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

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-Appellants, - v. - HERALD SQUARE OWNER LLC, successor in interest to 1328 Broadway, LLC, Defendant-Respondent.	App. Div. Nos. 2022-00195 2022-00196 Originating Court No. 651833/2020

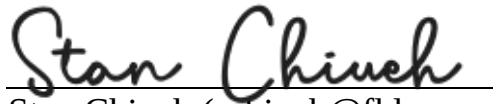
NOTICE OF MOTION OF RETAIL LITIGATION CENTER, INC. FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

PLEASE TAKE NOTICE that upon the annexed affirmation of Stan Chiueh, Esq., dated July 8, 2022, with all exhibits thereto, Retail Litigation Center, Inc. ("Proposed Amicus") will move this Court, at a term thereof to be held at the Supreme Court of the State of New York, Appellate Division, First Department, at the courthouse located at 27 Madison Avenue, New York, New York, the 25th day of July, 2022, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to New York Rule of Appellate Procedure 1250.4(f), granting Proposed Amicus leave to appear as *amicus curiae* and file a brief of *amicus curiae* in the above-captioned appeal, and for such other and further relief to Proposed Amicus as this Court may deem just and proper.

Dated: July 8, 2022
New York, New York

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP



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Attorneys for proposed amicus curiae Retail Litigation Center, Inc.

To: Counsel of Record (via NYSCEF)

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

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-Appellants, - v. - HERALD SQUARE OWNER LLC, successor in interest to 1328 Broadway, LLC, Defendant-Respondent.	App. Div. Nos. 2022-00195 2022-00196 Originating Court No. 651833/2020

AFFIRMATION IN SUPPORT OF MOTION OF RETAIL LITIGATION CENTER, INC. FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

STAN CHIUEH, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am counsel for Retail Litigation Center, Inc. ("Proposed Amicus").

2. I make this affirmation in support of Proposed Amicus' motion for leave to appear as *amicus curiae* and file a brief of *amicus curiae* in the above-captioned appeal in support of plaintiffs-appellants 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. (the "Retailers"). A copy

of the proposed brief of *amicus curiae* is attached as Exhibit A. A copy of the notice of appeal and order appealed from is attached as Exhibit B.

3. The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, RLC has participated as *amicus curiae* in more than 175 judicial proceedings of importance to retailers.

4. Motions for leave to file briefs of *amicus curiae* by industry groups like Proposed Amicus are regularly granted because courts recognize such briefs may assist the Court in understanding the significance of the material issues and provide the Court with useful industry-specific context in a particular case. For instance, in one recent matter concerning the impact of COVID and resulting state and local shutdown orders on a retail flagship store, this Court granted a motion for leave to file a brief of *amici curiae* by Proposed Amicus and other industry groups. *See* Order, NYSCEF Doc. No. 19, *The Gap, Inc. and Old Navy,*

LLC, v. 44-45 Broadway Leasing Co., LLC, Case No. 2021-03261 (1st Dep't May 12, 2022). And in another matter concerning the impact of COVID and resulting state and local shutdown orders on a restaurant business in a business coverage dispute, this Court granted five different motions for leave to file briefs of *amici curiae*, which provided industry-wide perspectives and analyses on both sides of the dispute. *See* Order, NYSCEF Doc. No. 22, *Consolidated Restaurant Ops., Inc. v. Westport Ins. Corp.*, Case Nos. 2021-02971 and 2021-04034 (1st Dep't Dec. 28, 2021).

5. Here, as a trade organization whose members include retailers that own, operate, build out, and vacate large stores, including flagships, these organizations and their members have a significant interest in ensuring that this Court, through the proposed brief of *amicus curiae*, understands the practical realities and challenges of vacating a retail flagship store, particularly during the worst pandemic in our lifetimes.

6. Specifically, Proposed Amicus's brief will (a) explain how it is generally understood, by landlords and commercial tenants alike (including Proposed Amicus's constituent members), that a threat by a landlord to invoke a lease's holdover rent clause effectively uses the demand of a massive penalty—which the tenant may or may not be able to pay—to force a *de facto* eviction of the tenant from the leased premises; and (b) elaborate upon the herculean task (made

even more difficult, if not impossible, due to the unprecedented global COVID-19 pandemic) of vacating a flagship store, which requires dozens, if not more, of employees or personnel to work indoors and in close physical contact with each other for potentially thousands of hours to leave the store "broom clean." Proposed Amicus respectfully submits that it and its members' collective industry-wide perspectives on these issues would aid this Court in its consideration of the issues in this matter.

7. Proposed Amicus certifies that counsel for the Retailers consents to Proposed Amicus filing this motion, and that counsel for Defendant-Respondent Herald Square Owner LLC, successor in interest to 1328 Broadway, LLC, has stated that it is not willing to consent to Proposed Amicus' motion "in the abstract" but is willing to reconsider a decision to oppose leave once Defendant-Respondent has seen and reviewed this motion.

8. Finally, pursuant to Rule 500.23, Proposed Amicus certifies that no party or party's counsel contributed content to Proposed Amicus's proposed brief, participated in the preparation of the brief, or contributed money to fund submission of the brief. Further, no other person or entity other than Proposed Amicus contributed money intended to fund preparation or submission of the brief.

9. Accordingly, on behalf of Proposed Amicus, I respectfully request that this Court grant leave to Proposed Amicus to file the proposed brief of *amicus curiae* attached as Exhibit A in support of the Retailers, the appellants in this case.

I affirm the foregoing to be true under the penalties of perjury.

Dated: New York, New York
July 8, 2022

Stan Chiueh
STAN CHIUEH

EXHIBIT A
[PROPOSED *AMICI CURIAE* BRIEF]

To be Submitted by:
STAN CHIUEH

New York Supreme Court

Appellate Division—First Department

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-Appellants,

– against –

HERALD SQUARE OWNER LLC, successor in interest to 1328 Broadway, LLC,

Defendant-Respondent.

Appellate Case Nos.: 2022-00195 2022-00196

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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New York County Clerk's Index No. 651833/20

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 175 judicial proceedings of importance to retailers, including before this Court.

Amicus respectfully submits this brief in support of plaintiffs-appellants Victoria's Secret Stores, LLC and L Brands Inc. (the "Retailers"), who seek reversal of the trial court's entry of judgment granting nearly $24 million in holdover damages plus 9% interest, to defendant-respondent Herald Square Owner LLC (the "Landlord"). As a trade organization whose members include retailers that own, operate, build out, and vacate large stores, including flagships, *amicus*

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made any monetary contribution to this brief's preparation or submission.

has a significant interest in ensuring that this Court understands the practical realities and challenges of vacating a retail flagship store, particularly during the worst pandemic in our lifetimes.

