

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

THE GAP, INC. AND OLD NAVY, LLC,

Plaintiffs-Appellants,

- v. -

44-45 BROADWAY LEASING CO., LLC,

Defendant-Appellee.

App. Div. No. 2021-03261

Originating Court No.
652549/2020

**NOTICE OF MOTION OF THE ACCESSORIES COUNCIL,
THE COUNCIL OF FASHION DESIGNERS OF AMERICA, INC.,
THE NATIONAL RETAIL FEDERATION, THE RETAIL COUNCIL
OF NEW YORK STATE, AND RETAIL LITIGATION CENTER, INC.
FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE***

PLEASE TAKE NOTICE that upon the annexed affirmation of Stan Chiueh, Esq., dated April 14, 2022, with all exhibits thereto, The Accessories Council, The Council of Fashion Designers of America, Inc., The National Retail Federation, The Retail Council of New York State, and Retail Litigation Center, Inc. (collectively, “Proposed Amici”) 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 April, 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 Amici leave to appear as *amici curiae* and file a brief

of *amici curiae* in the above-captioned appeal, and for such other and further relief to Proposed Amici as this Court may deem just and proper.

Dated: April 14, 2022
New York, New York

Respectfully submitted,

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To: Counsel of Record (via NYSCEF)

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**AFFIRMATION IN SUPPORT OF MOTION OF THE ACCESSORIES
COUNCIL, THE COUNCIL OF FASHION DESIGNERS OF AMERICA,
INC., THE NATIONAL RETAIL FEDERATION, THE RETAIL COUNCIL
OF NEW YORK STATE, AND RETAIL LITIGATION CENTER, INC.
FOR LEAVE TO FILE BRIEF OF *AMICI 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 The Accessories Council, The Council of
Fashion Designers of America, Inc., The National Retail Federation, The Retail
Council of New York, and Retail Litigation Center, Inc. (collectively, “Proposed
Amici”).

2. I make this affirmation in support of Proposed Amici’s motion
for leave to appear as *amici curiae* and file a brief of *amici curiae* in the above-
captioned appeal in support of plaintiffs-appellants The Gap, Inc. and Old Navy,
LLC (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 Accessories Council is a not-for-profit, international trade organization established in 1994. Its mission is to stimulate global consumer awareness and demand for fashion accessory products. The Accessories Counsel serves the industry globally, which generates over \$50.8 billion dollars annually in the United States alone. Over the past 25 years, membership has grown internationally to include over 330 companies and organizations, representing the world's leading brand names, designers, publications, retailers and associated providers for the accessories, eyewear, and footwear industries.

4. The Council of Fashion Designers of America, Inc. ("CFDA") is a not-for-profit trade association founded in 1962, whose membership consists of 477 of America's foremost womenswear, menswear, jewelry and accessory designers. The mission of the CFDA is to strengthen the impact of American fashion in the global economy.

5. The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and

diversity of an industry that is the nation's largest sector employer with more than 52 million employees and contributes \$3.9 trillion annually to GDP. NRF has filed briefs in support of the retail community on topics stemming from the pandemic, including workers' compensation and COVID-19 vaccine policies.

6. The Retail Council of New York State (the "Retail Council") was incorporated in 1931 by a group of retailers who came together to support their industry. Today, the Retail Council is New York's largest statewide association of its kind. Headquartered in Albany, just one block from the Capitol, the Retail Council is a full-service trade organization with extensive experience in government and media relations. As the exclusive voice of retail in New York, the Retail Council is a trusted resource for business owners to stay informed on issues essential to the industry. It provides members with the tools and support they need to operate efficiently.

7. 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.

8. Motions for leave to file briefs of *amici curiae* by industry groups like Proposed Amici 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 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).

9. Here, as trade organizations whose members either own brick-and-mortar stores or sell their products through such stores, Proposed Amici and their members were required to respond to the unprecedented challenges posed by the early months of the COVID pandemic. As such, Proposed Amici seek, in their brief of *amici curiae*, to provide helpful retail industry context about the impact of the pandemic on brick-and-mortar retail in support of the Retailers’ arguments that

the pandemic frustrated the purposes of their respective leases with their landlord, defendant-appellee 44-45 Broadway Leasing Co., LLC (the “Landlord”).

10. Specifically, Proposed Amici’s brief will (a) draw from real-time accounts of COVID-as-it-was-happening, from March through June 2020, to remind how the severity and uncertainty of the pandemic were felt and perceived at the time (not, as the Landlord offers, through *post hoc* accounts from months and years later); (b) lay foundation for the impact that COVID had on brick-and-mortar stores by explaining why brick-and-mortar retail—and the physical and social experiences this business model provides—continues to play such a critical role for retailers; and (c) elaborate upon the specific, unique, and unprecedented challenges that the first few months of the COVID pandemic presented to brick-and-mortar retail. Proposed Amici respectfully submit that their collective industry-wide perspectives respecting the impact that COVID and the subsequent state and local shutdown orders had on brick-and-mortar stores would aid this Court in its consideration of the issues in this matter.

11. Proposed Amici certify that counsel for the Retailers consents to Proposed Amici filing this motion, and that counsel for the Landlord has stated that Landlord reserves all rights to oppose Proposed Amici’s motion.

12. Finally, pursuant to Rule 500.23, Proposed Amici certify that no party or party’s counsel contributed content to Proposed Amici’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 Amici contributed money intended to fund preparation or submission of the brief.

13. Accordingly, on behalf of Proposed Amici, I respectfully request that this Court grant leave to Proposed Amici to file the proposed brief of *amici 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
April 14, 2022


STAN CHIUEH

EXHIBIT A
[PROPOSED *AMICI CURIAE* BRIEF]

New York Supreme Court

Appellate Division—First Department

THE GAP, INC. and OLD NAVY, LLC,

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Case No.:
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– against –

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Defendant-Appellee.

**BRIEF OF *AMICI CURIAE* THE ACCESSORIES COUNCIL,
THE COUNCIL OF FASHION DESIGNERS OF AMERICA,
INC., THE NATIONAL RETAIL FEDERATION,
THE RETAIL COUNCIL OF NEW YORK STATE AND
RETAIL LITIGATION CENTER, INC. IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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INTEREST OF *AMICI CURIAE*¹

The Accessories Council is a not-for-profit, international trade organization established in 1994. Its mission is to stimulate global consumer awareness and demand for fashion accessory products. The Accessories Council serves the industry globally, which generates over \$50.8 billion dollars annually in the United States alone. Over the past 25 years, membership has grown internationally to include over 330 companies and organizations, representing the world's leading brand names, designers, publications, retailers and associated providers for the accessories, eyewear, and footwear industries.

The Council of Fashion Designers of America, Inc. ("CFDA") is a not-for-profit trade association founded in 1962, whose membership consists of 477 of America's foremost womenswear, menswear, jewelry and accessory designers. The mission of the CFDA is to strengthen the impact of American fashion in the global economy.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45

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

countries abroad. In the United States, the NRF represents the breadth and diversity of an industry that is the nation's largest sector employer with more than 52 million employees and contributes \$3.9 trillion annually to GDP. NRF has filed briefs in support of the retail community on topics stemming from the pandemic, including workers' compensation and COVID-19 vaccine policies.

