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

PRADA USA CORP., Plaintiff, v. 724 FIFTH FEE OWNER LLC, WHARTON PROPERTIES LLC and JEFF SUTTON, Defendants.	Index No. 657674/2019 Motion Seq. No. 1

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE TO DISMISS THE FIRST AND SECOND CAUSES OF ACTION IN THE COMPLAINT AND FOR A PRELIMINARY INJUNCTION

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Defendant 724 Fifth Fee Owner LLC ("Owner" or "Defendant")[1] respectfully submits this memorandum of law in support of its order to show cause (a) to dismiss, pursuant to CPLR 3211(a)(7), the First and Second Causes of Action in Plaintiff Prada USA Corp.'s ("Prada" or "Plaintiff") complaint (the "Complaint"), and for a declaration that either (i) Owner validly withdrew its December 2018 Suspension Notice and can issue another Suspension Notice at a later date, or, alternatively, (ii) if the December 2018 Suspension Notice cannot be withdrawn and remains in effect, that the Suspension Date be defined consistent with ¶4(b) of Amendment 4, which will occur after March 12, 2020; and in any event, in all events (iii) Owner can exercise more than one Suspension Option, (b) pending this Court's final determination of the merits of Prada's First Cause of Action, for a preliminary injunction, pursuant to CPLR 6301, tolling the commencement of the Suspension Period until one year after the Court renders a final determination on Prada's First Cause of Action, and (c) awarding Defendant its reasonable attorneys' fees, disbursements and court costs, pursuant to ¶64(I) of the 1997 Lease.

PRELIMINARY STATEMENT

Prada is a commercial tenant in the Building located at 724 Fifth Avenue, pursuant to a long-term Lease between Owner and Prada. Prada's First and Second Causes of Action are frivolous: they have no basis in the parties' Lease and cannot be reconciled with its express terms. Those causes of action therefore merit outright dismissal as a matter of law, based on the plain terms of the Lease. Unfortunately, however, as long as the First Cause of Action is pending, preliminary injunctive relief is needed to prevent irreparable harm to Defendant. Defendant therefore has moved by order to show cause for dismissal of the First and Second

[1] Unless otherwise defined herein, all defined terms have the meaning ascribed to them in the Affidavit of Jeff Sutton, sworn to January 9, 2020 (the "Sutton Aff.").

Causes of Action, or in lieu of an immediate dismissal for a preliminary injunction pending a final resolution on the merits of the First Cause of Action.

The parties' dispute involves Owner's clear right to develop the Building and Prada's efforts to frustrate and eviscerate that right. Owner issued a December 2018 Suspension Notice to Prada (with a corresponding March 12, 2020 Suspension Date) to commence the Building's development. Because Prada was required to vacate the Building during the development, Owner (through an affiliate) offered Prada a lease in the Crown Space[2] for a term equal to the development period, and the parties' agreed that Prada would not vacate the Building until the Crown Space was ready for it to use. This alleviated many issues regarding Prada's transition out of and back into the Building, including the need to pay double rent or the possibility of being without a store. Owner informed Prada that the timing of its move into the Crown Space was contingent upon the current tenant (Mikimoto) relocating to a new store that needed to be refit for its use, and then having the vacated space made ready for Prada, which could not be accomplished until January 2021 at the earliest. Prada accepted in writing the offer to lease the Crown Space on June 25, 2019 (and reaffirmed this acceptance through its counsel on July 8, 2019), thereby confirming its agreement to both lease the Crown Space and to not move out of the Building until January 2021 at the earliest. With the Crown Space agreement in place, it was mutually understood that the March 12, 2020 Suspension Date was no longer viable. Accordingly, Owner did not need to take steps necessary to satisfy the conditions in the Lease to duly exercise the Suspension Option and commence the development by March 2020.

The parties proceeded with this understanding until mid-October 2019, when Prada

[2] The Crown Space refers to the space in the Crown building, which is directly adjacent to the Building where Prada is currently operating, and is currently occupied by Mikimoto and the store next door to it. *See* Sutton Aff. ¶ 2.

suddenly and unexpectedly breached its commitment to lease the Crown Space and notified Owner that it would move out of the Building on March 12, 2020. Rather than taking the adversarial approach of suing Prada at this time to enforce the terms of the Crown Space deal, Owner attempted to peacefully resolve the issue by immediately notifying Prada that it was withdrawing the December 2018 Suspension Notice, so that it could issue a new Suspension Notice with an achievable Suspension Date.