PRELIMINARY STATEMENT

In this case, Landlord claims that a June 4, 2020 notice to cancel (the "June 4, 2020 Notice")[2] a lease for a flagship retail store (the "Lease")[3] triggered the Landlord's entitlement to begin collecting holdover rent (*i.e.*, triple rent) from Retailers, even though Landlord waited for almost five months—until November 2020—before demanding, for the first time, that Retailers pay holdover rent, retroactively from the date the June 4, 2020 Notice was delivered.[4] The lower court awarded Landlord approximately $20 million in holdover rent (plus approximately $4 million in interest), accruing not just from when Landlord first invoked the holdover rent clause in November 2020, but from when the June 4, 2020 Notice was first delivered to Retailers. In other words, the lower court fashioned a bright-line rule stating that, upon receipt of the June 4, 2020 Notice, Retailers had to vacate their premises immediately (regardless of the cost or public health consequences of doing so) or else face a massive triple-rent penalty.

[2] R-391.

[3] R-69; *see also* Brief For Plaintiffs-Appellants ("Pl. Brief"), NYSCEF Doc. No. 26, at 1-2, 8-10.

[4] R-384-85.

Amicus respectfully urges this Court to repudiate the bright-line rule proposed by Landlord and ordered by the trial court, because such a rule (whether applied to Retailers here, or to any other commercial retailer placed in the same position in this pandemic or the next) leaves no room for considering the potential risk to the health and safety of the men and women who would be tasked with vacating the flagship premises and leaving them "broom clean" in the midst of the most devastating pandemic in our lifetimes and, therefore, runs contrary to public health, public safety, and public policy.

Amicus's argument is divided into two parts.

First, and as a threshold matter, this Court should understand that a landlord's threat to invoke a lease's holdover rent clause is not merely about collecting holdover rent. Landlords and commercial tenants alike generally understand that a landlord's demand for holdover rent effectively uses the threat of a massive penalty—which the tenant may or may not be able to pay—to force a *de facto* eviction of the tenant. Indeed, this case presents a classic example of the power of a landlord's threat to charge holdover rent to force a tenant out of leased premises. It is undisputed that, "promptly" upon Landlord's threat in November 2020 to charge Retailers with holdover rent, Retailers determined to vacate, and did vacate, the premises in question.

Second, this Court should understand that the herculean task of vacating a flagship store and leaving it "broom clean" at the height of the pandemic in June 2020—which would have been required under the trial court's bright-line rule—was practically impossible at that time, given the severe risk of transmission of COVID among people indoors. Vacating such a store would have required dozens, if not more, of employees or personnel to work indoors and in close physical contact with each other for potentially thousands of hours in order to remove not only inventory, trade fixtures, and other personal property, but also escalators, elevators, branding and other substantial equipment installed as part of creating the unique "flagship" experience. Accordingly, *amicus* respectfully submits that any bright-line rule that would have forced a retailer, like the Retailers here, to bring in personnel to vacate such a store completely under the particular circumstances of June 2020 should be found to be void as against public health, public safety, and/or public policy.

Amicus instead urges this Court to require the trial court, and future courts, to conduct a careful case-by-case evaluation as to whether a *de facto* eviction of Retailers in June 2020 (or any future *de facto* eviction of any other commercial retailer in a similar situation in this pandemic or the next) would have been proper, as a matter of public health, public safety, and public policy, under the circumstances of each case.

ARGUMENT

I.
THIS COURT SHOULD NOT IMPOSE A BRIGHT-LINE RULE EFFECTIVELY FORCING RETAILERS TO VACATE FLAGSHIP STORES IN THE MIDST OF THE PANDEMIC

A. Invocation of a holdover rent clause is well-understood by landlords and commercial tenants alike as a means for landlords to de facto evict tenants without resort to an eviction proceeding

Commercial landlords and tenants around the country—including *amicus*'s own members—know that a holdover rent clause, like the one in the Lease here, is not merely a means for landlords to collect money from holdover tenants; such a clause is an effective means for a landlord to force a tenant out of leased premises without a formal eviction proceeding. *See generally Ferraina v. Indus. Health Care Co.*, 2000 WL 226707, at *2 (Conn. Super. Ct. Feb. 20, 2000) (landlord "insisted" on including clause in lease providing for holdover damages of triple rent "to dissuade the tenant from holding over and to give the tenant an incentive to leave"); *cf. Sesko v. McConkey*, 126 Wash. App. 1051 (2005) ("The purpose of [statute providing for] double damages is to encourage holdover tenants to vacate the property when their tenancy is terminated.").

Indeed, New York landlord-side attorneys have pointed to the threat and enforcement of holdover rent clauses as the answer to the question: "How To Evict Commercial Tenants in New York When You Can't Commence

Proceedings."[5] As one attorney recently put it, a "savvy" landlord's attorney could use an action for holdover rent to "effectively litigat[e] an eviction proceeding immediately" even in the face of an executive order forbidding landlords from commencing formal eviction proceedings.[6] And as another "titan of real estate law"[7] has explained, holdover rent clauses "provide, among other things, a significant incentive to tenants to timely vacate and surrender the premises upon the expiration of the lease term."[8]

A landlord's threat to charge holdover rent is thus understood by all parties as a *de facto* eviction notice. The undisputed facts here aptly illustrate the power of such a threat. Upon being informed, on or about November 19, 2020, that Landlord intended to seek holdover rent, Retailers "promptly" determined to vacate, and did vacate, the leased premises, "broom clean," as soon as possible.[9] But by granting Landlord holdover rent accruing from the delivery of the June 4,

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[5] Michael A. Pensabene, *How To Evict Commercial Tenants in New York When You Can't Commence Proceedings*, GLOBEST.COM (Mar. 22, 2021), https://www.globest.com/2021/03/22/how-to-evict-commercial-tenants-in-new-york-when-you-cant-commence-proceedings/?slreturn=20220502103613.

[6] *Id.*

[7] *Warren Estis '73, Titan of Real Estate Law, Dies at 73*, BROOKLYN LAW SCHOOL (Apr. 15, 2022), https://www.brooklaw.edu/News-and-Events/News/2022/04/Warren-Estis-73----Titan-of-Real-Estate-Law----Dies-at-73.

[8] Warren A. Estis and Michael E. Feinstein, *'Hamilton': Enforcement of Holdover Rent Provisions*, N.Y. LAW J. (Dec. 7, 2016), *available at* https://www.rosenbergestis.com/wp-content/uploads/sites/1101496/2021/01/HamiltonEnforcementofHoldoverRentProvisions.pdf.

[9] R-384-85.

2020 Notice onwards,[10] the trial court imposed a bright-line rule (which would be applicable both in this and any future pandemic) stating that Retailers should not have delayed vacating the premises until the Landlord actually invoked the holdover rent clause—they should have vacated the premises *immediately*.

