

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>ESTABLISHMENT</b>	*	
<b>ENTERTAINMENT PARTNERS, LLC</b>	*	
	*	
<b>Plaintiff,</b>	*	<b>CIVIL ACTION</b>
	*	
<b>v.</b>	*	<b>FILE NO.</b> <u>1:20-cv-2918-MLB</u>
	*	
<b>LVA4 ATLANTA COLONY</b>	*	
<b>SQUARE, LP</b>	*	
	*	
<b>Defendant.</b>	*	

---

**PLAINTIFF’S COMPLAINT FOR DAMAGES  
AND SPECIFIC PERFORMANCE**

**COMES NOW**, Establishment Entertainment Partners, LLC (“Plaintiff”) and files this, its Complaint, against LVA4 Atlanta Colony Square, LP (“Defendant”), and shows this Honorable Court the following:

1.

Plaintiff is a Georgia limited liability company with a principal office address of 3050 Amwiler Road, Suite 200-C, Atlanta, Georgia 30360.

2.

Defendant is a foreign limited liability company with a principal office address of 100 Waugh Drive, Suite 600, Houston, Texas 77007.

Defendant may be served with this lawsuit through its registered agent,

National Registered Agents, Inc., 289 S. Culver Street, Lawrenceville, Georgia 30046, or by any other lawful means.

3.

This Court has jurisdiction over this matter sounding in breach of contract and equity, and venue is proper as the actions have taken place in this district, and Paragraph 29.8(a) of the Lease (as hereinafter defined), provides that any disputes arising out of the Lease shall be dealt with and adjudicated in this Honorable Court.

4.

On or about July 1, 2015, Plaintiff and Defendant's predecessor in interest, Colony Square (Colony-Midtown), L.P., entered into a commercial lease agreement (the "Lease") for the property located at 1197 Peachtree Street, Suite 517, Atlanta, Georgia 30361 (the "Premises"), in which Plaintiff operates a restaurant and cocktail lounge. A copy of the Lease is enclosed herewith as Exhibit "1."

5.

The Premises are located in Colony Square, which is real property consisting of retail stores and over 40,000 square feet of office space.

6.

The Lease has an initial term of ten (10) years, beginning at \$23.75/sf, and thereafter increasing at a rate of three percent (3%) per year.

Additionally, the Lease contains two five (5) year options, exercisable at Plaintiff's discretion, at annual increases of three percent (3%) per year.

7.

The Lease provides that Plaintiff shall have access to the Premises from both the exterior of Colony Square and the interior of Colony Square and does not give Defendant the right to change or otherwise interfere with Plaintiff's interior and exterior access points.

8.

The Site Plan contained in Exhibit "A" of the Lease identifies the Premises as having a back entrance to the interior of Colony Square. Upon the initial build-out of the Premises, it has always had a door accessing the interior of Colony Square.

9.

Shortly after executing the Lease, Defendant bought the property from Colony Square (Colony-Midtown), L.P. for approximately \$170,000,000.00.

10.

Almost immediately after Defendant purchased Colony Square, they began violating the terms and conditions of the Lease. Specifically, despite having the obligation of providing Plaintiff with a staircase leading to the Premises from 14<sup>th</sup> Street, Defendant deliberately delayed this process.

11.

After approximately one (1) year of owning Colony Square, Defendant announced plans to perform extensive renovations and modifications therein, including tearing the roof off the retail component of Colony Square, building a movie theater right on top of the Premises, and performing a complete redesign of the food court so that it would become a food hall as found in Ponce City Market and other venues.

12.

Knowing it would be impossible to perform these renovations and expansion without severely impacting Plaintiff's business, Defendant attempted to relocate Plaintiff to another portion of Colony Square beginning in 2017.

13.

Upon attempting to relocate Plaintiff to another portion of Colony Square, Plaintiff, at the request of Defendant, provided Defendant with a

request for a reasonable compensation package to help offset anticipated costs and operating losses, including those to be sustained from the shutting of the business for a period of months. However, despite informing Plaintiff it was reviewing Plaintiff's compensation request, Defendant completely failed to respond or offer an alternative compensation structure.