The Retail Council of New York State (the "Retail Council") was incorporated in 1931 by a group of retailers who came together to support their industry. Today, the Retail Council is New York's largest statewide association of its kind. Headquartered in Albany, just one block from the Capitol, the Retail Council is a full-service trade organization with extensive experience in government and media relations. As the exclusive voice of retail in New York, the Retail Council is a trusted resource for business owners to stay informed on issues essential to the industry. It provides members with the tools and support they need to operate efficiently.

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.

Together, *amici* respectfully submit this brief in support of appellants The Gap, Inc. and Old Navy, LLC (the “Retailers”), who seek vacatur of the trial court’s August 3, 2021 order granting summary judgment to appellee 44-45 Broadway Leasing Co., LLC (the “Landlord”). As trade organizations whose members either own brick-and-mortar stores or sell their products through such stores, these organizations and their members were required to respond to the unprecedented challenges posed by the early months of the COVID pandemic. As such, *amici* write here to provide helpful context about the impact of the pandemic on brick-and-mortar retail.

PRELIMINARY STATEMENT

If you had to capture this moment in five artifacts, what would you choose? Face masks? Hand sanitizer? How about diary entries, TikTok shorts or newspaper accounts? Would you collect recordings of Zoom calls, hospital and emergency medical workers' testimony, or obituaries?

How would you tell the story of the pandemic to future generations?

Jeremy Engle, *How Will We Remember the Coronavirus Pandemic?*, N.Y. TIMES.²

If its briefs below are any guide, the Landlord would tell the story of the pandemic as “undeniably unfortunate.”³ The Landlord would claim that the only thing that this Court needs to know is that the pandemic made the Retailers’ flagship brick-and-mortar stores in Times Square “less profitable.”⁴ And beyond that, the Landlord would urge the Court to “not detain itself” with any further “voluminous discussion” of COVID’s “effects and impacts.”⁵

Amici disagree. We may all share the Landlord’s fervent hope to move on from the pandemic. But moving on is not the same thing as rewriting history by calling the COVID pandemic—which, by contemporaneous accounts

² May 29, 2020, <https://www.nytimes.com/2020/05/29/learning/how-will-we-remember-the-coronavirus-pandemic.html>.

³ Defendant’s Reply Memorandum of Law in Further Support of Defendant’s Motion for Summary Judgment (“Reply”) at 11 (R-1062), *quoting Gap Inc. v. Ponte Gadea N.Y. LLC*, 524 F. Supp. 3d 224, 235 (S.D.N.Y. 2021).

⁴ Reply at 11.

⁵ Reply at 1 (R-1052).

from public officials and journalists and landlords and courts, was a once-in-a-lifetime catastrophe—simply “unfortunate.” Nor is our collective hope to move forward a justification for failing to mention the pandemic even once in analyzing the legal issues at hand—which was the trial court’s approach in its Decision and Order on appeal.⁶

Amici respectfully submit that this Court should meaningfully grapple with how COVID impacted society, the economy, and the retail industry, and in particular, brick-and-mortar retail, rather than downplay or minimize it. Nearly all of *amici*’s constituent members either own and operate brick-and-mortar stores themselves or sell their products through such stores. *Amici* understand that, at its core, brick-and-mortar retail is about providing a memorable “shopping experience” for customers—to give customers the chance to “try, touch and taste” what they want to buy, and to build a lifelong relationship of personalized trust between shopper and retailer. And *amici* experienced firsthand—and still remember—the immense and unprecedented challenges that COVID, and the state and local orders responding to the pandemic, brought to this business model. Not only were customers kept out of brick-and-mortar stores at the outset of the pandemic, but retailers were forced to navigate and implement ever-changing health and safety guidelines even after a fraction of these customers were allowed

⁶ Decision and Order on Motion (R-4-10).

to return. These challenges—and other in-the-moment accounts of COVID as it was happening—should be considered by this Court.

This brief has three parts. *First*, we draw from real-time accounts of COVID-as-it-was-happening, from March through June 2020, to remind the Court how the severity and uncertainty of the pandemic were felt and perceived at the time (not, as the Landlord offers, through *post hoc* accounts from months and years later). *Second*, to lay the foundation for the impact that COVID had on brick-and-mortar stores, we explain why brick-and-mortar—and the physical and social experiences this business model provides—continues to play such a critical role for retailers. *Third*, we lay out the specific, unique, and unprecedented challenges that the first few months of the COVID pandemic presented to brick-and-mortar retail.

ARGUMENT

I.

REAL-TIME ACCOUNTS OF THE FIRST FEW MONTHS OF COVID SPOTLIGHT THE ONCE-IN-A-LIFETIME CATASTROPHE CREATED BY THE PANDEMIC

In considering the impact of COVID on our society and economy, *amici* urge the Court to focus on the real-time accounts of those who were experiencing COVID-as-it-was-happening, rather than descriptions of the pandemic from months—and in some cases years—after the fact.

A. *Contemporaneous accounts from public officials and journalists*

Contrary to the Landlord’s retelling of the story of the pandemic, COVID was not merely “unfortunate”; nor did it merely make certain retail stores “less profitable.” The explosive onset of the pandemic—which, even with the benefit of modern medicine, has killed six million people worldwide and counting—upended societies, devastated economies, and, in two short years, fundamentally altered how billions of people across the globe interact.⁷

The pandemic took New York by storm. The first case in New York State was reported on March 1, 2020; within just three weeks, by March 20, 2020, this number had mushroomed to over 8,300 reported cases, with the number sometimes doubling every day.⁸ Given the exponential speed at which COVID was spreading, then-Governor Cuomo signed, that same day, the “New York State on PAUSE” executive order, which, among other things, indefinitely shut down all “nonessential businesses.”⁹ The governor knew exactly what he was asking of

⁷ 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>.

⁸ Chris Francescani, *Timeline: The first 100 days of New York Gov. Andrew Cuomo’s COVID-19 response*, ABC NEWS (Jun. 17, 2020), <https://abcnews.go.com/US/News/timeline-100-days-york-gov-andrew-cuomos-covid/story?id=71292880>. Courts regularly took judicial notice of news reports and other publicly available sources about COVID’s progression. *See, e.g., Joffe v. King & Spalding LLP*, 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020).

⁹ Governor Cuomo Signs the ‘New York State on PAUSE’ Executive Order, N.Y. GOVERNOR’S OFFICE (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

New York; in signing this order, Governor Cuomo called this “the most drastic action we can take.”¹⁰

However “drastic” the PAUSE order may have appeared at the time, the worst was yet to come. Within two weeks, New York’s case count had skyrocketed to **over 100,000 reported cases**.¹¹ By June 5, 2020, this number had more than tripled again, to over 376,000 cases, nearly 45 times higher than when the PAUSE order was signed.¹² And, in April 2020, as much of the state was being shut down, COVID was killing one person roughly every four minutes in New York State, and every six minutes in New York City.¹³

The severity of COVID’s impact on New York during the early months of the pandemic was captured by journalists in many haunting ways. Photographs, in particular, told the story of a vacant cityscape—the Brooklyn Bridge, Rockefeller Center, Radio City Music Hall, the New York Stock Exchange, among others—for months on end.¹⁴ And while this Court may recall

¹⁰ Joseph De Avila, *Gov. Cuomo Orders All Workforce in State to Stay Home*, THE WALL STREET JOURNAL (Mar. 20, 2020), https://www.wsj.com/articles/new-york-gov-cuomo-orders-all-nonessential-workers-in-state-to-stay-home-11584718223?mod=article_inline.