B. A bright-line rule requiring a retailer to immediately vacate a flagship store and leave the store "broom clean" in the middle of the most devastating pandemic in our lifetimes should be found to be void as against public health, public safety, and/or public policy

This bright-line rule imposed by the trial court—effectively stating that the Retailers (and any retailer in a similar situation in this or a future pandemic) should have vacated the premises immediately upon receiving the June 4, 2020 Notice—should be found void as against public health, public safety, and/or public policy.

Many courts in New York and elsewhere have acknowledged that the explosive onset of the pandemic in 2020—which, even with the benefit of modern medicine, has killed more than a million people in the United States, and six million people worldwide and counting[11]—upended societies, devastated economies, and, in two short years, fundamentally altered life for billions of

[10] *Amicus* takes no position on whether the termination notice was properly delivered in this case. If there were defects in the substance or delivery in the June 4, 2020 Notice, Retailers would have further and additional arguments against the trial court's award of holdover rent.

[11] Adeel Hassan, *The pandemic's official global toll surpasses 6 million known virus deaths*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/world/six-million-covid-deaths.html.

people. COVID was "unprecedented and extraordinarily dangerous[.]" *United States v. Stephens*, 447 F. Supp. 3d 63, 65 (S.D.N.Y. 2020). For many people, it was "potentially fatal." *Joffe v. King & Spalding LLP*, 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020). Its spread was "exponential" and "unparalleled." *United States v. Browning*, 2020 WL 2306566, at *3 (S.D.N.Y. May 7, 2020). As of June 4, 2020, "there [wa]s no approved cure, treatment, or vaccine to prevent it." *United States v. Rodriguez*, 451 F. Supp. 3d 392, 394 (E.D. Pa. 2020).

During these early months of the pandemic, courts expressly warned that, "for New York City residents, there is no end in sight." *Browning*, 2020 WL 2306566, at *3. As one court noted in late June 2020 (over three weeks after the June 4, 2020 Notice was sent), "there was no indication that the prohibitions" in place in New York as of May 2020 "would be lifted by" even as late as October 2020. *Nelkin v. Wedding Barn at Lakota's Farm, LLC*, 72 Misc. 3d 1086, 1094 (N.Y. Civ. Ct. Queens Cty. June 29, 2020).

A bright-line rule requiring a commercial retailer to vacate a flagship store in June 2020 (or in the midst of a potential future pandemic or other instance of fundamental societal disruption) would have imposed unacceptable public health and safety risks on retailers (including *amicus*'s constituent members) and their personnel. *Amicus*'s members are aware, and seek to ensure that this Court is aware, that vacating such a flagship store—a space with unique designs, bespoke

interiors, and signature external architecture[12]—requires a massive commitment of in-person, on-the-ground personnel-hours[13] to leave the space "broom clean."[14] Virtual walkthroughs of such stores[15] highlight these stores' "interactive displays," "lavish decor," "sleek finishes," and "entertainment offerings" far beyond the finishings found in typical stores, even under the same banner.[16]

Amicus urges this Court—aided by reference to these video walkthroughs—to carefully consider what retailers and their employees and personnel would have had to do to "vacate" such a store and leave it "broom clean" in June 2020.

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[12] Karinna Nobbs, Christopher Moore & Mandy Sheridan, *The Flagship Format Within the Luxury Fashion Market*, 40 INT'L J. OF RETAIL & DISTRIBUTION MGMT. 920, 924-25 (2012).

[13] R-385 (Vacating the flagship store in this case "encompassed more than 2,500 man-hours from store staff, as well as another 1,900 man-hours from maintenance workers removing items and debris" from the flagship store).

[14] R-123-124.

[15] *Inside Nordstrom's newest experiential flagship in NYC*, YOUTUBE.COM (Oct. 25, 2019) ("Tour of Nordstrom's Flagship Video"), https://www.youtube.com/watch?v=4EcZU2vEYPk; *see also A Full Store Tour Of The Former Neiman Marcus at the Shops & Restaurants At Hudson Yards in NYC*, YOUTUBE.COM (Sept. 11, 2020) ("Tour of Neiman Marcus Flagship Video") https://www.youtube.com/watch?app=desktop&v=_lUTW454wfw.

[16] Robert V. Kozinets *et al*., *Themed Flagship Brand Stores in the New Millennium: Theory, Practice, Prospects*, 78 J. OF RETAILING 17, 20, 24, 28 (2002); *see also* Pierre-Yann Dolbec & Jean-Charles Chebat, *The Impact of a Flagship vs. a Brand Store on Brand Attitude, Brand Attachment and Brand Equity*, 89 J. OF RETAILING, 460, 464 (2013); Veronica Manlow and Karinna Nobbs, *Form and Function of Luxury Flagships*, 17 J. OF FASHION MARKETING AND MGMT. 49, 60 (2013).

Retailers would have had to call in dozens, if not more, of their employees and personnel, at least most of whom were on furlough,[17] to come into New York City and enter the flagship store. These employees would have then had to work with little or no physical distancing, in an enclosed indoor space for weeks, to completely vacate the space, which would have involved not just removing rooms upon rooms of inventory,[18] but uninstalling and removing, among other things, escalators;[19] elevators;[20] floor-to-ceiling screens;[21] dozens of merchandise displays;[22] interactive and augmented reality stations;[23] interior and exterior branding;[24] and more.

This Court should also be reminded—as it references the virtual walkthroughs and considers what physically vacating such a retail store in the midst of a pandemic would have looked like—that COVID is particularly transmissible among individuals in an enclosed space, even when they are wearing

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[17] *See, e.g.,* Sapna Maheshwari and Michael Corkery, *U.S. Retail Crisis Deepens as Hundreds of Thousands Lose Work*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/business/coronavirus-retail-furloughs-macys.html

[18] *See generally* Tour of Nordstrom's Flagship Video, *supra* n.15.

[19] *See* Tour of Nordstrom's Flagship Video, *supra* n.15, at 0:04-0:05; *see also* Tour of Neiman Marcus Flagship Video, *supra* n.15, at 0:44.

[20] *See, e.g.*, Tour of Neiman Marcus Flagship Video, *supra* n.15, at 2:24

[21] *See* Tour of Nordstrom's Flagship Video, *supra* n.15, at 0:48-0:50.

[22] *See id.* at 0:13, 0:22, 0:55-0:56.

[23] *See id.* at 0:24-0:40.

[24] *See id.* at 0:02.

masks. Research has shown that particles containing COVID can "remain airborne for hours" in a room or indoor space.[25] And some of the critical factors that could increase the risk of infection include "[b]eing indoors rather than outdoors"; "[a]ctivities that increase emission of respiratory fluids, such as speaking loudly, singing, or exercising"; and "[p]rolonged time of exposure (e.g., longer than a few minutes)."[26] All of these would have been serious risk factors for anyone vacating a flagship store (including uninstalling and removing escalators, elevators, and more) in June 2020 or under similar circumstances in a future pandemic.