Prada now takes the incredible and wholly unsupportable position that (a) the December 2018 Suspension Notice cannot be withdrawn, (b) Owner had a one-time Suspension Option – contrary to the "from time to time" language in the Lease – that it has somehow "used up", that is, Owner cannot issue a new Suspension Notice, and (c) Prada is entitled to stay in the Building and receive the $5 million Suspension Payment even though according to the plain language of the Lease that payment is not payable until Prada vacates the Building and is to be used to compensate Prada for expenses incurred when moving out of and back into the Building.

Owner asks the Court to dismiss Prada's attempt to enforce terms to which the parties never agreed in the Lease, and thereby confirm the proper reading of the Lease. Specifically, Owner was wholly within its rights under the Lease to withdraw the December 2018 Suspension Notice, and Owner is permitted to issue a new Suspension Notice at a later date. Even if the Court determines that Owner did not have the right to withdraw the December 2018 Suspension Notice, that notice would remain in effect and the Suspension Date would only occur once the conditions in ¶4(b) of Amendment 4 have been satisfied, which will occur after March 12, 2020.

Prada's First Cause of Action for a declaration that Owner has no right to withdraw and at a later date re-issue a Suspension Notice should be dismissed. As explained in Point I(A) below, Prada points to no language in the Lease (and there is none) prohibiting Owner from

withdrawing the Suspension Notice. In addition, the Lease specifically states that Owner has the right to issue more than one Suspension Notice. For example, ¶4(a) of Amendment 4 states that "Owner shall have the option … from time to time … to suspend" Prada's possession of the Demised Premises. Furthermore, under New York law, a landlord is entitled to withdraw this type of notice under the facts pleaded here. Accordingly, Prada's First Cause of Action for declaratory relief should be dismissed, and this Court should enter a judgment declaring that Owner validly withdrew its December 2018 Suspension Notice and can issue another Suspension Notice.

As explained in Point I(C), even if Owner did not have the right to withdraw its December 2018 Suspension Notice, then as Prada itself conceded on October 29, 2019, that notice remains in effect. (*See* Compl. ¶41.) Under the plain terms of the Lease, this means that the Suspension Date will be the later of March 12, 2020 or the date on which all conditions to the Suspension Date being "deemed to occur" have been satisfied, as set forth in ¶4(b) to Amendment 4. Accordingly, even if the Court were to determine that Owner did not have the right to withdraw its December 2018 Suspension Notice, the Court should still dismiss Prada's First Cause of Action and enter a judgment declaring that the December 2018 Suspension Notice remains in effect and the Suspension Date shall not be deemed to occur until the later of March 12, 2020 or when all of the conditions in ¶4(b) have been satisfied.

As discussed in Point II, Prada's shocking claim that it is entitled to be paid the $5 million Suspension Payment even without vacating the Building is obviously meritless and in direct contradiction of the Lease. Under the Lease's plain language, the Suspension Payment is payable only when Prada vacates the Building and is intended to compensate Prada for the costs of temporarily vacating the Building and then returning upon the completion of the development.

Prada cannot credibly claim an entitlement to this payment if it is not vacating the Building. Moreover, Owner's withdrawal of the Suspension Notice is another independent reason why no Suspension Payment is due to Prada. Thus, Prada's Second Cause of Action, which seeks nothing more than an inequitable windfall, should be dismissed.

For the reasons set forth in Point III, this Court should also enter a preliminary injunction tolling the commencement of the Suspension Period until one year after the Court renders a final determination on the merits of Prada's First Cause of Action. The one-year tolling period is equal to the time period between now and January 2021 – the earliest date the parties anticipated that the Crown Space would be ready for Prada's occupancy and when Owner would be ready to start developing the Building. In the absence of a ruling on Prada's claim, Owner runs the risk – no matter how frivolous Prada's claim – that if the Court were to agree with Prada that the Suspension Period starts on March 12, 2020, without regard to whether the conditions in ¶4(b) have been satisfied, and that Owner is not entitled to issue any other Suspension Notices in the future, then Owner would forever lose its negotiated-for right to develop the Building. It simply is no longer feasible for Owner to take the necessary steps to commence the development by March 12, 2020. And Owner did not take those necessary steps sooner solely because Prada and Owner agreed that the Suspension Period would commence no sooner than January 2021. The requested injunction would give Owner the same amount of time that Prada caused it to lose through its breach of its commitment to lease the Crown Space.

To be clear, no injunction would be needed if it is determined, through dismissal of Prada's First Cause of Action and a related declaration of the parties' rights and obligations under the Lease, that (a) Owner properly withdrew the December 2018 Suspension Notice and can issue a new Suspension Notice at a later date, or alternatively (b) if the December 2018

Suspension Notice could not be withdrawn, then that notice remains in effect and the Suspension Date will not occur until all conditions under ¶4(b) of Amendment 4 have been satisfied (which will occur after March 12, 2020); and in any event, in all events (c) Owner can exercise more than one Suspension Option.