¹¹ Francescani, *supra* n.8.

¹² *Id.*

¹³ Rhea Mahbubani & Dave Mosher, *‘In search of the apex and the other side of the mountain’: The coronavirus has killed more than 4,100 New Yorkers in just over a month, and the worst is still to come*, BUSINESS INSIDER (Apr. 5, 2020), <https://www.businessinsider.com/new-york-coronavirus-crisis-1-month-cases-surge-apex-2020-4>.

¹⁴ Adam Jeffery, *Photos of New York City quieted by coronavirus*, CNBC (Apr. 1, 2020), <https://www.cnbc.com/2020/04/01/photos-of-new-york-city-quieted-by-coronavirus.html>.

seeing photos of an empty Times Square early in the pandemic, it is worth emphasizing that these photos were still being taken, week after week, well into the first summer of the pandemic: March 22;¹⁵ March 31;¹⁶ April 10;¹⁷ April 21;¹⁸ May 5;¹⁹ May 12;²⁰ May 20;²¹ June 2;²² June 11;²³ and more.

Likewise, news coverage of New York City during this time did not characterize the pandemic as merely “unfortunate.” To the contrary, news anchors used words more frequently found in descriptions of scenes from a “disaster

¹⁵ Donald G. McNeil Jr., *Restrictions Are Slowing Coronavirus Infections, New Data Suggest*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/health/coronavirus-restrictions-fevers.html>.

¹⁶ Jeffery, *supra* n.14.

¹⁷ Richard Stengel, *The Coronavirus Pandemic Can Lead Us to a Smarter Future. Let’s Make Sure It Does*, TIME (Apr. 13, 2020), <https://time.com/5819799/coronavirus-pandemic-smarter-future/>.

¹⁸ Patrick Adcroft & Faraz Toor, *Timeline: How COVID-19 Changed NYC*, NY1 SPECTRUM NEWS (Mar. 11, 2021), <https://www.ny1.com/nyc/all-boroughs/news/2021/03/10/timeline--how-covid-19-changed-nyc>.

¹⁹ Lucia Mutikani, *Coronavirus pummels U.S. retail sales, industrial production*, REUTERS (May 15, 2020), <https://www.reuters.com/article/us-usa-economy/coronavirus-likely-hammered-us-retail-sales-again-in-april-idUSKBN22R0GJ>.

²⁰ Dawn Jorgenson, *29 moving images that paint the picture of an epic 2020*, KSAT NEWS (Dec. 9, 2020) <https://www.ksat.com/features/2020/12/09/29-moving-images-that-paint-the-picture-of-an-epic-2020/>.

²¹ Sasha Pezenik & Jacinta Leyden, *Feds warned last spring of spike in violence and extremism during pandemic*, ABC NEWS (Jul. 5, 2021), <https://abcnews.go.com/Health/feds-warned-spring-spike-violence-extremism-pandemic-memo/story?id=78408266>.

²² Elizabeth Kim, *What New Yorkers Need To Know About The City’s History Curfew*, GOTHAMIST (Jun. 4, 2020), <https://gothamist.com/news/what-new-yorkers-need-know-about-citys-historic-curfew>.

²³ Raedeh Wahid, *NYC Lacked Pandemic Plans and Equipment Before Covid, Comptroller Says*, BLOOMBERG (Aug. 18, 2021), <https://www.bloomberg.com/news/articles/2021-08-18/nyc-lacked-pandemic-plans-equipment-before-covid-stringer-says>.

film”²⁴: “deserted,”²⁵ “desolate,”²⁶ “surreal,”²⁷ “ghost town,”²⁸ “eerie.”²⁹ The New York Times dubbed this experience “The Great Empty,” telling its readers that photographs of empty cities during the pandemic “imagine an experience more akin to the wonder of bygone explorers coming upon the remains of a lost civilization. They evoke the romance of ruins.”³⁰ And, while perhaps less poetic, then-Governor Cuomo appeared on Good Morning America in June 2020 to tell a national audience that these first hundred days of the pandemic in New York were, quite simply, “hell.”³¹

²⁴ CNN anchor: *Scenes from Times Square are like a ‘disaster film’*, CNN (Apr. 2, 2020), <https://www.cnn.com/videos/us/2020/04/02/us-new-york-coronavirus-covid-19-pandemic-times-square-subway-quest-pkg-intl-ldn-vpx.cnn>.

²⁵ Konrad Putzier & Will Parker, *How Covid Broke Times Square, the Heart of New York’s Economy*, WALL STREET JOURNAL (Oct. 2, 2020), <https://www.wsj.com/articles/how-covid-broke-times-square-the-heart-of-new-yorks-economy-11601656831>.

²⁶ Jennifer Broski, *Photo Coverage: 19 Eerie Images of a Desolate Times Square*, BROADWAY WORLD (Mar. 28, 2020), <https://www.broadwayworld.com/article/Photo-Coverage-19-Eerie-Images-of-a-Desolate-Times-Square-20200328>.

²⁷ Jeffery, *supra* n.14.

²⁸ Adam K. Raymond, *Photos: New York City’s Most Crowded Places Are Empty*, N.Y. MAG. (Mar. 17, 2020), <https://nymag.com/intelligencer/2020/03/photos-coronavirus-has-emptied-nycs-most-crowded-places.html>.

²⁹ Jordan Gale and J. Oliver Conroy, *Desolate New York: eerie photos of a ghost metropolis*, THE GUARDIAN (Apr. 4, 2020), <https://www.theguardian.com/us-news/2020/apr/04/desolate-new-york-eerie-photos-ghost-metropolis-coronavirus>.

³⁰ Michael Kimmelman, *The Great Empty*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/interactive/2020/03/23/world/coronavirus-great-empty.html>.

³¹ Francescani, *supra* n.8.

The severity of the early stages of the pandemic was matched by the “extreme uncertainty”³² surrounding the pandemic and our responses to it. As the governors of New York, New Jersey, Pennsylvania, and Connecticut bluntly put it in a March 2020 letter to the federal government, there was “no historical analog for the challenges we will face in the coming weeks and months.”³³ And the news and guidelines surrounding the disease itself were changing, seemingly daily, as experts learned more. COVID was not a “global emergency,”³⁴ until, only a few weeks later, it was.³⁵ Masks were not required,³⁶ until they were.³⁷ Surfaces needed to be cleaned and disinfected,³⁸ until they weren’t.³⁹ Experts vigorously

³² Ed Yong, *Why the Coronavirus is So Confusing*, THE ATLANTIC (Apr. 29, 2020), <https://www.theatlantic.com/health/archive/2020/04/pandemic-confusing-uncertainty/610819/>.

³³ De Avila, *supra* n.10.

³⁴ Denise Grady, *Coronavirus Is Spreading, but W.H.O. Says It’s Not a Global Emergency*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/health/china-virus-who-emergency.html>.

³⁵ Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, NAT’L INST. HEALTH (Mar. 19, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7569573/>.

³⁶ Maria Cramer & Knvul Sheikh, *Surgeon General Urges the Public to Stop Buying Face Masks*, N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/health/coronavirus-n95-face-masks.html>.