CONCLUSION

Amicus respectfully requests that this Court *deny* Landlord's request for a rule that would have required Retailers to vacate the flagship store at issue as of June 2020, and would effectively require future retailers, in this pandemic or the next, to immediately be put to the challenge of vacating a similar flagship store despite the clear public health and safety risks involved. *Amicus* instead urges this Court to conduct a careful case-by-case evaluation of whether such a *de facto* eviction would have been proper, as a matter of public health, public safety, and public policy, under the circumstances of each case.

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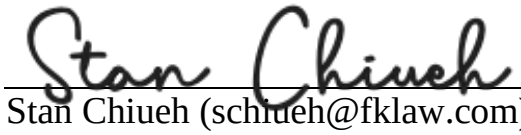
[25] *See, e.g., Indoor Air and Coronavirus (COVID-19)*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19#:~:text=Transmission%20of%20COVID%2D19%20from,for%20hours%20in%20some%20cases

[26] *See id.*

Dated: New York, New York
July 8, 2022

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP



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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 1250.8 that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14, except 12 for footnotes
Line spacing:	Double, except single for point headings, block quotes, and footnotes

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, and any authorized addendum containing statutes, rules and regulations is 2,601.

Dated: New York, New York
July 8, 2022

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
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EXHIBIT B

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

Assigned Justice
Hon. Andrew S. Borrok, J.S.C.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiffs Victoria's Secret Stores, LLC successor in interest to Victoria's Secret Stores, Inc., L Brands Inc., successor in interest to the Limited, Inc., and Intimate Brands, Inc. ("Plaintiffs"), hereby appeal to the Appellate Division of the State of New York, First Department, from the Decision and Order of Hon. Andrew S. Borrok, J.S.C., dated July 22, 2021 and entered in the office of the Clerk of the Court on July 23, 2021, and this appeal is taken from each and every part of that order, as well as from the whole thereof.

Dated: New York, New York
August 11, 2021

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 53

- X

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.

- X

Index No. 651833/2020

July 21, 2021
Microsoft Teams Proceeding

B E F O R E: THE HONORABLE ANDREW BORROK, Justice

A P P E A R A N C E S:

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HOWARD S. KOH, ESQ.

Terry-Ann Volberg, CSR, CRR
Official Court Reporter

tav

THE COURT: Victoria's Secret Stores, LLC et al v. Herald Square Owner LLC, Index Number 651833/2020.

Your appearances for the record, please.

MR. MACK: William Mack, Davidoff Hutcher & Citron, for the plaintiffs. With me is my colleague, Matthew Yogg.

MR. MEISTER: Stephen Meister, Meister Seelig & Fein, for the defendants. I will allow my colleague to state his appearance.

MR. KOH: Howard Koh, Meister Seelig & Fein, also for the defendant.

THE COURT: Good morning to all of you.

A couple of things before we get started: First, I would ask when you are not speaking that you please mute your microphone, it will reduce the possibility of feedback which will make my reporter's life more manageable. Our reporters work very hard here in New York County, we appreciate everything that they do, and I appreciate you extending that courtesy to them as they record the record that we will work diligently together to develop. Secondly, I would ask that at the beginning of your presentation if you could please let me know if you would prefer for me to wait until the end of your presentation to the extent that I may have questions, I may not have questions, but I would

like you to let me know what your preference is. I will do my best to try to accommodate your preference, but, in any event, I'm prepared to hear the motion.

I will note a couple of things for the record. Following my decision as it relates to the plaintiffs' claims, Judge Swain in the Southern District addressed I think the very issues that are at stake here today in the Gap decision particularly when Judge Swain wrote at the end of her decision, "The Court finds and declares based on the undisputed facts of record that the Lease was terminated by Ponte Gadea effective June 15, 2020, and that Ponte Gadea's entitled pursuant to Section 25.2 of the Lease to payment for holdover occupancy from that date." I realize that our date is not June 15, June 8th, but it strikes me as that's the starting point of our conversation today.

You're up, Mr. Meister.

MR. MEISTER: Good morning, your Honor.

Your Honor, I would prefer that you actually interrupt me with your questions, and I am largely going to actually ask you if you have questions because I feel our briefing is thorough and that I can rely on it.

So I would start out as a threshold matter by pointing out that none of the underlying calculations are in dispute, in other words, as your Honor is well aware we received two checks after your Honor's January 7th decision,

a larger one and a smaller one on interest, and we then applied that to past charges as described in our briefing.

Our briefing includes, in I think painstaking detail, those charges. There's a chart that's included in the briefing, and so there are no calculational disputes here. We have worked hard to present to the Court in this motion sequence an application that is free of factual controversy. We are seeking only the holdover damages and interest, we are not seeking in this application legal fees, electric charges which might have involved some controversy or obviously any charges following February 20th. So I just want to point out again as a threshold matter that there are no disputed facts, just the issues of law raised by the briefing.

The primary argument, in my view, that the plaintiff makes is that the executive orders issued by Governor Cuomo following the onset of the pandemic somehow invalidate the notices to cure and the follow-on termination notices in this case. We don't think that is a legally correct argument.

THE COURT: Wasn't that addressed necessarily by the decision that I just identified, Judge Swain's decision from the Southern District?

MR. MEISTER: It was certainly addressed in Judge Swain's decision as you pointed out.

THE COURT: I realize I said -- I misspoke, I said 8th as opposed to the 18th, but in terms of the termination, I understand what you're saying.

MR. MEISTER: Yes, there was an early termination in the Gap case that Judge Swain handled, and it was during the COVID pandemic, and there was a holdover damages clause, and it was enforced. And this issue has been raised in other courts of coordinate jurisdiction, we have cited those cases, and I don't think I need to clutter the record now with repeated citations to what's already in the briefing.

The executive order says there shall be, this is 202.28, there shall be no initiation or enforcement of an eviction of any commercial tenant for nonpayment of rent. This is not an eviction proceeding so the executive order does not in our view bar the contractual remedies that we have exercised.

A secondary argument related to that argument is that, is that the executive orders barred the removal of merchandise and branding that Victoria's Secret had in the store. We don't think that argument is availing either for two reasons. One is, under New York law the surrender of a premises does not require that the premises be delivered, you know, free and clear of everything and broom clean as the lease may require. There may be a surviving claim for the delivery in that condition, but they could have

surrendered. And, by the way, the courts reopened May 25th, and obviously the stores were opened in June, and they continue to holdover for many, many months after that, and they are continuing to holdover, so we don't think that argument is availing, and I think it was also the situation in the Gap case with Judge Swain.