Defendant satisfies all requirements for the issuance of a preliminary injunction. First, Defendant has established a likelihood to succeed (either in its current motion to dismiss or in subsequent proceedings) in defeating Prada's claims for declaratory relief and for damages under the Lease.

Second, the equities heavily favor issuance of the preliminary injunction. The reason it is no longer feasible for Owner to proceed with the development by March 12, 2020 is because in June 2019 Prada committed to lease the Crown Space during the Building's development and agreed not to vacate the Building until the Crown Space was ready. *See* Sutton Aff. ¶¶ 30-36. Specifically, Owner and Prada agreed that the Suspension Date would be delayed until (a) Mikimoto, the current tenant in the Crown Space, was moved to its new store, and (b) the Crown Space was refitted to accommodate a seamless transition for Prada. The Crown Space agreement resulted in a Suspension Date of January 2021 at the earliest – well after March 12, 2020.

Third, Owner will be irreparably harmed. New York courts have routinely held that the potential loss of an option in a real estate contract constitutes irreparable harm. If this Court holds in Prada's favor, Owner would be irreparably harmed if it were not afforded sufficient time to satisfy the conditions to make the Suspension Date effective, and thereby risk forfeiting its valuable Suspension Option.

Fourth, the real and substantial irreparable harm to Owner far outweighs any conceivable harm to Prada, of which there is none. Indeed, granting the requested injunction would simply

maintain the status quo: Prada would continue to stay in the Building paying rent at the current rate until this Court determines whether Owner has the right to withdraw its December 2018 Suspension Notice and issue a new Suspension Notice. Prada would not be harmed by an injunction enforcing the terms of the Lease to which it agreed.

ARGUMENT

I. The Court Should Dismiss Plaintiff's First Cause of Action and Issue an Order Declaring that Owner Was Permitted to Withdraw the December 2018 Suspension Notice and is Entitled To Issue A New Suspension Notice

Prada's First Cause of Action seeks a declaration that Owner was not permitted to withdraw its December 2018 Suspension Notice and no longer retains any right to exercise its Suspension Option by issuing another Suspension Notice at a later date. (Cplt. ¶61.) This cause of action is meritless and should be dismissed as a matter of law.[3]

A. Owner Has The Right to Withdraw and Re-Issue a Suspension Notice

While Prada's First Cause of Action asserts that Owner purportedly lacks any right to withdraw its December 2018 Suspension Notice, the Complaint notably fails to cite to any Lease provision that either forbids withdrawal of a Suspension Notice or otherwise places any supposed limitation on Owner's right to withdraw. And the Lease contains no such provision – a fact Owner pointed out to Prada before it commenced this baseless action. (Sutton Aff., Ex. 14.)

Prada also claims that Owner only has only one Suspension Option. To the contrary, the Lease specifically states that Owner has the right to issue more than one Suspension Notice. Paragraph 4(a) of Amendment 4 states that "Owner shall have the option … ***from time to time*** …

[3] With respect to Defendant's motion to dismiss, all relevant facts are contained in the documents referenced in Prada's Complaint (which are annexed as exhibits to the Sutton Aff.), including Amendment 4 (Ex. 6), the December 2018 Suspension Notice (Ex. 7), the October 16, 2019 letter withdrawing the December 2018 Suspension Notice (Ex. 12), and Prada's October 29, 2019 letter rejecting that withdrawal (Ex. 13).

to suspend" Prada's possession of the Building. (Sutton Aff., Ex. 6 (¶4(a) (emphasis added).) It is self-evident from the plain meaning of the phrase "from time to time" that Owner has the right to exercise a Suspension Option more than once, meaning that more than one Suspension Notice may be issued. *See, e.g., Sullivan v. Harnisch*, 96 AD3d 667, 667-68 (1st Dep't 2012) ("There was no limitation on when Harnisch was permitted to set the sharing ratio, since the operating agreements provided that it was to be 'determined from time to time.'"). Moreover, it is clear from the parties' use of the phrase "from time to time" throughout the Lease that it was intended to mean more than one time. *See* Sutton Aff. ¶ 16.

The "from time to time" language would be rendered meaningless by Prada's assertion that Owner has only the limited right to issue a ***single and irrevocable*** Suspension Notice, regardless of whether the option was duly exercised. It is a cardinal rule that courts should reject proposed contract interpretations that would render express provisions of a contract meaningless. *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 328 (2007); *UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 578-79 (1st Dept. 2010).