³⁷ Michael D. Shear & Sheila Kaplan, *A Debate Over Masks Uncovers Deep White House Divisions*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/coronavirus-white-house-face-masks.html>.

³⁸ *New coronavirus stable for hours on surfaces*, NAT’L INST. HEALTH (Mar. 17, 2020), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>.

³⁹ Anjalee Khemlani, *Fauci: ‘Just focus on washing your hands.’*, YAHOO! (Oct. 27, 2020), https://www.yahoo.com/now/fauci-just-focus-on-washing-your-hands-174323153.html?guccounter=1&guce_referrer=aHR0cHM6Ly9raG4ub3JnLw&guce_referrer_si_g=AQAAAJDiwY8W3sKGqg0HmsqXy0c66zKHGMqObvXROmpY3PG9xqLOR6szX7gx1Y

debated whether surfaces, droplets, or aerosols were major means of viral transmission, or whether surfaces or aerosols could actually transmit COVID at all.⁴⁰ In a single week, cash was⁴¹—and then was not⁴²—reported as a potential critical infectious vector of the pandemic. And none of this accounts for the malicious disinformation that was circulated on social media and elsewhere, about the pandemic, its origins, its transmissibility, or its potential alleged treatments and cures.⁴³ Quite simply, even though there was no doubt among reasonable minds that the pandemic was a real and serious threat, even the foremost experts struggled to understand—and advise the public on—the best measures to take in service of public health.

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⁴⁰ Dyani Lewis, *COVID-19 rarely spreads through surfaces. So why are we still deep cleaning?* NATURE (Jan. 29, 2021), <https://www.nature.com/articles/d41586-021-00251-4>; see also Dyani Lewis, *Is the coronavirus airborne? Experts can't agree*, NATURE (Apr. 2, 2020) <https://www.nature.com/articles/d41586-020-00974-w>.

⁴¹ Pete Schroeder & Anna Irrera, *Fed quarantines U.S. dollars repatriated from Asia on coronavirus caution*, REUTERS (Mar. 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-fed-dollars/fed-quarantines-us-dollars-repatriated-from-asia-on-coronavirus-caution-idUSKBN20T1YT>.

⁴² Meera Jagannathan, *World Health Organization: 'We did NOT say that cash was transmitting coronavirus'*, MARKETWATCH (Mar. 9, 2020), <https://www.marketwatch.com/story/who-we-did-not-say-that-cash-was-transmitting-coronavirus-2020-03-06>.

⁴³ Sheera Frenkel et al., *Surge of Virus Misinformation Stumps Facebook and Twitter*, N.Y. TIMES (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/technology/coronavirus-misinformation-social-media.html>; see also Elia Gabarron et al., *COVID-19-related misinformation on social media: a systematic review*, NAT'L INST. HEALTH (Mar. 19, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8164188/>.

B. Contemporaneous accounts from landlords and courts

This Court should not forget that landlords themselves viewed the early months of the pandemic as a true emergency warranting government-funded relief from their own legal and financial obligations. In April 2020, the Real Estate Board of New York, the city’s “leading real estate trade association,”⁴⁴ co-signed a letter to New York city and state lawmakers seeking, among other things, a “government backstop” for landlords’ “financial obligations including property taxes, mortgages, maintenance, and capital improvements” during the emergency.⁴⁵

Likewise, this Court should remember how courts themselves described the severity and uncertainty of the pandemic’s early stages. COVID was “unprecedented and extraordinarily dangerous.” *United States v. Stephens*, 447 F. Supp. 3d 63, 65 (S.D.N.Y. 2020). It was “potentially fatal.” *Joffe*, 2020 WL 3453452, at *7. Its spread was “exponential” and “unparalleled.” *United States v. Browning*, 2020 WL 2306566, at *2 (S.D.N.Y. May 7, 2020). “At this point, 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).

⁴⁴ *About*, REBNY, <https://www.rebny.com/content/rebny/en/about.html/#collapse1> (last visited Apr. 8, 2022).

⁴⁵ Kelsey Neubauer, *REBNY Calls For A Landlord Bailout*, BISNOW N.Y. CITY (Apr. 14, 2020), <https://www.bisnow.com/new-york/news/commercial-real-estate/rebny-bailout-coronavirus-103914>; see also Georgia Kromrei, *Landlord Lobby Wants Government Relief on Rent and Mortgages*, THE REAL DEAL (Apr. 13, 2020), <https://therealdeal.com/2020/04/13/rebny-calls-for-government-assistance-for-landlords/>.

Courts also acknowledged that New York City was an “epicenter of the pandemic” during its early days. *Browning*, 2020 WL 2306566, at *3. “[O]ur ordinary way of life has been suspended,” bringing “to a halt much of the economic activity in the City.” *Geller v. de Blasio*, 2020 WL 2520711, at *4 (S.D.N.Y. May 18, 2020). And 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 June 2020, “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).

Indeed, the Court should recall that, in the early months of the pandemic, New York closed its courts to the filing of new complaints (including complaints like the one in this case), save for certain limited and enumerated types of “essential” matters. *See Administrative Order AO/78/20*, N.Y. COURTS (Mar. 22, 2020), <https://nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>. How ironic, then, to be told by their adversaries and the judiciary now, that the pandemic was merely “unfortunate.”

II. BRICK-AND-MORTAR RETAIL PROVIDES A PHYSICAL AND SOCIAL EXPERIENCE FOR CUSTOMERS THAT CANNOT BE FOUND ANYWHERE ELSE

In assessing COVID’s impact on brick-and-mortar retail, this Court should begin by understanding why brick-and-mortar remains such a vital part of the US retail economy. As *amici*’s members know, shopping in person at a brick-and-mortar store is, and should be, “more than a transaction”—for customers, it should be an experience.⁴⁶ Shopping in-person is “festive,”⁴⁷ “immersive,”⁴⁸ an “enchantment,”⁴⁹ an “escape.”⁵⁰ It is an opportunity for the retailer to “tell the

⁴⁶ Bobby Marhamat, *Why Experiences Could Be The Future Of Brick-And-Mortar Retail*, FORBES (Jul. 16, 2020), <https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2020/07/16/why-experiences-could-be-the-future-of-brick-and-mortar-retail/?sh=787ba2954bae>.

⁴⁷ The Journal Podcast, *How the Pandemic Helped Fix Retail*, THE WALL STREET JOURNAL (Dec. 6, 2021), <https://www.wsj.com/podcasts/the-journal/how-the-pandemic-helped-fix-retail/94e0a2d7-6aae-4de5-ace2-05d8031c2698>.

⁴⁸ Kyle Lauber, *5 Reasons Why Shoppers Still Prefer Brick-and-Mortar*, STAR MICRONICS POS BLOG (Feb. 26, 2019), <http://www.starmicronics.com/blog/5-reasons-why-shoppers-still-prefer-brick-and-mortar/>.

⁴⁹ Micah Solomon, *The Warby Parker Retail Customer Experience: Five Best Practices Every Retailer Needs To Borrow*, FORBES (May 23, 2016), <https://www.forbes.com/sites/micahsolomon/2016/05/23/the-five-warby-parker-retail-customer-experience-secrets-that-you-need-to-steal/?sh=23a0fa5f1952>.

