SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

VALENTINO U.S.A., INC.,

Plaintiff-Appellant,

- against-

693 FIFTH OWNER LLC,

Defendant-Respondent.

Appellate Division Case No.
2021-01099

Supreme Court
Index No. 652605/2020

REPLY AFFIRMATION IN FURTHER SUPPORT OF APPELLANT'S MOTION FOR STAY PENDING APPEAL

(Mot. No. M1161)

JARRED I. KASSENOFF, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury and pursuant to CPLR 2106:

1. I am a partner of Newman Ferrara LLP, attorneys for plaintiff-appellant VALENTINO U.S.A., INC. ("Appellant"), and am fully familiar with the facts and circumstances set forth below.[1]

2. This Reply Affirmation is respectfully submitted in further support of Appellant's motion, which seeks an Order:

(a) pursuant to CPLR 5518 and/or 5519(c), issuing a preliminary injunction and/or otherwise temporarily enjoining, staying and tolling the running of the Decision and Order on Motion, dated and entered on January 27, 2021 (Hon. Andrew S. Borrok, J.S.C.) (the "Dismissal Order"), pending this Court's hearing and determination of the within motion and five days after the service of notice of entry thereupon (or as otherwise directed by this Court);

(b) pursuant to CPLR 5519(c) and/or CPLR 2201, staying and tolling all proceedings, including but not limited to tolling Appellant's time to answer and/or otherwise move, in the related action between the parties captioned *693 Fifth Owner, LLC v. Valentino U.S.A., Inc.*,

[1] Undefined capitalized terms have the meaning set forth in the moving affirmation of Jarred Kassenoff, dated March 30, 2021 (the "Moving Affirmation") (NYSCEF Doc. No. 2). The Court is respectfully referred to the Moving Affirmation for a complete recitation of the procedural history and relevant factual background.

Sup. Ct. N.Y. County, Index No. 651158/2021 ("Respondent's Action"), pending the Court's determination of this appeal; and

(c) granting such other and further relief that the Court deems just, proper and equitable under the circumstances.

3. As set forth below, Appellant's motion for a stay should be granted, for the following reasons:

i. Appellant satisfies the standard for a stay pending appeal pursuant to CPLR 2201, 5518 and/or 5519(c);

ii. without a stay, the Dismissal Order's flawed analysis of the Lease and/or controlling law, and erroneous dismissal of Appellant's claims (and likely defenses in the Related Action), will prejudice Appellant in the Related Action; and

iii. Appellant's claims are fundamentally meritorious give the COVID-19 pandemic's unprecedented impacts on both society and Appellant's business.

4. Significantly, Respondent's opposition papers fail to competently rebut any of the forgoing points, do not meaningfully distinguish the controlling precedent governing the standard for a stay pending appeal, and, cite to cases that are either readily distinguishable or actually support Appellant's position.

5. Furthermore, while Respondent incredulously alleges that allowing the Related Action to proceed will not prejudice Appellant, such a statement must be deemed palpably absurd, as the Dismissal Order collaterally estops Appellant from raising key equitable and/or quasi-contractual defenses (such as frustration of purpose, impossibility and/or constructive eviction) in the Related Action. Forcing Appellant to litigate the Related Action, without its primary defenses, is clearly prejudicial, both on its face and as a matter of law.

6. Conversely, because there is a current moratorium on the commencement and prosecution of cases seeking payment of rent in this State (such as the Related Action),[2] and Appellant is no longer occupying the Premises, there is absolutely no prejudice to Respondent should this Court grant the requested relief.

7. Lastly, Respondent opposes a stay on the inaccurate basis that Appellant's claims "lack merit."

8. Putting aside that any merits inquiry is inappropriate and premature at this stage (as the only inquiry here is whether, on a pre-Answer motion to dismiss, an opposing party is afforded every favorable inference, Appellant's claims state a cause of action), many of Respondent's cases are distinguishable, or expressly limited to their specific facts. In fact, several of the opinions cited by Respondent have, in fact, held that the types of claims asserted by Appellant in this Action raise factual issues, and are **not** susceptible to summary disposition. Yet, the court below, dismissed Appellant's case on a pre-Answer motion.

