

Exhibit 5

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

THE GAP, INC. and OLD NAVY, LLC,

Plaintiffs,

-against-

44-45 BROADWAY LEASING CO., LLC

Defendant.

Index No.

COMPLAINT

Plaintiffs THE GAP, INC. (“Gap,”) and OLD NAVY, LLC (“Old Navy”) (together, “Tenants” or “Plaintiffs”), by and through their attorneys, Davis & Gilbert LLP, for their Complaint (the “Complaint”) against Defendant 44-45 BROADWAY LEASING CO., LLC (“Landlord” or the “Defendant”), state as follows:

NATURE OF THE ACTION

1. This action concerns Landlord improperly sending Tenants Notices of Default (the “Notices”) on June 16, 2020, attempting to terminate two leases, dated June 24, 2015, as amended and modified (the “Leases”) for basement, ground floor, and other retail premises (the “Premises”) in the building known at 1514-1530 Broadway, New York, New York (the “Building”). By serving the Notices, Landlord seeks to “terminate” the Leases and trigger default remedies that would attempt to leave Tenants liable to Landlord for hundreds of millions of dollars in future rent but deprive them of possession. This attempt by Landlord to “terminate” the Leases must be enjoined.

2. In addition, as part of this action, Tenants seek, among other things, rescission of the Leases, and a declaration that the Leases are unenforceable as a result of the COVID-19 pandemic and the related government-mandated shutdowns. Those shutdowns brought New

York City to a complete halt. Since March 2020, virtually all business and commercial activity has been at a standstill. The formerly burgeoning business of selling apparel from physical store locations has been non-existent. None of this was even remotely foreseeable. As a result, the purpose of the Leases has been completely frustrated, and the object and purpose of the Leases has been rendered impossible, illegal, and impracticable.

3. Before March 19, 2020, Tenants operated flagship Gap and Old Navy retail stores at 1530 Broadway, New York, New York, in the heart of Times Square. In exchange for the ability to operate their retail stores at this location, Tenants agreed to pay Defendant, *inter alia*, monthly rents exceeding \$3 million for the two stores (which, over the life of the Leases was scheduled to increase to more than \$4.5 million per month).

4. Tenants' decision to pay such enormous sums was based on the Building's extraordinary location. Before the COVID-19 pandemic, Times Square was considered one of the busiest, most trafficked, and most visible retail locations in the world. Known for generations as the "Crossroads of the World," Times Squares is easily accessed via New York City subway and bus lines as well commuter rail and bus service from the New York suburbs and beyond. In addition, these stores are located adjacent to where New York City and the rest of the world celebrate the coming of the New Year and where the world watches as the ball drops at midnight on New Year's Eve. As a result, Tenants' stores are often prominently featured in movies and commercials, and are seen by hundreds of millions of people on television and otherwise, providing a degree of advertising that is unmatched.

5. Indeed, Times Square has drawn an estimated 50 million visitors annually. Before the COVID-19 pandemic, approximately 330,000 people passed through Times Square daily, many of them tourists, while over 460,000 pedestrians walked through Times Square on its

busiest day. Plaintiffs would never have agreed to pay rent in excess of \$1.5 million per month for each of the Gap and Old Navy retail stores (increasing to \$2.3 million per month by the end of each lease term) without Times Square’s teeming sidewalks and hordes of eager shoppers. Defendant’s ability to demand such stratospheric rent was also based almost entirely on the Building’s highly visible location in the heart of Times Square.

6. But in March 2020, everything changed. New York City became a ghost town and overnight, retail activity in New York City came to an abrupt halt. The COVID-19 pandemic, unmatched in scope and unprecedented in duration, resulted in government mandates that changed New York City if not forever then for the foreseeable future. Because thousands of lives were at stake, Governor Cuomo and Mayor DeBlasio’s response to the COVID-19 pandemic was swift, severe and uncompromising. Since mid-March, emergency orders have mandated the complete closure of Tenants’ Times Square retail locations, and to this day, continue to prohibit non-essential retail establishments either from operating altogether or requiring them to operate in a manner drastically different from what was contemplated when these retail leases were negotiated. This shutdown utterly and irreversibly frustrated the purpose of the parties’ agreements, and rendered the object and purpose of the Leases impossible, illegal and impracticable.