⁵⁰ William L. McComb, *Clicks and Mortar: Why In-Store Experience Matters (Now More Than Ever)*, FORBES (Jun. 11, 2012), <https://www.forbes.com/sites/onmarketing/2012/06/11/clicks-and-mortar-why-in-store-experience-matters-now-more-than-ever/>.

story of [its] brand.”⁵¹ And, done well, it takes the customer on a “journey”⁵² that generates “lasting memories.”⁵³

To deliver this experience, brick-and-mortar stores are built on two foundational pillars: physical contact and customer trust. Leading national retailers spend, at a minimum, millions of dollars a year building, developing, and refining these foundational pillars to make the in-person shopping experience at brick-and-mortar retail stores memorable and worthwhile for their customers. Without the ability to provide these experiences, retailers might very well choose not to incur the cost of brick-and-mortar offerings at all.

A. Physical contact: try, touch and taste

Shopping in a brick-and-mortar store is, quintessentially, a physical experience. The whole purpose of doing so is to let the customer “try, touch & taste” what they might buy.⁵⁴ The customer can—and often wants to—try on the shoes, put on the makeup, fit in the pants, hold up the ties, peer through the glasses, flop on the mattress, sniff the flowers, test-drive the car, sample the ice cream, thump the melon, and on and on and on. Doing so gives the customer a chance to

⁵¹ The Journal Podcast, *supra* n.47.

⁵² Solomon, *supra* n.49.

⁵³ McComb, *supra* n.50.

⁵⁴ *Brick & Mortar Remains King: The Value of In-Store Experiences*, PARCEL PENDING (last visited Apr. 8, 2022), <https://www.parcelpending.com/blog/brick-mortar-remains-king-the-value-of-in-store-experiences/>; *see also* McComb, *supra* n.50 (in-person shopping allows customers to “see, touch and feel” products).

“verify[] the quality” of the product being sold and “helps avoid inaccurate sizing, malfunctioning equipment, and product scams.”⁵⁵ It is a “surefire way to avoid surprises.”⁵⁶ And once they make the purchase, the customer can walk straight out the door with the product—no shipping required.⁵⁷

This indelible desire for physical contact while shopping is borne out by both survey data and academic literature. One survey reported that “as many as 87% of modern consumers want to see and experience a product prior to ‘taking the plunge.’”⁵⁸ Others have reported that over 60% of consumers listed the ability to “physically experienc[e]”⁵⁹ or “see, touch, feel, and try out”⁶⁰ the products being sold as reasons to shop in person. Indeed, even as online shopping expanded during the pandemic, customers reiterated that doing so was not their preferred choice: “in categories like clothing, where product interaction is important to the

⁵⁵ Lauber, *supra* n.48.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *International Omni-Channel Retail Report 2021*, YOUGov (last visited Apr. 8, 2022), https://commercial.yougov.com/rs/464-VHH-988/images/yougov-global-retail-white-paper-may-2021.pdf?mkt_tok=NDY0LVZISC05ODgAAAGC75nXAynwp0N1OnpTMKehl3yGL38xolds1RRu5C2sQNtLipCByCn2p2CbIGqCUEd35FIXIXTTt8pufgTM8cPqIL6FXrhU0o-xHb0rVxemHQLQ, at 20.

⁶⁰ Sandy Skrovan, *Why most shoppers still choose brick-and-mortar stores over e-commerce*, RETAIL DIVE (Feb. 22, 2017), <https://www.retaildive.com/news/why-most-shoppers-still-choose-brick-and-mortar-stores-over-e-commerce/436068/>.

shopping experience . . . only 41% of those preferring to buy in-store did so.”⁶¹

And in a survey of 22,000 participants, “almost every single one would go back to shop in stores when the pandemic is over.”⁶²

Researchers in consumer psychology and behavior have reached similar conclusions about the importance of physical contact to retailers.⁶³ Customers “often have a need to touch products and many find pleasure in the sensory stimulation of visiting a shop, which clearly can’t be replicated online.”⁶⁴ Physical interaction is particularly important when it comes to impulse buying: “[a]lmost all unplanned buying is a result of touching, hearing, smelling or tasting something on the premises of the store.”⁶⁵ In one study, researchers found that planting a sign by produce encouraging shoppers to “feel the freshness” increased the fruits and vegetables customers purchased even if the customers’ baseline

⁶¹ *International Omni-Channel Retail Report 2021*, *supra* n.59, at 3.

⁶² Cathrine Jansson-Boyd, *COVID-19 is giving us a new appreciation for physical shops*, THE CONVERSATION (Feb. 12, 2021), <https://theconversation.com/covid-19-is-giving-us-a-new-appreciation-for-physical-shops-154525>.

⁶³ See generally Cathrine V. Jansson-Boyd, *Touch matters: exploring the relationship between consumption and tactile interaction*, 21 SOC. SEMIOTICS 531 (2011); Deborah Brown McCabe & Stephen M. Nowlis, *The Effect of Examining Actual Products or Product Descriptions on Consumer Preference*, 13 J. CONSUMER PSYCH. 431 (2003); Bianca Grohmann *et al.*, *The influence of tactile input on the evaluation of retail product offerings*, 83 J. RETAILING 237 (2007).

⁶⁴ Jansson-Boyd, *supra* n.62.

⁶⁵ PACO UNDERHILL, *WHY WE BUY: THE SCIENCE OF SHOPPING* 168 (Simon & Schuster, 1999).

“need for touch” preferences were lowered.⁶⁶ And as another study put it in explaining why clothing retailers “fold clothes and put them on shelves easily accessible to shoppers”—“touch matters.”⁶⁷

B. Customer trust: personalized treatment and customer loyalty

The other pillar of the brick-and-mortar shopping experience is the development of individual trust—a social contract, as it were—between retailer and customer.

As retailing consultants like to remind their clients, research suggests that it is “seven times more expensive to acquire a new customer than it is to retain an existing customer.”⁶⁸ A major element of maintaining the customer’s trust—to ensure that the customer returns—is “personalized treatment” that “elevates a mere purchase to an ‘experience.’”⁶⁹ Indeed, such personalized treatment has been found to be, after the quality of the product itself, the most important indicator of a

⁶⁶ Joann Peck & Terry L. Childers, *If I touch it I have to have it: Individual and environmental influences on impulse purchasing*, 59 J. BUS. RSCH. 765, 768 (2006).

⁶⁷ Jansson-Boyd, *supra* n.63; see also Malcolm Gladwell, *The Science of Shopping*, THE NEW YORKER (Oct. 27, 1996), <https://www.newyorker.com/magazine/1996/11/04/the-science-of-shopping> (“[T]he reason the Gap and Banana Republic have tables is not merely that sweaters and shirts look better there, or that tables fit into the warm and relaxing residential feeling that the Gap and Banana Republic are trying to create in their stores, but that tables invite—indeed, symbolize—touching.”).

⁶⁸ Randy Burt *et al.*, *Redefining the role of the brick-and-mortar store*, KEARNEY (last visited Apr. 8, 2022), <https://www.kearney.com/consumer-retail/article?/a/redefining-the-role-of-the-brick-and-mortar-store>.

