To be Argued by:
MENACHEM J. KASTNER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2020-04770

THE GAP, INC.,

Plaintiff-Respondent,

– against –

170 BROADWAY RETAIL OWNER, LLC,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant 170 Broadway Retail Owner, LLC ("Landlord") respectfully submits this Brief in support of its appeal of the Order of the Supreme Court, New York County, entered November 2, 2020 (the "Order") (R. 5–15), which (i) granted Plaintiff-Respondent The Gap, Inc.'s ("The Gap," "Gap," or "Tenant") untimely Order to Show Cause seeking a *Yellowstone* injunction and directed Tenant to post an undertaking to secure both accrued arrears and future rent *pendente lite*, and (ii) granted in part, and denied in part, Landlord's motion pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss Tenant's complaint.[1] Count One (Breach of Contract), the majority of claims under Count Two (Declaratory Relief), Count Three (Injunctive Relief), and Count Four (Rescission) are the surviving causes of action and are the subject of this appeal.

PRELIMINARY STATEMENT

This appeal involves a dispute between two sophisticated parties who entered into a 136-page, state-of-the art, long-term commercial lease (the "Lease") in 2014, expiring on February 28, 2030. At the outset of the COVID-19 pandemic, The Gap (one of the most recognized worldwide retail clothing stores) famously chose to stop paying rent nationwide, causing a flood of litigation in state and federal courts

[1] The Trial Court dismissed Counts Two (Declaratory Relief, to the extent it was based on failure of consideration), Five (Reformation of Lease), Six (Money Had and Received), and Seven (Unjust Enrichment). Plaintiff has not cross-appealed from the foregoing portions of the Order.

around the country. This is one of those cases. Landlord is a single purpose entity that owns exactly one building in which it has exactly one tenant—The Gap.

The Gap stopped paying rent and filed this suit to try to get out of its clear obligations under the Lease. The Complaint is a near carbon copy of other suits that it has brought elsewhere, with one minor difference. That difference is that The Gap had been trying to get out of this particular Lease for years—well before the onset of the Pandemic.

While The Gap's Complaint describes the premises as being in "the heart of New York's vibrant Financial District and near some of New York City's most visited tourist attractions," this desirable location had, in fact, proved financially unsuccessful for The Gap. (Compl. ¶ 4, R. 50.) Over the past several years, The Gap continually attempted to negotiate its way out of the Lease. And the parties engaged in discussions on possible solutions—though none had come to pass. The Gap's strategy, however, changed in March 2020 when the COVID-19 pandemic began to ravage New York City and the world. The Gap seized the opportunity as a potential way to get out of the Lease. And, when it was allowed to reopen its stores—for curbside pickup or in-store shopping—The Gap simply chose not to reopen this particular store, though it opened scores of other stores throughout New York City and nationwide.

The Gap is a sophisticated party that entered into a sophisticated commercial Lease that squarely allocates the risks of potential business closures to The Gap. The obligation to pay rent under the Lease is absolute in all but the narrowest of circumstances—none of which apply here as a matter of law. It could have negotiated for different protections in the Lease, but did not.

The Trial Court erroneously held that The Gap adequately pled breach of contract (Count One)—based on the Lease's "casualty" language. The Gap did not specifically plead that breach, but even if it had, the claim would have to be dismissed because (as numerous courts have held for similar leases) COVID-19 does not amount to a "casualty," which requires physical damage or destruction of the subject premises. Likewise, this Court's precedent precludes, as a matter of law, The Gap's claims relating to "frustration of purpose" and "impossibility of performance," which are the basis of the Gap's second and fourth counts. And, the court below also erred in granting a *Yellowstone* injunction after the cure period had expired and in ordering The Gap to post a bond instead of paying Landlord use and occupancy (or rent) during the pendency of the litigation.

For the reasons described herein, this Court should reverse the Order to the extent that it denied Landlord's motion to dismiss Gap's Complaint, and should dismiss the surviving causes of action with prejudice. This Court should also reverse the Trial Court's issuance of a *Yellowstone* injunction, and Tenant should be directed

to pay rent *pendente lite* directly Landlord beginning August 1, 2020 (during the duration of this litigation).

QUESTIONS PRESENTED

This appeal presents the following questions:

1. Did the Trial Court err in holding that The Gap had properly stated a breach of contract claim where the court mistakenly held that the COVID-19 pandemic could be considered a "casualty" under the Lease and where The Gap failed to plead that Landlord had breached any particular term of the Lease?

2. Did the Trial Court err by failing to dismiss The Gap's claims relating to "frustration of purpose" and "impossibility of performance" where (i) the only alleged harm is financial hardship, (ii) the disruption did not render the lease virtually worthless (and was for a short duration), (iii) the Lease anticipates and allocates the risk associated with potential business closures, and (iv) the Lease specifically precludes reliance on common law defenses?

3. Did the Trial Court err in granting *Yellowstone* relief long after the expiration of the cure period set forth in a notice of default?

4. Did the Trial Court err in directing The Gap to post an undertaking instead of paying rent (or use and occupancy) directly to Landlord?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties, the Building, and the Lease

Landlord owns and operates the retail condominium located at 170 Broadway, New York, NY (the "Building"). (R. 287, 512.) The Gap[2] is a major international retailer with hundreds of stores in the United States and worldwide. Landlord and The Gap entered into the Lease in February 2014 with the Lease expiring February 28, 2030. (Compl. ¶ 14, R. 53.) The Lease covers the basement, ground floor, and second floor of the Building (the "Premises"). (Compl. ¶ 1, R. 49, 92.) Tenant is the sole occupant of the Building, leasing 100% of the available space. Pursuant to Article 2 of the Lease, the initial fixed annual rent was set at $4,250,000 for the first year of the term, escalating to approximately $6.4 million in the fifteenth year. (Lease 2, R. 95.) At the start of this litigation in 2020, the base rent was $4,926,914 per year, or $410,576 per month. As of March 2021, it has increased (pursuant to the Lease) to $5,074,722 annually or $422,893 per month.[3] (*Id.*)

Rent is payable on the first day of the calendar month, and is due unconditionally, "without any setoff, abatement, reduction, deduction or defense

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[2] Gap is a Delaware corporation with its principal place of business in San Francisco, California. (Compl. ¶ 12, R. 53.)

[3] Tenant is also responsible under the Lease for "Additional Rent," which includes, but is not limited to, real estate taxes, water, and sewer charges. (Rent and Additional Rent are collectively referred to as "Rent") (R. 96.)

whatsoever, except as may be specifically provided for in this Lease." (Lease 3, R. 103.)

Significantly, the Lease does not contain a "force majeure" clause. (*See generally* Lease, R. 87–222.) Article 15, "DESTRUCTION; FIRE OR OTHER CAUSE," makes clear that a "casualty" exists only where there is "damage" to the Premises caused by "fire or other insurable casualty" and directs that "[r]ent due hereunder shall not be reduced or abated, it being agreed that Tenant shall carry business interruption insurance to cover any of same for a period of six (6) months as required by Article 13 hereof." (Lease 15, R. 133.) Any of the occurrences covered by Article 15 require the Tenant to give notice to Landlord, and are the type of occurrence that can be "repaired" by Landlord. (*Id.*)

B. COVID-19 and the Executive Orders

In mid-March 2020, Governor Cuomo issued a series of Executive Orders to address the COVID-19 pandemic. (Compl. ¶ 6, R. 51, 292–93.) These Orders temporarily modified the operations of retail stores, and restricted Tenant's workers from the Premises starting on March 22, 2020. (Compl. ¶ 30, R. 56, 292.)

Things improved later in the spring, and different regions started phased re-openings in May 2020. (R. 378.) New York City began its phased reopening on June 8. (*Id.*) This allowed retail stores, such as The Gap, to open for curbside and in-store pickup. (*Id.*) Phase 2, which began on June 22, allowed in-store retail to

resume. (*Id.*) The Gap was only required to close for in-store shopping for seventy-seven days, less than 1.5% of the Lease term. (R. 527.)

C. Tenant's Failure to Pay Rent

Notwithstanding that Gap raised $2.25 billion in secured debt in April 2020 (R. 338), it has not paid monthly rent since March 2020. (R. 288.) On May 5, 2020, Landlord served a Ten Days' Notice of Default ("Notice of Default"), advising that Tenant was "in default of a substantial obligation of the Lease in that Tenant has failed to pay Rent . . . totaling $825,924.44 through May 1, 2020." (R. 246.) The Notice of Default further requested that Tenant cure its default "by tendering $825,924.44 to Landlord on or before May 22, 2020." (R. 256.)

The arrears set forth in the Notice of Default continue to accrue (the "Arrears"). As of the filing of this Opening Memorandum, the Arrears total $4,988,874.08 (excluding prejudgment interest and most of the Additional Rent that is due).[4] As the sole occupant in the Building, Tenant's Rent is Landlord's sole source of income and is used, in part, to cover Landlord's debt-service obligations. (R. 289.) Tenant's failure to pay its rent has caused Landlord to be in default of its loan obligations. On July 21, 2020, Landlord received a default notice advising that

[4] The Arrears will continue to accrue in the amount of $422,893.52 per month for the next eleven months, exclusive of any Additional Rent. (R. 95.)

the lender had exercised its option to accelerate the maturity of the unpaid balance of its loan. (R. 305–07.)