They make, I guess, a third related argument that the Yellowstone relief was not available to them. That's not true. The courts were open, as your Honor is very well aware, to essential filings at all times, and, in any event, on May 25th became open to nonessential filings. On that very day they filed the case seeking recision, they didn't seek a Yellowstone. I think it's clear they didn't seek a Yellowstone because they didn't want to pay, and obviously they would have had to bond and/or pay U&O going forward.

They argue that the liquidated damages clause which is three times is unenforceable. There are many cases including appellate authorities that hold otherwise in the First Department. We have --

THE COURT: Let me go back to your fixtures point.

Doesn't the lease -- I know you don't, no one addresses it in the briefing, but doesn't the lease specifically discuss what happens with respect to trade installations in the lease, and if the tenant elects not to remove, and how can the landlord treat it, and all of that

sort of thing?

MR. MEISTER: Yes, it's all addressed.

THE COURT: Isn't it specifically addressed in, I mean, in the lease itself?

MR. MEISTER: Yes, it is. That's my point, that they could have either said to themselves, well, it's very important to us that we preserve this merchandise and branding so we will pay the holdover damages, or the holdover damages are high, we will abandon these assets and they will be dealt with as provided in the lease according to the landlord right that were bargained for and negotiated in the lease and the clauses you're referencing.

THE COURT: The landlord could have given notice of its intent to the require removal --

MR. MEISTER: Yes, exactly.

THE COURT: That's the alterations provision of the lease, it specifically governs how this works.

MR. MEISTER: Exactly, your Honor.

THE COURT: Yes.

MR. MEISTER: Just trying to move on and get done quickly, then the next argument they make --

THE COURT: I will being doing paying client work without the fear of collections no matter what we do. I am here. If you need more time, you take your time, sir.

MR. MEISTER: Thank you, your Honor.

So the three times liquidated damages clause has been upheld by the Appellate Division, it was a Second Department case in the Federal Realty case that we cite, it was upheld by the First Department in the Teri-Nichols case which we cite, and a similar clause, not exactly the same, was upheld by Judge Swain in the Gap case that you recognize. There is a recent Justice Ostrager case, a trial level case, Teriyaki, that we cite, that upheld it.

So we are going to rely on our briefing there. We think that it was a reasonable estimate of damages at the time. The lease was signed in 2001. So it was a long-term lease. So we will just rest on our briefing on the --

THE COURT: I have one question, before you rest on your brief.

There is one thing raised in the opposition papers that the tenant was somehow prejudiced by virtue of engaging in potential settlement discussions with the landlord under the circumstances. It strikes me as you may want to address that.

MR. MEISTER: No, I was -- I wasn't clear. I meant to say I was resting in respect of the three prongs argument.

THE COURT: I'm sorry.

MR. MEISTER: No problem. So I will get to that. Let me do that right now.

So they do argue as you say, your Honor, that there were settlement discussions. We don't --

THE COURT: Why does that argument fail?

MR. MEISTER: Well, it fails for two reasons: One is that CPLR 4547, I think, prevents them from relying on the substance of those offers, but, more importantly, there's a pre-negotiation agreement that we signed in July of 2020 that very, that explicitly says they can't rely on any of these conversations, and so they knew that when we were having these conversations they weren't allowed to rely on them, and they continued to holdover in the face of these conversations.

So we certainly should not be, my client should not be prejudiced or disadvantaged because it held good faith settlement discussions including because the Court suggested appropriately that we do that. So we took the care to sign a pre-negotiation agreement, it is in the record, and we think it bars this argument.

THE COURT: Well, I would ask, additionally, I take it, that you're only in this situation by the inappropriate withholding of the rent in the first instance?

MR. MEISTER: Yes.

THE COURT: So how could you come forward and say, hey look, we owe you a ton of money, and we were willing to talk to you about taking some de minimis percentage on the

dollars that we owe, and because you were willing to talk to us about that we are now prejudiced as a result of your good faith willingness to talk to us about our pennies-on-the-dollar offer as it relates to the settlement?

MR. MEISTER: Exactly. Understand that SL Green -- look, Victoria's Secret, we congratulate them, L Brands, has done very well, their stock is doing very well, they were withholding until February, following your decision in January, all the rent. We were paying, my client was paying taxes, and a mortgage, and we were out-of-pocket millions and millions of dollars, and so, yes, we engaged in these conversations hoping they would bear fruit. They didn't, but we did take the precaution of signing a PNA which, as you know, your Honor, I know your background, you know this is a standard operating procedure in any relationship, landlord-tenant, borrower-lender, when this kind of situation presents itself.

So I would move on.

There's kind --

THE COURT: One last thing and then I think we are good, I will let Mr. Mack make his record, which is the notion of the endorsing the continued tenancy as it relates to the potential easement.

MR. MEISTER: Yes. So that's that Ulta easement, I think you are referring to, U-L-T-A.

THE COURT: Yes.

MR. MEISTER: There is a Recital F in the Ulta easement, Exhibit G to the Matthews affidavit, NYSCEF Document Number 83, which expressly provides, it references this very litigation.

THE COURT: It more than references the litigation, I know that's the way you talk about it in your papers, it's actually well-crafted. It says, "Any rights conveyed in this agreement thus are conveyed only to the extent that grantor has good and valuable lease of all title to the premises a matter which is at issue in the litigation." So it's more than it recognizes the fact that there's litigation. The language that was acceptable under the circumstances for the landlord's consent specifically said okay, but only to the extent that you have rights which essentially we don't think you do, is essentially what it is that that's saying, in sum and substance.

MR. MEISTER: That is what it says, and I guess just to wrap up my record, there's an argument of waiver by virtue of some rent bills. There's --

THE COURT: There's no waiver clause in the lease.

MR. MEISTER: It's Article 24 and it's been specifically upheld.

THE COURT: Right, I have it in writing.

MR. MEISTER: So unless your Honor has further

questions, we would --

THE COURT: No, I'm good.

MR. MEISTER: Okay.

THE COURT: Mr. Mack, I will let you make your record.

MR. MACK: Thank you, your Honor. Good morning.

At the outset, liquidated damages clauses are not uncommon, they are certainly not, but to be enforceable you need to at least have some measure of damages. Here we have a landlord that's been paid in full. They have been paid their rent, they have been paid any late fees or interest that was due and owing by virtue of any late payments, they are receiving monthly payments going forward, and they have full possession of the premises since February of this year. We are here only because landlord is seeking to, for lack of a better word, extract a pound of flesh as a punishment for the tenant's prosecution of an action seeking rescission.