⁶⁹ Jack Loechner, *Trust, Loyalty, and Quality Carry Retailing*, MEDIAPOST RESEARCH BRIEF (Oct. 16, 2018), <https://www.mediapost.com/publications/article/326520/trust-loyalty-and-quality-carry-retailing.html>.

positive shopping experience.⁷⁰ And getting this treatment “right” is a high-stakes affair: according to one survey, 40% of customers are willing to switch to a competitor based on a single bad experience.⁷¹

Leading national retailers spend millions of dollars each year, if not more, to get the brick-and-mortar shopping experience right. They pay knowledgeable salespeople to greet customers the moment they walk in the door.⁷² They hire and train “engaging, authentically personable employees” to walk the customer through the point of sale.⁷³ And, in appropriate cases, they allow the customer to customize the product in the store, literally inviting the customer to “co-create,” with the retailer, the very product the customer wants to buy.⁷⁴

The rise of online shopping, a trend that picked up steam before COVID and barreled full-speed for retailers of all types after COVID began, has not changed the importance of retailers’ direct and personal relationships with their customers. In fact, technology has simultaneously “streamline[d]” the brick-and-mortar shopping process (e.g., having employees ready to check the customer out with a tablet at the point of sale).⁷⁵ It has meant using digital data to understand

⁷⁰ Loechner, *supra* n.69.

⁷¹ Burt *et al.*, *supra* n.68.

⁷² Solomon, *supra* n.49.

⁷³ *Id.*

⁷⁴ Burt *et al.*, *supra* n.68.

⁷⁵ Solomon, *supra* n.49.

customers’ personal preferences and offer personalized appointments, opportunities, and recommendations in a way that “creat[es] a sense of community that will incentivize customers to keep coming back.”⁷⁶ And even for manufacturers and direct-to-consumer retailers, brick-and-mortar stores offer unique, sought-after opportunities for “showrooming,” that is, “the process by which a shopper visits a brick-and-mortar store to examine or browse for products but then purchases online.”⁷⁷

Indeed, the best proof that brick-and-mortar stores continue to afford retailers a unique ability to build a “special experience”⁷⁸ is that, in the past decade, many formerly “pure-play” online or direct-to-consumer retailers—Allbirds,⁷⁹

⁷⁶ *Reinventing the In-Store Experience: The Reshaping of Retail*, FAST CASUAL BLOG (Jun. 29, 2021), <https://www.fastcasual.com/blogs/reinventing-the-in-store-experience-the-reshaping-of-retail/>.

⁷⁷ *Duff and Phelps Apparel Quarterly Update*, KROLL.COM (Fall 2017), <https://www.kroll.com/-/media/assets/pdfs/publications/mergers-and-acquisitions/industry-inserts/consumer/apparel-quarterly-update-late-fall-2017.pdf>.

⁷⁸ Jana Kasperkevic, *Why Warby Parker Opened a Retail Store*, INC. (May 21, 2013), <https://www.inc.com/jana-kasperkevic/warby-parker-co-founder-why-we-opened-a-flagship-store.html>.

⁷⁹ Mallika Mitra, *Allbirds co-CEO says company plans to open 20 stores next year*, CNBC (Oct. 28, 2019), <https://www.cnbc.com/2019/10/28/allbirds-co-ceo-says-company-plans-to-open-20-stores-next-year.html>.

Amazon,⁸⁰ Away,⁸¹ Bonobos,⁸² Casper,⁸³ Harry's,⁸⁴ Indochino,⁸⁵ UNTUCKit,⁸⁶ Warby Parker,⁸⁷ Wayfair,⁸⁸ and Zappos,⁸⁹ among many others⁹⁰—have opened and maintained hundreds of brick-and-mortar stores alongside their online presence to offer a better shopping experience for their customers.

⁸⁰ Sebastian Herrera *et al.*, *Amazon Plans to Open Large Retail Locations Akin to Department Stores*, THE WALL STREET JOURNAL (Aug. 19, 2021), <https://www.wsj.com/articles/amazon-retail-department-stores-11629330842>.

⁸¹ Marianne Wilson, *First Look: Digitally native Away continues to expand in brick-and-mortar*, CHAIN STORE AGE (Feb. 12, 2021), <https://chainstoreage.com/first-look-digitally-native-away-continues-expand-brick-and-mortar>.

⁸² Dennis Green, *Bonobos is opening retail stores – but you can't actually take any of the clothes home*, BUSINESS INSIDER (Jul. 16, 2015), <https://www.businessinsider.com/bonobos-opened-a-store-where-you-cant-physically-buy-anything-2015-7>.

⁸³ Daphne Howland, *Casper opens first standalone store*, RETAIL DIVE (Feb. 27, 2018), <https://www.retaildive.com/news/casper-opens-first-standalone-store/517965/>.

⁸⁴ Rebecca Stewart, *DTC razor brand Harry's strikes retail deal with Boots*, The Drum (Apr. 9, 2019), <https://www.thedrum.com/news/2019/04/09/d2c-razor-brand-harrys-strikes-retail-deal-with-boots>.

⁸⁵ Daphne Howland, *Indochino expands with new wave of showrooms*, RETAIL DIVE (May 7, 2018), <https://www.retaildive.com/news/indochino-expands-with-new-wave-of-showrooms/522924/>.

⁸⁶ Daphne Howland, *Untuckit to open 100 brick-and-mortar stores by 2022*, RETAIL DIVE (Nov. 3, 2017), <https://www.retaildive.com/news/untuckit-to-open-100-brick-and-mortar-stores-by-2022/510022/>.

⁸⁷ Kasperkevic, *supra* n.78.

⁸⁸ WAYFAIR, *Wayfair to Launch First Brick & Mortar Experiences for AllModern and Joss & Main Brands* (last visited Apr. 8, 2022), <https://investor.wayfair.com/news/news-details/2021/Wayfair-to-Launch-First-Brick--Mortar-Experiences-for-AllModern-and-Joss--Main-Brands/default.aspx>

⁸⁹ Daphne Howland, *Zappos opens first brick-and-mortar store*, RETAIL DIVE (Nov. 21, 2014), <https://www.retaildive.com/news/zappos-opens-first-brick-and-mortar-store/335922/>.

⁹⁰ Sean Burke, *Multi Channel Retail Options for eCommerce Pure Players*, CLARKSTON CONSULTING BLOG (May 20, 2020), <https://clarkstonconsulting.com/insights/multi-channel-retail-options-for-ecommerce-pure-players/>.

* * *

In sum, to understand COVID’s impact on brick-and-mortar retail, this Court should understand why brick-and-mortar retailing exists in the first place. Brick-and-mortar, far from serving solely as a mere physical clearinghouse of goods to be sold, is in fact a critical tool for retailers to provide memorable physical and social shopping experiences to their customers. It was precisely these “unique customer experiences,” as the Retailers’ own brief notes, that were “prohibited” and made “effectively impossible,” in an extreme and unprecedented way, in the early months of the COVID pandemic.⁹¹

III.
THE EARLY MONTHS OF COVID CREATED UNPRECEDENTED AND
UNIQUE CHALLENGES FOR BRICK-AND-MORTAR RETAIL

There should be no surprise, then, that brick-and-mortar stores faced major and unforeseen challenges posed by the early months of the COVID-19 pandemic—a period that was described by journalists covering retail as “pretty catastrophic.”⁹² These first few months took direct aim at the two foundational pillars of the brick-and-mortar retail shopping experience: physical experience and customer trust. That retailers have met this challenge head-on speaks volumes as

⁹¹ Retailers’ Brief at 23.