Gap did not cure its default by May 22, 2020—or at any time since. (R. 297.) Nor did Gap move for *Yellowstone* relief prior to the expiration of the cure period.

In addition to the Executive Orders described above, on March 22, 2020, Chief Administrative Judge Lawrence Marks issued Administrative Order AO/78/20, which restricted new Court filings to those deemed "essential matters." (R. 390–92.) While it was unclear what constituted "essential matters," on May 18, 2020 (before the cure period in the Notice of Default expired), a tenant in an unrelated matter, *Philippe MP LLC v. Sahara Dreams LLC*, filed an emergency application in the Supreme Court seeking a *Yellowstone* injunction (index number 153042/2020). (R. 393–95.) There, as here, the tenant was served with a notice of default for nonpayment of rent. (R. 360.) Prior to the expiration of its cure period, the tenant sought to have its *Yellowstone* injunction deemed "essential" under AO/78/20 and sought *Yellowstone* relief. (R. 394–95.) The Trial Court granted the application, deeming the order to show cause an "essential" filing. (R. 393.) The Gap (on the other hand) did not seek *Yellowstone* relief.

D. The Premises, Banana Republic, and Other Neighboring Retail Stores

During the seventy-seven day closure, Gap stored its merchandise in the Premises, changed window displays, and posted signs that advised the public that

"team members [were] inside [and] hard at work fulfilling online orders." (R. 327.) As of June 25, 2020, The Gap's website indicated it would be opening the Premises for in-store shopping on July 1, 2020. (R. 329.) As of July 27, 2020, the store's voice message stated that orders placed online could be picked up, in-store, within one hour. (R. 294.) To add to the confusion, The Gap did reopen many of its other retail stores around New York City. The Gap's Banana Republic store—located two blocks from the Premises—reopened in July 2020 for in-store shopping, and curbside pickup, seven days a week. (R. 330.) All of The Gap's neighboring retail stores reopened as well. As of July 31, 2020, the nearby Century 21, Urban Outfitters, Anthroplogie, and Zara were all open for in-store shopping. (R. 331–34.) The Gap clearly cherry-picked which of its stores it would open and which it would keep shuttered.

E. The Gap's Attempts to Negotiate an Early Termination of the Lease

For several years prior to the pandemic, Gap told Landlord it was looking to sublease the Premises. (R. 290.) Tenant's broker had been marketing the Premises to potential subtenants, and The Gap retained at least two different real estate firms to explore sublease or exit opportunities on its behalf. (*Id.*) Tenant's long-standing, stated desire to extricate itself from the Lease was no secret, and, in fact, representatives from Gap repeatedly made its position clear, with sublet or termination proposals discussed throughout 2019 and 2020. (R. 290–92, 308–12,

318–26.) These efforts continued as late as February 28, 2020, just as the COVID-19 pandemic began, when The Gap proposed a potential buy-out offer of $23 million. (R. 326.) The Gap changed tactics when COVID-19 hit and elected to litigate rather than negotiate.

II. PROCEDURAL BACKGROUND

A. Tenant's Complaint and Order to Show Cause and Landlord's Cross-Motion

On July 2, 2020, six weeks after the cure period in the Notice of Default expired—and more than five weeks after the courts reopened for non-essential filings—Tenant filed an Order to Show Cause seeking *Yellowstone* relief and simultaneously commenced this action, asserting various and contradictory counts—all for the purpose of trying to get out of the Lease. (R. 49–71, 233–35.)

1. The Order To Show Cause and Landlord's Cross-Motion

Tenant sought a Preliminary Injunction under *Yellowstone* restraining Landlord from terminating, cancelling, or holding Tenant in default of the Lease and tolling the long-expired cure date on the Notice of Default. (R. 233–35.)

Tenant was well aware that its *Yellowstone* motion was untimely. In fact, on June 3, 2020, Tenant's counsel published an article on its firm website, entitled "Real Estate Litigation Alert: New York State Court Reopening Changes Landlord-Tenant COVID-19 Landscape." (R. 405–07.) In it, counsel wrote that, with the reopening of the Courts, Tenants must "view these default notices with a greater degree of

urgency" and even suggested that "[a] Tenant that previously received a default notice threatening to terminate its lease (even if received before May 26) should consider whether it needs to file a *Yellowstone* injunction or obtain a side letter from the landlord to insure that the landlord does not terminate the lease on notice." (R. 406.).

Despite this acknowledgement of urgency, Tenant waited another full month before seeking *Yellowstone* relief. (R. 233–35.)

On July 15, 2020, the Trial Court signed Tenant's Order to Show Cause, granting Tenant a temporary restraining order pending the outcome of Tenant's *Yellowstone* application. (R. 231–32.)

Landlord opposed Tenant's Order to Show Cause and cross-moved for an order (i) directing Tenant to pay rent *pendente lite* in the sum of $411,412.12 per month and (ii) directing Tenant to post a bond in the amount of $1,691,946.95 to secure the Rent accrued from April to July 2020. (R. 345–75.)

The Trial Court held oral argument on August 17, 2020, and reserved decision. (R. 21, 47.)

2. <u>The Complaint</u>

The Complaint includes a host of contradictory theories for why Gap should be allowed to get out of the Lease. Gap alleges (without citation) that the Lease "terminated as a matter of law on or before March 19, 2020, both under the terms of

the Lease and the laws of the State of New York, and Tenant had no further obligation to pay rent or other consideration under the Lease." (Compl. ¶ 10, R. 52.) Gap (inconsistently) alleges that Landlord is in breach of the same allegedly terminated Lease. (Compl. ¶¶ 46–51, R. 59–60.) Tenant also alleges causes of action for various types of declaratory and injunctive relief, rescission, reformation, money had and received, and unjust enrichment. (Compl. ¶¶ 52–95, R. 60–69.) These claims are the same claims that The Gap has raised (either as claims or defenses) all around the country. *See, e.g.*, *The Gap Inc. v. Ponte Gadea New York LLC*, No. 20 CV 4541-LTS-KHP, 2021 WL 861121, at *5–13 (S.D.N.Y. Mar. 8, 2021) (Swain, J.) (dismissing, as a matter of law, all of Gap's identical claims).

B. Landlord's Motion to Dismiss

On August 24, 2020, Landlord filed a motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), which was fully submitted on October 8, 2020. (R. 504–39.)

C. The Decision and Order

By Decision and Order, dated October 30, 2020, the Trial Court decided all three pending motions. (R. 5–15.)

Despite this Court's long-standing precedent to the contrary, the Trial Court granted The Gap *Yellowstone* relief, tolling the long-expired cure period in the Notice of Default and enjoining Landlord from terminating the Lease pending the outcome of this action. (R. 7.) The Trial Court conditioned the *Yellowstone*

injunction on Tenant posting an undertaking in the form of a bond for $5.5 million—$2.5 million to secure future use and occupancy accruing *pendente lite* from November 1, 2020, until a final determination of this action, plus $3 million to secure the payment of the arrears accrued from April through October 2020. (*Id.*) This bond provides no money to the Landlord during the pendency of the Litigation, meaning that Landlord cannot service its debt.

With regard to Landlord's Motion to Dismiss, the Supreme Court correctly dismissed Gap's declaratory claim that there was a failure of consideration, and dismissed the reformation, money had and received, and unjust enrichment claims. (R. 6.) On the other hand, the Supreme Court refused to dismiss The Gap's claims for breach of contract, the majority of its claims for declaratory relief,[5] and its claims for injunctive relief and rescission of the Lease. (*Id.*)

The Trial Court incorrectly found that Gap had adequately pled a cause of action for breach of contract, despite the fact that Gap's Complaint failed to point to any specific Lease provision that Landlord had allegedly breached. The Trial Court

[5] Tenant's surviving claims for declaratory relief, include (i) that the Lease Terminated "pursuant to the Lease and applicable law," (ii) abatement, (iii) frustration of purpose, (iv) impossibility of performance (and related claims), (v) its claim that the parties have no continuing obligations under the Lease, (vi) its claim that the Notice of Default was ineffective, and (vii) its claim that Tenant is not in default and is entitled to injunctive relief. (R. 5–13.) These claims are derivative of and/or depend on Tenant's arguments regarding "casualty," "frustration of purpose," "impossibility of performance," and its purported entitlement to injunctive relief, and should be dismissed for all of the reasons described below.

determined (by looking at The Gap's brief, not its Complaint) that Gap had somehow alleged that Landlord had breached the Lease's "casualty" language—even though The Gap made no such allegations in its Complaint (and any such claim would be contrary to well-established law). This holding directly contradicts this Court's black letter law that requires a breach of contract claim to allege a specific breach of a specific contractual provision.

The Trial Court also incorrectly held, as a matter of law, that Tenant adequately alleged "frustration of purpose" and "impossibility of performance" due to COVID-19. (R. 10–12.) This holding contravenes this Court's well established precedent that "frustration" and "impossibility" are not available where: (i) the only harm is financial hardship; (ii) the contract anticipated and allocated risks associated with potential business interruptions; (iii) the disruption did not render the Lease practically worthless; and (iv) the Lease specifically precluded reliance on common law defenses. Since the issuance of the Order, other Justices of the Supreme Court and a federal judge in the Southern District of New York have followed this Court's analysis of "frustration" and "impossibility" and confirmed that neither is available as a result of COVID-19, as a matter of law. A contrary ruling would be tantamount to shredding every commercial lease in New York.