9. Accordingly, for the reasons articulated below and in the Moving Affirmation, Appellant respectfully asks that a stay be granted.

ARGUMENT

I.

APPELLANT MEETS THE STANDARD FOR A STAY PENDING APPEAL

10. Initially, Appellant's stay should be granted on the basis that this Court's decision in *OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 96 A.D.3d 541 (1st Dep't 2012) is both controlling and directly on-point.

[2] See Governor Cuomo's Executive Order 202.28, as extended.

11. Indeed, Appellant clearly satisfies the conditions for a stay set forth in *OneBeacon*, because this Action and Respondent's Action concern:

- the exact same parties;[3]
- the exact same Lease; and
- the exact same issues, directly arising from the COVID-19 pandemic and Appellant's resulting surrender of the Premises.

12. As noted in the Moving Affirmation, this Court has held that failure to grant a stay under these circumstances constitutes reversible error. See *Asher v. Abbott Labs*, 307 A.D.2d 211 (1st Dep't 2003).

13. Notably, Respondent fails to distinguish *OneBeacon* (or any of the other cases cited in the Moving Affirmation, where failure to grant a stay in similar circumstances was reversed on appeal[4]). On that basis alone, Appellant's motion should be granted.

14. Instead of addressing and distinguishing controlling precedent, Respondent introduces a so-called "guiding principle" from a lower court – the Westchester County Surrogate's Court – and argues that Appellant must make an "extraordinary showing" that "proceed[ing] to trial very likely will result in a waste of judicial resources[.]" *Matter of Denton*, 2002 N.Y.L.J. LEXIS 2080 at *1-2 (Sur. Ct., Westchester Cty. 2002).

15. Respondent's suggestion that the parties litigate the Related Action without Appellant's primary defenses intact, that Appellant should bond any adverse judgment therein when its hands are effectively tied, and that Appellant later move to vacate such judgment post-

[3] Respondent named Appellant's parent company, the guarantor under the Lease, as a defendant in the Related Action.

[4] See *People ex rel. Smalls v. Tekben,* 193 A.D.2d 828 (2d Dep't 1993); *Van Amburgh v. Curran*, 73 Misc.2d 1100 (Sup. Ct. Albany Cty. 1973); *Niagara Mohawk Power Corp. v. New York State Dept. of Environmental Conservation*, 169 A.D.2d 943 (3d Dep't 1991).

appeal, would certainly constitute a waste of judicial resources, not to mention an academic exercise, particularly if Appellant's defenses are restored (and have not been heard) within the context of that Related Action.

16. Respondent's other cited cases are similarly unavailing.

17. In *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005), the Court of Appeals held that the Appellate Division appropriately exercised its equitable powers in the context of a *Yellowstone* injunction application and a request for an injunction to toll the time to exercise a lease renewal option, both pursuant to CPLR 6301 – an entirely different context and standard than a stay pending appeal pursuant to CPLR 2201, 5518 and/or 5519.

18. Likewise, *Eisner v. Goldberger*, 28 A.D.3d 354 (1st Dep't 2006) (decided prior to *OneBeacon*) concerned the stay of enforcement of a judgment pending the appeal of another action. However, the fact that there was a judgment in that case – which does not exist here – was a critical distinction and key factor in the Court's ultimate decision.

19. Other cases cited by Respondent actually support the granting of a stay.[5] Specifically, in *Safier v. Cohl*, 95 A.D.2d 933 (3d Dep't 1983), the Third Department held that while the Sullivan County trial court should not have stayed a Kings County action based on the facts of that case, a stay should be granted if separate actions would be a waste of judicial economy.

20. Similarly, the court in *Smith v. Proud,* 2013 N.Y. Slip Op. 33509[U] (N.Y. Sup. Ct, New York County 2013), denied the request for a stay because (a) the actions at issue involved different plaintiffs (unlike here); (b) the parties therein could coordinate their discovery schedules to facilitate judicial economy (the Dismissal Order forestalled discovery on Appellant's claims); and (c) the actions involved sufficiently different issues such that resolution of one appeal would

[5] These cases do not support Respondent's proposition that the stay application must be made before the trial court, and there is no prohibition to seek this relief in this Court

not resolve the other action. (Here, if the Dismissal Order is reversed, and Appellant is successful in the Action, the Lease would be deemed terminated and the gravamen of Respondent's claims in the Related Action would be addressed).

