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

VICTORIA'S SECRET STORES, LLC successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC., Plaintiffs, *~ against ~* HERALD SQUARE OWNER LLC successor in interest to 1328 BROADWAY, LLC, Defendant.	Index No.: 651833/2020 Hon. Andrew Borrok, J.S.C. Motion Seq: 002

MEMORANDUM OF LAW IN OPPOSITION TO COUNTERCLAIM PLAINTIFF HERALD SQUARE OWNER LLC'S MOTION SEEKING PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Counterclaim Defendants Victoria's Secret Stores, LLC and L Brands, Inc. ("Tenant" or "VS") respectfully submits this memorandum of law in opposition to Counterclaim Plaintiff Herald Square Owner LLC's ("Landlord") motion seeking partial summary judgment. The Landlord's application is unfounded in law, raises factual issues, and should be rejected.

PRELIMINARY STATEMENT AND STATEMENT OF PERTINENT FACTS

Upon the shutdown of the New York City economy amid the COVID-19 health emergency, VS sought judicial relief from onerous Lease obligations relating to its completely-shuttered flagship at Two Herald Square in Manhattan. This Court rejected Tenant's arguments for rescission of the Lease under the doctrines of frustration of purpose and impossibility of performance, based in part on its finding that the Lease allocated store closure risk to the Tenant. *See* January 7, 2021 Decision & Order, NYSCEF Dkt. 47. As such, this Court dismissed the Tenant's complaint seeking judicial rescission.[1]

Following this Court's Decision & Order, VS promptly paid 100% of rent arrears, plus accrued interest (18% per annum as specified in the Lease). Affidavit of Colin Mathews ("Mathews Aff.") ¶ 22. The aggregate amount promptly paid to the Landlord in response to this Court's January 7, 2021 Decision & Order totaled $15,018,395.90. *Id.* It is undeniable that Landlord has been made more than whole, not only receiving all amounts of rent and additional rent owed to that point along with the hefty interest for the delayed payment thereof, but also VS' agreement, with more than a year of term remaining on the Lease, to relinquish to Landlord possession of the Premises and commitment to timely payment of rent and charges through the end of the Leases' term on March 31, 2022. That should be the end of the dispute.

[1] Tenant filed a Notice of Appeal of this Court's on February 5, 2021 (*see* NYSCEF Dkt. 49). That appeal has not yet been perfected.

But now, Landlord wants more, seeking an *additional* $20+ million. It remarkably styles VS as a "holdover" tenant, purporting to rely upon an invalid termination notice that was issued in June 2020 – at the height of the COVID-19 emergency. Mathews Aff. ¶¶ 5-7 & Exhs. C, D. That notice improperly demanded that VS quit the Premises at a time when such evictions were outlawed by Executive Order. Landlord myopically argues that the Executive Orders proscribe only "actions" for eviction. That reading, however embodies a dishonest view of the landscape.

The Governor paused evictions, in part, so that landlords and tenants could engage in discussions to resolve their rent disputes, and so that tenants could "catch up on" payments. Affirmation of William Mack, Esq. ("Mack Aff.") Exh. A. And that is exactly what occurred here. As Landlord's motion papers demonstrate, VS and the Landlord specifically undertook settlement discussions long after its purported notice. Landlord's Memorandum of Law ("LL Mem.") at 16. This effort would have been illusory had Landlord seriously contended that VS was an illegal "holdover" tenant, and would have placed VS in the untenable position of choosing between negotiating a resolution or facing draconian penalties. This plainly was not the posture in which the parties were situated at any point.

Evictions were also paused, at least at the outset, to limit unnecessary human-to-human contact amidst stringent "stay home" public health orders. The VS Herald Square Premises is not a 1,000 square foot store in a strip mall. It is a massive flagship, filled with inventory and branding, all of which needed to be methodically removed in order to tender the Premises back to the landlord in accordance with the Lease terms. Mathews Aff. ¶ 21. Vacating the Premises in accordance with the Lease's "End of Term" provisions is a massive project, requiring months of work and thousands of man-hours. *Id*. For the Landlord to now suggest that this task could be accomplished

overnight – at a time when this sort of non-essential work was not even permitted in New York City (Mack Aff. Exh. B) – is preposterous.

Aside from its COVID-related infirmities, Landlord's claim also fails for numerous other reasons. ***First***, Landlord never bothered to plead its claimed entitlement to liquidated damages in its counterclaims. In fact, the filing of the instant summary judgment motion is the *very first time* that Landlord has requested such relief, such delay resulting in serious prejudice to the Tenant. ***Second***, Landlord is estopped from now seeking liquidated damages by virtue of its own conduct. Specifically, Landlord *never once* demanded or even suggested that Tenant vacate the Premises. Landlord *never once* transmitted an invoice purporting to collect the so-called "holdover" amounts that it now claims. Quite to the contrary, as related below, Landlord ratified and even encouraged VS' continued possession of the space while the litigation and the related settlement discussions were ongoing.