STANDARDS OF REVIEW

This Court reviews a motion to dismiss under CPLR 3211 *de novo*. *Alden Global Value Recovery Master Fund, L.P. v. KeyBank N.A.*, 159 A.D.3d 618, 621–22 (1st Dep't 2018).

Pursuant to CPLR 3211(a)(7), a complaint must plead a cognizable cause of action "within the four corners of the complaint." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002). Only factual allegations, and not bare legal conclusions or "factual claims either inherently incredible or flatly contradicted by documentary evidence," will be presumed to be true. *Roberts v. Pollack*, 92 A.D.2d 440, 444 (1st Dep't 1983).

Pursuant to CPLR 3211(a)(1), a party may also move for judgment dismissing a cause of action on the ground "that a defense is founded upon documentary evidence." Dismissal is warranted where "'the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" *Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 538–39 (1st Dep't 2019) (citation omitted).

While the Trial Court relied on the distinction between a motion to dismiss and summary judgment in denying parts of Landlord's motion (R. 12), this distinction is largely irrelevant when dealing with a motion to dismiss under 3211 (a)(1). *See, e.g., 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st

Dep't 2004) ("In particular, where a written agreement (such as the lease in this case) unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim."); *Toys "R" Us-Delaware, Inc. v. 44-45 Broadway Realty Co., LLC,* 110 A.D.3d 521, 521 (1st Dep't 2013) ("The terms of the subject lease unambiguously contradict the allegations supporting plaintiff's claims, thereby warranting dismissal of the complaint pursuant to CPLR 3211 (a) (1).").

The Appellate Division's power to review decisions granting or denying provisional relief such as a *Yellowstone* injunction or an award of rent *pendente lite* looks to whether the lower court abused its discretion in granting or denying the relief sought. *Gap, Inc. v. 44-45 Broadway Leasing Co., LLC,* No. 13134N, 2021 N.Y. Slip Op. 01019 (1st Dep't Feb. 16, 2021) (holding that the trial court abused its discretion in not directing tenant to pay rent or use and occupancy directly to the landlord).

ARGUMENT

I. THE SUPREME COURT ERRED IN HOLDING THAT COVID-19 COULD AMOUNT TO A "CASUALTY" UNDER THE LEASE

The Trial Court erroneously held that The Gap properly alleged a cause of action for breach of contract (relying on Gap's brief, not its Complaint). This

holding was based on a complete misreading of Article 15 of the Lease ("DESTRTUCTION; FIRE OR OTHER CAUSE"). Recent decisions by the Supreme Court and the Southern District of New York have definitively held, as a matter of law, that the COVID-19 pandemic does not amount to a "casualty" under similar commercial leases because an airborne virus does not cause physical harm or damage to real property. The same applies here, and the Trial Court's decision was incorrect as a matter of law. Additionally, while the Complaint alleges "breach of contract," it does not allege that Landlord allegedly breached any specific provision. (Compl. ¶¶ 46–51, R. 59–60.) That failure is also fatal to a contract claim.

Article 15 of the Lease, "DESTRUCTION; FIRE OR OTHER CAUSE," provides that:

> A. Tenant shall give immediate notice to Landlord in case of fire or accident in or about the Demised Premises. If the Demised Premises shall be damaged by fire or other insurable casualty, the damages, other than to Tenant's Personalty and leasehold improvements made by Tenant to the Demised Premises, shall be repaired by and at the expense of Landlord, promptly after the collection of the insurance proceeds attributable to such damage. Rent due hereunder shall not be reduced or abated, it being agreed that Tenant shall carry business interruption insurance to cover any of same for a period of six (6) months as required by Article 13 hereof….

(Lease 15, R. 133.)

Article 15 could not be more clear that it applies solely to a "fire or accident in or about the []Premises" or "fire or other insurable casualty," and clearly applies where there is "damage" that needs to be "repaired." Based on this plain language, it was error to conclude that COVID-19 amounts to a casualty "in or about the Premises," and the Trial Court's Order should be reversed.

Prior to COVID-19, it appears that no one had ever attempted to argue that a virus—or anything other than actual physical damage—could amount to a "casualty" under a commercial lease. But in light of the temporary COVID-19-related closures, several tenants tried to raise this novel claim. This has met near-uniform rejection by the Supreme Court, and, most recently, by the Southern District of New York in another case involving The Gap. *See Ponte Gadea*, 2021 WL 861121, at *5–7.

While "casualty" language can differ slightly, New York courts in the COVID-19-era have recognized that "casualty" requires physical harm to the subject premises. They have agreed that the pandemic does not cause "physical harm" to premises and cannot trigger a "casualty" provision in a commercial lease. *See, e.g.*, *id.*; *Dr. Smood New York LLC v. Orchard Houston, LLC*, 2020 N.Y. Slip Op. 33707(U), at *1–2, 4 (Sup. Ct. N.Y. Co. Nov. 2, 2020) ("[P]laintiff's allegations that the pandemic constitutes a 'casualty' are entirely without merit as there has been no physical harm to the demised premises and the lease does not provide for a rent

abatement in such a case as plaintiff was required to obtain insurance to guarantee payment under said circumstances."); *111 Fulton Street Investors, LLC v. Fulton Quality Foods LLC*, 2021 N.Y. Slip Op. 30348(U), at *4 (Sup. Ct. N.Y. Co. Feb. 5, 2021) (tenant's performance under a commercial lease was not "impossible" where the operative casualty provision referred to damage by "fire or other casualty" because it "references damage to the building (such as a fire) that renders the commercial space unusable. A deadly infectious disease is not a 'casualty.'"); *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U), at *6 (Sup. Ct. N.Y. Co. Dec. 3, 2020) (casualty provision referencing damage by "fire or other casualty" did not excuse payment of rent because "[t]hat portion of the lease refers to physical damage.").

The casualty provisions in these cases are functionally equivalent to the language here. That is particularly true in *The Gap v. Ponte Gadea*:

> The text and structure of Article 16, which refers in several instances to a "fire or other casualty" causing "damage" occurring "in" or "to" " the "Premises," and describes in detail the restoration obligations of the parties in the event such damage occurs, leave no doubt that "casualty" refers to singular incidents, like fire, which have a physical impact in or to the premises—and does not encompass a pandemic, occurring over a period of time, outside the property, or the government lockdowns resulting from it.

2021 WL 861121, at *6.

These cases got it exactly right. And The Gap's attempt to shoehorn COVID-19 into being a "casualty" fails on the language of Article 15. The Gap did not—and could not—allege that there was any physical harm to or "destruction" of the Premises as a result of COVID-19, and therefore no "casualty" occurred. Moreover, under Article 15, The Gap would have had to provide "immediate notice" that there had been a "casualty" to the Premises. As the record makes clear, The Gap provided no such notice, nor did The Gap allege that it did. And, in any event, Article 15 is clear that "Rent due hereunder shall not be reduced or abated," which is the relief that The Gap appears to be seeking.[6]

The Trial Court's determination was made in the absence of any allegations in the Complaint about "casualty" and relied on "[t]he complaint and plaintiff's papers in opposition to this motion, considered collectively." Based on this "admixture," the court concluded that Gap had somehow alleged a breach of the Lease. (R. 9–10.) While there were no such allegations in the Complaint, The Gap did raise in its opposition to Landlord's motion to dismiss the novel argument that "[p]ursuant to the terms of Article 2(c), Tenant is entitled to an abatement or reduction in rent in the event of a casualty." (R. 566.) The Trial Court's reliance on

[6] There appears to be only one case that goes the other way. *See 188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, 2020 N.Y. Slip Op. 34311(U) (Sup. Ct. N.Y. Co. Dec. 21, 2020) (holding—based on the casualty language of that lease—that the COVID-19 pandemic could (at least for the purposes of a *Yellowstone* injunction) constitute a "casualty."). A Notice of Appeal was filed on January 21, 2021, and a motion to reargue is currently returnable on April 7, 2021.

Gap's brief instead of its Complaint was inappropriate as a matter of law. *Seltzer v. Fields*, 20 A.D.2d 60, 64 (1st Dep't 1963) ("Of course, even if the statements in the brief were more detailed, they may not be used to remedy inadequate complaint allegations."). This Court has made it clear that in order to state a breach of contract claim a plaintiff must identify the specific contractual provision that was allegedly breached. *See, e.g., Gordon v. Curtis*, 68 A.D.3d 549, 550 (1st Dep't 2009) ("In any event, the complaint fails to state a cause of action. The breach of contract cause of action does not identify the express provision that defendants allegedly breached."); *D'Artagnan v. Sprinklr Inc.*, No. 13332, 2021 N.Y. Slip Op. 01479, at *1–2 (1st Dep't Mar. 11, 2021) (same); *767 Third Avenue LLC v. Greble & Finger, LLP*, 8 A.D.3d 75, 75 (1st Dep't 2004) ("Plaintiff's failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract."). The Complaint fails this basic requirement.

The portion of the Order denying dismissal of Gap's breach of contract claim (Count One) should therefore be reversed and the claim dismissed.