Under New York law anyone seeking to enforce a liquidated damage provision though has to have been damaged. Just last year the First Department refused to enforce a liquidated damages clause because the party seeking to enforce that clause did not identify to the motion court any damages that they sustained as a result of the breach. That was the Rubin v. Napoli Bern case, First Department, last year. We pointed this out in our briefing, and the landlord

didn't even attempt to articulate any damages that they have suffered. They submitted a lengthy affidavit from a senior executive at SL Green, and if they had been damaged in some way I would have expected to see some assertion that, oh, hey, we had a potential deal that fell through because you had possession of the property still or we had some other use to which we wanted to put the property in, we couldn't do that because you were still in possession, but there's nothing in the record even suggesting that they have been harmed at all. That should be the end of the analysis as far as a liquidated damages clause is concerned.

Even if the landlord had articulated some de minimis measure of damages, that would, that would still be unenforceable as unconscionable. They are seeking -- $22 million is an awful lot of money when they have not even bothered to assert that they have been harmed in any way, and so, you know, even if there had been some de minimis damage, I submit that amount is grossly disproportionate to the amount of actual damages which renders the clause unenforceable under New York law. They have not responded to that argument in their reply brief.

I will also turn to the question next of the fact that any damages sought here under this clause are duplicative of what the landlord could have sought under the specific language of 21(b). So the only potential damages

here are lost opportunities, okay, somebody wanted to lease the space. That's already provided for in the lease at Section 21(b), it provides them the opportunity to seek actual damages for any such losses. And the landlord cites this, let me get the name of the case for you, Federal Realty v. Choices Women's Medical Center, for the proposition that you can kind of have both clauses and still reap the liquidated damages provision, but there the Court upheld the liquidated damage solely because "The record is devoid of evidence that the amount of liquidated damages to which the parties agreed is grossly disproportionate to the plaintiff's actual loss." We don't have that here. We have a situation where the landlord has not come forward with evidence of any loss in light of our assertion that there's been no loss at all so that leaves us with a liquidated damages clause that can be for no other reason other than to expound a penalty upon the tenant.

They do state in their papers that this is meaning to provide them with compensation for a trespass of sorts, but that, of course, that's a tort damage, that has nothing to do with what we are talking about here, and, in any event, the holdover provision states that the parties recognize the damage to landlord resulting from failure by the tenant to surrender, that's what they are talking about, they are not talking about a benefit to me. So the

landlord's claim that we had a place to store our inventory and our branding, that does not apply to the liquidated damages clause either.

So I'll address the additional public policy arguments of why this clause is unenforceable. This was not an ordinary circumstance by any stretch. This lease was terminated. The Notice of Termination that the landlord sent was sent in June of 2020. That was still the height of COVID. We still had tractor trailers full of --

THE COURT: I'm sorry to interrupt on that point, but how is that any different than the termination in the Gap case that Judge Swain decided? Wasn't that Notice of Termination also sent in 2020?

I mean, I will let Mr. Meister address the damages point, I will give him an opportunity to do that, but on this point I do want to jump in. Isn't that within days of the termination notice that Judge Swain was faced with?

MR. MACK: I am glad you brought that up, Judge. I had in my notes to address the Judge Swain decision.

The Gap decision does not address or grapple with any of the arguments that we are making in this case. It's a one line conclusory claim, and the Court does not analyze really anything that we are discussing here today.

THE COURT: Wait a minute. I'm sorry. I thought that the Court did decide to grant judgment in favor of the

counterclaims on the issue of whether or not the legal was validly terminated and whether or not the landlord was entitled to holdover rent, and my question as simply as it relates to the timing of the termination notice. Wasn't it within days of the termination notice that was sent here, just days?

MR. MACK: I believe it was in June 2020, Judge. I would also note that that is not a court -- not a New York State court.

THE COURT: I understand. She is a chief in the Southern District. I mean, she's an important, thoughtful judge. I think that that decision may have been followed recently by the First Department on the issue of frustration of purpose. I think that the First Department recently -- albeit for a different proposition, fair, but I think that the First Department has looked to Judge Swain's decision in Gap for a different purpose, respectfully.

MR. MACK: And respectfully, Judge, it was one line in a decision from a federal court without any analysis of holdover whatsoever.

THE COURT: I think she is a pretty thoughtful judge. I am sure she wouldn't put -- you know, some people say that brevity is a sign of, you know, intelligence and all of that, Mark Twain certainly thought so, so I wouldn't put too much into the fact that it took Judge Swain one

line, as you say, what it may have taken many of us five or six to compose.

MR. MACK: Well, Judge, I don't know whether that --

THE COURT: I don't mean to be sending adoration to Justice Swain who I do have a lot of respect for, but -- okay.

MR. MACK: Judge, I could see if the Court had engaged in some analysis of the damages question or if there had been some analysis of the public policy implications of requiring a mass mobilization of workforce to get a store like the Gap or a store like Victoria's Secret out at the height of -- COVID was still a very, very real thing in June 2020, and that's the point I wanted to address next.

Liquidated damages clauses are also unenforceable when they fly in the face of public policy, and here if the tenant were really forced to choose between treble rent and vacating the space, that would have required a mass mobilization of workforce. It took us 4500 hours --

THE COURT: You didn't have to make that choice. The choice was necessitated solely by your default under the lease and your failure to cure. And what you could have -- I mean, there are a hundred different things that the tenant could have done under this situation notwithstanding the fact that there was an express bargain in place that

addressed this very issue which your client violated. And one of the things that it could have done is, it could have paid the rents and say we are paying the rent, but reserving our rights with respect to paying the rents. It could have done a whole host of things. The fact is it didn't do any of those things.

So now to come forward and say we were put in this Hobson's choice, I mean, it's ludicrous, respectfully. This choice is created by our own action or inaction as it relates to your obligations that you expressly agreed to under the lease. This wasn't like a lot of leases where the lease was silent as it relates to, you know, what could potentially happen if there was an executive order that came down that potentially in response to a health crisis affect your potential customers ability to come to the store. Here there was an express agreement as to how that was going to work, and your client made certain choices based on its -- I mean, made certain choices ignoring the language of the lease that it had expressly agreed to, and now to say, well, we are choosing between vacating and -- I mean, it's ludicrous. I mean, this is not a close call.

MR. MACK: It doesn't change the fact that there's no damages.

THE COURT: Well, I'll let Mr. Meister address that, but it strikes me as, you know -- well, I will let him

address that issue, but you're in a difficult spot to make an equitable argument when you come in having no clean hands but I will certainly let him address the issue of the damages more head-on, but that's just not, respectfully, it's not fair in the assessment of the situation.

MR. MACK: Well, I will say that we came to the situation in light of executive orders barring enforcement of eviction, and I submit that treble rent in light of the overwhelming public health concerns at the time, enforcement would render this liquidated damages clause in violation of public policy. I understand your Honor disagrees, but that's our position.