21. Finally, Respondent cites to *Pierre Assoc. Inc. v. Citizens Cas. Co. of New York*, 32 A.D.2d 495, 497-98 (1st Dep't 1969), which actually held that a stay should have been denied because the landlord in that action had a meritorious, uncontested reason for terminating that tenant's lease (directly opposite to the present circumstances), and therefore the outcome of the appeal would have no impact on the lower court's ruling. By contrast, here the outcome of the appeal will absolutely determine the merits of Appellant's claims in this Action and likely defenses in the Related Action.

22. Appellant has therefore amply demonstrated that it satisfies the standard for a stay pursuant to CPLR 2201, 5518 and/or 5519, as set forth in, *inter alia*, *OneBeacon*.

II.

APPELLANT WILL BE PREJUDICED UNLESS THE RELATED ACTION IS STAYED

23. Appellant will be significantly prejudiced unless the stay is granted, because the Dismissal Order likely precludes Appellant from asserting its primary defenses to the alleged nonpayment of rent, to wit: frustration of purpose, impossibility of performance, and constructive eviction.[6]

24. In an attempt to ignore this clear prejudice, Respondent suggests that Appellant could simply litigate the entire Related Action (without its primary defenses), bond an adverse

[6] Notably, Respondent waited until immediately after the Dismissal Order was entered to commence the Related Action, because eleven (11) of the thirteen (13) causes of action in the Related Action are premised upon Respondent's central argument that the Dismissal Order precludes Appellant from asserting that the Lease has been terminated and that Appellant was therefore entitled to vacate and surrender the Premises.

judgment, and then later move to vacate any improvidently entered judgment after this appeal is concluded. Respondent's proposed course runs afoul of the precedent referenced above, and this Court's long-standing public policy disfavoring the waste of judicial resources incurred by unnecessary litigation.

25. Second, Respondent claims that an interlocutory appeal should not result in a delay of the Related Action. Such argument is unavailing.

26. First of all, this is not an interlocutory appeal – the Action has been dismissed by the Dismissal Order.

27. Second, Respondent's interpretation of the case law on that point is misguided.

28. The sole case cited for Respondent's proposition, *Matter of Denton*, concerned an interlocutory appeal from the Surrogate's Court of a denial of a motion to dismiss (the exact opposite circumstances that are presented in this Action). Thus, there was no concern in that case that a party would be forced to defend the litigation without its defenses.

29. Based on the foregoing, it cannot be credibly disputed that Appellant would suffer prejudice if a stay is not granted.

30. Respondent will suffer no prejudice from a stay because (a) the Related Action (based upon the alleged nonpayment of rent) is barred by Executive Order 202.28 (as extended),[7] and (b) Appellant is not in possession of the Premises.

31. In that regard, Executive Order 202.28 provides, in relevant part that, "[t]ere shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent[.]"

[7] See *SRI Eleven 1407 Broadway Operator LLC v. Mega Wear Inc.*, 2021 N.Y. Slip Op. 21046 (Civ. Ct., New York Cty., March 3, 2021).

32. As Judge Tsai held in *SRI Eleven 1407 Broadway Operator LLC*, landlords should not be permitted to circumvent the eviction moratorium's purpose by exercising a conditional limitation based on a tenant's nonpayment of rent. See *SRI Eleven 1407 Broadway Operator LLC*, 2021 N.Y. Slip Op. 21046, at *14.

33. Here, the Related Action is exactly the type of attempt to litigate claims based upon the alleged nonpayment of rent that is barred by Executive Order 202.28.

34. In that regard, Respondent's very first claim in that action seeks a judgment for alleged unpaid rent purportedly owed through February, 2021, in direct violation of the moratorium.

35. Accordingly, proceeding with the Related Action should not be countenanced and should be found violative of public policy, if not the Governor's moratorium. Alternatively, the court should be found to lack subject matter jurisdiction given the moratorium's directive and guidance. See *SRI Eleven 1407 Broadway Operator LLC*.

36. The Court should not allow Appellant to be prejudiced in this manner, and the stay should be granted.

III.