II. THE GAP CANNOT RELY ON "FRUSTRATION OF PURPOSE" OR "IMPOSSIBILITY OF PERFORMANCE" TO ESCAPE ITS LEASE OBLIGATIONS

The Trial Court erred in holding that The Gap adequately alleged "frustration of purpose" and "impossibility of performance" based on COVID-19 (Counts Two (d) and (e)). This Court's prior precedent makes it abundantly clear that those

defenses are exceedingly narrow, rarely allowed, and entirely unavailable where: the only harm alleged is economic harm; the interruption does not render the contract completely worthless; or where the parties foresaw—and addressed—the potential risks of business closures. Here, Gap's claims fail for all of these reasons, and this Court should reverse those portions of the Order.

Gap's bases for claiming "frustration" and "impossibility" are that, "without Tenant's ability to use the Premises in the manner originally contemplated or for Lower Manhattan to continue to be the destination location contemplated, the transaction between the parties that resulted in the Lease would have made no sense." (Compl. ¶ 55, R. 61.) The Gap also alleges that:

> Tenant has been deprived of its use of the Premises for the full term that Tenant was promised under the Lease. Such a result is inequitable and damages Tenant, in part because the term of the Lease and the expectation that Tenant would be able to benefit from the foot traffic and popularity of downtown Manhattan as an international retail shopping and tourist hub, were the basis for the parties' negotiations and calculations at the time of contracting Tenant's obligation to pay rent. Thus, for the additional fact and reason that the Premises will not be what was originally contemplated for the foreseeable future, the object and purpose of the Lease became impossible, illegal, and impracticable, the parties' mutual purpose for entering into the Lease has been frustrated, and the consideration Tenant was to receive under the Lease has failed.

(Compl. ¶ 34, R 57–58.)

Gap further speculated (incorrectly) that, "[n]obody can predict if or when workers and/or tourists will return to Manhattan, or how social distancing and other

governmental restrictions or even a second waive [sic] of the virus will impact retail." (Compl. ¶ 8, R. 51–52.) Gap complained about the "prospect of [an] unknown future," (Compl. ¶ 56, R. 61), and claimed "[t]hat purpose is also frustrated when the store can only open at limited capacity or for curbside pick-up only, or when customers are too afraid to go out to shop." (Compl. ¶ 56, R. 61.) Lastly, Gap alleged that "businesses have been advised of extensive and mandatory guidelines they will need to follow to afford customers protection," and speculated that "[s]uch restrictions are certain to negatively impact the behavior and comfort levels of customers willing to return to crowded retail shops and shopping areas." (Compl. ¶ 10, R. 52.)

Based on these allegations, Gap sought a declaratory judgment that the purpose of the Lease was frustrated (Count Two (d)), and that "continued operation of the Lease was illegal, impossible, or impractical" (Count Two (e)).[7] (Compl. ¶ 58, R. 63.) Gap also sought rescission on the same basis (Count Four). (Compl. ¶ 66, R. 64.) For the reasons described below, this Court should reverse the Supreme Court and dismiss Tenant's claims for declaratory relief (Count Two) and rescission or cancellation (Count Four).

[7] New York does not recognize "impracticability" as a cause of action. *Axginc Corp. v. Plaza Automall, Ltd.*, No. 14-CV-4648 (ARR) (VMS), 2017 WL 11504930, at *8 (E.D.N.Y. Feb. 21, 2017), *aff'd*, 759 Fed. App'x 26 (2d Cir. 2018).

A. The Trial Court's Frustration of Purpose Ruling Should be Reversed

As a general matter, "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome." *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). "Frustration" is therefore a narrow doctrine. *Crown IT Servs. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004) ("[T]his doctrine is a narrow one which does not apply 'unless the frustration is substantial.' In order to invoke this defense, 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." (citation omitted)); *see also PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 507–09 (1st Dep't 2011) (Hurricane Katrina did not "frustrate" the purpose of an indemnification agreement that was part of a New Orleans-based real estate transaction because the hurricane did not render defendants' performance "virtually worthless").

This Court recently addressed "frustration" in *Center for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 185 A.D.3d 34 (1st Dep't 2020) ("*CSC*"). There, two sophisticated, counseled parties entered into a series of agreements (including a lease) in connection with the purchase of a surgical center. The deal subsequently fell through, and defendants raised "frustration" under the lease, asserting that they could not occupy the premises without a Certificate of Need, which was never

issued. *Id*. at 40. This Court rejected that argument wholesale, recognizing 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," and distinguishing case law where leases had been frustrated either entirely or for a period of years, not months. *Id*. at 42–43 (cleaned up). The Court also noted that "frustration" is not available where the harm preventing performance was foreseeable and either could have been or was provided for, as the parties had in that case:

> Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed . . . , and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it.

Id. at 43 (citations omitted).

The Southern District of New York recently relied on *CSC* in *Ponte Gadea*, a case in which The Gap raised identical claims to those it raised here. There, the court dismissed Gap's "frustration" claims as a matter of law for three reasons (any one of which would do): economic harm is insufficient to support "frustration"; the interruption did not render the lease virtually worthless—particularly because the mandated closure was for a very small period of a long-term lease; and the temporary shutdown was not "wholly unforeseeable" as the parties clearly anticipated business

interruptions in their lease. 2021 WL 861121, at *7–9. Those same reasons are equally applicable here, and the Order should accordingly be reversed.

1. Financial Hardship Cannot be the Basis for Frustration of Purpose

The court below ignored well-settled law that financial hardship cannot be the basis of a "frustration" defense. *See Gander Mt. Co. v. Islip U-Slip LLC,* 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) ("Frustration of purpose excuses performance when a 'virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party.' . . . It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." (cleaned up)); *Kate Spade & Co., LLC v. G-CNY Group LLC*, 63 Misc. 3d 1205(A), at *7 (N.Y. Civ. Ct. 2019) ("Subtenant's nonperformance is based not on impossibility, but its own, unsupported determination of economic infeasibility."); *A+E TV Networks, LLC v. Wish Factory*, No. 15-CV-1189 (DAB), 2016 WL 8136110, at *13 (S.D.N.Y. Mar. 11, 2016) (frustration of purpose failed as a matter of law because "New York law is clear that financial hardship, even to the point of insolvency, is not a defense to enforcement of a contract.").

Other than the court below, the state and federal courts that have considered the "frustration" doctrine as it applies to COVID-19 have refused to allow the frustration of purpose defense. In *35 East 75th Street Corp. v. Christian Louboutin L.L.C.*, 2020 N.Y. Slip Op. 34063(U) at *1 (Sup. Ct. N.Y. Co. Dec. 9, 2020), a

commercial landlord sought summary judgment in an action for unpaid rent against a retail tenant who had not paid rent since March 2020. The tenant raised, *inter alia*, frustration of purpose (based on COVID-19), arguing that the pandemic was an unforeseeable occurrence that decimated customer traffic, and, by extension, its revenues. *Id.* at *1–2. Justice Bluth made short work of this:

> 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 . . . 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.

Id. at *4.

Other recent decisions have followed suit. *See RPH Hotels 51st Street Owner, LLC v. HJ Parking LLC*, 2021 N.Y. Slip Op. 30286(U), at *4 (Sup. Ct. N.Y. Co. Jan. 28, 2021) (holding that where tenant only faced "decreased revenue from fewer customers and increased costs from pandemic-related regulations," a "less profitable business [was] not a basis to find that [frustration of purpose] could absolve [tenant] of its obligation to pay rent."); *1140 Broadway*, 2020_NY_Slip_Op_34017(U)_at_*1–3 (where office tenant's business (providing management and consulting services to restaurants) was "devastated by a pandemic," the court made clear, "[t]hat does not fit into the narrow doctrine of

frustration of purpose. Simply put, defendants could no longer afford the rent because restaurants no longer needed the management help that the tenant provides."); *Dr. Smood*, 2020_NY_Slip_Op_33707(U)_at_*4 ("[P]artial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law.") (cleaned up).

In *The Gap v. Ponte Gadea*, the Southern District of New York reached the same conclusion: "The possibility that the stores at issue in this case may suffer particularly adverse financial consequences from the COVID-19 pandemic does not amount to frustration of the purpose of the Lease." 2021 WL 861121, at *9.

Here, all of The Gap's allegations boil down to financial consequences:

- Tenant's expectation that it would be able to benefit from the foot traffic and popularity of downtown Manhattan were the alleged basis for the parties' negotiations at the time of contracting. (Compl. ¶ 34, R 57–58.)
- The store can only open at limited capacity or for curbside pick-up only, or when customers are too afraid to go out to shop. (Compl. ¶ 10, R 52.)
- Businesses have been advised of extensive and mandatory guidelines they will need to follow to afford customers protection. (Compl. ¶ 9, R 52.)
- Restrictions are certain to negatively impact the behavior and comfort levels of customers willing to return to crowded retail shops and shopping areas. (*Id.*)

These allegations make clear that Gap is concerned about one thing: the economic impact of COVID-19 on its business, but that is insufficient as a matter of

law to invoke "frustration of purpose." This is particularly so here where Gap expressly acknowledged that Landlord made no representation as to the "fitness" or "income from" Gap's operation at the Premises. (Lease 5.B, R. 109 ("Tenant acknowledges that Landlord makes no representation or warranty, express or implied in fact or by law, as to the nature, condition or zoning of the Demised Premises or its fitness or availability for any particular use, or the income from or expenses of operation of the Demised Premises.").)

2. COVID-19 did not Render the Lease Virtually Worthless

As this Court made clear in *CSC*, "[i]n order to invoke the doctrine of frustration of purpose, 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." 185 A.D.3d at 42 (cleaned up); *see also PPF Safeguard*, 85 A.D.3d at 508; *Gander Mt.*, 923 F. Supp. 2d at 359.

