurers' exclusion of coverages for viral pandemics after SARS outbreak. Action No. 2, NYSCEF Doc. No. 22 at p. 14.

Tenant's cases are misplaced. *The Gap, Inc. v 170 B'way Retail Owner, LLC*, 2020 WL 6435136 (Sup Ct, NY Cnty, Oct. 30, 2020), involved a motion to dismiss where the issue was whether a claim was adequately pleaded, and *Jones v Wolf*, 467 FSupp3d 74 (WDNY 2020), involved an emergency application in an immigration matter that did not involve a contract between sophisticated parties.

Tenant's cases of *Jack Kelly Partners LLC v Zegelstein*, 33 NYS3d 7 (1st Dept 2016), *Benderson Dev. Co. v Commenco Corp.*, 44 AD2d 889 (4th Dept 1974), and *Doherty v Eckstein Brewing Co.*, 115 Misc 175 (1st Dept 1921), also do not apply because there, unlike here, the use the tenant contracted for was prohibited by law, preventing the tenant from conducting business therein permanently. For example, in *Jack Kelly Partners LLC*, the parties' lease for office space

[5] *See* Aidan Graham, *Indoor dining capacity expands to 35% in NYC next week: Cuomo*, AMNY (Feb. 19, 2021), https://www.amny.com/new-york/indoor-dining-capacity-expands-to-35-in-nyc-next-week-cuomo/; Adam Zagoria, *New York to Begin Allowing Fans At Madison Square Garden, Barclays Center on Feb. 23*, Forbes (Feb. 10, 2021, 6:38 PM), https://www.forbes.com/sites/adamzagoria/2021/02/10/new-york-to-begin-allowing-fans-at-madison-square-garden-barclays-center-on-feb-23/?sh=70c41295433c.

was prohibited because the property was zoned for residential use and the certificate of occupancy explicitly prohibited commercial use of the space. *Jack Kelly*, 33 NYS3d at 9. Moreover, *Jack Kelly* was expressly distinguished in a case involving a frustration claim. *See Kate Spade & Co., LLC v G-CNY Gp. LLC*, 2019 WL 1303557 at *7 (Civ Ct, NY Cnty, Jan. 18, 2019) ("economic infeasibility" did not amount to impossibility). In *Doherty*, a case from 1921, the tenant was prohibited from operating the premises as a saloon due to the enactment of the "so-called Prohibition Law." *Doherty*, 115 Misc at 177. Executive Orders that placed temporary restrictions on Tenant's use of the Store, which have already been substantially lifted, are completely different than an amendment to the United States Constitution.

B. Impossibility of Performance

Tenant's claim that it is "impossible to operate a first-class retail store consistent with a typical Hugo Boss store as it existed in 2012" (Tenant's Opp. at p. 19) is belied by its admission that the Store has been open since the shutdown (Action No. 1, Tenant's Rule 19-a Counterstatement at ¶¶ 31-32) and there is nothing now preventing it from operating the Store as it did back then. Whether there may be plexiglass or other safety measures or there may be less traffic now does not render performance impossible — indeed, the Store has been undisputedly and continuously open for business for the last six months, once the Governor eased restrictions. *Id.*

The cases Tenant cites in support of its argument for impossibility of performance are misplaced. For example, in *Adler v Miles*, 69 Misc 601, 602-03 (Sup Ct, App Term 1910), the tenant was prohibited by a city ordinance from showing motion pictures in the leased premises. In *Seoul Garden Bowery Inc. v Ng*, 2020 WL 3104371 at *2 (Sup Ct, NY Cnty, June 8, 2020), the tenant's use was barred by the certificate of occupancy.