A STAY IS WARRANTED WHILE THIS COURT CONSIDERS APPELLANT'S MERITORIOUS CLAIMS

37. Appellant's claims are fundamentally meritorious, given the Dismissal Order's flawed ruling and the trial court's disregard for controlling precedent.

38. First, Respondent conveniently fails to competently rebut Appellant's *prima facie* showing that the Dismissal Order (1) misapplied the standard on a pre-Answer motion to dismiss; (2) ignored controlling law concerning constructive eviction claims; and (3) improperly read an overly-broad waiver into the Lease and misinterpreted relevant Lease provisions.

39. Second, Appellant adequately pleaded frustration of purpose and impossibility causes of action, and this Court should hold that such claims cannot (and should not) be dismissed pre-joinder of issue and pre-discovery, particularly in the absence of necessary fact-finding.

A. Appellant Demonstrated that the Dismissal Order Must be Reversed.

(1) Respondent fails to address the fact that the Dismissal Order misapplied the standard on a pre-Answer motion to dismiss.

40. Notably, Respondent's opposition papers fail to contest, or distinguish, Appellant's case law demonstrating that the trial court's analysis on a motion to dismiss was limited to whether Appellant's factual allegations "fit into any cognizable legal theory[.]" *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).[8]

41. As set forth in Appellant's Moving Affirmation (and unrebutted on this motion), the Dismissal Order plainly ignored such precedent. On that basis alone, Appellant has demonstrated a likelihood of success, warranting the granting of this application.

(2) Respondent fails to dispute the fact that the Dismissal Order ignored this Court's constructive eviction precedent.

42. Again, Respondent's opposition papers fail to challenge the fact that the Dismissal Order misapplied controlling precedent governing constructive eviction claims.[9]

43. Surprisingly, Respondent's opposition papers merely claim that "[b]y virtue of the express provisions of the Lease, [Appellant] had contracted away its right to rely upon frustration of the venture, impossibility of performance and constructive eviction." *See* MOL, page 8.

[8] Indeed, as discussed further below, the fact that other trial courts have recently held that commercial tenants may plead such claims during the pandemic further undermines any argument for pre-Answer dismissal.

[9] A commercial tenant has a "reasonable" time to abandon its leased premises, and any question of reasonableness is an issue of fact. See *Joseph P. Day Realty Corp. v. Franciscan Sisters for Poor Health Sys., Inc.*, 256 A.D.2d 134, 135 (1st Dep't 1998) (denying motion to dismiss over factual dispute concerning "reasonableness" of tenant's delay in abandoning).

44. However, the Dismissal Order did not reach this conclusion, and the Lease does not contain any waiver of Appellant's right to bring a constructive eviction claim (and no such waiver would be enforceable, as a matter of public policy).

45. Appellant's challenge of the trial court's order on this point is therefore likely to prevail. Simply stated, and as set forth in more detail in Appellant's Moving Affirmation, because Appellant's constructive eviction claim (and the issue as to whether Appellant vacated the Premises in a reasonable time) presents factual issues, it was improper for the lower court to dismiss this claim pre-joinder of issue.

(3) Respondent fails to competently support its claim that the Lease contains a broad waiver of all equitable, quasi-contractual and contractual claims, including frustration of purpose and impossibility.

46. As set forth in the Moving Affirmation, the Dismissal Order improperly read an all-encompassing "waiver" of any conceivable equitable, quasi-contractual and contractual claims into the Lease that would permit Appellant to deem the Lease terminated and/or rescinded.

47. Rather than oppose any of Appellant's case law standing for the proposition that such a waiver must be clear and unambiguous (no such waiver is found in any Lease provision), Respondent claims that the occurrence of pandemics in the past somehow proves that Appellant contemplated and guarded against the COVID-19 pandemic in the Lease (it did not).

48. Amazingly, Respondent's opposition raises this argument despite the fact that the Lease mentions nary a word about "pandemics."

49. Similarly, Respondent defends the Dismissal Order's misinterpretation of Lease, by alleging that Articles 9.1 and 21.11 allocated all pandemic-related risks to Appellant.