THE COURT: I do, I think this is a willful breach. I think this is a knowing, voluntary and willful breach, and I think to come in and say that we shouldn't have to pay the understood and agreed upon damages under the circumstances is, quite frankly, outrageous or that we are prejudiced because they wouldn't settle with us, I think the argument is just, I think it's outrageous.

MR. MACK: Well, when the landlord -- I will pivot to the pleading argument that we advanced -- when the landlord responded to our complaint they never asserted this measure of damages in their papers. The very first time we learned of it was the filing of this motion.

We cited a leading New York treatise which

explains that a party cannot recover liquidated damages if it does not assert liquidated damages in its pleading. The landlord, of course, argues to your Honor that notice pleading allowed them to simply state that they were entitled to a measure of damages in excess of $25 million, but the cases that they cite, none of them concern a failure to allege liquidated damages. The CAE case that they cite involves failure to allege the specific nature of consequential damages, and the Seaport Global case that they cite says that the party seeking money damages is not required to present a computation of damages. That's not what we have here. We have here a failure to allege liquidated damages when such pleading was required.

And then your Honor has addressed to a degree the equitable estoppel arguments that we raise, and, you know, we are in a situation where the landlord issued its termination notice of whatever validity, but later sent bills failing to seek treble rent. They never suggested that we were improperly holding over. These discussions that took place which were active and in depth toward a new deal, the Ulta agreement, these issues at best create an issue of fact. If the landlord demands that the tenant quit and surrender via the June notice, but later communicates through outward conduct that the tenant is no longer required to do so, then there's at best an issue of fact as

to whether that demand has been overridden by subsequent actions.

And I believe that covers all the points that I wanted to make to your Honor today, but if there is anything else that the Court would like to discuss, I would be happy to address them, and we rest on our brief.

THE COURT: Thank you.

Mr. Meister, I said I would give you the chance to talk about -- I kind of steered our conversation.

MR. MEISTER: Yeah, I would like to, I think, address three points: The Rubin case, the damages don't exist issue, and the pleadings issue.

So the Rubin case which I had out a moment ago is inapposite because that case was a case where an employee had signed a confidentiality clause, and there was apparently a liquidated damages provision for the violation of the confidentiality clause, and the First Department in this recent decision, it was a January 2020 decision, said, well, putting aside whether it's an unenforceable penalty, there was no damage from the disclosure. That's very different than our situation.

There's a long, long history of the New York courts enforcing holdover damages clauses in leases. That's a completely different context and a violation by an employee of a confidentiality clause. We cite to a Second

Circuit case from 2005, Third Avenue case, in which the Court said "The New York Court of Appeals has recently cautioned courts against interfering with liquidated damages provisions," meaning referring to holdover clauses in leases, citing JMD Holding v. Congress which was a Court of Appeals case. Obviously you have the Judge Swain case.

The law is very clear that in the context of a lease, especially a long-term lease, this lease was signed in 2001, here we are, it's, let's call it, 2020 when these events occurred, almost two decades later, the time to measure this is 2001, that's when the parties sat down and said, hey, we don't know what's going to happen in 20 plus years, in March of 2023 --

THE COURT: Right, but also didn't the notices to cure expressly provide that, when Mr. Kessner signed these letters, didn't he say specifically that you shall remain liable, you should be required to then quit, surrender the premises, but you shall remain liable as provided for in the lease? I don't know how it could have been any more crystal clear than that, that you're going to be responsible if you don't leave to have to pay holdover rent than the actual termination notice telling you that you are going to have to do that.

MR. MEISTER: Look, look, it's so simple, right. They're a 16 billion-dollar company. They had a bunch of

options. They could have paid rent in accordance with the, you know, the contract rate, not the holdover rate, and reserved their rights, okay.

THE COURT: I said that before.

MR. MEISTER: Right, or they could have, you know, paid to a date and gotten out, and then, of course, not have been liable as a holdover, they would have been liable through the conclusion of the term, but they wouldn't, as the notices said, as your Honor just mentioned, that's explicitly in both notices. So I don't see how it could have been made more clear, but for whatever reason, and I don't know the reason, I have some speculation, but, you know, they were dealing with Sycamore Partners, they were trying to preserve this brand. I don't know what they, what was going through their heads, but they made a voluntary -- this is a sophisticated board, thousands of stores, a lot of wealth, and they made a decision to stop paying and to not leave the premises, and now they just have no business griping about living up to their contract.

So we don't think the Rubin case is apposite. We don't think -- we think the damages discussion is as of 2001, and, in any event, when they held over we couldn't show the space, we couldn't talk to prospective tenants so we were damaged, and I think it's just fanciful to think that Judge Swain handled a case in COVID with Gap, with

almost the same date terminations, and did not consider the public policy arguments because she wrote a brief portion of her decision on this. Of course she did, she considered them. There's no -- the briefing that the Gap put in is not in the record. So we think these arguments fail.

Finally, with respect to the pleading, I would just respectfully point out that paragraph 135 of our answer, affirmative defenses and counterclaims --

THE COURT: Give me a minute to get there. Remind me of the NYSCEF number.

MR. MEISTER: It's six.

THE COURT: Six?

MR. MEISTER: Yes, sir.

THE COURT: Sorry. I had a lot of this stuff open. I didn't remember to keep that open for our conversation. I apologize for that. As you know, I am pretty good at having these things open where I think the conversation will go, but this one, I submit, I didn't keep open. 135?

MR. MEISTER: Yes, sir, 135.

THE COURT: I'm there. Page 15.

MR. MEISTER: Yes, sir.

So paragraph 135 says, "These counterclaims seek recovery from tenant or from guarantor for certain monies owed as rent and/or damages under the parties lease in

connection with the termination of that lease following the tenant's default in the payment of rent." I mean, that is a sufficient pleading. We call out rent and/or damages, this is holdover damages.

And then in paragraph 151 of the same document which is on page 20 we point out that on May 25th which was the date that the court reopened to nonessential filings, tenant and L Brands filed this action seeking rescission, and then there's a footnote five, and the footnote reads, "A tenant can only seek rescission if and after it has surrendered the premises," and then we cite to the Edgar Levy case, an older case, that I think says that you can't seek rescission if you are still in possession on when it's a lease.

And, you know, I don't want to take up more time, but in their reply, they filed a reply which is document NYSCEF 45, they refer explicitly to these allegations, and they, you know, they deny them or they state that they assert conclusions of law, but the point is, there's a sequence of pleadings that shows that we sought rent or damages and that they responded to those pleadings, and, of course, in the notices themselves, in the cure notices, the two, obviously one for retail, one for office, and the follow-on termination notices in the months of May and June of 2020, as your Honor said, and I think all four notices we

said if you continue to holdover, you're liable as provided in the lease.