If the parties to the Lease, who were sophisticated, counseled business people, intended to limit Owner to a single Suspension Option, they would have included clear language to that effect. For example, ¶63(A) of the 1997 Lease shows that when the parties wanted to limit the number of times an option could be exercised they did so explicitly. *See* Sutton Aff. Ex. 2. But, Amendment 4 is directly contrary to the notion of a one-time option, as it specifically provides that the Option can be exercised "from time to time." Having contractually agreed to give Owner multiple Suspension Options, Prada cannot now rewrite the Lease to limit Owner to only

one option, regardless of the consequences of that agreement.[4] *See Sullivan* 96 AD3d at 668 (an interpretation of the agreements that causes the plaintiff to incur additional expense "is no reason to rewrite the agreements"); *Jade Realty LLC v. Citigroup Commercial Mtge. Trust 2005–EMG*, 83 A.D.3d 567, 568 (1st Dep't 2011), *affd.* 20 N.Y.3d 881 (2012) ("courts may not by construction add terms and thereby make a new contract for the parties under the guise of interpreting the writing …This rule has even greater force where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length … it is not a court's function to imply a term to save [a party] from the consequences of an agreement that it drafted.") (internal citations omitted); *425 Fifth Ave. Realty Assoc. v. Yeshiva Univ.*, 228 A.D.2d 178 (1st Dep't 1996) ("Where, as here, the lease terms were negotiated by experienced attorneys and business persons, there is no basis to interpret an agreement as impliedly stating something which the parties have neglected to specifically include") (internal citations omitted).

Furthermore, under New York law, a landlord is entitled to revoke a "termination notice." *See Eve & Mike Pharmacy, Inc. v. Greenwich Pooh, LLC,* 107 A.D.3d 505, 505 (1st Dept. 2013) (tenant's declaratory judgment action regarding the validity of a termination notice was rendered moot by landlord's subsequent withdrawal of that notice). And, if a landlord can withdraw a

[4] Prada's contention that permitting Owner to withdraw a Suspension Notice would permit Owner to repeatedly issue, withdraw and re-issue Suspension Notices so as to "significantly disrupt Prada's business" (Cplt., ¶39) is nothing more than a blatant attempt to have the Court rewrite the parties' agreement, contrary to New York law, which provides that the express language of an agreement must be enforced even where the results are contrary to the expectations of one of the parties, or are extremely disadvantageous to that party. *See, e.g., Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195 (2001) ("It does not follow, however, that Financial should be given a comparable remedy to save it from the consequences of its own agreements …"); *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995) (rejecting claim that contract "should not be read literally because it would give rise to dramatic inconsistencies and anomalies [including] fiscal uncertainties"); *Jade Realty*, 83 A.D.3d at 568.

termination notice, it goes without saying that Owner can withdraw a less drastic Suspension Notice.

The decision in *Abramson v. 74th LLC*, No. 151330/2014, 2014 WL 6682633 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 12, 2014) is particularly instructive. In that case, which cites to the First Department's decision in *Eve & Mike Pharmacy, Inc.*, section 61(c) of the parties' lease provided that in the event the landlord proposed to sell the building to a third party, the landlord had the right to terminate the lease by sending a termination notice to the tenants terminating their lease six months after the issuance of such notice. This provision further provided that if landlord elected to terminate the lease, it was obligated to pay tenant a "termination payment" equal to nine times the monthly base rent, payable to the tenants on the date they vacate the leased premises.

While the landlord was in negotiations to sell the building, he sent a termination notice to the tenants on March 5, 2014, electing to terminate their lease as of September 10, 2014. After the landlord ended negotiations with the third-party buyer to purchase the building, the landlord sent a letter on March 26, 2014 withdrawing the March 5, 2014 termination notice. The tenants, like Prada here, argued that the withdrawal of the March 5, 2014 termination notice was null and void, that the termination notice was in full effect, and that the landlord was thus obligated to tender the termination payment to the tenants upon the termination date. The court rejected the tenants' argument, holding:

> Nothing in the Lease prohibits Landlord from withdrawing the Termination Notice prior to the termination date set forth in the Termination Notice. Further, the nine (9) month termination payment is only triggered after Landlord provides the Termination Notice and six (6) months have elapsed since the Termination Notice was served, and Landlord is required to pay the termination payment on the date Tenants vacate the Property… The Termination Notice is null and void, and the March 26, 2014 withdrawal of the Termination Notice is valid and remains in full force and effect. Tenants are not entitled to the nine (9) month

termination payment …

*Abramson*m, 2014 WL 6682633.