Recent COVID-19-era decisions have adhered to this principle. *See BKNY1, Inc. v. 132 Capulet Holdings, LLC*, 2020 N.Y. Slip Op. 33144(U), at *3 (Sup. Ct. N.Y. Co. Sept. 23, 2020) ("Inasmuch as the initial term of the lease … is for approximately nine years …, a temporary closure of plaintiff's business for two months (April and May 2020) in the penultimate year of its initial term could not have frustrated its overall purpose."); *CAB Bedford LLC v. Equinox Bedford Ave, Inc.*, 2020 N.Y. Slip Op. 34296(U), at *4 (Sup. Ct. N.Y. Co. Dec. 22, 2020) ("A gym

being forced to shut down or a few months does not invalidate obligations in a fifteen-year Lease.").

As with the other COVID-19-era cases (including the other Gap cases), The Gap was only forced to close for seventy-seven days—less than 1.5% of the term of a 15-year Lease. (R. 527.) This disruption, while unfortunate, is a far cry from such a complete destruction of the basis of the Lease. As the other courts have held, the COVID-19 mandatory closure is insufficient as a matter of law to support frustration of purpose.

And, while The Gap (after initially advertising that it would reopen) has decided to keep this store closed, it bears reemphasizing that The Gap was free to reopen on June 8, 2020. (R. 378.) Gap's election not to open simply because it anticipated less customer traffic, makes clear that the Lease has not been frustrated. *See Ponte Gadea*, 2021 WL 861121, at *9 ("Gap has made a business decision to close its stores at 59th and Lexington, perhaps due to the pandemic's greater financial impact on those stores than on its other stores."); *East 16th Street Owner LLC v. Union 16 Parking LLC*, 2021 N.Y. Slip Op. 30151(U), at *3–4 (Sup. Ct. N.Y. Co. Jan. 15, 2021) (Although parking garage business was "essential" and never closed, court noted that just because "their customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here. . . . The frustration of purpose doctrine was not intended to allow a tenant

to avoid having to pay rent while running a business at the premises, even if business has slowed.").

The temporary shutdown and downturn in expected foot traffic do not amount to a complete frustration of the purpose, and the Trial Court Order should therefore be reversed.

3. The Government Closures Were Not Completely Unforeseeable

Gap's frustration of purpose claims also fail because it cannot show that the pandemic and the attendant government-mandated closures were "completely unforeseeable." *See Gander Mt.*, 923 F. Supp. 2d at 362. As this Court recently made clear in C*SC*, "frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence." 185 A.D.3d at 43. In *Ponte Gadea*, the court made clear—based solely on the lease—that the closures relating to COVID-19 could not be "wholly unforeseeable" because the lease itself included provisions that anticipate the possibility of "a strike … fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies of labor resulting therefrom, or any other cause beyond Tenant's reasonable control." 2021 WL 861121, at *8 (emphasis in original).

Here, the Lease contains a whole host of provisions that make clear that the parties anticipated the possibility of events that could significantly impact The Gap's business—including its ability to remain open:

- The Lease requires that The Gap maintain six (6) months of business interruption insurance. (See Lease 13.A.(e), 15.A, R. 130, 133.)

- The Lease requires The Gap to maintain terrorism insurance. (Lease 13.A(f), R. 130.)

- The Lease further allows The Gap to close its doors for up to one-hundred eighty (180) consecutive days without penalty. (Lease Art. 4.B, R. 104.)

- The Lease defines the term "Unavoidable Delays" to include delays due to "strikes, acts of God, *governmental restrictions*, enemy action, riot, civil commotion, fire, unavoidable casualty or other causes beyond the control of the party whose action was delayed. . . . Lack of funds shall not be deemed a cause beyond the control of either party." (Lease 39, R. 161.)

- Throughout the Lease, where "Unavoidable Delays" are referenced, it is in connection with construction at the Premises. And, most significantly, Article 43.P, makes clear that "payment of money is not subject to Unavoidable Delays." (Lease 39, R. 167.)

These provisions, just as in *Ponte Gadea*, make it perfectly clear that Landlord and The Gap—both sophisticated parties—anticipated the possibility of (and allocated the risk for) significant business interruptions, and clearly mandated continued payment of rent. Gap's "frustration" claims therefore fail. *See, e.g.*, *GE v. Metals Resources Group Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002) ("[F]inancial 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.").

Faced with a similar situation, the tenant in *Urban Archeology*, 34 Misc. 3d 1222(A), at *2–3, argued that its obligation to pay rent should be excused because, in the wake of the 2008 "Great Recession," "the circumstances which are serving to frustrate performance under the terms of the Lease are due to an unforeseeable and extreme occurrence." The Supreme Court dismissed this argument:

> The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed.

Id. at *4–5 (citation omitted). This Court unanimously affirmed. *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 68 A.D.3d 562, 562 (1st Dep't 2009) ("[A]n economic downturn could have been . . . guarded against in the lease.").

Where a lease specifically allocates risk, New York courts must apply the "'familiar and eminently sensible proposition of law . . . that, when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.'" *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 358 (2019) (*quoting Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004)). This is particularly the case where the lease was negotiated "between sophisticated, counseled business people negotiating at arm's length." *Id.*

at 359 (cleaned up); *see also W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) ("[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is general inadmissible to add to or vary the writing. Such considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern.").

Several courts have considered this same issue in the COVID-19 era and have reached the same conclusion. *See, e.g., Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*, 2021 N.Y. Slip Op. 50119(U), at *1–2 (Sup. Ct. Jan. 27, 2021) (noting that, where the parties allocated risk to the tenant, it "is therefore not forgiven from its performance, including its obligation to pay rent by virtue of a state law."); *CAB Bedford*, 2020_NY_Slip_Op_34296(U)_at_*4 (rejecting frustration of purpose defense because "[n]othing in the lease itself provides for the Tenant to avoid its obligation to pay rent," including an "Inability to Perform" provision; "[s]imply put, the parties did not contract to absolve the Tenant of its obligation to pay rent if it were forced to shut down due to governmental orders. That they did not include such language is not surprising; a global pandemic is not a common occurrence."); *RPH Hotels*, 2021_NY_Slip_Op_30286(U)_at_*3 ("The Court recognizes that the pandemic has devastated many businesses … But that does not mean that defendant

can simply walk away from a valid lease."); *Victoria's Secret Stores, LLC v. Herald Sq. Owner LLC*, 2021 N.Y. Slip Op. 50010(U), at * 1–2 (Sup. Ct. N.Y. Co. Jan. 7, 2021) (granting landlord's motion for summary judgment and finding tenant not relieved from paying rent where lease allocated risk to tenant).

In addition, where a lease precludes reliance on common law defenses, those defenses, including frustration of purpose, cannot be raised. *See, e.g.*, *Axginc Corp. v. Plaza Automall, Ltd.*, 759 Fed. App'x 26, 29, 31 (2d Cir. 2018) (sublease language prohibited tenant from later asserting frustration of purpose in the aftermath of Hurricane Sandy); *In re M & M Transp. Co.*, 13 B.R. 861, 871–72 (Bankr. S.D.N.Y. 1981) (holding defendants' frustration of purpose argument inapplicable based on agreement language: "[a] person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended."); *Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 170, 173, 176–77 (1st Dep't 2010).

Here, the Lease contains a clear "NO COUNTERCLAIM OR ABATEMENT" provision, which expressly provides that Gap must pay rent "without any setoff, abatement, reduction, deduction or defense whatsoever." (Lease 3, R. 103.) Such language must be given full effect in sophisticated commercial leases. *See, e.g.*, *Lincoln Plaza Tenants Corp. v. MDS Properties*

Development Corp., 169 A.D.2d 509 (1st Dep't 1991) (holding that tenant was liable for unpaid rent, notwithstanding parties' ongoing dispute concerning utility services and hookups, given lease provision requiring payment of rent "'without any setoff or deduction whatsoever.'"); *Maiden Lane Props., LLC v. Just Salad Partners LLC*, 2013 N.Y. Misc. LEXIS 2647 (Civ. Ct. N.Y. Co. 2013) (rejecting defense premised on Hurricane Sandy where, *inter alia*, tenant was required to pay the rent due "without offset or defense.").

Accordingly, the Order should be reversed and Gap's claims that rely on "frustration" should be dismissed.

B. The Supreme Court's Ruling on "Impossibility of Performance" Should Also be Reversed

The Trial Court also erred in not dismissing Gap's "impossibility of performance" claims (Counts Two (e) and Four). "Frustration" and "impossibility" are similar concepts, and "impossibility" here fails for the same reasons: economic hardship is insufficient for "impossibility"; the interfering cause was not so complete as to make performance impossible; and the effect (business closure) was not unforeseeable. As with "frustration," Gap fails on all grounds.

The Court of Appeals has made clear that "[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *Kel Kim*, 70 N.Y.2d at 902. "[W]here impossibility or difficulty of performance is occasioned

only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968).