But most fundamentally, it is hornbook New York law that liquidated damages must bear *at least some relationship to the actual harm* suffered by the claiming party. Here, Landlord has not even attempted to articulate *any* harm. Nor can it. Landlord has been made whole, having collected all past due rents with interest, and having been guaranteed payment of rents continuing through the end of term in March 2022. During that time, Landlord will also enjoy possession of the Premises, more than a year early, thus affording ample opportunity to re-let the space. There can be no serious contention – nor is it anywhere alleged – that Landlord has suffered *any* harm. Yet it now seeks an exorbitant payment resulting in a breathtaking windfall. This result is not contemplated by the Lease or by New York law.

For these and all of the following reasons, VS respectfully requests that the instant application be denied in all respects.

LEGAL STANDARD

Summary judgment pursuant to CPLR 3212 deprives the litigant of its day in court, and is thus a drastic remedy that should be denied where there is *any doubt* as to the existence of a material issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978).

A summary judgment movant has the burden to set forth evidentiary facts sufficient to entitle that party to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. Failure to make that showing requires denial of the motion. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

ARGUMENT

I. THE PURPORTED "TERMINATION" WAS ILLEGAL AND A NULLITY

Landlord's application rests upon the fiction that it was permitted to eject VS from the Premises at the height of the COVID-19 health emergency. This contention fails for at least three reasons: (i) Landlord's purported "termination notice" amounts to a *de facto* eviction, expressly proscribed by Executive Order; (ii) even if Landlord's termination were permissible, *enforcement* of that termination (*e.g.*, the charging of treble rent) is stayed pending the expiration of the Executive Orders; and (iii) the purported notice to cure respecting the Retail Premises was void because it was issued – and the entire purported cure period ran – during a period in which the New York State Courts were shuttered to all non-essential filings. VS was, thus, stripped of its right to seek judicial relief challenging that notice.

A. The Claimed "Termination" Amounts to an Illegal Eviction and Cannot Be Enforced

Since the early days of the COVID-19 health emergency, Executive Order has suspended eviction of New York commercial tenants. On March 20, 2020, Governor Andrew Cuomo issued Executive Order 202.8, providing: "[t]here shall be no enforcement of either an eviction of any

tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days." In a series of subsequent Orders, that directive was extended through at least February 2021.[2]

And yet, eviction enforcement is *precisely* what Landlord seeks in its application. On May 11, 2020 the Landlord transmitted a purported Notice to Cure based on the alleged failure to pay Minimum Rent for the months of April and May 2020. Mathews Aff. Exh. C. In the event that the claimed monies were not received, that Notice threatened that VS "shall be required to then ***quit and surrender*** the Premises." *Id*. The Landlord next issued a Notice to Cancel, again commanding that VS "***quit and surrender*** the Retain Premises." *Id*. Exh. D.[3]

Landlord cannot seriously contend that these notices – purporting to require that the Tenant "quit and surrender" the Premises – amount to anything other than eviction. Eviction, of course, is universally defined as "the action of expelling someone, especially a tenant, from a property."[4] Under the Landlord's logic, all New York landlords were free to issue termination notices throughout the COVID emergency – notwithstanding the Governor's clear directives restraining landlords from ***removing tenants*** during that critical time – and then seek to expound whatever punitive post-termination measures are contained in the respective leases if the premises were not immediately vacated. This yields an absurd result, and amounts to an undeniable work-around of the Executive Orders' spirit and purpose. To be sure, an order of this Court permitting the

[2] *See* E.O. 202.55 (September 4, 2020); 202.60 (October 4,2020); 202.64 (October 20, 2020); 202.67 (November 3, 2020); 202.70 (January 1, 2021); 202.92 (February 26, 2021). On May 7, 2020, the Governor issued Executive Order 202.28, which provides in pertinent part: "There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent…for a period of sixty days beginning on June 20, 2020."

[3] In addition to the Retail Premises, the Lease also includes certain Office Premises. Identical notices were served respecting the Office Premises dated June 4, 2020 and June 18, 2020, respectively. Mathews Aff. fn. 1.

[4] Oxford English Dictionary.

draconian "holdover" relief that Landlord seeks would amount to "enforcing" the eviction that is contemplated by the faulty notices.

B. Even if the Termination Was Proper, Enforcement of Punitive Measures Which Follow From Such Termination Is Stayed

Even accepting Landlord's contention that it was entitled to issue its termination notices (which it was not), "enforcement" of those notices is nonetheless proscribed until the Executive Orders are lifted or expire. That means that defaulting tenants cannot be *removed* from leased premises, *and* it also means that any post-termination remedies in the affected leases would *not* be triggered until that time.