The *Abramson* decision is directly on point and should be followed here. As in *Abramson*, nothing in the Lease prohibits Owner from terminating a Suspension Notice after it has been issued but before the Suspension Date has occurred. And, like the tenants in *Abramson*, Prada has no entitlement to a Suspension Payment once the Suspension Notice has been withdrawn. Moreover, while it would be legally irrelevant for the reasons stated in Section 1(B), similar to *Abramson* where the plaintiff did not vacate the property prior to the withdrawal of the Termination Notion, the Complaint includes no allegation that Prada materially relied on the pendency of the December 2018 Suspension Notice to lease new temporary space, move out of the Building, or take any other actions. The only purported "reliance" alleged by Prada is that it "took additional" – wholly unidentified – "steps to prepare for the Suspension Period, including by analyzing options for alternative space for a store near the Premises" (Cplt. ¶33.) This "analysis" obviously included Prada's commitment to lease the Crown Space. But Prada alleges no actual change in position as a result of the December 2018 Suspension Notice.

B. The Suspension Notice Did Not Duly Exercise the Suspension Option, and Thus Can Be Withdrawn

The Suspension Notice also can be withdrawn for the independent reason that it was only one of multiple conditions precedent to Owner's valid exercise of the Suspension Option, and without all conditions being satisfied, that option remained unexercised, giving Prada no enforceable rights thereunder.

Under New York law, a condition precedent is an act or event, other than a lapse of time, which "must occur before a duty to perform a promise in the agreement arises." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) (internal citations omitted).

The Court of Appeals has "recognized that the use of terms such as 'if,' 'unless' and 'until' constitutes unmistakable language of condition." *MHR Cap. Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009) (internal citations omitted). And, "[e]xpress conditions must be literally performed; substantial performance will not suffice." *Id*. Furthermore, New York courts are strict in holding an optionee to exact compliance with the terms of an option, and options are strictly construed. *Meccariello v. DiPasquale*, 35 A.D.3d 678, 679 (2nd Dep't 2006) ("optionee must strictly adhere to the terms and conditions of the option agreement").

Here, Amendment 4 provides Owner with the option of having Prada vacate the Building so that Owner can commence development, provided certain conditions precedent are satisfied:

(1) A notice is provided to Prada at least 365 days prior to the Suspension Date, containing certain specified details;

(2) On the Suspension Date, the other tenants or occupants have vacated the Building;

(3) At least 20 days prior the Suspension Date, Owner deposits into Escrow the Suspension Payment and a $25 million Letter of Credit; and

(4) On the Suspension Date, the Escrow Agent pays Prada the Suspension Payment and delivers the Letter of Credit.

See Amendment 4 ¶¶4(a)-(b). Only when all of these conditions have been satisfied, and not before, is the Suspension Option validly exercised and Prada is obligated to temporarily surrender the Building to Owner. *See* Amendment 4 ¶4(b) ("Tenant shall have no obligation to so surrender possession of the Demised Premises …unless .."); Amendment 4 ¶4(c) ("it shall be a condition of Tenant's obligation to surrender the Demised Premises" that Escrow Agent pay the Suspension Payment to Tenant).

Prada's position appears to be that Owner's taking of step one alone (simply providing notice) constitutes a valid and irrevocable exercise of the Suspension Option. This is contrary to the law, which provides that *all* conditions must be satisfied before the option is properly

exercised. The Second Circuit explained this concept in *Life Preserver Suit Co. v. Nat'l Life Preserver Co.*, 252 F. 139, 141-42 (2d Cir. 1918), where the plaintiff had to "give notice of election in writing, and within ten days thereafter give a $10,000 bond" in order to exercise an option to obtain a license. The court held that "[b]oth of these requirements were of equal importance; added together they constituted acceptance of option or exercise of privilege; nothing else would do; there could be no fractional acceptance, and until there was an acceptance completed and perfected, [plaintiff] had nothing to forfeit." *Id.* Although the plaintiff had provided notice, because he failed to produce the required bond by the due date, the court held that "[i]t follows that as matter of law plaintiff never duly exercised the option of becoming defendant's exclusive licensee…." *Id.* at 142.

Here, the Suspension Notice alone is insufficient to duly exercise the Suspension Option. Indeed, after providing this notice, Owner subsequently realized that the stated Suspension Date could not be achieved, and then withdrew the notice so that it could initiate the option exercise process again, with a new, achievable Suspension Date. There is nothing in the Lease obligating Owner to complete all conditions precedent to exercising the option once notice was given.[5] Furthermore, since the Suspension Option has not expired (as it runs for the duration of the Lease), Owner is completely within its rights to exercise the option again – consistent with the "from time to time" language in Amendment 4.

[5] While Prada bargained for a right to receive 365 days' notice before a Suspension Date can occur, it did not bargain for any limitation on Owner's ability to change the noticed Suspension Date to a later date. If the parties intended to limit Owner's rights in this way, they would have specifically included such language, and did not do so. Indeed, ¶4(b) is to the contrary. *See Civil Serv. Employees Ass'n, Inc. v. Plainedge Union Free Sch. Dist.*, 786 N.Y.S.2d 59, 61 (2d Dep't 2004) ("The defendants had the opportunity to include … any provisions they thought were necessary to protect their rights. The fact that they failed to do so does not warrant after-the-fact judicial modification to add the language they neglected to include.").