14.

Beginning in January 2018, and despite knowing the devastating impact it would have on Plaintiff's business, and having not offered Plaintiff a reasonable opportunity to relocate within Colony Square, Defendant began to perform massive renovations and expansion to Colony Square in an effort to add additional retail space to the corner of Peachtree Street and 14<sup>th</sup> Street, one of the busiest intersections in Atlanta, and to also completely revamp the food hall. During these massive renovations and expansion, Defendant periodically barricaded access to the Premises on all sides, operated heavy equipment during business hours, and otherwise severely hindered Plaintiff's ability to operate its business.

15.

Furthermore, Defendant publicly announced plans to build Atlanta's first iPic movie theater directly on top of the Premises, with an announced opening date of 2020. This plan posed a clear and present safety risk to

Plaintiff, its employees, and its customers, and was not possible without causing further interference with Plaintiff's ability to operate its business.

16.

In addition to the massive renovations and expansion taking place on the exterior of Colony Square, Defendant also started the process of making massive renovations to the interior of Colony Square, including the food court.

17.

Upon information and belief, Defendant executed a master lease with a food hall operator, in which this operator would have had exclusive access over the area of Colony Square consisting of the food court.

18.

As part of this interior renovation, Defendant completely blocked pedestrian access to the Premises from the interior of Colony Square and intended to block this pedestrian access on a permanent basis.

19.

However, the Lease provides for the Premises to have an unobstructed entranceway to the interior of Colony Square, which consists of 40,000 square feet of occupied office and hotel space, and without this interior entranceway, the rental value of the Premises is greatly diminished.

Furthermore, without this interior entranceway, Plaintiff would not have entered into the Lease with Defendant's predecessor in interest.

20.

Defendant, having contracted with an operator and agreeing to provide exclusive access to the food hall, deliberately took steps to eliminate Plaintiff's interior access to Colony Square.

21.

However, knowing they did not have the right to eliminate Plaintiff's interior access to Colony Square, Defendant, in November 2017, attempted to induce Plaintiff to sign a lease amendment where Plaintiff would have relinquished this access. However, Plaintiff did not sign the amendment.

22.

Yet, as with their decision to begin massive renovations to Colony Square despite knowing the devastating impact it would have on Plaintiff's business, Defendant also deliberately took steps to eliminate Plaintiff's interior access to Colony Square, despite knowing it was a clear violation of the Lease.

23.

Defendant's actions were a clear violation of the Lease and were done in bad faith.

24.

Upon being told by Plaintiff in August 2018 that it was intending to sue Defendant for multiple violations of the Lease, Defendant approached Plaintiff in an effort to achieve a mutually agreeable resolution.

25.

The negotiations were led by Mr. Brandon Lewis on behalf of Plaintiff, and Mr. David Weinert, on behalf of Defendant.

26.

During the negotiation process, Defendant requested and received annual and monthly financial data of Plaintiff, including annual tax returns, monthly profit and loss statements, sales summaries, and other requested financial data.

27.

In fact, on September 24, 2018, Plaintiff, through counsel, provided Mr. Weinert with monthly profit and loss statements for the calendar years 2017 and 2018, along with other requested financial data. (Exhibit 2).

28.

The monthly profit and loss statements were broken down into revenue line items and expense line items, including, but not limited to, line items pertaining to consulting expenses and legal expenses.



29.

After extensive negotiations, Plaintiff and Defendant executed the Third Amendment To Lease on October 1, 2018 (the “3<sup>rd</sup> Amendment”). (Exhibit 3).

30.