So, finally, there is in the record a December 2020 letter, I don't know if I have the NYSCEF number handy, but there's a letter in the record from Mr. Mack to me in which he complains about the holdover, and that's back in December before your Honor's decision the following January. This is, it's Exhibit D to my affidavit. Pardon me, but I don't have that NYSCEF number handy. He is talking about basically the same theories or defenses that he has raised in his pleadings here. So it's very clear that there was a complete understanding on the part of the plaintiffs here.

THE COURT: I don't know that it matters whether they understood it or didn't understand it, the fact is that it's contractually provided for. As you say in your papers, you gave notice that you were seeking rent and/or damages that's provided for in the lease.

Mr. Mack, is there anything else you would like to address for the record?

MR. MACK: Just, your Honor, that we still have not heard any description of any damages. That's all. That's required.

The fact that the Napoli case dealt with a different type of contract does not change the principles of

law.

THE COURT: They have told you that they couldn't, they couldn't show the space, they couldn't get into the space, it wasn't available to them to --

MR. MACK: That's not in the record anywhere, Judge, that's Mr. Meister arguing here.

THE COURT: It's obvious because your client was in possession. I understand --

MR. MACK: Then Mr. Kessner should have said that in his affidavit.

THE COURT: It's not disputed that your client was not out of possession of the premises. I mean, that's part of what you have put into the record as it relates to these "fixtures" which is dealt with explicitly in the lease.

(Continued on next page for certification.)

THE COURT: (Continuing) Mr. Meister, you can submit a judgment on notice. Upload a copy of the transcript. Please order it from Ms. Volberg, and I will so order the transcript so that Mr. Mack can go to 25th Street if he so chooses.

MR. MEISTER: We will submit a judgment.

THE COURT: Thank you.

Off the record.

(Discussion off the record.)

***

C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

[redacted]

Terry-Ann Volberg, CSR, CRR
Official Court Reporter

So ordered:

7/22/2021

HON. ANDREW BORROK J.S.C.

tav

[redacted]

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

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.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- [x] Civil Action
- [ ] CPLR article 75 Arbitration
- [ ] CPLR article 78 Proceeding
- [ ] Special Proceeding Other
- [ ] Habeas Corpus Proceeding

Filing Type

- [x] Appeal
- [ ] Original Proceedings
  - [ ] CPLR Article 78
  - [ ] Eminent Domain
  - [ ] Labor Law 220 or 220-b
  - [ ] Public Officers Law § 36
  - [ ] Real Property Tax Law § 1278
- [ ] Transferred Proceeding
  - [ ] CPLR Article 78
  - [ ] Executive Law § 298
- [ ] CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

[ ] Administrative Review	[ ] Business Relationships	[ ] Commercial	[x] Contracts
[ ] Declaratory Judgment	[ ] Domestic Relations	[ ] Election Law	[ ] Estate Matters
[ ] Family Court	[ ] Mortgage Foreclosure	[ ] Miscellaneous	[ ] Prisoner Discipline & Parole
[x] Real Property (other than foreclosure)	[ ] Statutory	[ ] Taxation	[ ] Torts

Appeal

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	☐ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☑ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 07/22/2021	Entered: 07/23/2021
Judge (name in full): Hon. Andrew S. Borrok, J.S.C.	Index No.: 651833/2020
Stage: ☑ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☑ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Plaintiffs Victoria's Secret Stores, LLC, L Brands Inc., and Intimate Brands, Inc. ("Plaintiffs") hereby appeal from that part of the Decision and Order of Hon. Andrew S. Borrok, J.S.C., dated July 22, 2021 and entered in the office of the Clerk of the Court on July 23, 2021, which granted the motion of defendant Herald Square Owner LLC ("Defendant") for partial summary judgmnet and awarding Defendant liquidated damages in the amount of $23,670,889.79.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The court below erred in determining that Defendant was entitled to liquidated damages from Plaintiff by virtue of Plaintiffs' alleged holdover of the subject leased premises because, among other reasons, (a) Defendant suffered no actual damages or harm as a result of Plaintiffs' alleged holdover, (b) the liquidated damages is an impermissible penalty by virtue of, among other things, the fact that the subject lease permitted Defendant to seek liquidated damages and actual damages for Plaintiffs' alleged holdover of the subject leased premises, (c) Defendant failed to plead or otherwise request liquidated damages from Plaintiffs in its answer with counterclaims, and (d) Defendant is equitably estopped from enforcing the holdover provision's liquidated damages clause as a result of its overt actions and forbearances.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Victoria's Secret Stores, LLC	Plaintiff	Appellant
2	L Brands Inc.	Plaintiff	Appellant
3	Intimate Brands, Inc.	Plaintiff	Appellant
4	Herald Square Owner LLC	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: William H. Mack, Esq. of Davidoff Hutcher & Citron, LLP			
Address: 605 Third Avenue, 34th Floor			
City: New York	State: New York	Zip: 10158	Telephone No: 212-557-7200
E-mail Address: whm@dhclegal.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1, 2, and 3			
Attorney/Firm Name: Stephen B. Meister, Esq. of Meister Seelig & Fein LLP			
Address: 125 Park Avenue, 7th Floor			
City: New York	State: New York	Zip: 10017	Telephone No: 212-655-3551
E-mail Address: sbm@msf-law.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 4			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

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 Assigned Justice Hon. Andrew S. Borrok, J.S.C. **AFFIRMATION OF SERVICE**

MATTHEW R. YOGG, an attorney admitted to practice in the Courts of the State of New York, affirms the truth of the following under penalties of perjury:

On August 11, 2021, I caused to be served on Herald Square Owner LLC successor in interest to 1328 Broadway, LLC, by and through its counsel, the annexed **Notice of Appeal** and **Informational Statement** completed pursuant to 22 NYCRR 1250.3(a) at the following address:

MEISTER SEELIG & FEIN LLP
125 Park Avenue, 7th Floor
New York, New York 10017

by causing the same to be deposited in a wrapper addressed as shown above, in an official depository under the exclusive care and custody of the U.S. Postal Service.

Dated: New York, New York
August 11, 2021

MATTHEW R. YOGG

652213v.1

NYSCEF Confirmation Notice

New York County Supreme Court

The NYSCEF website has received an electronic filing on 08/11/2021 06:28 PM. Please keep this notice as a confirmation of this filing.

651833/2020

Victoria's Secret Stores, LLC successor in interest to VICTORIA'S SECRET STORES, INC. et al v. Herald Square Owner LLC successor in interest to 1328 BROADWAY, LLC

Assigned Judge: Andrew Borrok

Documents Received on 08/11/2021 06:28 PM

Doc #	Document Type
106	NOTICE OF APPEAL, Motion #002

Filing User

Matthew Robert Yogg | mry@dhclegal.com | 2125577200
605 Third Avenue, 34th Floor, New York, NY 10158

E-mail Notifications

An email regarding this filing has been sent to the following on 08/11/2021 06:28 PM:

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