C. If the December 2018 Suspension Notice Cannot be Withdrawn, then the Suspension Date Will Not Occur Until All Conditions in the Lease are Satisfied

Even if Owner were not entitled to withdraw its December 2018 Suspension Notice, the Complaint fails to allege any legitimate basis for seeking a declaration that "Owner no longer retains any right to exercise the Suspension Option." (Cplt. ¶61.) The Lease includes no such provision. And Prada itself, when purporting to reject Owner's withdrawal of the Suspension Notice, wrote on October 29, 2019 that the "Suspension Notice remains in effect…." (Sutton Aff. Ex. 13.)

Prada's position that the Suspension Notice cannot be withdrawn and the Suspension Date can never be changed from March 12, 2020, causing Owner to somehow forfeit its right to develop the Building now or at any other time, is both extreme and inequitable. It is well-settled that "the law abhors a forfeiture, [and] it is the duty of the court to interpret the agreement strictly in order to avoid such a result." *Magnani v. Cuggino*, 57 Misc.3d 1, 3 (App. T. 2d Dept 9th & 10th Dists. 2017) (internal citations omitted); *Zaid Theatre Corp. v. Sona Realty Co.*, 18 A.D.3d 352, 355 (1st Dept. 2005) ("equity abhors forfeitures of valuable leasehold interests").

Furthermore, Prada's contention that the Suspension Date must occur by March 12, 2020 is belied by the plain language of ¶4(b) of Amendment 4, which clearly and unequivocally states that "Tenant shall quit and surrender to Owner possession of the Demised Premises..; *provided, however, … **the Suspension Date shall not be deemed to have occurred, unless*** (i) on such date there shall not be any other tenants or occupants in possession of all or any part of the Building …." (Sutton Aff. Ex. 6 (¶4(b) (emphasis added).) In other words, the Lease unequivocally contemplates that a Suspension Date would not "be deemed to occur" until certain conditions have been met, including, among others, the vacating of all other tenants. This date is intentionally fluid because any number of things could happen that would necessitate adjourning

the Suspension Date: for example, a tenant may hold over.

Accordingly, if this Court were to rule that Owner cannot withdraw the December 2018 Suspension Notice, then that notice remains in effect and the Suspension Date shall not occur until all conditions in the Lease are satisfied.

D. The Court Should Enter a Declaration Confirming the Correct Interpretation of the Lease

It is well-settled in New York, when dismissing a plaintiff's claim for declaratory relief, the court should also issue a declaration in favor of the defendant. *See Maurizzio v. Lumbermen's Mut. Cas. Co.*, 73 N.Y.2d 951, 954 (1989) (modifying trial court ruling dismissing plaintiff's claim for a declaration and affirmatively issuing a declaration in defendant's favor); *Lanza v. Wagner*, 11 N.Y.2d 317, 334 (1962) (same); *CPTS Hotel Lessee LLC v. Holiday Hospitality Franchising LLC*, 171 A.D.3d 484, 484-485 (1st Dept. 2019) (same); *Ruiz v. Lenox Hill Hosp.*, 146 A.D.3d 605, 606 (1st Dept. 2017) (same).

For the reasons set forth above, the Court should dismiss Prada's First Cause of Action and enter a judgment declaring that (1) Owner validly withdrew its December 2018 Suspension Notice, and can issue another Suspension Notice at a later date. Alternatively, if the Court were to determine that the December 2018 Suspension Notice cannot be withdrawn, the Court should issue a declaration that the notice remains in effect and the Suspension Date shall be the date when the conditions in ¶4(b) of Amendment 4 have been satisfied. But, in any event, the Court should declare that Owner can exercise more than one Suspension Option.

II. The Court Should Dismiss Plaintiff's Second Cause of Action

Prada's Second Cause of Action alleges that Owner damaged Prada by improperly withdrawing the December 2018 Suspension Notice and failing to pay Prada the $5 million Suspension Payment. (Cplt. ¶65.) This claim, like the First Cause of Action, is baseless and

should be dismissed as a matter of law.

First, Prada's claim that Owner anticipatorily breached the Lease by not making the Suspension Payment fails because the December 2018 Suspension Notice was properly withdrawn, as discussed in Points I(A) and I(B) above.