C. Tenant Cannot, in Good Faith, Remain in Possession "Rent Free"

As established in Landlord's moving papers (Action No. 2, NYSCEF Doc. No. 22, Point III[A]), a tenant cannot have it both ways; it cannot claim rescission and enjoy the "fruits of the contract" by remaining in possession because, by remaining in possession, Tenant ratified and affirmed the terms of the Lease. *See Vesell v Reisfield*, 152 Misc 464, 467 (NY Mun Ct 1934) ("If defendant by remaining in possession till June, and in paying the rent up to then, had ratified the lease, he cannot now rescind it"). Rather than contest that logical legal concept or cite to any cases to the contrary, Tenant weakly attempts to distinguish Landlord's cases. It defies well-settled law and common sense that Tenant can remain in possession "rent free." In fact, in another similar case where an international retailer is also seeking to be relieved from its rental obligations as a result of the pandemic, the Appellate Division, First Department, recently held that a tenant remaining in possession must pay rent during the litigation. *The Gap, Inc. v 44-45 B'way Leasing Co., LLC*, 2021 WL 561152 at *1 (1st Dept 2021).

For all of the foregoing reasons, Tenant has failed to defeat Landlord's entitlement to summary judgment on Tenant's first two causes of action in Action No. 2.

POINT V

TENANT'S THIRD AND FOURTH CAUSES OF ACTION IN ACTION NO. 2 BASED UPON THE LEASE'S CASUALTY CLAUSES FAIL AS A MATTER OF LAW

Tenant's third and fourth causes of action in Action No. 2 seek judgments declaring that it is entitled to a rent abatement or that the Lease was terminated in mid-March 2020 when the Governor first enacted the "pause," respectively, based upon certain casualty clauses in the Lease.

Tenant does not oppose Landlord's argument that such clauses do not apply because neither the Governor's Orders nor the pandemic can constitute a casualty since the Store has not

been physically damaged or destroyed. Again, without any evidentiary support, Tenant merely denied Landlord's allegation in its Rule 19-a statement (no. 21) that there was no damage or destruction to the Premises or the Shops, which constitutes an admission

Because Tenant has no defense, it skirts Landlord's arguments that (a) Article 15 of the Lease addresses the rights of the parties only when there is a casualty and the Store is partially or totally "destroyed or damaged" (Lease § 15.1(a), 15.(d), 15.2(i)), (b) the pandemic is not a "casualty," which is defined as a "serious or fatal accident" or a "person or thing injured, lost, or destroyed" (Black's Law Dictionary [11th ed. 2019]), and (c) consistent with that definition, in *Dr. Smood*, the Supreme Court recently rejected this exact argument made by Tenant because the pandemic is not a casualty in that "there has been no physical harm to the demised premises." *Dr. Smood New York LLC*, 2020 WL 6526996 at *4 (emphasis supplied);[6] *see also 111 Fulton Street Investors, LLC*, 2021 WL 408238 at *2 ("[The casualty clause] references damage to the building (such as fire) that renders the commercial space usable. A deadly infectious disease is not a 'casualty'"); *see also Ponte Gadea*, 2021 WL 861121 at *6 (awarding landlord summary judgment and rejecting tenant's claim that the pandemic constituted a casualty).

Instead of directly dealing with these arguments, Tenant claims that it is entitled to an abatement on its third cause of action pursuant to Lease § 15.1(d) because there was a "hazard." The relevant provision states:

> If the Premises are completely or partially destroyed or so damaged by fire or other hazard that the Premises cannot be reasonably used by Tenant or can only be partially used by Tenant and this Lease is not terminated as provided in this Article XV, then rent shall be abated (in the case of substantial damage) or reduced proportionately (in the case of partial damage) during any period in which, solely by reason of such damage or destruction, there is substantial interference with the

[6] Tenant's attempt to distinguish *Dr. Smood* because the tenant there was a restaurant and the case was before the Court on an injunction is irrelevant to the issue as to whether the Store were "destroyed or damaged."

> operation of the business of Tenant in the Premises. Action No. 1, NYSCEF Doc. No. 17 at ¶ 15.1(d) (emphasis in original).