50. In essence, Respondent's argument relies on the extreme claim that the unprecedented COVID-19 pandemic was foreseeable, and therefore Appellant had a legal obligation to draft COVID protections into the Lease when it was negotiated in 2013.[10]

51. In fact, as further set forth in the Moving Affirmation, while Article 21.11 provides that certain "Unavoidable Delays" would not excuse payment of rent, the parties' agreement:

i. fails to reference "pandemics,"

ii. (ii) fails to expressly or unequivocally provide that Appellant preemptively waived any and all contractual, quasi-contractual and/or equitable claims; and

iii. (iii) does **not** preclude claims seeking rescission or termination of the Lease (the primary relief sought by Appellant in this Action).

52. Nothing in Section 21.11 indicates, in any manner, that Appellant recognized or anticipated that a global pandemic, and related governmental shut-down orders, would thwart its ability to operate at the Premises.

53. Furthermore, 21.11 fails to address the parties' fundamental assumptions in entering into the Lease, and other material factual inquiries.

54. Given that ambiguity, it cannot be credibly argued that Respondent's assertions of a "waiver" is legally cognizable or enforceable. Nor should it be consistent with public policy that the entire weight of a global pandemic should be shouldered by a tenant. (That, too, is fundamentally inequitable.)

55. For those reasons, Appellant's Moving Affirmation has amply demonstrated that the appeal is meritorious, and the Dismissal Order likely to be reversed.

[10] Respondent's opposition papers claim that prior pandemics render the COVID-19 pandemic "foreseeable" and therefore Appellant's duty to explicitly guard against in the Lease, but are utterly devoid of a single case arising from the 1918 pandemic, 1967-68, 1968, SARS, H1N1 and/or Ebola scare holding that such public-health crises are foreseeable or a tenant's obligation to protect against in a commercial lease.

56. Accordingly, Appellant's motion for a stay of the Related Action pending the outcome of the appeal should be granted.

B. Appellant's Claims, Including Frustration of Purpose and Impossibility, Are Viable and the Appeal Should be Decided on its Merits.

57. Lastly, although not discussed in its memorandum of law, Respondent annexes several cases to its opposition papers purporting to show that the trial courts have rejected frustration of purpose and impossibility claims brought by tenants "for a century."[11]

58. Initially, as set forth above, Respondent's attempt to litigate the merits of these claims on this motion is both inappropriate and premature. As this is an appeal of a motion to dismiss, the only inquiry at this stage is whether, affording Appellant every favorable inference, Appellant's claims state a cause of action. On that basis alone, Respondent's arguments and case law concerning the merits of these claims should be ignored.

59. Nonetheless, even if this Court were to entertain such an inquiry (which it shouldn't), Appellant's claims unequivocally have merit. In that regard, Appellant has adequately pleaded that the COVID-19 pandemic frustrated its central purpose in paying a premium rent for retail space on Fifth Avenue – and that the public-health crisis and resulting governmental restrictions have fundamentally altered the basic consideration that Appellant bargained for.[12]

60. Appellant's other claims, including impossibility and constructive eviction, were also adequately pleaded based on controlling precedent.

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[11] See footnote 8. Upon information and belief, despite Respondent's implication that frustration of purpose claims related to pandemics have been rejected "for a century," no such cases exist, and conversely, this Court has recently held that frustration of purpose is a viable doctrine and has upheld frustration claims related to other issues. To the extent this Court cannot locate any such precedent declaring an unprecedented global pandemic to be an "unforeseeable" event triggering the application of the doctrine of frustration of purpose, Appellant respectfully paraphrases a compelling argument attributed to Justice Ruth Bader Ginsburg: "I'm asking you to set a new precedent, as courts have done before when the law is outdated."

[12] Respondent also notes that Appellant has opened a boutique on Spring Street, but this has nothing to do with the merits of the Action or Related Action – that is a different lease, with different terms, for difference premises, which has no bearing on this motion or the appeal.

61. Notably, frustration of purpose arguments raised by commercial retail tenants during the COVID-19 pandemic have survived harsher challenges. See *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2020 N.Y. Slip Op. 33623[U], 1 (Sup. Ct, N.Y. County 2020).