Second, Prada's claim that Owner breached the Lease by refusing to make the Suspension Payment is contrary to the plain language of the Lease, under which Owner agreed to provide Prada with a Suspension Payment payable ***only*** upon Prada actually vacating the Building. In particular, ¶4(c) of Amendment 4 provides that:

> … ***contemporaneous with such surrender of the Demised Premises***, Owner shall pay, or shall cause the Escrow Agent to pay, to Tenant … an amount (the "Suspension Payment") …

(Emphasis added.) Furthermore, in ¶4(c), the parties expressly acknowledge that there could be a circumstance where Prada vacates the Building (thus triggering the timing for the Suspension Payment) after the Suspension Date:

> the Suspension Payment must be "equal to the lowest sum listed in Schedule I attached hereto that correlates to ***either*** (x) the date which is the Suspension Date ***or*** (y) ***if following the Suspension Date, the date Tenant actually delivers*** possession of the Demised Premises in the condition required hereunder…."

(Emphasis added.)

Prada nowhere alleges that it has vacated, or has any intention of vacating, the Building. Accordingly, its right to receive the Suspension Payment has not been triggered, even assuming withdrawal of the December 2018 Suspension Notice was ineffective. Moreover, since the Suspension Payment is plainly intended to compensate Prada for the cost of temporarily vacating the Building during development, Prada's assertion that it is entitled to the $5 million payment while Owner has purportedly forfeited its right to develop the Building is as baseless as it is

absurd. The Complaint cites no Lease provision allowing Prada such an inequitable windfall.[6]

III. The Court Should Toll the Commencement of the Suspension Period Until One Year after It Rules on Prada's First Cause of Action

Although the December 2018 Suspension Notice references a March 12, 2020 Suspension Date, the Suspension Option could only be duly exercised once all conditions precedent in the Lease were satisfied. Prada and Owner confirmed in writing on June 25, 2019 (and their respective counsel reconfirmed on July 8, 2019), that Prada would move to the Crown Space during the Building's development. (Sutton Aff. ¶¶ 31-33.) Prada also agreed that it would stay in the Building until the Crown Space was ready to be occupied, which meant it would remain in the Building until at least January 2021. Based on that commitment, Owner proceeded with the understanding that the Suspension Date would not commence by March 12, 2020, but rather January 2021 at the earliest. (*Id.* ¶ 34-36.)

On October 16, 2019, Prada unilaterally, and in contravention of its written commitment to relocate to the Crown Space, announced that it would ***not*** be moving into the Crown Space. (Sutton Aff. ¶ 40.) This obviously disrupted Owner's planned timeframe for moving forward with the development. (Sutton Aff ¶¶ 40-41.) Owner thus immediately sent Prada written notification that Owner was withdrawing the December 2018 Suspension Notice, so that a new Suspension Notice could be issued later with an achievable Suspension Date. (*Id.* ¶ 41.)

Prada's Complaint – asserting that Prada will not recognize the withdrawal of the Suspension Notice, and asserting at the same time that Owner no longer has any right to issue a new Suspension Notice (while Owner purportedly still must pay Prada a $5 million Suspension

[6] To be clear, when Owner actually develops the Building and Prada temporarily relocates out of the Building, Owner shall make the Suspension Payment to Prada. But here, Prada claims an entitlement to the Suspension Payment at the same time it alleges that Owner has no right to develop the Building (meaning that Prada would have no need to vacate).

Payment) – leaves Owner in an untenable position that, without relief, will cause Owner to suffer irreparable harm.

Defendant thus requests that this Court enter a preliminary injunction tolling the commencement of the Suspension Period until one year after the Court renders its final determination on the merits of Prada's First Cause of Action. Under CPLR 6301, a party may obtain a preliminary injunction if it can establish (1) a likelihood of success on the merits of its claim; (2) that in the absence of injunctive relief, the moving party will suffer irreparable harm; and (3) that a balancing of the equities weighs in favor of the moving party. *See* CPLR 6301; *See Faith in Action Deliverance E. Ministries v. 3231 Assocs., LLC*, 168 A.D.3d 502, 503 (1st Dep't 2019). For the reasons set forth below, Defendant satisfies all three prongs necessary for the issuance of a preliminary injunction.

A. Defendant Has Demonstrated A Likelihood of Success on the Merits

To demonstrate a likelihood of success on the merits, "a *prima facie* showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172–73 (2d Dept. 1986); *Invar Int'l, Inc. v. Zorlu Enerji Elektrik Uertim Anonim Sirketi*, 86 A.D.3d 404, 405 (1st Dept. 2011). "Furthermore, even when the facts are in dispute, a court may find a likelihood of success on the merits; conclusive proof is not required.' *Ruiz v. Meloney*, 26 A.D.3d 485, 486 (2d Dept. 2006).

For the reasons stated in Points I and II above, Defendant has established a likelihood to succeed (either in its current motion to dismiss or in subsequent proceedings) in defeating Prada's First and Second Causes of Action.