Tenant's argument ignores the plain meaning of this provision because, to invoke it, the Store must be "destroyed or damaged." Without any damage or destruction, any hazard is irrelevant. Tenant's interpretation of the Lease would improperly excise and rewrite § 15.1(d) as that provision contemplates only that rent shall be abated if the Premises is "substantial[ly] damaged" or "partial[ly] damaged." *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (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.") (internal citations and quotations omitted). Thus, Tenant's third cause of action must be dismissed.

Tenant's fourth cause of action seeks a judgment declaring that the Lease is terminated pursuant to Lease § 15.2, which states:

> If (a) the Premises are (i) rendered wholly or substantially untenantable, or damaged as a result of any casualty which is not covered by the insurance required hereunder to be maintained by Landlord…, then in any of such events, Landlord and Tenant may elect to terminate this Lease by giving the other written notice of such election within ninety (90) days after the occurrence of such casualty event. Action No. 1, NYSCEF Doc. No. 17 at ¶ 15.2 (emphasis supplied).

Tenant cannot seek any relief under § 15.2 because it is undisputed that Tenant did not serve the requisite notice as required by the Lease. Tenant's Complaint (Action No. 2, NYSCEF Doc. No. 1 at ¶¶ 17, 21) first claimed that the Lease was terminated in mid-March 2020 when the Governor shut down the Shops. Thereafter, Landlord claimed that Tenant did not serve the notice required by the Lease and asked Tenant to respond to the following statement of fact "Tenant has not terminated the Lease pursuant to the terms of the Lease" (Action No. 2 19-a

Statement, no. 22). In response to the Action No. 2 19-a statement, Tenant made another unsupported blanket denial, which constitutes an admission.

Moreover, recognizing that its claim that the Lease was terminated in March 2020 is completely without merit, Tenant changed course. In response to Landlord's 19-a statement (no. 22), Tenant now claims, without any legal support, that the Lease was terminated when it filed its Complaint in Action No. 2 in October 2020.[7]

Conspicuously absent from Tenant's motion is any unequivocal notice of termination of the Lease served upon Landlord pursuant to Lease § 15.2(a)(i). Tenant's failure to comply with the Lease's notice requirements is fatal to Tenant's fourth cause of action. *See, e.g., 235 W 71 Units LLC v Zeballos*, 127 AD3d 389, 490 (1st Dept 2015).

Lastly, Tenant's March 18, 2020 letter (Born Aff., Ex. 4) is irrelevant in light of its recent statement that it terminated the Lease when it filed Action No. 2 in October 2020 and, in any event, it does not satisfy this notice requirement because such letter is not a unequivocal termination, but merely a broad reservation of rights that mentions nothing about specifically terminating the Lease. *See Zeballos*, 127 AD3d at 490.

Based upon the foregoing, the Court should declare on Tenant's third and fourth causes of action that (a) Tenant is not entitled to any rent abatement, (b) the Lease has not been terminated, and (c) the Lease continues to be in full force and effect.

[7] This new claim also undermines Tenant's claims that it does not have to pay rent until the time that it filed its Complaint.

POINT VI

TENANT'S FIFTH CAUSE OF ACTION TO REFORM THE LEASE SHOULD BE DISMISSED

Tenant's argument that the there was no meeting of the minds at the time of contracting because the parties' understood that Tenant would not have to pay rent in a pandemic is belied by the force majeure clause and, in any event, Mr. Born's affidavit does not address this issue. Tenant's opposition papers are devoid of any evidence establishing any other intention. "In the absence of the tender of extrinsic evidence to establish otherwise, the court establishes the meaning of [a] provision in question from within the four corners of the agreement and the general circumstances of the relation between the parties, including the subject matter of the agreement." *Estate of Stravinsky*, 4 AD3d 75, 83 (1st Dept 2003), *citing Bensons Plaza v Great Atl. & Pac. Tea Co.*, 44 NY2d 791, 793 (1978); *see also Ponte Gadea*, 2021 WL 861121 at *12 (the tenant's "unilateral beliefs about how the possibility of a pandemic in 2020 might have affected the parties' negotiation of the Lease in 2005 does not overcome the 'heavy presumption' that the plain language of the Lease captures the complete intention of the parties).