COVID-19-era decisions, including *The Gap v. Ponte Gadea*, have adhered to this principle, making clear that complaints about financial hardship—which are the basis of Gap's claims here—do not excuse the obligation to pay rent. *See Lantino v. Clay LLC*, No. 1:18-cv-12247 (SDA), 2020 WL 2239957 (S.D.N.Y. May 8, 2020) (dismissing defendants' argument that the doctrine of impossibility premised on inability to pay due to the pandemic excused defendants' performance under a settlement agreement); *RPH Hotels*, 2021_NY_Slip_Op_30286(U)_at_*4 (holding that where tenant only faced "decreased revenue from fewer customers and increased costs from pandemic-related regulations," a "less profitable business [was] not a basis to find that [impossibility of performance] could absolve [tenant] of its obligation to pay rent."); *35 East 75th Street*, 2020_NY_Slip_Op_34063(U)_at_*5 ("The subject matter of the contract—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.").

"Impossibility" also requires that the "event" must be so complete as to make performance objectively impossible. *Kel Kim*, 70 N.Y.2d at 902. Following this rule, the COVID-19-era Supreme Court decisions have held the "impossibility"

doctrine inapplicable. *See, e.g.*, *CAB Bedford*, 2020_NY_Slip_Op_34296(U)_at_*5 (rejecting impossibility of performance defense where defendants "ran an 'upscale gym' for many years prior to the Covid-19 pandemic and, after some painful months, are now permitted to operate (although at a limited capacity). The subject matter of the lease was not destroyed. At best, it was temporarily hindered."); *RPH Hotels*, 2021_NY_Slip_Op_30286(U)_at_*5 ("Quite simply, here, where there is a downturn in a tenant's business—with or without Covid—it does not invoke the doctrine of impossibility of performance, especially when the business is operating.").

Lastly, as with "frustration," in order to invoke "impossibility," any harm must have been *completely unforeseeable* even if the precise cause was not. In *Ponte Gadea*, the court noted that "Gap's impossibility defense fails because the very text of the Lease demonstrates that the conditions that Gap claims render performance impossible were foreseeable … [T]he parties foresaw, and apportioned the risk associated with, the possibility that government measures in the event of a public emergency could affect performance under the Lease." As described above, the Lease here also anticipated (and allocated risk for) a host of potential business disruptions. (*See* Lease 13.A.(e), 13.A(f), 15.A, 39, 43.P, R. 104, 130, 133, 161,

167.) Moreover, as noted, at every turn the Lease mandates the payment of rent and does not offer abatement (except under circumstances not available here).

This Court has further made clear that "foreseeability" does not require that the parties anticipated the *precise* cause of any future issues. In *GE*, 293 A.D.2d at 418, plaintiff brought an action to recover amounts due from defendant under their commodities swap contracts. This Court specifically rejected defendant's "impossibility" argument, stating that "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." *Id.*; *see also Urban Archaeology*, 68 A.D.3d at 562 (rejecting plaintiff's claim of impossibility of performance and noting that "an economic downturn could have been foreseen or guarded against in the lease.").

Landlord and The Gap—both sophisticated parties—allocated all types of risk (*See* Lease 13.A.(e), 13.A(f), 15.A, 39, 43.P, R. 104, 130, 133, 161, 167); and neither "impossibility" nor any similar concept can upset the parties' agreement. *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 34 Misc. 3d 1222(A), at *4–5 (Sup. Ct. NY Co. 2009), *aff'd*, 68 A.D.3d 562 (1st Dep't 2009) (Stating that "[t]he law in New York is well settled that 'once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome'" and denying impossibility of

performance defense based on lease language.) (quoting *Kel Kim*, 70 N.Y.2d at 902); *Pacific Coast Silks*, 76 A.D.3d at 170, 173, 176–77 (reversing judgment in favor of tenant where lease rider required that "'Tenant shall pay the entire Annual Rental Rate and additional rent without any offsets or abatement on the Commencement Date,'" and tenant could not establish constructive or partial eviction.).

Accordingly, the Trial Court ruling on impossibility of performance should be reversed.

C. All of the Additional Remaining Counts Should be Dismissed

The Gap's various additional claims for declaratory relief in the subsections of Count Two should also be dismissed. The Gap failed to oppose Landlord's motion to dismiss for Counts Two (b), (c), (g), (i), (j) & (k), and therefore abandoned those claims. *Cassell v. City of New York*, 159 A.D.3d 603, 603 (1st Dep't 2018) ("Plaintiff's claim of municipal liability under 42 USC § 1983 is abandoned because, in the motion court, he did not oppose the City's argument that the complaint had failed to state a section 1983 claim."). They are also duplicative, incomprehensible, or otherwise dismissible.

Two (a) alleges that the Lease terminated pursuant to the terms of the Lease and the applicable law. (Compl. ¶ 58 a, R. 62.) But there is no such applicable law, the Lease clearly did not terminate on its own terms, and neither "frustration" nor "impossibility" or any other concept "terminates" the Lease.

Count Two (b) relates to abatement of rent and expenses under the Lease from and after March 19, 2020. (Compl. ¶ 58 b, R. 62.) Count Two (c) alternatively seeks an abatement for a period after March 19 in the Court's discretion. The Lease, however, only provides for "an abatement or reduction in Fixed Rent . . . pursuant to the provisions of this Lease." (Lease Art. 2.C, R. 97.) The Gap has failed to indicate any Lease provision that allows for abatement under these circumstances, and there is none. To the contrary, the Lease provides that there shall be no "setoff, abatement, reduction, deduction or defense whatsoever." (*Id*. Art. 3, R. 103.) As established above, the COVID-19 pandemic does not constitute a casualty or "Damage Event."

Count Two (g) seeks declaratory judgment for "[t]he effects of the foregoing on the Lease's Term and expiration." (Compl. ¶ 58 g, R. 63.) This should have been dismissed as incomprehensible in addition to the above-stated reasons.

Count Two (h) seeks a declaration that the Lease should be reformed. (Compl. ¶ 58 h, R. 63.) But the Trial Court dismissed Gap's claim for reformation (Count Five) for failure to allege mutual mistake or fraud. (R. 13.) Therefore, this claim has already been implicitly dismissed but should be formally dismissed.

Counts Two (i), (j), and (k) all should have been dismissed because they are duplicative and were abandoned when Gap failed to oppose Landlord's motion to dismiss arguments below. *Cassell*, 159 A.D.3d at 603.

Dismissal of Count Three, for declaratory judgment and injunctive relief, was warranted for all of the reasons set forth below in Landlord's arguments regarding Gap's request for *Yellowstone* relief. There is also no basis for Gap's request for injunctive relief under Counts One (for breach of contract) or Two, as stated above.

Finally, while the Trial Court declined to dismiss Count Four on the basis that "[r]escission on the grounds of impossibility or frustration of purpose is a viable cause of action, which . . . plaintiff has sufficiently plead," (R. 12), as described above, Gap has not adequately alleged "frustration" or "impossibility," and it should be dismissed.

III. THE SUPREME COURT ERRED IN GRANTING YELLOWSTONE RELIEF

In *First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc.*, 21 N.Y.2d 630 (1968), the Court of Appeals held that under certain circumstances a tenant may be entitled to a stay of the cure period set forth by its landlord in a notice to cure or a notice of default. These stays, referred to as "*Yellowstone* injunctions," toll the cure period in order to preserve the *status quo* pending a court's determination of the underlying dispute. In order to obtain a *Yellowstone* injunction, the moving party must satisfy a four prong test establishing that tenant: (1) holds a commercial lease; (2) received either a notice of default, a notice to cure, or a threat of termination; (3) requested injunctive relief prior to the termination of the lease; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating

the premises. *See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999).

This standard was set out in *Graubard*, but, over the years, this Court has further refined it. In particular, while *Graubard* indicated that a tenant must seek injunctive relief prior to the termination of the lease, this Court has made it abundantly clear that a tenant must seek *Yellowstone* relief not just prior to termination, but prior to the expiration of the cure period set forth in the notice of default.[8]

In *Prince Fashions, Inc. v. 542 Holding Corp.*, 15 A.D.3d 214 (1st Dep't 2005) (which the Trial Court overlooked), this Court rejected a tenant's claim that "it timely sought a *Yellowstone* injunction *after* the cure period, but before the lease was legally terminated," holding that "a commercial tenant may not secure *Yellowstone* relief after the cure period has already expired." (emphasis in original). *See also KB Gallery, LLC v. 875 W. 181 Owners Corp.*, 76 A.D.3d 909 (1st Dep't 2010) (holding that a *Yellowstone* application was untimely where the application

[8] Indeed, this Court has refused to grant an injunction pursuant to CPLR 6301, when such application is made after the expiration of the cure period. *See Manhattan Parking Sys.-Serv. Corp. v. Murray House Owners Corp.*, 211 A.D.2d 534, 535 (1st Dep't 1995) ("[W]ith the practice of granting preliminary injunctive relief pursuant to CPLR 6301 when *Yellowstone* relief is unavailable because of the untimeliness of the application," the Appellate Division expressly "disavow[ed] [its] previous holding to the contrary."); *Goldcrest Realty Co. v. 61 Bronx River Rd. Owners, Inc.*, 83 A.D.3d 129, 135 (2d Dep't 2011) (Plaintiff denied preliminary injunctive relief pursuant to CPLR 6301 where Appellate Division, Second Department agrees with First and Third Departments that "motions for preliminary injunctions pursuant to CPLR 6301, like motions for *Yellowstone* injunctions, must also be made prior to the expiration of the cure period").

was filed after the cure period had expired and notice of termination served); *166 Enters. Corp. v. I G Second Generation Partners, L.P.*, 81 A.D.3d 154, 155 (1st Dep't 2011) ("[A] tenant is not entitled to a *Yellowstone* injunction after the cure period has expired."); *JH Parking Corp. v. E. 112th Realty Corp.*, 298 A.D.2d 258 (1st Dep't 2002) (tenant did not timely seek injunctive relief as the order to show cause was signed after the cure period expired); *Glyncor, Inc. v. Ironwood Realty Corp.*, 259 A.D.2d 363 (1st Dep't 1999) (tenant not entitled to *Yellowstone* injunction where application made after expiration of cure period); *Daashur Assocs. v. December Artists Apartment Corp.*, 226 A.D.2d 114 (1st Dep't 1996) (no basis for *Yellowstone* relief where injunction sought after expiration of cure period and after service of notice of termination).[9]

Here, it is undisputed that the ten-day cure period expired on May 22, 2020. (R. 256.) Indeed, the Trial Court acknowledged this in the Order. (R. 14 ("the ten-day cure period under the Default Notice has expired").) And, while the Supreme Court was only accepting "essential" filings until May 25, 2020, earlier in May it had deemed the *Yellowstone* application in the *Philippe MP* case "essential." (R. 393–95.)