⁹² Sapna Maheshwari & Ben Casselman, *‘Pretty Catastrophic’ Month for Retailers, and Now a Race to Survive*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/business/economy/coronavirus-retail-sales.html>.

to the resourcefulness and resilience of the retail industry as a whole. But retailers have not forgotten the unique and unprecedented challenges imposed by COVID-as-it-was-happening on their brick-and-mortar businesses.

A 2021 retail study concluded that “[n]o single event has had a more profound impact on shopping attitudes and behaviors globally than COVID-19.”⁹³ Customers were kept out of stores by a plethora of state and local orders. In the first three months of the pandemic, foot traffic around major retail corridors fell by as much as 80% nationwide⁹⁴ and 90% in New York City.⁹⁵ Month-over-month and year-over-year data underscore the historic and unprecedented impact that the first three months of COVID had on retail. Retail sales, for instance, fell 16.4% month-over-month in April 2020—the biggest single month-over-month decline since the government started tracking this series of data in 1992.⁹⁶ This drop was led by a significant decline in clothing store sales, which fell month over month by 50.5% in March 2020,⁹⁷ and then again by 78.8% in April 2020.⁹⁸ Year-over-year

⁹³ *International Omni-Channel Retail Report 2021*, *supra* n.59, at 5.

⁹⁴ Daniel Keyes, *US retail’s foot traffic bounce-back has stalled as the number of coronavirus cases picks up in several states*, BUSINESS INSIDER (Jul. 8, 2020), <https://www.businessinsider.com/us-retail-foot-traffic-regressing-as-coronavirus-cases-picks-up-2020-7>.

⁹⁵ *The Retail Sector in New York City: Recent Trends and the Impact of COVID-19*, OFFICE OF THE N.Y. STATE COMPTROLLER (Dec. 2020), <https://www.osc.state.ny.us/files/reports/osdc/pdf/report-8-2021.pdf>, at 1 and 7.

⁹⁶ Mutikani, *supra* n.19.

⁹⁷ Maheshwari & Casselman, *supra* n.92.

⁹⁸ Mutikani, *supra* n.19.

sales data showed similar declines. New York, for instance, reported declines in total retail taxable sales for the period March-May 2020 of 31.8% compared to the same period in 2019; for clothing and clothing accessories, the year-over-year drop for this same period was 72.8%.⁹⁹

All of this, coupled with the whiplash caused by constantly changing and often conflicting medical and governmental guidance, *see supra* pp. 11-12, created what *amicus* the National Retail Federation—the world’s largest retail trade association—called “a world of inordinate uncertainty.”¹⁰⁰ The economic data retailers were collecting in the early months of the pandemic was simply “not comparable to anything in economic history.”¹⁰¹ And the questions various brick-and-mortar retailers were forced to consider in a compressed and ever-changing timeframe was enormous. A small sample of these questions is below:

1. What protective gear were employees required to wear? Masks? Gloves? Eye protection?¹⁰²
2. What sorts of health screenings were appropriate to ensure that employees were not infected? What technologies were beneficial?¹⁰³

⁹⁹ NEW YORK STATE COMPTROLLER, *supra* n.95, at 8.

¹⁰⁰ Jack Kleinhenz, *Monthly Economic Review: June 2020*, NATIONAL RETAIL FEDERATION (Jun. 1, 2020), <https://nrf.com/research/monthly-economic-review-june-2020>.

¹⁰¹ *Id.*

¹⁰² *See, e.g.,* A.A. Dawood, *Transmission of SARS CoV-2 virus through the ocular mucosa worth taking precautions*, 22 VACUNAS 56 (2021).

¹⁰³ *See* Ashkan Soltani *et al.*, *Contact-tracing apps are not a solution to the COVID-19 crisis*, BROOKINGS INST. (Apr. 27, 2020), <https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/>.

3. How can customers be protected? Were customers required to wear protective gear? What if they refused?
4. What would enforcing mask-wearing do to retailer-customer relationships?¹⁰⁴
5. How should customer occupancy limits be determined? Be enforced? What would enforcing occupancy limits do to retailer-customer relationships?¹⁰⁵
6. Could retailers operate dressing rooms? Did they actually pose a transmission risk to customers? If so, should the rooms be cleaned after each use? What about clothes that had been tried on? Did each set of clothes need to be quarantined or decontaminated in some way?¹⁰⁶
7. Should Plexiglas dividers be used? Did they even work? Did they lull customers into a false sense of security?¹⁰⁷
8. How about returns? Should return windows be extended? What should be done with returned goods? Should they be quarantined? Could they be resold?¹⁰⁸

These questions, and many more, challenged retailers in real-time as the pandemic was unfolding. Governmental guidance could be provided, and then

¹⁰⁴ See Haley Messenger, *Retailers – and their customers – are divided over maskless shopping*, NBC NEWS (May 17, 2021), <https://www.nbcnews.com/business/consumer/retailers-their-customers-are-divided-maskless-shopping-n1267715>.

¹⁰⁵ See Dan Berthiaume, *Survey: Long wait lines in stores amid pandemic may cost retailers \$100 billion*, CHAIN STORE AGE (Apr. 22, 2021), <https://chainstoreage.com/survey-long-wait-lines-stores-amid-pandemic-may-cost-retailers-100-billion>

¹⁰⁶ See *Fitting Room Confusion: Why Some Are Still Closed As Stores And Restaurants Begin To Reopen*, CBS NEWS CHICAGO (Apr. 30, 2021), <https://www.cbsnews.com/chicago/news/fitting-rooms-covid-19-reopen-pandemic/>.

¹⁰⁷ See Tara Parker-Pope, *Those Anti-Covid Plastic Barriers Probably Don't Help and May Make Things Worse*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/19/well/live/coronavirus-restaurants-classrooms-salons.html>.

¹⁰⁸ See Lauren Thomas, *Retailers face another challenge during coronavirus: Handling returns*, CNBC (Apr. 14, 2020), <https://www.cnbc.com/2020/04/14/coronavirus-dealing-with-returns-could-be-bigger-burden-for-retailers.html>.

retracted, within a span of a few days. Nevertheless, retailers—through the dedicated efforts of individuals in and across the industry—developed sound guidelines and practices to navigate their businesses through the ever-changing landscape brought on by the pandemic.¹⁰⁹

In telling our story of the pandemic in April of 2022, *amici* are proud to say that this story can now include the tales of resilience and resolve by the members of the retail industry in responding to the challenges of COVID. But this story still does not forget—and must never forget—the extreme chaos and uncertainty during the early months of COVID that threatened the very foundations of the brick-and-mortar retail experience. For retailers, COVID was not merely “unfortunate.” It did not merely make brick-and-mortar retail “less profitable.” We urge this Court to recognize and credit—not downplay or minimize—the unique impacts that COVID-as-it-was-happening had on the Retailers here.

CONCLUSION

For these reasons, *amici curiae* respectfully submit this brief in support of the Retailers on their appeal.

¹⁰⁹ See, e.g., *Open for Business – A Blueprint for Shopping Safe*, RETAIL INDUSTRY LEADERS ASSOCIATION (last visited Apr. 8, 2022), <https://www.rila.org/coronavirus-resources-for-retailers/shop-safe>.