Tenant's argument that the statute of limitations did not run pursuant to CPLR 203(f) fails because that statute deals with amendments of pleadings, which is not an issue here. To the extent that such cite was a typo and Tenant meant to cite to CPLR 203(g), contrary to Tenant's claim, there is no "discovery exception" to the six year statute of limitations as Landlord had previously argued when citing to *Nat'l Amusements, Inc. v South Bronx Dev. Corp.*, 253 AD2d 358, 358 (1st Dept 1998) (the six year rule is "not subject to a discovery accrual"); *see also* Weinstein-Korn-Miller, *NY Civil Practice* ¶ 213.18, n. 5 (drafter's proposal of a discovery exception for a reformation claim rejected).

POINT VII

TENANT'S SEVENTH AND EIGHTH QUASI-CONTRACT CAUSES OF ACTION SHOULD BE DISMISSED

Tenant fails to cite to any law to support its right to pursue these quasi-contract claims in the face of a binding lease, but instead seeks to distinguish only one of the cases cited by Landlord from the Court of Appeals (*Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 388 [1987]), arguing that this case only applies if the Lease was not rescinded. This argument is also disingenuous because Tenant admits that there was a binding Lease for many, many years.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court:

a. Award Landlord summary judgment on its first and second causes of action in Action No. 1, and enter a money judgment in the amount of $5,490,593.76 for each month from May 2020 through March 2021 plus rent in the amount of $692,026.07 for each month thereafter until a judgment is entered, plus pre-judgment from the interest ending point at the statutory rate;

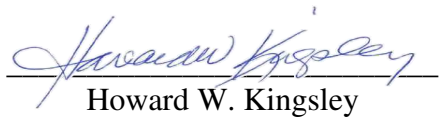
b. Award Landlord summary judgment dismissing Tenant's (i) affirmative defenses asserted in Action No. 1, (ii) Tenant's counterclaims in Action No. 1, and (ii) causes of action asserted in Action No. 2, except the sixth cause of action;

c. Set the matter down for an immediate hearing to determine all other amounts due, including, without limitation, late charges and attorneys' fees, plus pre-judgment interest; and

d. Such other and further relief that the Court deems just and proper.

Dated: New York, New York
March 10, 2021

ROSENBERG & ESTIS, P.C.
Attorneys for Plaintiff in Action No. 1 & Defendant in Action No. 2

By: 
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CERTIFICATE OF COMPLIANCE

I, Jarret S. Meskin, hereby certify that, pursuant to Rule 17 of the Commercial Division Rules, the foregoing reply memorandum of law contains a total of 6,230 words (as measured by the word processing system on which it was prepared), inclusive of point heading and footnotes and exclusive of pages containing the tables of contents, table of authorities, and this Certificate.

Dated: New York, New York
March 10, 2021

Jarret S. Meskin

1 New York Civil Practice: CPLR P 213.18

New York Civil Practice: CPLR > ARTICLE 2 LIMITATIONS OF TIME > 213 Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud > 213 ANALYSIS of CPLR 213

¶ 213.18 Action Based upon Mistake: Six-Year Statute; Discovery Rule May Apply

CPLR 213(6) applies to actions based upon mistake. In the event of mistake, the relief sought is generally equitable in character, usually reformation of an instrument or rescission.[1] Careful attention should be given to whether reformation is sought on grounds of fraud or mistake.[2]

The general rule is that an action to reform an instrument on the ground of mistake accrues at the date of delivery of the instrument and not at the date of the discovery of the mistake.[3]