7. While the parties might have imagined or even contemplated a certain ebb and flow to the economy, tourism habits, or even weather disruptions and closures, the COVID-19 shutdown is unlike anything ever before experienced in terms of its unpredictability, severity, duration, and impact on the retail industry. Surely, nothing like COVID-19 could have ever been foreseen.

8. Moreover, even when retail is eventually permitted to reopen, it will look nothing like it did pre-March 2020. Reopening will be phased over time with the possibility that stores may, intermittently have to be shut down again in the event of a sudden uptick in Covid-19 cases in New York City. Nobody can predict if or when Times Square’s 50 million annual visitors will return, or how social distancing and other governmental restrictions or even a second waive of the virus will impact retail.

9. COVID-19 cases continue to rise in many states across the country. Accordingly, businesses have been advised of extensive and mandatory guidelines they will need to follow to afford customers protection. Such restrictions are certain to negatively impact the behavior and comfort levels of customers willing to return to crowded retail shops and shopping areas. It is likely to be years before retail has even a chance to return to the pre-COVID form, which served as the bases for what both landlords and tenants relied on in agreeing to such enormous monthly rents.

10. The sudden suspension of retail operations at the Premises was unforeseeable and not contemplated by the parties at the time the Leases were executed. The purpose of tendering a monthly rent of over \$1.5 million (ultimately increasing to \$2.3 million) for each of the two Leases as been completely frustrated. That 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. As a result, the Leases were terminated as a matter of law on or before March 19, 2020, both under the terms of the Leases and the laws of the State of New York, and Tenants had no further obligation to pay rent or other consideration under the Leases.

11. In light of the foregoing, if Landlord’s attempt to “terminate” the Leases is not enjoined by this Court pending a determination on the merits as to whether Tenants are even in

default, or if the Leases have been frustrated or otherwise terminated as a matter of law, Tenants' rights under the Leases and New York law will be severely, and irreparably, impaired by Landlord's ability to exercise otherwise automatic remedies under the Leases that will leave Tenant facing judgments of hundreds of millions of dollars and no concomitant benefit from which to mitigate such a massive obligation.

PARTIES AND JURISDICTION

12. Plaintiff Gap is a Delaware corporation with its principal place of business in San Francisco, California.

13. Plaintiff Old Navy is a Delaware limited liability company with its principal place of business in San Francisco, California.

14. Upon information and belief, Landlord is a Delaware limited liability company, with an office located at 1530 Broadway, New York, New York. Upon information and belief, Landlord is also the owner of the Building.

ALLEGATIONS COMMON TO ALL CLAIMS

15. On or about June 24, 2015, Landlord and Tenants entered into two separate but largely identical Leases for the Premises, each for a term of 15 years to commence on the Commencement Date (as defined in the Leases) and end on June 30, 2032 (Old Navy) and July 31, 2032 (The Gap) respectively.

16. In 2015, monthly base rent for the Old Navy Premises was set at \$1.5 million and scheduled to increase every year thereafter such that by 2032, the monthly rent for the Old Navy space would increase to approximately \$2.3 million. Similarly, in 2015, monthly rent for the Gap Premises was set at \$1.4 million and scheduled to increase every year thereafter until 2032, when the monthly base rent was scheduled to be \$2.2 million.

17. The parties' mutual and express purpose in entering into these Leases was to provide Tenants with commercial retail spaces suitable for the operation of retail stores selling apparel.

18. For example, Article 4.1 of the Leases state in relevant part that Tenants "shall use the Premises . . . for the sale of apparel and accessories and, at Tenants' option, such other ancillary uses as are consistent with any of Tenants' other stores operating under the same trade name used by the then Tenant at the Premises and for no other purpose whatsoever."

19. But for the popularity of Times Square as one of the most visited and highly trafficked locations in the world and Tenants' ability to operate retail stores there, and the fact that the property is, by Landlord's own description, "spectacular and highly unique multi-level entertainment, dining and retail space," Tenants would not have entered into the Leases on the terms they did. Tenants' ability to operate retail stores at the Premises was the sole consideration Tenants received in exchange for entering into the Leases, all other nominal benefits of the Leases being a part of, and subordinate and ancillary to, that consideration.