B. Defendant Will Suffer Irreparable Harm Absent the Requested Injunction

In the context of a request for injunctive relief, "irreparable harm" simply means "any

injury for which money damages are insufficient." *McLaughlin, Piven Vogel, Inc. v. W.J. Nolan & Company, Inc.*, 114 A.D.2d 165, 174 (2d Dep't). New York courts have routinely held that the potential loss of the ability to exercise an option in a real estate contract constitutes irreparable harm. *See Faith in Action Deliverance E. Ministries*, 168 A.D.3d at 503 ("Absent an injunction, plaintiff would suffer irreparable injury since it would lose the ability to specifically enforce its option under the lease to purchase the property for a specified price"); *Masjid Usman, Inc. v. Beech 140, LLC*, 68 A.D.3d 942, 943 (2d Dept. 2009) ("the imminent threat of the plaintiff's loss of a valuable, long-term leasehold interest in the absence of an injunction satisfied the irreparable harm requirement for a preliminary injunction.").

Here, in the absence of a ruling on Prada's claims, Owner runs the risk – no matter how frivolous Prada's claims – that if the Court were to agree with Prada that the Suspension Period starts on March 12, 2020, without regard to whether the conditions in ¶4(b) have been satisfied, and that Owner is not entitled to issue any other Suspension Notices in the future, then Owner could forever lose its negotiated-for option to develop the Building. Given that there are only about two months remaining until March 12, 2020, it simply is no longer feasible for Owner to take all necessary steps to satisfy the conditions in ¶4(b) and commence the development by March 12, 2020. And Owner did not take those necessary steps sooner, solely because Prada agreed to relocate to the Crown Space when that space was ready (in January 2021 at the earliest) thus overriding the March 12, 2020 Suspension Date.

Having agreed with Owner that the March 12, 2020 date would be extended to accommodate Prada's move into the Crown Space, Prada should not be entitled to reverse course at the eleventh hour and demand that this date be reinstated for the clear purpose of trying to eviscerate Owner's valuable Suspension Option. This is exactly the type of loss of option

pertaining to real property that constitutes irreparable harm.

The requested one-year tolling period is equal to the time period between now and January 2021 – the earliest date by which the parties anticipated that the Crown Space would be ready for Prada's occupancy and when Owner would be ready to start its development. If the injunction is granted, and if the Court finds in Prada's favor, then Owner would have the same amount of time Prada caused it to lose through its breach of its commitment to lease the Crown Space.

C. The Balance of Equities Favors Defendant

In addressing the balance of the equities, Defendant must simply show that "the irreparable injury to be sustained * * * is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction." *McLaughlin, Piven Vogel, Inc.,* 114 A.D.2d at 174 (internal citations omitted). That is most assuredly the case here.

The potential harm to Owner far outweighs any conceivable harm to Prada, of which there is none. Even if Prada were correct (which it is not) that Owner cannot withdraw its December 2018 Suspension Notice, Prada must nonetheless continue to pay all rent due under the Lease until the Building is completely vacated – even if that does not occur until after March 12, 2020. (Sutton Aff. ¶ 56.) Consequently, granting Defendant the requested injunction would not cause Prada to incur any damages as it would simply maintain the status quo, *i.e.*, Prada would continue to stay in the Building at the pre-development rates. (*Id.* ¶¶ 56-58.)

D. Defendant Should Not be Required to Post an Undertaking

The purpose of an undertaking is to cover the "damages and costs which may be sustained by reason of the injunction" if it is determined that the movant was not entitled to the injunction. CPLR 6312(b). Since, for the reasons stated in Point II(C) above, Prada would not suffer any conceivable damages, there is no reason for this Court to require Defendant to post

any undertaking. Alternatively, if an undertaking is required, it should be set in a minimal amount.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that the Court: (a) grant its motion to dismiss the First Cause of Action and enter an order declaring that (i) Owner validly withdrew its December 2018 Suspension Notice and can issue another Suspension Notice at a later date, or, alternatively, (ii) if the December 2018 Suspension Notice cannot be withdrawn, it remains in effect and the Suspension Date is the date defined in ¶4(b) of Amendment No. 4, which will occur after March 12, 2020; and in any event, in all events (iii) Owner can exercise more than one Suspension Option; (b) dismiss the Second Cause of Action; (c) enter a preliminary injunction that tolls the Suspension Date until one year after the Court renders a final determination on the merits of Prada's First Cause of Action; (d) awarding Defendant its reasonable attorneys' fees, disbursements and court costs, pursuant to ¶64(I) of the 1997 Lease; and (e) grants Defendant such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 10, 2020

/s/ Stephen R. Neuwirth

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

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Dated: January 10, 2020

/s/ Stephen R. Neuwirth
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