Paragraph 2 of the 3<sup>rd</sup> Amendment provides as follows:

**2. Redevelopment Matters; Initial Redevelopment Work; Temporary Closure.**

- (a) In connection with and as part of the Redevelopment, [Defendant] shall perform certain work in the vicinity of the Premises as further described on Exhibit A attached hereto and incorporated herein by this reference (the “Initial Redevelopment Work”) commencing on February 4, 2019, or such other date as [Defendant] and [Plaintiff] may mutually agree in writing (the “Commencement Date”). Notwithstanding the foregoing, [Defendant] may unilaterally change the Commencement Date up to, and including, March 3, 2019, upon providing [Plaintiff] written notice on or before December 4, 2018. The Commencement Date shall be established as provided for above unless there is a mutual written agreement signed by both parties (the “Commencement Notice”), failing which the Commencement Date shall be deemed to have occurred on February 4, 2019. The Initial Redevelopment Work shall be conducted over a period commencing on the Commencement Date and continuing until the later to occur of (i) the date that is thirty (30) days after the Commencement Date (such thirtieth (30<sup>th</sup>) day being referred to herein as the “Anticipated Completion Date”), or (ii) the date upon which the Initial Redevelopment Work has actually been completed as mutually agreed to by [Defendant] and [Plaintiff] (the “Actual Completion Date”). The period beginning on the Commencement Date and

continuing through and including the Actual Completion Date is referred to herein as the “Work Period.” To enable [Plaintiff] to prepare for reopening [Plaintiff’s] business in the Premises, [Defendant] shall provide written notice to [Plaintiff] setting forth the Actual Completion Date (the “Completion Notice”) not less than seven (7) days prior to the Actual Completion Date.

- (b) To facilitate the performance of the Initial Redevelopment Work, [Defendant] and [Plaintiff] have agreed that [Plaintiff] shall close for business to the public during the Work Period (the “Temporary Closure”). In consideration of the Temporary Closure, [Defendant] shall pay to [Plaintiff] the sum of Four Hundred Seventy-Five Thousand And No/100 Dollars (\$475,000.00) (the “Closure Payment”). The Closure Payment shall be due and payable as follows: (1) Two Hundred Seventy-Five Thousand And No/100 Dollars (\$275,000.00) within fifteen (15) days of the Amendment Effective Date; (2) One Hundred Thousand and No/100 Dollars (\$100,000.00) within thirty (30) days of the Amendment Effective Date; and (3) One Hundred Thousand and No/100 Dollars (\$100,000.00) upon the Commencement Date. In addition, if the Actual Completion Date is later than the Anticipated Completion Date (“Landlord Delay”), then [Defendant] shall pay to [Plaintiff] an additional Ten Thousand Seven Hundred Fourteen and 29/100 Dollars (\$10,714.29) per day for each day after the Anticipated Completion Date until the Actual Completion Date occurs, payable every thirty (30) days.
- (c) [Plaintiff] shall use best efforts to re-open its business in the Premises to the public not later than seven (7) days after [Defendant’s] delivery of the Completion Notice to [Plaintiff].
- (d) Any provision of the Lease, as amended hereby, to the contrary notwithstanding, [Plaintiff] acknowledges, understands, covenants and agrees that (i) the Initial Redevelopment Work and the Redevelopment will be conducted at substantial expense to [Defendant] and are, and

will be, mutually beneficial to [Plaintiff], [Defendant], and the Project, (ii) [Plaintiff] entering in this Amendment is an inducement to [Defendant], without which [Defendant] would not perform the Initial Redevelopment Work or Redevelopment, (iii) [Defendant] has the right to perform the Initial Redevelopment Work and the Redevelopment, and (iv) the performance of the Initial Redevelopment Work and the Redevelopment shall not be deemed to be in violation of or in conflict with the Lease, as amended hereby. [Plaintiff] hereby acknowledges and agrees that the Initial Improvement Work and the Redevelopment may cause some disruption to and interference with the operation of [Plaintiff's] business, and [Plaintiff] hereby releases and discharges [Defendant] and its partners, members, managers, shareholders, directors, officers, affiliates, beneficiaries, trustees, principals, employees, and agents from any and all liability or loss, damage, or injury suffered or incurred by [Plaintiff] or third parties with respect to the disruption to or interference with the operation of [Plaintiff's] business (including, without limitation, loss of business, revenues or profits) arising out of or in connection with the Initial Improvement Work and the Redevelopment.