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[1] *Prand Corp. v. County of Suffolk, 62 A.D.3d 681, 878 N.Y.S.2d 198 (2d Dep't 2009)* ("A cause of action for rescission based on mistake runs from the date of the alleged mistake or actionable wrong (citations omitted). Here, the cause of action for rescission of the contract accrued on the date that the price was set in the contract, which was the date when the contract was fully executed (citations omitted). Consequently, the cause of action seeking rescission of the contract of sale on the ground of mutual mistake, which was brought more than six years after the contract was fully executed, was untimely (citation omitted)"); *Taintor v. Taintor, 50 A.D.3d 887, 855 N.Y.S.2d 642 (2d Dep't 2008)* (statute of limitations on cause of action for reformation of instrument based on mistake is six years and begins to run when the mistake was made, that is, when the agreement was executed). *Cf. American Home Assurance Co. v. Scanlon, 164 A.D.2d 751, 559 N.Y.S.2d 317, 1990 N.Y. App. Div. LEXIS 9066 (1st Dep't 1990)* (insurance company's action claiming mistake in payment was timely).

[2] *In re Penn Cent. Transp. Co., 354 F. Supp. 757 (E.D. Pa. 1972)*, *aff'd*, *480 F.2d 918 (3d Cir.)*, *cert. denied*, ***414 U.S. 1066 (1973)*** ("where rescission or reformation is sought on grounds of fraud or mistake, the courts of New York have generally held that the precise form of fraud or mistake determines whether the statutory period commences at the time of the transaction, or at the time of discovery of the alleged fraud or error") (**citing Weinstein, Korn & Miller**).

[3] *Diematic Mfg. Corp. v. Packaging Indus., Inc., 412 F. Supp. 1367, 1373 (S.D.N.Y. 1976)* (**citing Weinstein, Korn & Miller**); ***Zavaglia v. Gardner, 245 A.D.2d 446, 1997 N.Y. App. Div. LEXIS 13083 (2d Dep't 1997)*** (in action by purchasers to rescind contract for the sale of real property premised upon mistake, limitations period began to run when alleged mistake or actionable wrong occurred); *Taintor v. Taintor, 50 A.D.3d 887, 855 N.Y.S.2d 642 (2d Dep't 2008)* (statute of limitations on cause of action for reformation of instrument based on mistake is six years and begins to run when the mistake was made, that is, when the agreement was executed); *Wallace v. 600 Partners Co., 205 A.D.2d 202, 618 N.Y.S.2d 298, 1994 N.Y. App. Div. LEXIS 11144 (1st Dep't 1994)* (tenant's cause of action for reformation of lease on the basis of alleged scrivener's error accrued at the time of alleged error); *Arrathoon v. East New York Sav. Bank, 169 A.D.2d 804, 565 N.Y.S.2d 172, 1991 N.Y. App. Div. LEXIS 909 (2d Dep't 1991)* (in action for reformation of lease, trial court properly granted the defendant's motion for summary judgment, dismissing the complaint on the grounds that the statute of limitations had run; the reformation action, grounded in mistake, accrued upon execution; the plaintiff's action was brought more than six years after the execution of the lease, and was time-barred); *Allen v. First Wallstreet Settlement Corp., 130 A.D.2d 824, 514 N.Y.S.2d 726, 1987 N.Y. App. Div. LEXIS 46843 (3d Dep't 1987)* (claim asserted by brokerage firm against customers for erroneous book entry was not a claim for conversion subject to the three-year statute of limitations, but was claim of mistake to which six-year statute was applicable; court further held that claim accrued on the date shares were delivered rather than date they were erroneously credited, and concluded that action was timely when filed within six years of the date of delivery); ***Royal York Owners Corp. v. Royal York Assocs., L.P., 8 Misc. 3d 1002A, 2005 N.Y. Misc. LEXIS 1174 (Sup. Ct. New York County 2005)*** (action to reform condominium declaration based on mistake was barred; limitations period began to run when declaration was filed). *But see Federal Deposit Ins. Corp. v.*

This rule would have been changed under the tentative draft of CPLR 206(c), so that the cause of action would have accrued at the time the plaintiff discovered the mistake,[4] but this change was omitted in the belief that accrual of causes of action based upon mistake should remain governed by case law.[5]