Dated: New York, New York
April 14, 2022

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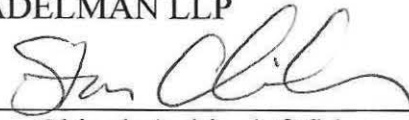
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Dated: New York, New York
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EXHIBIT B

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. 652549/2020

Hon. Debra A. James, J.S.C.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiffs-appellants The Gap, Inc. and Old Navy, LLC (“Plaintiffs-Appellants”) hereby appeal to the Appellate Division, First Department, 27 Madison Avenue, New York, New York, from the order of the Supreme Court, New York County, Hon. Debra A. James, entered and filed on August 3, 2021, annexed hereto as Exhibit A (the “Order”), which, *inter alia*, granted defendant-respondent 44-45 Broadway Leasing Co., LLC’s (“Defendant-Respondent”) motion for summary judgment dismissing the Complaint in the Action, granted summary judgment as to liability in favor of Defendant-Respondent on its first and second counterclaims, and directed certain other relief relating thereto.

This appeal is taken from each and every part of said Order, as well as the whole thereof.

Dated: New York, New York
September 1, 2021

DAVIS+GILBERT LLP

By: /s/ David S. Greenberg
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*Attorneys for Plaintiffs-Appellants
The Gap, Inc.*

To: Rosenberg & Estis, P.C.
733 Third Avenue
New York, New York 10017
(212) 867-6000

*Attorneys for Defendant-Respondent
44-45 Broadway Leasing Co., LLC*

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

PRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X

THE GAP, INC. and OLD NAVY, LLC,

INDEX NO.

652549/2020

MOTION DATE

07/01/2021

Plaintiffs,

MOTION SEQ. NO.

002

- v -

44-45 BROADWAY LEASING CO. LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 151, 152, 153, 154, 155, 156, 157, 158, 159, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 182, 183

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion to the extent that it seeks summary judgment dismissing the complaint (motion sequence number 002) is granted, and the complaint is dismissed; and it is further

ORDERED that defendant's motion to the extent that it seeks summary judgment on its first and second counterclaims for breach of Lease (motion sequence number 002), it appearing to the court that defendant is entitled to judgment on liability and that the only triable issues of fact arising on defendant's motion for summary judgment relate to the amount of damages to which defendant is entitled, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Room 2200, New York, New York 10007, is directed, upon receipt of a certified copy of this order, proof of service of copy of the notice of entry of this order upon plaintiffs, a Certificate of Deposit duly issued by the Department of Finance upon the deposit with the court of funds by plaintiffs The Gap, Inc. and Old Navy, LLC, and any other forms required by the Department (<http://www.nyc.gov>), to turn over to such defendant the funds deposited with that Department constituting the funds deposited with the court by such plaintiffs, representing the outstanding rent arrears as of July 31, 2020, as reflected in the Certificate, less the fee of the Department; and it is further

ORDERED that plaintiffs are directed to take all steps necessary to procure the release to defendant of all such foregoing funds previously paid into the court on this matter; and it is further

ORDERED that this matter having come on before this court on July 1, 2021, on motion of the defendant for summary judgment, upon the e-filed documents, including the letter dated June 30, 2021 from Joshua H. Epstein, Esq. (NYSCEF Document Number 182) and the letter dated July 1, 2021 from Warren A. Estis, Esq.

(NYSCEF Document Number 183), and the plaintiffs having been represented in connection therewith by Joshua H. Epstein, Esq., and the defendant having been represented in connection therewith by Warren A. Estis, Esq., and, pursuant to CPLR § 4317(b), the court having on its own motion determined to consider the appointment of a referee to determine as follows, and it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR § 4317 (b) in that an issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) Applying a credit for the amount of all funds on deposit made by plaintiffs that are released to defendant by the New York City Department of Finance, as directed in the herein Order and in the Amended Order dated August 2, 2021 of this court, the issue of the sum of

- (a) the amount of Fixed Rent and/or additional rent (including reasonable attorneys' fees, incurred by defendant in this action) that the plaintiff The Gap, Inc. failed to pay to defendant for the period from May 1, 2020 to date under the Lease dated June 24, 2015, as amended and modified, plus

- (b) the amount of Fixed Rent and/or additional rent (including reasonable attorneys' fees, incurred by defendant in this action) that Old Navy, LLC failed to pay to defendant for the period from May 1, 2020 to date

under the Lease dated June 24, 2015, as amended and modified;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR, including CPLR § 4319; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the defendant shall serve a proposed accounting and/or pre-hearing memorandum, within 24 days from the date of this order and the plaintiffs shall serve objections to the proposed accounting and /or pre-hearing memorandum, within 20 days from service of defendant's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and

counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that defendant shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD23d 575 (1st Dept. 2021), reversing in part Order dated November 2, 2020 (Debra A. James, J.).


20210803165846DJAMES8D1FF60D013C4234B3D2790A2987FD80

8/3/2021DATE

CHECK ONE:

☒

CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

REFERENCE

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.

The Gap, Inc. and Old Navy, LLC,
Plaintiffs,

 - against -
 44-45 Broadway Leasing Co., LLC,
Defendant.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
☐ CPLR article 75 Arbitration
☐ CPLR article 78 Proceeding
☐ Special Proceeding Other
☐ Habeas Corpus Proceeding

Filing Type

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

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

<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input checked="" type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input checked="" type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Informational Statement - Civil

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.	
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment	<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court		County: New York	
Dated: 08/03/2021		Entered: 08/03/2021	
Judge (name in full): Debra A. James		Index No.: 652549/2020	
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final		Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury	
Prior Unperfected Appeal and Related Case Information			
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> 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: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> 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.			
By the order from which this appeal is taken, Supreme Court granted the defendant's motion for summary judgment dismissing plaintiffs' complaint and awarded summary judgment on liability on defendant's counterclaims for breach of lease. The court further ordered the release of funds on deposit with the NYC Department of Finance as an undertaking, and referred the case to a special referee for determination of damages for unpaid rent.			

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.

Supreme Court improperly summarily granted defendant's motion solely by reference an order of this Court in another case involving different facts and a different lease, without any reasoned analysis of the unique facts and circumstances of this specific matter. The court implicitly (and incorrectly) held that the doctrines of frustration of purpose and impossibility did not apply for any period to suspend or cancel plaintiffs' obligations under leases for flagship retail stores in the unique Times Square location at issue in this case. Appellant seeks reversal of the Supreme Court's order, reinstatement of its causes of action, and denial of summary judgment on defendant's counterclaims.

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	The Gap, Inc.	Plaintiff	Appellant
2	Old Navy, LLC	Plaintiff	Appellant
3	44-45 Broadway Leasing Co., 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: Davis+Gilbert LLP (represents parties 1 & 2 above)

Address: 1675 Broadway

City: New York

State: NY

Zip: 10019

Telephone No: 212-468-4800

E-mail Address: jepstein@dglaw.com

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: Robins Kaplan LLP (represents parties 1 & 2 above)

Address: 399 Park Avenue, Suite 3600

City: New York

State: NY

Zip: 10022

Telephone No: 212-980-7400

E-mail Address: lcoyle@robinskaplan.com

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: Rosenberg & Estis, P.C. (represents party 3 above)

Address: 733 Third Avenue

City: New York

State: NY

Zip: 10017

Telephone No: 212-867-6000

E-mail Address: westis@rosenbergestis.com

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

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Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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