At least one court has already rejected Landlord's position. In *Prestige Deli & Grill Corp. v. PLG Bedford Holdings LLC*, 2020 WL 4059137 (Sup. Ct. Kings Cnty. July 17, 2020), the Court interpreted Executive Order 202.8 as follows: "***The Executive Order clearly prohibits the enforcement of a termination of a commercial lease*** for sixty days commencing June 20, 2020."[5] *Id*.

Landlord seeks to distinguish *Prestige Deli* by arguing that the tenant there sought a Yellowstone injunction, which it claims would have been "superfluous" under VS' logic. But, as Landlord correctly points out, assertion of a Yellowstone injunction (seeking to prevent termination) would have been inconsistent with VS' then-pending claims for rescission of the Lease. For this reason, VS was entitled to reasonably rely upon the Executive Orders' protection from ***enforcement*** of termination of the Lease. Collection of treble-rent as "holdover" amounts certainly qualifies as enforcement of termination.

[5] As noted (*supra* n.2), that date was extended through a series of subsequent executive orders.

C. The Termination Notice Was Invalid Because the New York State Courts Were Closed to Non-Essential Filings During the Entire Cure Period

The Landlord's purported Notice to Cure respecting the Retail Premises was further invalid because it was issued – and the *entire* cure period expired – during the period that the New York State Unified Court System was entirely closed to non-essential filings. Mack Aff. Exhs. C & D. As Landlord acknowledges, "normally a tenant cannot seek Yellowstone relief once its landlord has issued a notice to terminate." LL Mem. at 15.

Here, Landlord's notice to cure as to the Retail Premises was issued on May 11, and the cure period was identified as five days. The *entire* cure period, thus, expired during the period in which the courts were unavailable. Thus, VS had no opportunity to seek judicial relief – Yellowstone injunction or otherwise – respecting the Retail Premises cure notice.

Thus, the May 11 notice is invalid as a lease termination vehicle because the Tenant has been deprived of *any* legal path to toll the cure period or otherwise challenge the notice. If Landlord wished to rely upon and/or otherwise enforce this notice, it should have re-served the notice once the New York State courts reopened on May 25, 2020. There is no legal basis to suggest that the cure period purportedly asserted in the cure notice somehow automatically started running as of the courts' reopening on May 25. As such, because the May 11 cure notice was not properly issued, the later Termination Notice (which relied upon issuance of a proper cure notice) is void and of no effect. Landlord's request for holdover damages must be denied for this reason alone.

II. LANDLORD'S POSITION UPENDS THE EXECUTIVE ORDERS' PUBLIC POLICY GOALS

Landlord's attempted workarounds described above are not without consequence. Rather, they seek to upend the careful COVID-19 protections that the New York State government enacted during a critical emergency period. Under the Landlord's analysis, commercial tenants faced with

termination notices during the COVID-19 crisis would have been forced to choose between vacating the leased premises *immediately*, thereby risking themselves and their employees to COVID-19 exposures and violating public health proscriptions, and the imposition of draconian "holdover" damages related penalties. That choice starkly conflicts with the public policy considerations underscoring the Executive Orders.

According to the Governor, the eviction moratorium was first announced "to ensure ***no tenant*** was evicted during the height of the public health emergency." Mack Aff Exh. A at 2. Permitting Landlord's claim – enforcing a "get out now or pay three times rent" directive – contradicts that policy goal.

The claimed termination also flies in the face of public health policy. Throughout the COVID crisis, authorities pleaded with the public to remain socially distant. Yet, if valid, the purported termination would have required a massive mobilization of labor in direct contravention of the New York State on PAUSE executive orders. As of the date of the Notice of Termination (June 4, 2020), New York City had not yet entered Phase II of "reopening," the phase in which commercial building management activities became permitted. Mack Aff. Exh. B.

Thus, the massive labor mobilization required to tender the Herald Square Premises to the Landlord would have directly violated State regulation. To illustrate, surrender of the Premises was completed on February 19, 2021 after ***two full months*** of work. Tendering the space took more than 2,500 man-hours on the "store" side, as well as another 1,900 man-hours from maintenance workers removing items and debris from the Premises. Mathews Aff., ¶ 21. This enormous, labor intensive effort would have ***directly*** and unequivocally violated New York's then-existing COVID-related rules, and would have gratuitously risked exposing scores of workers to potential COVID risk near the height of the emergency. *Id.*

In addition, the extensions of the anti-eviction measure were intended to "give[] commercial tenants and mortgagors additional time to get back on their feet and catch up on rent or their mortgage, or to renegotiate their lease terms…" Mack Aff. Ex. A. As related below, that is exactly the exercise in which the Landlord and the Tenant herein had been engaging (or so Tenant thought). A finding of "holdover" damages would give rise to "the illogic of requiring the [tenant] to have removed from the premises while at the same time discussing renewal and expansion of the leased premises, *i.e.*, the [landlord] did not expect vacatur…" *Tanenbaum v. Panzik,* 2008 WL 1773938 (Sup. Ct. Nassau Cnty. 2008). Under Landlord's logic, Tenant could not move out without rendering the negotiations moot, and could not stay without subjecting itself to the increased rent provision that Landlord now claims is due. Notably, the *Tanenbaum* court held that "[n]o contract could fairly be said to express such an absurd result as constituting the expectation of the parties." *Id*.