Thus, case law exceptions to the general rule have emerged postponing the accrual date until discovery of the mistake:

(1) If a party is in possession of real property under an instrument of title, a cause of action to reform the instrument accrues when the party has notice of an adverse claim under the instrument or his possession is otherwise disturbed.[6]

(2) If an instrument conveys a gift, the statute of limitations commences to run when the mistake is discovered.[7]

(3) If an obvious mistake would result in an unconscionable advantage to the defendant, and defendant's failure to disclose the mistake prevents the plaintiff from discovering that a mistake has been made, then the statute of limitations on an action for reformation begins to run not when the mistake was made, but when it is discovered by plaintiff. In such a situation, defendant's conduct is tantamount to "constructive fraud."

For example, in *Metropolitan Life Ins. Co. v. Oseas*,[8] the plaintiff sought to reform a life insurance policy it had issued on the defendant's life. In opposition to the defense of the 10-year limitation of C.P.A. § 53, plaintiff

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Five Star Mgmt., Inc., 258 A.D.2d 15, 692 N.Y.S.2d 69, 1999 N.Y. App. Div. LEXIS 6782 (1st Dep't 1999) (statute of limitations for scrivener's mistake accrued on date of mistake).

[4] 2 N.Y. Adv. Comm. Rep. 55, 533, 534 (1958).

[5] 5 N.Y. Adv. Comm. Rep. A-136–A-137 (Advance Draft 1961).

[6] *Hart v. Blabey, 287 N.Y. 257, 39 N.E.2d 230 (1942)*; *Donnelly v. O'Rourke, 20 Misc. 2d 159, 187 N.Y.S.2d 557, 1959 N.Y. Misc. LEXIS 3687 (Sup. Ct. Nassau County 1959)*. *But see* *Nationstar Mtge., LLC v. Hilpertshauser, 156 A.D.3d 1052, 66 N.Y.S.3d 687 (3d Dep't 2017)* (" 'Reformation based upon a purported mistake is governed by a six-year statute of limitation that is generally measured from the occurrence of the mistake' (citations omitted). Contrary to plaintiff's representation (citation omitted), 'the same period applies to [its] cause of action seeking an equitable mortgage' (citations omitted). The statute of limitations will not begin to run upon the mistake for those 'in possession of real property under an instrument of title,' but plaintiff does not allege that it has ever been in possession of the mortgaged property and does not benefit from that exception (citations omitted). The alleged mistake occurred no later than the execution of the mortgage in 2007 and, therefore, this 2015 action was appropriately dismissed against defendant as time-barred."); *Lopez v. Lopez, 133 A.D.3d 722, 20 N.Y.S.3d 134 (2d Dep't 2015)* ("A cause of action seeking reformation of an instrument on the ground of mistake, including an alleged scrivener's error, is governed by the six-year statute of limitations pursuant to *CPLR 213(6)*, which begins to run on the date the mistake was made (citations omitted). However, 'a well-recognized exception exists as to *one who is in possession of real property under an instrument of title*,' whereby the statute of limitations never begins to run against his [or her] right to reform that instrument until he [or she] has notice of a claim adverse to his [or hers] under the instrument, or until his [or her] possession is otherwise disturbed" (citations omitted). Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the alleged scrivener's error occurred on August 8, 2005, and that the plaintiff did not commence this action until February 2013, more than six years after the alleged mistake (citations omitted). In opposition, the plaintiff failed to raise a question of fact as to the applicability of the exception to the statute of limitations based on his alleged 'possession of real property under an instrument of title' (citations omitted). The plaintiff failed to submit any evidence with respect to whether or when he was in possession of the subject property."); *Pulver v. Dougherty, 58 A.D. 3d 978, 871 N.Y.S.2d 495 (3d Dep't 2009)* ("An action to reform a deed based upon a mistake must generally be commenced within six years after the mistake is committed" (citations omitted). While a well-recognized exception exists "as to one who is in possession of real property under an instrument of title" (citations omitted), whereby the statute of limitations "never begins to run against his right to reform that instrument until he has notice of a claim adverse to his under the instrument, or until his possession is otherwise disturbed" (citations omitted), plaintiffs are not entitled to the benefit of the exception because they do not possess the farmhouse or surrounding land under the instrument of title sought to be reformed (citations omitted). Therefore, as this action for reformation was not commenced until nearly eight years after the mistake in the deed, it is barred by the statute of limitations.").