[9] The Second Department reached the same conclusion and has expressly rejected any prior decisions that allowed a longer time in which to seek *Yellowstone* relief stating that applications for *Yellowstone* relief must "be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure." *Korova Milk Bar of White Plains, Inc. v. PRE Properties, LLC* 70 A.D.3d 646, 647–48 (2d Dep't 2010).

Even giving Gap the benefit of the doubt, the Supreme Court started accepting non-essential filings on May 25, 2020. (R. 396–97.) But Gap waited more than five weeks—thirty-seven days—after the Court began accepting non-essential filings, before filing its request for *Yellowstone* relief on July 2, 2020—forty-one days after the cure period expired.

In its Order, the Trial Court ignored this Court's subsequent cases and relied solely on *Graubard*. But while *Graubard* is frequently cited for its succinct recitation of the four-pronged *Yellowstone* test, *Graubard* was not dispositive of the issue at hand.

Significantly, during oral argument, the Trial Court appeared to understand the legal standard, recognizing that the limited purpose of the *Yellowstone* is to "stop the running of the applicable cure period." (R. 33–34.) The Trial Court went on to have the following exchange with Gap's counsel:

> Mr. Schneider: That's what you did, Your Honor, when you signed the TRO.
>
> The Court: Not if the cure period had already run. That's a problem; right?
>
> Mr. Schneider: The problem is if they would have terminated us then we - -
>
> The Court: It doesn't say that. It doesn't say to stop the landlord from terminating the lease. It says it's limited to the running of the applicable cure period… If there is no cure period running then you can't demonstrate an ability to cure. I think that's a problem. (*Id.*)

And later citing *166 Enters. Corp.*, 81 A.D.3d 154, the Trial Court stated:

> The Court: …well, very plainly the Court said "Judge Gish improperly concluded that tenant still had the right to cure its breach. It's well settled that a tenant is not entitled to Yellowstone injunction after the cure period has expired." It doesn't say after the lease is terminated. It doesn't say that.
>
> Mr. Schneider: That's the whole purpose of a Yellowstone, Your Honor, to preserve the status quo.
>
> The Court: You keep saying that over and over again, but you're not addressing after the cure has expired. This does not say after the lease has terminated.
>
> Mr. Schneider: Neither Yellowstone itself, the very first case that ever created this law, nor *Brauberg* (ph) the Court of Appeals, uses this language.
>
> The Court: But that's for the Appellate Division. You're going to have to convince the Appellate Division. I think that what they said in 166 is not what they meant. It says "cure period." (R. 44.)

In the Order, however, the Trial Court completely changed course, finding the complete opposite. The Trial Court relied on the following single sentence in *KB Gallery*:

> The motion court properly found that plaintiff did not timely seek Yellowstone relief, since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served.

(R. 14 (emphasis in original).)

The Trial Court went on to reject as *dicta*, and contrary to *Graubard*, the following clarifying sentence from *KB Gallery*, "[w]e reject plaintiff's contention that a *Yellowstone* injunction brought after the expiration of the applicable cure period will be deemed timely as long as it is made before the lease in question actually terminated." (*Id.*) But this Court's clear and unequivocal statement in *KB Gallery* is not *dicta*. It has been cited for this proposition at least twice by this Court. *See 166 Enters. Corp.*, 81 A.D.3d at 157; *Three Amigos SJL Rest., Inc. v. 250 W. 43 Owner LLC*, 144 A.D.3d 490, 491 (1st Dep't 2016). In addition, contrary to the Trial Court, *KB Gallery* did not contradict *Graubard*; it clarified *Graubard* by making clear that a tenant must move for *Yellowstone* relief prior to the expiration of the cure period, not before a lease is terminated.

This Court recognized that the operative action is the expiration of the cure period, not the service of a notice of termination. In fact, the actual service of a notice of termination bears no legal significance on its own because the tenant's opportunity to prevent the termination of the lease is gone at that point. Whether or not a termination notice has been served does not matter for the purposes of *Yellowstone*.

Following the Trial Court's logic would render the cure period entirely meaningless, it would also encourage Landlords to terminate every lease at the earliest possible date, lest they lose significant legal rights. Under the Trial Court's

rule, a tenant could disregard a notice of default and ignore the cure period altogether so long as it moves for *Yellowstone* relief prior to the termination of the lease. This absurd result is not what this Court intended. *See Three Amigos*, 144 A.D.3d at 491 ("Plaintiff is not entitled to a *Yellowstone* injunction, since it sought such relief after the expiration of the cure period specified in the lease and the notice to cure. A tenant is not entitled to a *Yellowstone* injunction after the expiration of the cure period."); *166 Enters. Corp.*, 81 A.D.3d at 158 (same); *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 210 (1st Dep't 2005) ("[Tenant] was not entitled to a *Yellowstone* injunction in connection with the default notice it received in February 2003 because that relief was sought after the applicable cure period had expired."); *M.J.G. Merchant Funding Group LLC v. MatlinPatterson Global Advisers LLC*, 2018 N.Y. Slip Op. 31537(U) (Sup. Ct. N.Y. Co. 2018) (denying tenant's *Yellowstone* application because tenant did not seek injunctive relief until three days after the cure period had expired).

Clearly, this Court has long recognized the significance of the expiration of the cure period and has required tenants to move for *Yellowstone* relief prior to that expiration. As The Gap failed to timely seek *Yellowstone* relief, this Court should reverse the Trial Court's decision granting a *Yellowstone* injunction.

IV. THE TRIAL COURT ERRED BY DIRECTING TENANT TO POST AN UNDERTAKING IN LIEU OF DIRECTING TENANT TO PAY RENT *PENDENTE LITE* DIRECTLY TO LANDLORD

Landlord cross-moved seeking an order: (i) directing Tenant to post a bond in the amount of $1,691,946.95 to secure Landlord's damages equal to the arrears accrued from April 1 through July 31, 2021, and (ii) directing Tenant to pay on-going rent directly to Landlord. (R. 345–75.)

The Trial Court erred in granting the out-of-time *Yellowstone* relief but then compounded its error by ordering Gap to post an undertaking intended to secure both past arrears and future rent for only a limited period of time. The undertaking was for $5.5 million, which was supposed to represent "$2,500,000 to secure payment of future use and occupancy, *pendent[e] lite*, for the period November 1, 2020, until a final determination of this action plus $3,000,000 to secure the payment of rent arrears allegedly owed by plaintiff to defendant for the monthly fixed rent due under the Lease." (R. 7.)

This portion of the Order includes several errors and amounts to an abuse of discretion. In the event that the Court reverses the grant of the *Yellowstone* injunction, it should nevertheless order Gap to pay ongoing rent to Landlord *pendente lite* (*nunc pro tunc* to October 1, 2020) for the reasons stated below in subsection A. But even if the Court upholds the *Yellowstone*, which, respectfully, it should not, it should still modify the order to direct Gap to pay directly rent *pendente*

lite to the Landlord, also *nunc pro tunc* (subsection B). This is particularly so in light of the fact that $2.5 million was woefully inadequate to secure future rent through a "final determination" of this case. Indeed, it amounts to less than six months' rent (starting last October) all of which would be due before this appeal is heard and before discovery below has been completed.

Indeed, this Court recently directed that rent *pendente lite* be paid directly to the landlord, reversing (in relevant part) another decision from the same Trial Court in a similar case involving The Gap. In *Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, No. 13134N, 2021 N.Y. Slip Op. 01019 (1st Dep't Feb. 16, 2021), the Supreme Court granted Tenant's *Yellowstone* injunction (it was timely in that case), and directed tenant to post an undertaking equal to the rental arrears and to pay ongoing rent *pendente lite* in the form of an undertaking. On appeal, this Court held that the Trial Court "abused its discretion in failing to require that ongoing use and occupancy . . . be paid directly to defendant." *Id.* at *1. That is the same issue here, and the same result should obtain. This is particularly so when the Gap's weak and speculative claims are weighed against the fact that Landlord is in default of its loan obligations.

A. The Court Should Reverse the Order and Require The Gap to Pay Rent *Pendente Lite* During any Remaining Litigation.

In the event that this Court overturns the Trial Court's *Yellowstone* ruling, Landlord is nevertheless entitled to direct rent payments *pendente lite*.