31.

Paragraph 4 of the 3<sup>rd</sup> Amendment provides as follows:

4. **Rent and Other Payments.** Any other provision of the Lease, as amended hereby, to the contrary notwithstanding, the Lease is hereby further amended as follows:

(a) As used herein:

(i) the term "NOI" shall mean the net operating income of [Plaintiff] from its operations at the Premises for the applicable period, as determined in accordance with generally accepted accounting principles consistent applied;

- (ii) the term “Agreed Monthly NOI Base Amount” shall mean Twenty Thousand and No/100 Dollars (\$20,000.00) per month;
  - (iii) the term “Historical Monthly Gross Revenue” shall mean Two Hundred Twenty-Five Thousand and No/100 Dollars (\$225,000.00) being [Plaintiff’s] average monthly gross revenue for calendar year 2017, as set forth in financial statements previously provided by [Plaintiff] to [Defendant];
  - (iv) the term “Trigger Date” shall mean the earliest to occur of (A) the date upon which the food hall being constructed as part of the Redevelopment opens to the public for business and (B) the date upon which [Plaintiff’s] monthly Gross Revenue from operations in the Premises for three (3) consecutive calendar months meets or exceeds [Plaintiff’s] Historical Monthly Gross Revenue. Within ten (10) days after the last calendar month commencing on October 1, 2018, [Plaintiff] shall deliver to [Defendant] its unaudited written statement of Gross Revenue for such immediately preceding month.
  - (v) The term “Rent Abatement Period” shall mean the period commencing on October 1, 2018, and continuing through, and ending on the earlier of (A) the date upon which the food hall being constructed as part of the Redevelopment opens to the public for business, and (B) the date upon which [Plaintiff’s] monthly Gross Revenue from operations in the Premises for three (3) consecutive calendar months meets or exceeds [Plaintiff’s] Historical Monthly Gross Revenue.
- (b) During the Rent Abatement Period all payments of Fixed Rent, Percentage Rent and Additional Rent due from [Plaintiff] to [Defendant] under the Lease shall be abated.
  - (c) For the period beginning October 1, 2018, and continuing through the last day prior to the Trigger

Date (the “NOI Reconciliation Period”), [Defendant] shall pay to [Plaintiff] the amounts calculated pursuant to Section 4(e) below (the “NOI Reconciliation Amounts”).

- (d) Within ten (10) days after the last day of each calendar month during the NOI Reconciliation Period, [Plaintiff] shall deliver to [Defendant] its unaudited written statement of profit and loss for such immediately preceding month, together with such supporting documentation and records as [Defendant] may reasonably request (collectively, the “NOI Statement”).
- (e) Each NOI Statement shall include a calculation of [Plaintiff’s] NOI for the applicable month. The monthly NOI Reconciliation Amount for each month shall initially be equal to the Agreed Monthly NOI Base Amount, but shall be subject to adjustment as follows:
  - (i) If the NOI Statement for the applicable month indicates that [Plaintiff’s] NOI for such month was less than zero (i.e. a loss, referred to herein as “Negative NOI”), the NOI Reconciliation Amount for such month shall be equal to the sum of the Agreed Monthly NOI Base Amount and the Negative NOI for such month.
  - (ii) If the NOI Statement for the applicable month indicates the [Plaintiff’s] NOI for such month was greater than zero (referred to herein as “Positive NOI”) but less than the Agreed Monthly NOI Base Amount, the NOI Reconciliation Amount for such month shall be equal to the Agreed Monthly NOI Base Amount less the Positive NOI amount for such month.
  - (iii) If the NOI Statement for the applicable month indicates the [Plaintiff’s] NOI for

such month was Positive NOI greater than the Agreed Monthly NOI Base Amount, no NOI Reconciliation Amount shall be due or payable with respect to such month.