[7] *Delap v. Leonard, 189 A.D. 87, 178 N.Y.S. 102, 1919 N.Y. App. Div. LEXIS 4600 (2d Dep't 1919)*; *Vogel v. City Bank Farmers' Trust Co., 152 Misc. 18, 272 N.Y.S. 643, 1934 N.Y. Misc. LEXIS 1402 (Sup. Ct. New York County 1934)*.

contended that the cause of action did not accrue until the date it discovered the policy contained a mistake. The court agreed with the plaintiff, because of two factors: first, the insurance company had no opportunity to learn of the mistake since the defendant held the only copy of the insurance policy; second, the defendant had been guilty of "constructive fraud" in failing to notify the plaintiff of the error in the policy.[9]

In contrast, in *Goodbody & Co. v. Stern*,[10] plaintiff, a brokerage firm, brought an action in reformation because it had mistakenly credited defendant's account with 808 shares of common stock, whereupon defendant had fraudulently sold the shares and retained the proceeds. The court held that the statute of limitations began to run when the mistake was made and not when it was later discovered. While the defendant may have been guilty of fraud, such fraud did not interfere with plaintiff's ability to discover that the mistake had been made, as the mistake was contained in plaintiff's own records which were in its possession. The court distinguished *Oseas* as a case in which defendant's constructive fraud had prevented plaintiff's discovery of the mistake.

Notably, however, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine*,[11] similar tacit retention of the stock shares mistakenly credited to the recipient-client of the brokerage firm, was deemed to constitute constructive fraud and larcenous. Although the First Department agreed that the three-year limitation period applicable to a fraud claim had lapsed, the plaintiff's claim for restitution was nonetheless viable.

[8] *Metropolitan Life Ins. Co. v. Oseas, 261 A.D. 768, 27 N.Y.S.2d 65, 1941 N.Y. App. Div. LEXIS 7435 (1st Dep't 1941)*, *aff'd*, *289 N.Y. 731, 46 N.E.2d 348 (1943)*.

[9] *See also Jersey Interstate Wire & Strip Corp. v. Metropolitan Life Ins. Co., 41 Misc. 2d 967, 247 N.Y.S.2d 27, 1964 N.Y. Misc. LEXIS 2178 (Sup. Ct. Kings County 1964)* (cause of action for reformation for mistake accrues upon discovery where, because of "scrivener's error," beneficiary would recover four times the amount that the contracting parties had actually agreed to; insurer had no opportunity to learn of error where contract was retained by insured; reformation permitted to prevent an unconscionable advantage "which may be equated with constructive fraud"; *Oseas* exception applies under the CPLR even though it is a pre-CPLR case).

[10] *Goodbody & Co. v. Stern, 93 Misc. 2d 109, 402 N.Y.S.2d 167, 1978 N.Y. Misc. LEXIS 2022 (Sup. Ct. New York County 1978)*.

[11] ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine, 221 A.D.2d 284, 634 N.Y.S.2d 469, 1995 N.Y. App. Div. LEXIS 12294 (1st Dep't 1995)***. *See also Allen v. First Wallstreet Settlement Corp., 130 A.D.2d 824, 514 N.Y.S.2d 726, 1987 N.Y. App. Div. LEXIS 46843 (3d Dep't 1987)* (claim of mistake by brokerage firm that erroneously credited stock to customers account accrued on the date shares were delivered rather than date they were erroneously credited, and concluded that action was timely when filed within six years of the delivery date).