20. On or about June 16, 2020 Landlord improperly sent Tenants the Notices, alleging that Tenants were in default under the Leases for failing to timely pay rent for May and June 2020 and indicating Landlord's intent to terminate the Leases without first bringing summary proceedings if the alleged defaults were not cured on or before June 29, 2020. (True and accurate copies of the Notices are attached to the accompanying affidavit of Jennifer Rondholz, Senior Director of Real Estate (the "Rondholz Aff.") as Exhibit 1.)

21. Tenants are not in default under the Leases and are accordingly seeking protection necessary to prevent Landlord from improperly attempting to terminate the Leases. If the Leases are improperly terminated by Landlord pursuant to the conditional limitation provisions of the

Leases, and Tenants lose their leasehold interests before adjudication on the merits as to whether the Leases have been frustrated or otherwise terminated as a matter of law, Tenants will suffer immediate irreparable harm.

22. Specifically, Tenants are not in default for failing to timely pay rent because they do not owe rent as of March 19, 2020, as the purpose for which they leased the Premises has been entirely frustrated as a result of the COVID-19 pandemic. Tenants' ability to operate retail stores at the Premises was the parties' mutual purpose in entering into the Leases, as all parties understood at the time of contracting that but for their right to operate such retail stores, Tenants would not have ever entered into these Leases. When Tenants were forced to suspend all retail operations at the Premises, the purpose of the Leases was frustrated and impossible to effectuate due to no fault of the Tenants, the Leases' object and purpose became impossible and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases.

23. Thus, not only are Tenants not in default for failing to pay May and June rent, Tenants are entitled to a refund of a prorated portion of the rent and expenses it paid for March and April 2020, declaratory relief regarding their obligations under the Leases, and the equitable remedies described below.

24. In addition, Landlord's Notices, which threaten to terminate Tenants' valuable leasehold interests, are a clear violation of both Governor Cuomo's Executive Order against Landlord taking actions in furtherance of evicting commercial tenants at least through August 20, 2020 as well as Section 1., Paragraph 11 of subdivision (a) of Section 22-902 of the Administrative Code of the City of New York (the "Commercial Tenant Anti-Harassment

Statute,” which prohibits a Landlord from threatening a commercial tenant who has seen its business impacted by the COVID-19 pandemic.

25. For purposes of the Commercial Tenant Anti-Harassment Statute, “impacted by Covid-19” means such person’s business was closed as a direct result of the COVID-19 state disaster emergency (the “Closure Requirement”); and either (i) it was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issue by the Governor or Mayor during the COVID-19 period (the “Occupancy Limitation”) or (ii) its revenues during any three-month period within the COVID-19 period (March 7, 2020 through the first month after the eviction moratorium) were less than 50 percent of its revenues for the same three-month period in 2019 or less than 50 percent of its aggregate revenues for the months of December 2019, January 2020, and February 2020 and such revenue loss was the direct result of the COVID-19 state disaster emergency (the “Revenue Reduction Requirement”).

26. From the inception of the Lease, Tenants maintained and operated retail apparel stores at the Premises pursuant to the Leases. At all relevant times, the Leases were in full force and effect.

27. On March 7, 2020, the Governor of New York issued Executive Order 202 declaring a disaster in the State of New York.

28. On March 12, 2020, the Governor issued Executive Order 202.1, requiring any place of business to operate at no greater than fifty percent occupancy.

29. Also on March 12, 2020, the Mayor of New York City issued Emergency Executive Order No. 98, declaring a disaster in the City of New York.

30. On March 16, 2020, the Mayor issued Emergency Executive Order No. 100 imposing restrictions on various types of retail operations.

31. On March 18, 2020, the Governor issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. Tenants' retail stores at the Premises are non-essential under this Order.

32. On March 20, 2020, the Governor of New York issued Executive Order 202.8, requiring non-essential businesses to reduce their in-person work force by 100% no later than March 22, 2020 at 8:00 p.m. Tenants' retail stores at the Premises are non-essential under this Order.

33. Also on March 20, 2020, the Mayor issued Emergency Executive Order No. 102, further restricting retail operations in the City.