III. LIQUIDATED DAMAGES ARE PRECLUDED BECAUSE LANDLORD DID NOT CLAIM OR ALLEGE THEM IN ITS ANSWER WITH COUNTERCLAIMS

Even absent the Executive Order limitations on evictions described above, Landlord's application fails because the instant summary judgment motion is the ***very first time*** in which Landlord asserted or pled a claim for liquidated damages. It is undisputed that Landlord's counterclaims served on June 29, 2020 [NYSCEF Dkt. 6] did not allege, claim, demand, or even reference liquidated damages. Based on this fact alone, Landlord's tardy demand for such damages must be denied. *See Creative Waste Mgmt., Inc. v. Capitol Envtl. Servs., Inc.*, 495 F. Supp. 2d 353 (S.D.N.Y. 2007) (denying party's request for liquidated damages where it failed to claim or allege such damages in its counterclaim); *see generally* 28A N.Y. Prac., Contract Law § 22:38 (2018) (explaining that a party cannot recover liquidated damages if it does not assert liquidated damages in its pleading).

Landlord's failure to plead its claimed entitlement to liquidated damages is anything but harmless error. With no previous notice of Landlord's claim, Tenant was precluded from asserting defenses in prior pleadings, such as the fact that the liquidated damages clause at issue herein constitutes an unenforceable penalty. Of course, New York law provides that such an argument must be pled as an affirmative defense. *See* Liquidated damages, 4A N.Y. Prac., Com. Litig. in New York State Courts § 54:22 (5th ed.); *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 380 (2005).

Additionally, because Tenant lacked notice of the Landlord's liquidated damages claim until this application's filing in February 2021, it had no reason to seek discovery or develop proof supporting its defenses. For example, had liquidated damages been pled, Tenant would have promptly sought discovery from Landlord as to what damages were contemplated by the liquidated damages clause, or request documents or testimony that could conceivably justify enforcement – or the unenforceability – of the clause.

Finally, the very act of pleading a claim to liquidated damages (as required under New York law) may have altered Tenant's conduct. Had Landlord asserted a claimed right to treble rents with its counterclaims on June 29, 2020, Tenant may have foregone the settlement discussions suggested by the Landlord, and instead chosen to vacate as soon as possible (notwithstanding the public policy implications noted above). That is to say nothing of the merits of Landlord's baseless claim, but simply the reality of mitigating financial risk. Because Landlord chose to keep its liquidated damages claim a secret for more than eight months, Tenant had no opportunity to consider that risk.

For these reasons, Tenant will suffer irreparable injury if Landlord is permitted to now seek relief that was never pled. The application should be rejected for this reason alone.

IV. LANDLORD IS EQUITABLY ESTOPPED FROM CLAIMING LIQUIDATED DAMAGES

Even if Landlord had pled a liquidated damages claim (which it did not), it is nonetheless equitably estopped by its own conduct from claiming "treble rent." Landlord *never* treated VS as a "holdover" tenant, instead choosing to actively negotiate a potential lease extension, and in fact ratify Tenant's leasehold interest by affirming VS' execution of an easement in favor of a co-tenant. To be sure, Landlord never once sent a "treble rent" invoice or otherwise sought the monies now claimed. Nor did it request that the Tenant vacate. Its present claim reflects inconsistent and erratic behavior – amounting to nothing more than a baseless money-grab – that is wholly at odds with the positions it conveyed throughout this dispute, and upon which VS relied.

Under New York law, a party seeking equitable estoppel[6] must demonstrate a "lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position." *River Seafoods, Inc. v. JPMorgan Chase Bank*, 19 AD3d 120, 122 (1st Dept. 2005) (citing *BWA Corp. v. Alltrans Express U.S.A. Inc.*, 112 A.D.2d 850, 853 (1st Dept. 1985); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81–82 (4th Dept. 1980)).

"Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another." *Airco Alloys Div., Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Dept. 1980). The party against whom estoppel is sought, however, need not have actively misled the other party; it is sufficient that the party invoking estoppel had reason to believe that the other party would be prejudiced because of its reliance on its misrepresentations. *See Fin. Techs. Int'l, Inc. v. Smith*, 247 F. Supp. 2d 397, 410

[6] Tenant asserted the defense of equitable estoppel in its Reply to Counterclaims. Landlord now purports to reject this assertion, arguing in wholly conclusory fashion, that "[n]one of these elements [of equitable estoppel] are present, or even alleged," and that the "defense as alleged is insufficient because it is conclusory." LL Mem., at 19. Yet, because Landlord never pled or alleged entitlement to liquidated damages, Tenant could not possibly have advanced the particulars of its equitable estoppel defense in response thereto.

(S.D.N.Y. 2002) (citing *Sterling v. Interlake Indus., Inc.*, 154 F.R.D. 579, 585 (E.D.N.Y. 1994) (denying summary judgment on equitable estoppel theory).

At no point did Landlord's own behavior suggest that VS was a holdover tenant. Tenant relied upon Landlord's actions – wildly inconsistent with its present position – to its detriment. Indeed, had the Tenant known the true facts (that Landlord was scheming to later seek to collect penalty provisions), it would have altered its own course of action by, perhaps, vacating the Premises immediately. Landlord's inconsistent actions are detailed below.

A. No Treble Rent Demanded or Invoiced

Landlord never demanded treble rent at any point after serving the two purported notices of termination. *See* Mathews Aff. ¶ 10-12. Nor did Landlord *ever* invoice Plaintiff for treble rent damages during Plaintiff's use and occupancy of the Premises during the alleged holdover tenancy. To the contrary, month after month, Defendant invoiced Plaintiff for nothing other than standard base rent and additional rent owed under the Lease as if it were in full force and effect (which it was). *Id.* ¶ 11 & Exh. E. Those amounts have been paid in full. *Id.* ¶ 22. Nor did Landlord's pleadings in this litigation ever claim entitlement to (or even reference) treble liquidated damages during the alleged holdover period, until the filing of the instant summary judgment motion on February 9, 2021. *Id.*

B. No Demand to Surrender

At no point following issuance of the defective termination notice did Landlord ever demand that VS quit the Premises. On the contrary, over the course of the nearly eight months that followed Landlord's purported termination, the parties were actively negotiating possible modifications, amendments, and extensions to the Lease. Mathews Aff. ¶ 16. In addition, the parties regularly communicated about issues relating to the building, including access issues and the like. *Id.* ¶ 13.

For example, on August 3, 2020, Landlord's workers at the Premises advised VS associates that the locks were about to be changed. Mathews Aff. ¶ 13 & Exh. F. Upon receiving this report, Colin Mathews of VS communicated the incident to Brett Herschenfeld, Landlord's Director in charge of all retail properties (and the person directing negotiations on the Landlord's behalf). Mr. Herschenfeld dismissed Mr. Mathews' inquiry, concluding that "***I'm sure they didn't say that***." Mathews responded with an email indicating the "store team for Herald is there shipping product, and someone from the property told them 'VS is leaving, and locks will be changed soon." Herschenfeld responded within one minute: ***"Well, it's not true so all good."*** *Id.* Naturally, if Landlord truly considered VS to be a "holdover" tenant, this exchange would have gone differently, with Mr. Herschenfeld insisting that VS vacate. He did no such thing.

C. Landlord's Endorsement of Ulta Easement

Landlord's endorsement of Tenant's continued possession of the Premises is further demonstrated through two easements and an access agreement that Tenant negotiated with Landlord's full knowledge and ratification. In summary, the beauty company Ulta occupies a separate space situated in the same building as the Premises. Mathews Aff. ¶ 17. In order to complete certain renovations in its own store, Ulta required access to the VS Premises, including a stairwell easement and a temporary construction easement. *Id*. When Ulta contacted VS concerning its need for an easement, VS desired to be helpful. But it advised the counterparty of the litigation, specifically advising that VS has asserted that Lease was rescinded under the doctrine of frustration of purpose and/or impossibility of performance. Ulta nevertheless wished to proceed with securing an easement and an access agreement from VS. Mathews Aff. ¶ 17.

Throughout the summer of 2020, VS and Ulta negotiated the easements. Both easements were ultimately executed on September 25, 2020. Significantly, Neil Kessner (Landlord's EVP and General Counsel) signed the easement as "***authorized signatory for the lessor of Grantor's***

[VS] Leasehold Premises 2." This signature "***acknowledged and agreed***" to the easements on the Landlord's behalf. Nowhere did Mr. Kessner – who is the very same individual who now submits an affidavit purporting to support the Landlord's entitlement to "holdover" damages – seek to assert that VS did not possess a proper leasehold interest. Mathews Aff. ¶ 18 & Exh. G.