- (f) Within thirty (30) days after [Defendant's] receipt of each NOI Statement, [Defendant] shall pay to [Plaintiff] the NOI Reconciliation Amount for the immediately preceding month; provided, however, that if [Defendant] disputes in good faith the calculation of any NOI Reconciliation Amount it shall, within such thirty (30) day period, provide to [Plaintiff] its objection in reasonable detail, accompanied by payment of those amounts not in dispute. Any such dispute shall be resolved in the same manner as set forth in Section 7.3(b) of the Lease with respect to operating expense payments.

32.

Paragraph 8 of the 3<sup>rd</sup> Amendment, provides in relevant part, as follows:

**8. Miscellaneous.**

(a) This Amendment contains the parties' entire agreement regarding the subject matter covered by this Amendment, and supersedes all prior correspondence, negotiations, and agreements, if any, whether oral or written, between the parties concerning such subject matter. There are no contemporaneous oral agreements, and there are no representations or warranties between the parties not contained in this Amendment.

(c) [Defendant] and [Plaintiff] each represents and warrants to the other that as of the Amendment Effective Date, (i) the Lease, as amended hereby, is in good standing and remains in full force and effect and binding on the parties in accordance with its terms, (ii) the other party has fully performed and satisfied all of its covenants, agreements, and obligations under the Lease

to be satisfied or performed prior to or as of the Amendment Effective Date, (iii) the other party is not in default in the performance or observance of any of its covenants, agreements, or obligations under the Lease, nor has any event occurred which, with the giving of notice or the passage of time or both, would constitute a default by the other party under the Lease, as amended hereby, and (iv) the representing party has no claims, counterclaims, set-offs or defenses against the other party arising out of the Lease or this Amendment or in any way relating thereto or arising out of any other transaction between [Defendant] and [Plaintiff].

33.

For the months October 2018, November 2018, December 2018, and January 2018, and in accordance with Paragraph 4 of the 3<sup>rd</sup> Amendment, Plaintiff provided Defendant with its monthly NOI Statement, and after review, Defendant paid the NOI Reconciliation Amount to Plaintiff.

34.

Additionally, as set forth in Section 2 of the 3<sup>rd</sup> Amendment, Plaintiff shut down its operations on February 4, 2019, so that Defendant could conduct the Initial Redevelopment Work.

35.

However, although required pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment to commence the Initial Redevelopment Work on February 5, 2019, Defendant, without notice or approval from Plaintiff,

commenced the Initial Redevelopment Work on January 9, 2019.

Accordingly, the Commencement Date should be reflected as January 9, 2019.

36.

Beginning with the February 2019 Reconciliation Statement, Defendant, without justification, began refusing to pay portions of the NOI Reconciliation Amount, despite repeated demands by Plaintiff.

37.

Although originally scheduled to complete the Initial Redevelopment Work on or about March 6, 2019, Defendant did not complete the Initial Redevelopment Work until May 1, 2019.

38.

With the Initial Redevelopment Work commencing on January 9, 2019 and ending on May 1, 2019, the Temporary Closure encompassed a total of one-hundred-twelve (112) days.

39.

After deducting the thirty (30) day period allotted for the Initial Redevelopment Work to be completed, the Landlord Delay was for a total of eighty-two (82) days. Applying the liquidated damages amount of Ten Thousand Seven Hundred Fourteen and 29/100 Dollars (\$10,714.29) per



day, Defendant owed Plaintiff a total of Eight Hundred Seventy-Eight Thousand Five Hundred Seventy-One and 78/100 Dollars (\$878,571.78) for Landlord Delay.

40.

However, in an effort to reach an amicable resolution and be able to continue to operate its business, Plaintiff agreed to enter into a Fourth Amendment To Lease (the “4<sup>th</sup> Amendment) with Defendant on June 28, 2019, a copy of which is enclosed herein as Exhibit “4.”

41.