34. Following the outbreak of COVID-19 in the United States, Tenants were forced to suspend all retail operations at the Premises on or before March 19, 2020, to comply with applicable governmental orders and guidelines and to protect the health and safety of their employees, customers, and the surrounding community. Between March 2020 and the present, Tenants were never able to resume normal operations at the Premises. Indeed, it is likely that Tenants will never be able to resume operations in a manner contemplated by the Leases.

35. As a result of the foregoing circumstances and orders, and other applicable governmental orders and guidelines, all of which were unforeseeable at the time the Leases were entered into, and which resulted from no act of either party, the parties' intended use of the Premises was frustrated, became impossible, illegal, and impracticable. Specifically, Tenants were forced to suspend all retail operations at the Premises. The object and purpose of the Leases became impossible, illegal, and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases.

36. Indeed, although the Leases specifically contemplated that Tenants would benefit from their use for a fixed term, as a result of the unforeseeable COVID-19 crisis, Tenants have been deprived of their use of the Premises for the full term that Tenants were promised under the Leases. Such a result is inequitable and damages Tenants, in part because the term of the Leases and the expectation that Tenants would be able to benefit from the foot traffic and popularity of Times Square as an international tourist hub, were the basis for the parties' negotiations and calculations at the time of contracting Tenants' 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 Leases became impossible, illegal, and impracticable, the parties' mutual purpose for entering into the Leases has been frustrated, and the consideration Tenants were to receive under the Leases has failed.

37. Moreover, the COVID-19 crisis and the civil orders affecting Tenants' ability to operate retail stores at the Premises constitute a casualty under Article 16.4 of the Leases that rendered the Premises unusable, such that Tenants are entitled to an abatement of rent beginning on or before March 19, 2020. Article 16.4 of the Lease states: "The Fixed Rent, the Operating Expense Payment and the Tax Payment that is otherwise due and payable hereunder . . . shall not be abated or reduced by reason of fire or other casualty . . . provided that if (i) prior to such fire or other casualty, Tenant was open and operating its business in the Premises, (ii) in Tenant's reasonable business judgment, Tenant shall be unable to operate its business in the Premises in substantially the same manner as such business was conducted on the Premises prior to such fire or other casualty, and (iii) Tenant actually does not operate its business in all or a portion of the Premises, the Fixed Rent, the Operating Expense Payment and the Tax Payment that is otherwise due and payable hereunder . . . shall be proportionally abated or reduced, as the case may be, for

the period commencing on the date of such fire or other casualty and ending the date that is the earliest of (x) the one hundred eighty-second (182nd) day after the Landlord Substantially Completes the restoration described in Section 16.2 hereunder, (y) the date the Tenant reopens the Premises to the public for the conduct of its business, and (z) the date upon which the Lease is terminated by reason of such fire or other casualty as provided in this Article 16.”

38. Because the Landlord is not able to restore the Premises or Times Square to its former glory, and Tenants will never be in a position to operate the Premises in the way in which it was contemplated when they entered into the Leases, the abatement of rent ought to be permanent and the Leases rescinded. In fact, the Leases terminated pursuant to law on the date Tenants were forced to close their businesses at the Premises, March 19, 2020.

39. Landlord had notice, and Tenants have given the Landlord sufficient written notice, of all the rights and remedies demanded in this complaint, including Article 16.

40. Despite the protections granted Tenant under Article 16 of the Leases, and Tenants’ rights as a result of the frustration of purpose of the Leases, the failure of consideration, and the impossibility, illegality and impracticability of the purpose and object of the Leases, Landlord has wrongly demanded that Tenants pay rent under the Leases for the period after Tenants were deprived of their use of the Premises, including, without limitation, the Notices dated June 16, 2020.

41. Landlord’s demands constitute a breach of the terms and conditions stated in Article 16 and related provisions, as well as Tenants’ rights pursuant to applicable law. Further, Landlord owes Tenant damages equal to the amount of rent and other expenses paid in advance for the months of March and April 2020 during which Tenants were deprived of the use of the

Premises, as well as damages for excess charges of rent and other expenses prior to the COVID-19 crisis.

42. Moreover, as Tenants meet the Closure Requirement, the Occupancy Limitation, as well as the Revenue Reduction Requirement with respect to the Premises, Landlord's threat of Lease termination is a direct violation of the Commercial Tenant Anti-Harassment Statute.