D. Settlement Negotiations Toward Continued Possession

Landlord's claim that "protected settlement negotiations cannot be used to advance a waiver argument" flatly misses the point. *See* LL Mem., at 16. New York case law holds that a party can overcome a non-waiver clause though a showing of equitable estoppel. *See* *EMI Music Mktg. v. Avatar Records, Inc.*, 317 F.Supp.2d 412, 421 (S.D.N.Y.2004) (citing *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 342 (1977)). And equitable estoppel, in turn, is established though the parties' outward behavior and representations, both express and tacit. *See id.* It is unclear what relevance – if any – could be attributable to the fact that such negotiations were allegedly "protected" from discovery or from use at trial. Contrary to the assertions in Landlord's MOL (p.16), it was Landlord's counsel who first approached VS on or about July 1, 2020 about engaging in resolution discussions. Mack Aff. ¶ 7. The purpose of this communication was to open an avenue for negotiations toward a resolution of the parties' lease dispute.

Based on the foregoing, it would be unconscionable to impose trebled liquidated damages. *See* *American Bartenders School, Inc. v. 105 Madison Co.*, 59 N.Y.2d 716 (1983), (holding that "[t]he purpose of invoking the doctrine [of equitable estoppel] is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another"). The ongoing negotiations concerning the Lease, along with the successfully executed and ratified easement, in conjunction with Defendant's failure to communicate, signify, or demand payment of the holdover liquidated damages, unequivocally induced Tenant's reasonable reliance and belief that it could remain on the Premises at base rent amounts owing and due prior to the purported termination of

the Lease. *See, e.g.,* *Gleason v. Tompkins*, 84 Misc. 2d 174, 180 (N.Y. Sup. Ct. 1975) (noting that the purpose of equitable estoppel is to "prevent a party from denying the effect of his statements, actions or nonactions which have influenced the conduct of another.").

Defendant has failed to meet its burden to establish the absence of any genuine issue of material fact such that it would be entitled to judgment as a matter of law. Such a fact intensive inquiry, under the circumstances of this case, is not appropriately decided on a motion for summary judgment. *See* *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d at 725 (2d Cir. 2001) (holding that "[w]hether equitable estoppel applies in a given case is ultimately a question of fact") (citing *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 65 (2d Cir. 1995)).

V. THE LIQUIDATED DAMAGES HOLDOVER PROVISION IS AN UNENFORCEABLE PENALTY

In support of its argument that the Lease's liquidated damages clause is enforceable, Defendant proffers just one line: "[t]hree-times liquidated damages provisions have been repeatedly and consistently upheld in this Department." LL Mem., at 15 (citing cases). Notably, Landlord's argument lacks any discussion of the legal standards upon which such provisions are viewed. In fact, there exists no bright line rule as to what types of holdover tenancy liquidated damages clauses are enforceable. Far from it. The enforceability of holdover liquidated damages clauses, like all liquidated damages clauses, are scrutinized using the specific facts pertinent to the underlying lease. The undisputed facts of this case demonstrate that the Lease's liquidated damages clause, which if enforced would result in a windfall payout to Defendant's in an amount exceeding $20,000,000, is nothing short of an egregiously unenforceable penalty.

Under New York law, a liquidated damages provision represents an estimate made by the parties of the extent of the injury that would be sustained as a result of breach of the underlying agreement. *See* *Truck Rent–A–Ctr. v. Puritan Farms 2nd*, 41 N.Y.2d 420, 424 (1977). "A

liquidated damage provision has its basis in the principle of just compensation for loss." *Id*. (citing Restatement of Contracts § 339, and Comment). Thus, New York courts will construe a purported liquidated damages provision strictly, *see* Elmira v. Larry Walter, Inc., 76 N.Y.2d 912, 913–14 (1990) (mem.), and will sustain such a provision ***only*** where the specified amount "is a reasonable measure of the anticipated harm." BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 396 (1999) (internal quotations omitted). As recently restated by the Court of Appeals, a "provision which requires damages grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable." Trustees of Columbia Univ. in City of New York v. D'Agostino Supermarkets, Inc., 36 N.Y.3d 69 (2020) (holding that liquidated damages authorized by surrender of a lease between a university and grocery store chain was grossly disproportionate to damages from breach, and thus was an unenforceable penalty).

Courts in New York have consistently held that where there is evidence of a ***gross disproportion*** of the liquidated damages to actual damages, a damages clause will not be enforced. *See* In re T.R. Acquisition Corp., 309 B.R. 830, 837 (S.D.N.Y. Br. 2003); Square Lex 48 Corp. v. Shelton Towers Assoc., 98 Misc.2d 1039 (Sup. Ct. N.Y. Cnty. 1978) (holding liquidated damages lease provision unenforceable against non-vacating tenant where the evidence showed that the liquidated damages were far greater than actual damages). In T.R. Acquisition, the court found that the record established that the actual damages were not in proportion to the double-rent liquidated damage amount. The tenant proffered evidence that after the premises were vacated, the landlord relet the premises for a rent similar to the prior rent. The court thus found that the double rent provision was "clearly far in excess of a fair market rent for the premises, and thus far in excess of any damage [Landlord] may have sustained as a result of the breach." T.R. Acquisition, 309 B.R. at 837; *see also* J.C. Studios, LLC v. Telenext Media, Inc., 32 Misc.3d

1211(A), at *10 (Sup. Ct. Kings Cnty. 2011) ("holdover penalty of 200% imposed by [landlord] is unduly harsh, defeats the parties' reasonable expectations, and has no relationship to any actual losses sustained by plaintiff.")