It is well established that the pendency of litigation does not obviate a commercial tenant's obligation to pay for its use and occupancy of the demised premises. *Corris v. 129 Front Co.*, 85 A.D.2d 176 (1st Dep't 1982). Indeed, the "award of use and occupancy during the pendency of an action or proceeding accommodates the competing interests of the parties in according necessary and fair protection to both." *255 Butler Assoc., LLC v. 255 Butler, LLC*, 173 A.D.3d 651, 653 (2d Dep't 2019) (cleaned up). And compelling a tenant to pay rent or use and occupancy to its landlord pursuant to the lease accommodates those competing interests by affording fair protection to both and by preserving the *status quo* until the final judgment is rendered. *Albright v. Shapiro,* 92 A.D.2d 452, 453–54 (1st Dep't 1983). "[I]t is manifestly unfair" for a tenant to be permitted to remain in a demised premises without paying for their use. *MMB Associates v. Dayan*, 169 A.D.2d 422, 422 (1st Dep't 1991).

Courts have repeatedly ordered payment of rent for use and occupancy *pendente lite* under both expired and unexpired leases. *Andejo Corp. v. South St. Seaport Ltd. Partnership*, 35 A.D.3d 174 (1st Dep't 2006). Even where rent is in dispute, as Gap claims here, courts grant use and occupancy. *See, e.g., La Fabrique Owners Corp. v. La Fabrique LLC*, 16 Misc. 3d 130(A) (App. Term 1st Dep't 2007) (affirming order directing tenant to pay rent *pendente lite* in proceeding for nonpayment of rent). Courts recognize that, in the event a tenant is ultimately

successful on the merits, it would be entitled to a refund or rent credit. *Steve Madden Retail, Inc. v. 720 Lex Acquisition LLC*, 2016 N.Y. Slip Op. 31522(U), at *6 (Sup. Ct. N.Y. Co. Aug. 5, 2016) ("A court has broad discretion in awarding use and occupancy *pendente lite* … [T]he landlord is awarded temporary rent/use and occupancy *pendente lite*, without prejudice, in the amount recited in the lease for rent and additional rent … [T]o the extent plaintiff is ultimately successful at trial, it may be provided with a refund or rent credit.").

Indeed, despite the pandemic and onslaught of related rent disputes, New York Courts have continued to uphold this longstanding principle, directing tenants to pay rent or U&O pending rent disputes. *See, e.g.*, *138-77 Queens Blvd. LLC v. QB Wash LLC*, No. 715071/2020, 2021 NYLJ LEXIS 17, at *7–8 (Sup. Ct. Queens Co. Jan. 15, 2021) ("Here, the equities support payment of use and occupancy. Tenant has no claim that landlord has done anything to impair tenant's performance under the Lease or use and enjoyment of the premises. Although tenant argues that a partial closure of its business due to the Covid-19 pandemic justifies the non-payment of rent, this Court finds that permitting tenant to remain in possession of the subject premises without paying for its use would be manifestly unfair." (cleaned up)); *BOP 350 Bleecker Street Leasehold LLC v. Quick Park Bleecker Street Garage LLC*, 2021 N.Y. Slip Op. 30325(U) (Sup. Ct. N.Y. Co. Feb. 4, 2021) (directing tenant to pay lump-sum payment to landlord for accrued rent from the

commencement of the action and future rent *pendente lite* by the 10th day of each month); *538 Morgan Ave. Properties v. 538 Morgan Realty LLC*, 2020 N.Y. Slip Op. 32780(U) (Sup. Ct. N.Y. Co. Aug. 20, 2020) (refusing to modify an existing order for tenant to pay use and occupancy, despite covid-19 interruptions to tenant's access to the demised premises).

This case is no different. Gap has neither vacated nor surrendered possession. Nor has Gap claimed that Landlord has in any way impaired its use or occupancy of the Premises. The equities clearly weigh in favor of Landlord receiving compensation for Gap's continued use of the Premise pending the resolution of this case, and the Order should be reversed and Gap should be ordered to pay rent *pendente lite* beginning August 1, 2020, and each month *pendente lite* at the amount set forth in the Lease.

B. In the Event The *Yellowstone* Injunction is Upheld, the Order Should be Modified so Rent is Paid Directly to Landlord *Pendente Lite*

In the event that this Court upholds the Trial Court's grant of the *Yellowstone* injunction, which respectfully it should not, the Order should still be reversed because the rent should be paid directly to the Landlord, and, in any event, the amount of the undertaking was clearly inadequate.

The Trial Court ignored a host of cases from this Court upholding an order to directing a tenant to pay rent *pendente lite* during the pendency of a *Yellowstone*

injunction. *See, e.g., 61 West 62nd Owners Corp. v. Harkness Apt. Owners Corp.*, 173 A.D.2d 372 (1st Dep't 1991); *see also 51 Park Place LH, LLC v. Consolidated Edison Company of N.Y.*, 34 Misc. 3d 590, 593–94 (Sup. Ct. N.Y. Co. 2011) (conditioning *Yellowstone* relief on tenant's continued payment of rent during the pendency of the litigation, and requiring an undertaking).

Most recently, in *44-45 Broadway Leasing*, 2021 N.Y. Slip Op. 01019, at *1, this Court reversed the Trial Court, holding that it had "abused its discretion in failing to require that ongoing use and occupancy . . . be paid directly to" the landlord.

Here, the Trial Court placed undue reliance on *Graubard*, 93 N.Y.2d 508, and *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating*, 205 A.D.2d 421, 423–24 (1st Dep't 1994). *Graubard* is inapposite, and *Lexington Ave.* actually supports Landlord's argument here. *Graubard* addressed landlord's entitlement to the *interest* on certain escrowed funds after the landlord had already established its entitlement to the funds; the court did not even consider whether a fixed-amount bond was appropriate. *Lexington Ave.*, on the other hand, involved a dispute over years old electricity charges. Notably, there the Court conditioned *Yellowstone* relief on tenant continuing "to pay all undisputed rent and additional rent due, both past and future, directly to plaintiff while continuing to pay the dispute submetered

electrical charges to plaintiff's attorney, to be held in escrow." *Lexington Ave,* 205 A.D.2d at 421.

Here, since it is undisputed that Gap remains in possession of the Premises, the plain language of the Lease and the balancing of the equities are best served by directing The Gap to pay rent *pendente lite* to Landlord at the rate set forth in the Lease. *See Eli Haddad Corp. v. Redmond Studio,* 102 A.D.2d 730, 731 (1st Dep't 1984) ("[T]enants should not now be permitted to reap the benefits of occupancy and, at the same time, avoid the payment of rent.") (cleaned up). The Trial Court had the authority to order Gap to pay rent directly to Landlord, but it abused its discretion by ordering the undertaking instead. *See 44-45 Broadway Leasing*, 2021 N.Y. Slip Op. 01019, at *1. Here the amount of monthly rent is not in dispute. What is in dispute is whether the lease magically terminated or (through some other miraculous means) Gap can escape its contractual obligation to pay rent. The equities therefore weigh strongly in favor of Landlord receiving rental payments *pendente lite*.

The Trial Court further erred by setting the bond in an insufficient amount. When ordering an undertaking it must be "rationally related to the quantum of damages which plaintiff would sustain in the event that defendant is later determined not to have been entitled to the injunction." *61 West 62nd Owners*, 173 A.D.2d at 373. Here, the undertaking is not rationally related to the damages, as Landlord's

damages will far exceed the amount secured. Landlord reasonably requested a bond equal to the arrears accrued from April to July 2020 in the amount of $1,691,946.95, and on-going rent paid directly to Landlord. The Order directing a bond of $5.5 million—which represented the arrears plus less than six months of additional rent—is clearly inadequate as the undertaking only accounts for newly-accrued rent through April 2021. That is why the continued obligation to pay rent *pendente lite* is so critical—it accurately (and rationally) captures the amounts owed throughout the litigation, rather than hazarding a guess as to how long a trial and/or an appeal with take to complete.

Accordingly, to the extent that the litigation proceeds and the Court upholds the *Yellowstone* injunction, the Order should be modified to have The Gap pay a lump sum to Landlord equal to the rent accrued from the commencement of the action to date, and then continue to pay rent *pendente lite* at the rate set forth in the Lease.

CONCLUSION

For all of the above reasons, the Order, to the extent that it denied Landlord's motion to dismiss The Gap's Complaint, should be reversed, and those causes of action dismissed with prejudice. Additionally, the granting of *Yellowstone* should be reversed, and The Gap should be directed to pay rent *pendente lite* directly Landlord beginning August 1, 2020.

Dated: New York, New York
March 22, 2020

Respectfully submitted,

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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 13,985.

Dated: March 22, 2021

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

THE GAP, INC.,

Plaintiff-Respondent,

– against –

170 BROADWAY RETAIL OWNER, LLC,

Defendant-Appellant.

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1. The index number of the case in the court below is 652732/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about July 2, 2020 by filing of a Summons and Complaint. Issue was joined on or about August 24, 2020 by service of an Answer with Counterclaims.

5. The nature and object of the action is for breach of contract and equitable relief.

6. This appeal is from the Decision and Order of the Honorable Debra A. James, dated October 30, 2020, which granted Plaintiff's Motion for a Yellowstone Injunction granted in part Landlord's Cross-Motion and denied in part Defendant's Motion to Dismiss.

7. This appeal is on the full reproduced record.