43. For these reasons, Landlord's attempt to terminate Tenants' Leases at the Premises is both improper and unenforceable.

44. In the unlikely event the Court determines that Tenants are, in any way, in default under the Leases, the default can be cured and Tenants have the desire and ability to cure any such default. That is to say, to the extent the Court finds that the Leases have not been entirely frustrated and/or terminated as a matter of law, and finds any portion of the rent for May and/or June to be due and owing (taking into account amounts already paid in full under protest for March and April, 2020), Tenants are ready, willing, and able to take necessary measures to remedy the alleged default in accordance with the Court's directives.

45. Under the circumstances at hand, in order to protect Tenants' interests under the Leases and prevent irreparable injury, Landlord must be enjoined from attempting to terminate the Leases or otherwise enforcing their rights under the Leases with respect to the alleged default, pending a determination by the Court as to the validity and existence of such default.

46. As stated above, Tenants are ready, willing and able to cure any default that this Court may find to exist after a trial on the merits.

47. If, however, the Leases are improperly terminated pursuant to the conditional limitation of the Leases, Tenants will suffer immediate irreparable harm by losing their valuable leasehold interests at the Premises.

48. No prior application has been made to this Court or any other for the relief sought herein.

**COUNT ONE
BREACH OF CONTRACT**

49. Tenants repeat, reallege, and incorporate all prior paragraphs.

50. The Leases are (or, in the alternative, were before the effective date of the Leases' termination and/or rescission as a matter of law, which occurred on or before March 19, 2020), binding enforceable contracts.

51. Landlord breached the contracts by, among other things: demanding Tenants pay rent and other expenses that were not owed under the Leases; demanding, collecting and subsequently failing to reimburse Tenants for excess charges paid in advance under the Leases before the COVID-19 crisis; later failing to reimburse Tenants for the prorated amount of the rent, charges and other expenses attributable to the period that Tenants have been deprived of their use of the Premises; serving purported notices to cure a default in violation of Tenants' rights and taking such other actions as are inconsistent with Tenants' rights.

52. Tenants performed all of their obligations under the Leases except those that were waived, excused or rendered impossible and/or impracticable.

53. As a direct and proximate result of Landlord's breach of contract, Tenants suffered the damages alleged hereinabove.

54. Tenants are entitled to a judgment against Landlord in an amount to be proven at trial.

**COUNT TWO
DECLARATORY RELIEF**

55. Tenants repeat, reallege, and incorporate all prior paragraphs.

56. Tenants have duly performed all of the terms of the Leases on their part to be performed.

57. Tenants' ability to operate retail stores at the Premises and benefit from the centrality of Times Square as New York City's most popular and highly trafficked locations was the express purpose of entering into the Leases and agreeing to monthly rents in excess of \$1.5 million (ultimately increasing to \$2.3 million) for each of the two Leases.

58. Tenants' operation of retail stores at the Premises was the parties' mutual purpose in entering into and the object of the Leases, as both parties understood at the time of contracting, that but for Tenants' right to operate in a location like that of Times Square's status as one of the most highly trafficked locations in the world, Tenants would not have entered into the Leases and/or would not have agreed to pay rent in excess of \$1.5 million per month for each of the Leases (ultimately increasing to \$2.3 million). Indeed, without Tenants' ability to use the Premises in the manner originally contemplated or for Times Square to continue to be the destination location contemplated, the transaction between the parties that resulted in the Leases would have made no sense. When Tenants were forced to suspend all retail operations at the Premises, the purpose of the Leases was frustrated and impossible to effectuate due to no fault of the Tenants. The Leases' object and purpose became illegal, impossible and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases.

59. Although necessary, the sudden suspension of retail operations at the Premises and the prospect of unknown future halts was unforeseeable and not contemplated by the parties at the time the Leases were executed.