62. Likewise, Respondent concedes that the court in *267 Dev., LLC v. Brooklyn Babies and Toddlers, LLC*, 2021 N.Y. Slip Op. 30796[U], 4 [N.Y. Sup Ct, Kings County 2021] upheld an impossibility of performance affirmative defense raised by a retail tenant, stating that, "[t]he government shutdown was unforeseeable and could not have been built into the contract. Under the circumstances presented, this Court finds that performance under the subject lease was made impossible[.]"

63. Furthermore, the cases cited by Respondent -- denying frustration claims and/or defenses -- were largely limited to their specific facts and lease terms, and distinguishable on procedural grounds from this Action, where the Dismissal Order incorrectly granted a pre-Answer dismissal despite the existence of material factual issues.

64. For example, Respondent cites to *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) (Sup. Ct. N.Y. Co. 2020), where Justice Bluth dismissed a frustration of purpose defense brought by a restaurant management and consulting business (not a retail business) on summary judgment (not pre-Answer dismissal), but specifically noted that the applicability of that doctrine is a fact-specific inquiry that will vary from case-to-case.

65. Likewise, Respondent's citation to *Backal Hosp. Group LLC v. 627 W. 42nd Retail LLC*, 2020 N.Y. Slip Op. 32538[U], 1 (N.Y. Sup Ct, New York County 2020) is unavailing, because that case concerned an injunction seeking to prevent a letter of credit draw down for a different type of tenant – not a retail tenant. That case does not stand for the proposition that a tenant could not bring a frustration claim under applicable circumstances.

66. In *RPH Hotels 51st St. Owner, LLC v. HJ Parking LLC*, 2021 N.Y. Slip Op. 30286[U], 1 (N.Y. Sup Ct, New York County 2021), Justice Bluth denied a motion to vacate a default judgment, and in doing so rejected a commercial garage operator's frustration of purpose defense to the payment of rent. This ruling should also be limited to its facts (as Justice Bluth expressly noted in *1140 Broadway LLC*), which are not analogous to the present circumstances.

67. Most recently, in *Mept 757 Third Ave. LLC v. Grant*, 2021 N.Y. Slip Op. 30592[U], 3 (N.Y. Sup Ct, New York County 2021), Justice Bluth rejected a sublandlord's claim that frustration excused payment of rent previously agreed to in a stipulation of settlement (again, on a motion for summary judgment, not a pre-Answer motion to dismiss).[13]

68. At most, these lower court decisions suggest that the issue is now ripe for review by this Court, to resolve a disagreement amongst the trial courts concerning the applicability of frustration of purpose and other equitable and quasi-contractual doctrines to the COVID-19 pandemic's unique and unprecedented challenges. See *Seawright v. Bd. of Elections in City of New York*, 35 N.Y.3d 227 (2020).

69. Accordingly, as Appellant's challenge of the Dismissal Order is entirely meritorious, and the failure to grant a stay (and force Appellant to litigate the Related Action without its primary defenses) would prejudice Appellant and result in a waste of judicial resources, it is respectfully requested that this Court grant Appellant's motion in its entirety.

70. Furthermore, should such a stay be granted, Appellant should not be required to post a bond.

[13] With all due respect to Justice Bluth, to the extent that Respondent's opposition papers appear to argue that, based on Justice Bluth's rulings, frustration of purpose is not a viable claim and/or defense during the COVID-19 pandemic, Appellant respectfully suggests that this conclusion would be incorrect, because the pandemic is "unprecedented," and therefore cannot be deemed "foreseeable" as a matter of law.

71. Respondent has demonstrated no prejudice for the stay (and cannot do so given the eviction moratorium set forth in Executive Order 202.28, and the undisputed fact that Appellant has vacated the Premises).

72. Additionally, no money judgment has been issued in Respondent's favor that would necessitate such relief at this juncture. Thus, Respondent's citation to *Lancaster v. Kindor*, 64 N.Y.2d 1013 (1985) is therefore unavailing and distinguishable.

WHEREFORE, Appellant respectfully submits that the Court should grant the instant motion for a stay, in its entirety, together with such other relief in Appellant's favor as this Court deems just, proper, and equitable under the circumstances including, but not limited to, an award of Appellant's costs and fees.

Dated: New York, New York
April 16, 2021

Jarred Kassenoff

Jarred I. Kassenoff