Landlord here seeks liquidated damages comprising three times the then-current Rent and the additional rent from the Lease's purported termination to the date of surrender, which occurred on February 19, 2021, for a total of $22,754,846.10. LL Mem. at 22. It bases its entitlement to this amount based upon Section 21.A of the Lease, which provides in relevant part:

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

Lease, NYSCEF #53, at § 21.A

Landlord's papers nowhere assert what actual damages have resulted or could have resulted from Tenant's alleged "holdover." In fact, Landlord has failed to proffer even one category of actual damages that could conceivably support the enforceability of the liquidated damages clause. The Lease's single vacant claim that the amount of damages resulting from Plaintiff's holdover "will be substantial, [and] will exceed the amount of the monthly installments of the Rent theretofore payable hereunder" lacks any factual or evidentiary underpinnings.

A. Landlord's Inability to Establish that it Suffered Damages as a Result of Tenant's Alleged Holdover Necessarily Precludes Liquidated Damages.

Any party seeking to enforce a liquidated damages provision must necessarily have been damaged in order for the provision to apply. *See Rubin v. Napoli Bern Ripka Shkolnik, LLP*, 179

A.D.3d 495, 496 (1st Dept. 2020) (citing *J. Weinstein & Sons, Inc. v. City of New York*, 264 App.Div. 398, 400 (1st Dept. 1942) ("The proof establishes that no claims were made against defendant and that defendant suffered no financial damage whatsoever."), *aff'd* 289 N.Y. 741, 46 N.E.2d 351 (1942)). Here, Landlord has failed to identify any damages that it sustained as a result of Tenant's alleged holdover.

Indeed, Landlord cannot claim that it was denied base rent owed pursuant to the Lease during Tenant's alleged holdover (*i.e.*, June of 2020 to February 19, 2021) because Landlord claimed entitlement to these amounts pursuant to Paragraph 2(A) of the Tenth Amendment to the Lease, and was subsequently compensated for the same in full. Mathews Aff. ¶ 22. Similarly, Landlord cannot claim that it was denied additional rent owed pursuant to the Lease during Tenant's alleged holdover because Landlord claimed entitlement to these amounts pursuant to Paragraph 19(B)(i) of the Lease, and was subsequently compensated thereon in full. Mathews Aff. *Id*. Moreover, Landlord cannot claim that it was denied the interest accrued pursuant to the Lease during Tenant's alleged holdover because Landlord claimed entitlement to interest at the rate of 18% *per annum* under the terms of the Lease for late payments, and was subsequently compensated thereon in full. *See* Kessner Aff., at ¶ 49 (detailing Landlord's claimed damages).

In fact, not only is Landlord unable to establish that it was harmed in any way through Tenant's alleged actions, it has actually profited as a result thereof, and will continue to profit through the remainder of the Lease's term, which expires in March of 2022. While Tenant fully vacated and surrendered the Premises as of February 19, 2021 (Mathews Aff. ¶ 21), it has nonetheless committed to continue paying Landlord all amounts of Rent and additional rent owed through the remainder of the Lease's term. Consequentially, Landlord will not only receive all monetary compensation that it is owed under the Lease, but will also enjoy uninterrupted

possession of the property for the next 12 months. *See* *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 536–37 (2014) (holding that landlord's receipt of all future rent along with uninterrupted possession of the property provided it with compensation that greatly exceeded any losses flowing from the breach).[7]

Significantly, none of the cases cited by Landlord in purported support of its claim that trebled liquidated damages provisions "have been repeatedly and consistently upheld in this Department" involved a landlord that – as here – was unable to establish ***any*** harm as a result of the tenant's holdover. Accordingly, these authorities are inapposite to the facts of this case and should be disregarded.

B. Landlord's Failure to Identify a Single Category of Damages Reasonably Contemplated by the Liquidated Damages Provision Establishes that It Is Unreasonable and Unenforceable.