60. An actual controversy exists between Tenants and Landlord concerning their respective rights under the Leases. Tenants have no adequate remedy at law. Specifically, the parties dispute:

- a. Whether the Leases terminated as of March 19, 2020 pursuant to the Leases and applicable law;
- b. Alternatively, whether the obligation to pay rent and expenses were abated from and after March 19, 2020,
- c. Alternatively, for what period from and after March 19, 2020 the obligation to pay rent and expenses abated if the abatement was not permanent despite the interruption or impairment of Tenants' use of the Premises and the likelihood of future disruptions and shutdowns;
- d. Whether there was a frustration of purpose of the Leases,
- e. Whether the continued operation of the Leases was illegal, impossible, or impracticable;
- f. Whether there was a failure of consideration under the Leases;
- g. Whether a casualty occurred that rendered the Premises unusable under Article 16 of the Leases; and
- h. Whether the Leases should be reformed.

61. The parties further dispute the effects of the foregoing on the Leases' term, expiration, and the continuing obligations, if any, of the parties. Therefore, Tenants seek a judgment declaring the following:

- a. That the Leases terminated as of March 19, 2020 pursuant to the Leases and applicable law;

- b. Alternatively, that the rent and expenses under the Leases abated from and after March 19, 2020,
- c. Alternatively, if the abatement of rent and expenses was not permanent despite the interruption or impairment of Tenants' use of the Premises and the likelihood of future disruptions and shutdowns, that the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020;
- d. That there was a frustration of purpose of the Leases,
- e. That the continued operation of the Leases was illegal, impossible, or impracticable;
- f. That there was a failure of consideration under the Leases;
- g. That a casualty occurred that rendered the Premises unusable under Article 16 of the Leases;
- h. The effects of the foregoing on the Leases' Term and expiration;
- i. That the Leases should be reformed;
- j. That the parties have no continuing obligations to one another under the Leases from and after March 19, 2020 (or another date in the discretion of the Court) when Tenants were forced to suspend retail operations, which occurred on or before March 19, 2020, and at all times thereafter.
- k. In addition, Tenants seek a judgment declaring that Landlord's purported Notices were ineffective and of no legal consequence, because Tenants were not in default, because the Leases had already terminated as a matter of law, and because Landlord failed to respect the notice provisions of the Leases.

1. In addition, Tenants seek a judgment declaring that Tenants are not in default under the Leases and are entitled to immediate and permanent injunctive relief restraining Landlord from terminating the Leases.

**COUNT THREE
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

- 62. Tenants repeat, reallege, and incorporate all prior paragraphs.
- 63. At all relevant times, the Leases were in full force and effect.
- 64. Tenants have duly performed all of the terms of the Lease on their part to be performed.
- 65. Tenants have the desire and ability to cure any default this Court may find by any means short of vacating the Premises should it not be ruled that the Leases have been terminated as a matter of law.
- 66. Because of the foregoing, a declaratory judgment should be entered in Tenants' favor, finding that Tenants are not in default under the Lease and are entitled to immediate and permanent injunctive relief restraining Landlord from terminating the Leases pursuant to a conditional limitation in the Leases.

**COUNT FOUR
RESCISSION
(Rescission/Cancellation of Lease)**

- 67. Tenants repeat, reallege, and incorporate all prior paragraphs.
- 68. Tenants' ability to operate retail stores at arguably the world's most popular and highly trafficked location was the parties' mutual purpose and intent in entering into the Leases and in Tenants agreeing to pay rent in excess of \$1.5 million per month for each of the two Leases (scheduled to increasing to \$2.3 million per month for each location).

69. When Tenants were forced to suspend all retail operations at the Premises, the purpose and object of the Leases were frustrated and impossible to effectuate due to no fault of the Tenants, the Leases' object and purpose became impossible, illegal and impracticable, and Tenants were deprived of the consideration it received in exchange for entering into the Leases.

70. The sudden suspension of retail operations at the Premises and the likely long-term impact on Times Square as a destination location was unforeseeable and could not have been contemplated by the parties at the time the Leases were executed.

71. An actual controversy exists between Tenants and Landlord concerning their respective rights under the Leases and Tenants have no other adequate remedy at law.

72. In addition to, and/or in the alternative to, Tenants' claim for declaratory relief regarding the termination of the Leases, Tenants are entitled to judicial rescission of the Leases, as a result of the frustration of purpose of the Leases, the illegality, impossibility and impracticability of the Leases, and/or the failure of consideration, effective on such date as the Court determines based on the evidence presented at trial.

**COUNT FIVE
REFORMATION OF LEASE**

73. Tenants repeat, reallege, and incorporate all prior paragraphs.

74. Tenants' ability to operate retail stores at arguably the world's most popular and highly trafficked locations in the world was the parties' mutual purpose and intent in entering into the Leases and agreeing to pay monthly rent in excess of \$1.5 million per month rent for each of the two Leases (scheduled to increase to \$2.3 million). But for Tenant's right to do so, Tenants would not have entered into the Leases.

75. When Tenants were forced to suspend all retail operations at the Premises, the purpose of the Leases was frustrated and impossible to effectuate due to no fault of the Tenants,

the Leases' object and purpose became impossible and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases.

76. This sudden suspension of retail operations at the Premises and the likelihood of future intermittent interruptions was unforeseeable and not contemplated by the parties at the time the Leases were executed.

77. The Parties would not have entered into the Leases and/or agreed to pay such exorbitant monthly rents had they known that Tenants would be unable to operate retail apparel stores at the Premises or that, for the foreseeable future, Times Square would no longer be a premier destination for New Yorkers and international tourists alike. Such was the sole consideration for Tenants entering into the Leases and agreeing to exorbitant monthly rents.

78. It was the Parties' true intent that Tenants would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable. Had the Parties been able to foresee the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language stating their true intent expressly.

79. An actual controversy exists between Tenants and Landlord concerning their respective rights under the Leases and Tenants have no adequate remedy at law.

80. In the alternative to Tenants' claims related to the termination and rescission of the Leases, Tenants are entitled to judicial reformation of the Leases to reflect the Parties' true intent that Tenants would have no obligation to pay rent once it was deprived of the use of the Premises and that the Leases would terminate automatically when Tenants were deprived of their use of the Premises as originally contemplated by the Leases, or that the amount of rent for the Term would have otherwise been adjusted to account for the portion of the Leases' Term during which Tenants could not operate retail stores at the Premises.

**COUNT SIX
MONEY HAD AND RECEIVED**

81. Tenants repeat, reallege, and incorporate all prior paragraphs.

82. Tenants' ability to operate retail stores at arguably the most popular and highly trafficked locations in the world was the parties' mutual purpose in entering into the Leases and agreeing to pay monthly rent in excess of \$1.5 million per month for each of the two Leases (scheduled to increase to \$2.3 million). But for Tenant's right to do so, Tenants would not have entered into the Leases.

83. When Tenants were forced to suspend all retail operations at the Premises, the purpose of the Leases was frustrated and impossible to effectuate due to no fault of the Tenants, the Leases' object and purpose became impossible, illegal, and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases.

84. The sudden suspension of retail operations at the Premises and the likely long-term impact on Times Square as a destination location was unforeseeable and could not have been contemplated by the parties at the time the Leases were executed.

85. Had Tenants known that they would be unable to operate retail apparel stores at arguably the world's most highly trafficked and notable locations for some undetermined period of time during the terms of their Leases, and that there would likely be future intermittent disruptions, they would not have entered into them and/or would not have agreed to pay in excess of \$1.5 million per month in rent (increasing to \$2.3 million). Tenants' ability to use the Premises as retail stores was the sole consideration it received under the Leases.

86. Tenants have previously paid rent and other consideration to the Landlord, in an amount to be proven at trial, for a period of time that Tenants were unable to operate retail stores at the Premises.

87. The Landlord benefited from these payments to Tenants' detriment.

88. Under principles of good conscience, Landlord should not be allowed to retain the rent and other consideration paid for the period of time that Tenants were unable to operate retail stores at the Premises as originally contemplated by the Leases.

89. Tenants were entitled to a judgment in their favor equal to the sums that Tenants have overpaid as rent and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenants were unable to operate retail stores at the Premises as originally contemplated by the Leases or after which the Leases terminated pursuant to law.

**COUNT SEVEN
UNJUST ENRICHMENT**

90. Tenants repeat, reallege, and incorporate all prior paragraphs.

91. Tenants' ability to operate retail stores at arguably the most popular and highly trafficked locations in the world was the parties' mutual purpose in entering into the Leases and agreeing to pay monthly rent in excess of \$1.5 million for each of the two Leases (increasing to \$2.3 million). But for Tenant's right to do so, Tenants would not have entered into the Leases.