A liquidated damages provision will only be enforced if it bears a "reasonable proportion to the probable loss." *Rubin v. Napoli Bern Ripka Shkolnik, LLP*, 179 A.D.3d 495, 496 (1st Dept. 2020). Here, Landlord has not identified any probable loss against which to measure the proportionality of its claimed liquidated damages provision. As stated *supra*, Landlord has exercised its right to seek base rent,[8] additional rent, and interest accrued during the alleged holdover period based on provisions unrelated to the liquidated damages provision. Accordingly, these damages cannot justify the reasonableness of the claimed liquidated damages provision.

[7] The Lease at issue herein, like the lease at issue in *172 Van Duzer Realty Corp.*, gives Defendant the option to accelerate future rent owed through the remainder of the term. However, Defendant has elected against seeking "accelerated damages," *see* Kessner Aff., at ¶ 10, meaning that all amounts of base rent and additional rent will be paid on a monthly basis throughout the remainder of the Lease's term.

[8] To the extent that Defendant argues that it claimed entitlement to base rent during the holdover period pursuant to Section 21(A) of the Lease, not Paragraph 2(A) of the Tenth Amendment to the Lease, the distinction is immaterial; as the Lease itself acknowledges, the liquidated damages at issue herein that Defendant must justify are those amounts that "exceed the amount of the monthly installments of the Rent theretofore payable hereunder," exclusive of the monthly installments of the Rent. *See* Mathews Aff. Exh. A, at § 21.A

The only category of damages that could conceivably have been contemplated warranting a liquidated damages provision are those flowing from Landlord's lost opportunity in reletting the Premises as a result of a claimed holdover. Stated differently, a refusal to vacate the Premises after expiration of the Lease could, in theory, result in Landlord losing a future tenant that was otherwise ready and willing to enter into a new lease for the Premises. ***The Lease, however, already expressly entitles Landlord to actual damages in such circumstances, which belies any claim to the treble rent now sought***. Section 21.B of the Lease provides:

> If Tenant shall hold-over or remain in possession of any portion of the Premises for more than thirty (30) days beyond the Expiration Date of this Lease, notwithstanding the acceptance of any Rent and additional rent paid by Tenant pursuant to Subsection A of this Article 21, Tenant shall be subject not only to summary proceeding and all damages related thereto, but also to ***any damages arising out of lost opportunities (and/or new leases) by Landlord*** to re-let the Premises (or any part thereof). All damages to Landlord by reason of such holding over by Tenant may be the subject of a separate action and need not be asserted by Landlord in any summary proceedings against Tenant.

Mathews Aff., Exh. A, at § 21.B (emphasis added). Even so, the Landlord has not argued or alleged that it lost any opportunities at all, or that any potential tenants have expressed an interest in leasing the Premises at any point since June 2020.

Under New York law, a plaintiff may not recover liquidated damages "where the contractual language and attendant circumstances show that the contract provides for the full recovery of actual damages, because liquidated and actual damages are mutually exclusive remedies under New York law." *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 71 (2d Cir. 2004) (citing *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 104 A.D.2d 181 (1st Dept. 1984)); *accord Glob. Facility Mgmt. & Constr., Inc. v. Joe & the Juice Miami LLC*, 63 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2019) ("Under no circumstances will liquidated damages be allowed where the contractual language and attendant circumstances show that the contract provides for

the full recovery of actual damages. The reason for this rule is that the existence of a non-exclusive remedy is inconsistent with the intention of contracting parties to liquidate or 'fix' the damages in the event of a breach."); *Franklin First Fin., Ltd. v. Contour Mortg. Corp.*, 62 Misc. 3d 1220(A), 113 N.Y.S.3d 489 (N.Y. Sup. Ct. 2019) (same, and "declin[ing] to award liquidated damages to the plaintiff as a matter of law."); *Bristol Inv. Fund, Inc. v. Carnegie Int'l Corp.*, 310 F. Supp. 2d 556, 568 (S.D.N.Y. 2003) (refusing to award liquidated damages because the plaintiff was already receiving interest on outstanding principal, as well as increased sum due to defendant's default).

Significantly, not one of the cases cited by Landlord in purported support of its claim that trebled liquidated damages provisions "have been repeatedly and consistently upheld in this Department" concerned or discussed the existence of a provision entitling the landlord to both actual damages and liquidated damages as a result of the tenant's holdover. Accordingly, they are inapposite to the facts of this case and should be disregarded.

CONCLUSION

For all of the foregoing reasons, VS respectfully requests that this Court deny Landlord's motion in its entirety, award VS its attorneys' fees and costs in connection with opposing this application, and grant such other and further relief as it deems just and proper.

Dated: New York, New York
March 18, 2021

Respectfully submitted,

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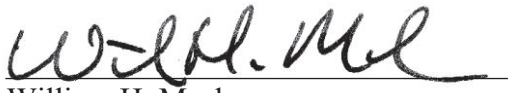
CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities, and signature block, is 6,884 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: New York, New York
March 18, 2021

DAVIDOFF HUTCHER & CITRON LLP

By: 
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