92. When Tenants were forced to suspend all retail operations at the Premises, the purpose of the Leases was frustrated and impossible to effectuate due to no fault of the Tenants, the Leases' object and purpose became impossible, illegal, and impracticable, and Tenants were deprived of the consideration they received in exchange for entering into the Leases. As a result, the Leases terminated and became void.

93. This sudden suspension of retail operations at the Premises and the likelihood that there will be future intermittent disruptions was unforeseeable and not contemplated by the parties at the time the Leases were executed.

94. The Parties would not have entered into the Leases and/or agreed to pay such exorbitant monthly rents had they known that Tenants would be unable to operate retail apparel stores at the Premises or that, for the foreseeable future, Times Square would no longer be a premier destination for New Yorkers and international tourists alike. Such was the sole consideration for Tenants entering into the Leases and agreeing to exorbitant monthly rents.

95. Tenants have overpaid rent and other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenants were unable to operate retail stores at the Premises.

96. Landlord was enriched as a result of these payments at Tenants' expense.

97. Under principles of good conscience, Landlord should not be allowed to retain the rent and other consideration paid for the period of time that Tenants were unable to operate retail stores at the Premises as originally contemplated by the Leases.

98. Tenants are entitled to restitution of the sums that Tenants have previously overpaid as rent and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenants were unable to operate retail stores at the Premises as originally contemplated by the Leases.

PRAYER FOR RELIEF

WHEREFORE, Tenants respectfully requests that this Court enter judgment:

- a. Awarding damages to Plaintiffs in an amount to be proven at trial;
- b. Declaring that the Leases terminated pursuant to law effective on or before March 19, 2020;
- c. Enjoining and restraining Landlord from terminating the Leases;
- d. Declaring that Tenants are not in default under the Leases;

- e. Alternatively, that the obligation to pay rent and expenses under the Leases abated from and after March 19, 2020,
- f. Alternatively, if the abatement of rent and expenses was not permanent despite the interruption or impairment of Tenants' use of the Premises, that the rent and expenses abated for a period in the discretion of the Court from and after March 19, 2020;
- g. That there was a frustration of purpose of the Leases,
- h. That the continued operation of the Leases was illegal, impossible, or impracticable on and after March 19, 2020;
- i. That there was a failure of consideration under the Leases;
- j. That a casualty occurred that rendered the Premises unusable under Article 16 of the Leases;
- k. That the parties had and have no continuing obligations to one another under the Leases from and after March 19, 2020 (or another date in the discretion of the Court);
- l. Such other effects of the foregoing on the Leases' Term and expiration as the Court deems just and proper;
- m. Declaring that Landlord's purported notices to cure default were ineffective and of no legal consequence, because Tenants were not in default, because the Leases had already terminated, and/or because Landlord failed to respect the notice provisions of the Leases.
- n. Declaring that Landlord's purported notices to cure were in violation of the Commercial Tenant Anti-Harassment Statute;
- o. In the alternative, declaring that the Leases were equitably rescinded effective on or before March 19, 2020;

- p. In the alternative, granting equitable reformation of the Leases to reflect the Parties' true intent that Tenants would have no obligation to pay rent while they were deprived of the use of the Premises and that the Leases would terminate automatically when Tenants were deprived of their use of the Premises as originally contemplated by the Leases, or adjusting the amount of rent and expenses for the portion of the Leases' Term during which Tenants could not operate retail stores at the Premises;
- q. Ordering Landlord to reimburse and give restitution to Tenants for the payment of rent and other expenses paid for the period that Tenants were deprived of their use of the Premises as originally contemplated by the Leases;
- r. Ordering Landlord to pay Tenants' fees and costs incurred in this action, including their reasonable attorneys' fees; and
- s. Such other and further relief that this Court may deem just and proper.

Dated: New York, New York
 June 23, 2020

DAVIS & GILBERT LLP

By: /s/ Jesse B. Schneider
 Jesse B. Schneider
 Joshua H. Epstein
 Allyson B. Hopper
 1740 Broadway
 New York, NY 10019
 (212) 468-4800

ROBINS KAPLAN LLP

Lisa M. Coyle
 399 Park Avenue, Suite 3600
 New York, NY 10022
 (212) 980-7400

Attorneys for Plaintiffs