Paragraph 2 of the 4<sup>th</sup> Amendment provides as follows:

**2. Redevelopment Matters; Initial Redevelopment Work.**

- (a) Notwithstanding any other provision of the Lease (including, without limitation, the Third Amendment), [Defendant] and [Plaintiff] hereby agree and confirm that the Initial Redevelopment Work has been completed.
- (b) [Defendant] and [Plaintiff] acknowledge and agree as follows: (i) [Defendant] shall pay to [Plaintiff] Twenty-Eight Thousand and No/100 Dollars (\$28,000.00) in full satisfaction of the NOI Reconciliation Amounts for February 2019 and March 2019; and (ii) the April 2019 NOI Reconciliation Amount to be paid by [Defendant] to Plaintiff shall be One Hundred One Thousand Four Hundred Fifty-Eight and 88/100 Dollars (\$101,458.88).
- (c) Within five (5) business days of the execution of this Amendment by both parties, [Defendant] shall pay to [Plaintiff] the amounts described in 2(b) above and an additional Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00).

42.

Paragraph 3 of the 4<sup>th</sup> Amendment provides, in relevant part, as follows:

**3. Certain Additional Matters.**

- (a) [Defendant] agrees to construct a drink rail in the southwest corner of the patio area of the Premises at [Defendant's] sole cost and expense to complement the new design of the Complex and the Redevelopment, as generally reflected in Exhibit A hereto, which drink rail shall be constructed upon completion of the [Plaintiff] Work as depicted in the plans and design approved by [Defendant] and as described in the Third Amendment to Lease.

43.

Paragraph 7 of the 4<sup>th</sup> Amendment provides, in relevant part, as follows:

**7. Miscellaneous.**

- (a) This Amendment contains the parties' entire agreement regarding the subject matter covered by this Amendment, and supersedes all prior correspondence, negotiations, and agreements, if any, whether oral or written, between the parties concerning such subject matter. There are no contemporaneous oral agreements, and there are no representations or warranties between the parties not contained in this Amendment.
- (b)
- (c) [Defendant] and [Plaintiff] each represents and warrants to the other that as of the Amendment Effective Date, (i) the Lease, as amended hereby, is in good standing and remains in full force and effect and binding on the parties in accordance with its terms, (ii) the other party has fully performed and satisfied all of its covenants, agreements, and obligations under the Lease to be satisfied or performed prior to or as of the Amendment Effective Date, (iii) the

other party is not in default in the performance or observance of any of its covenants, agreements, or obligations under the Lease, nor has any event occurred which, with the giving of notice or the passage of time or both, would constitute a default by the other party under the Lease, as amended hereby, and (iv) the representing party has no claims, counterclaims, set-offs or defenses against the other party arising out of the Lease or this Amendment or in any way relating thereto or arising out of any other transaction between [Defendant] and [Plaintiff], provided however, that nothing in this subsection 7(c) shall affect [Defendant's] right to dispute the May NOI Statement submitted June 21, 2019 pursuant to the terms of the Lease.

44.

Almost immediately after executing the 4<sup>th</sup> Amendment, Defendant raised a dispute regarding Plaintiff's June 2019 NOI Statement, and unilaterally determined to not issue any payment to Plaintiff.

45.

As it relates to Plaintiff's July 2019 NOI Statement, Defendant once again willfully determined to not issue any payment.

46.

For the Reconciliation Statements of June 2019 through February 2020, Defendant failed to pay Plaintiff the total sum of One Hundred Thirty-Two Thousand Eight Hundred Thirteen And 01/100 Dollars (\$132,813.01), in which they raised issues for certain expenses for which issues were never raised previously, including consulting expenses and legal expenses.

47.

Thereafter, on May 13, 2020, and in response to Plaintiff's March 2020 NOI Statement, Defendant informed Plaintiff it will no longer make any payments due and owing, even those monies that are undisputed. A copy of this correspondence is enclosed herein as Exhibit "5."

48.

Despite owing undisputed amounts of \$52,816.19 for March 2020, \$32,302.92 for April 2020, and \$42,136.66 for May 2020, Defendant has willfully decided to violate the terms and conditions of the 3<sup>rd</sup> Amendment and not issue any payments to Plaintiff.

49.

By not issuing any payments to Plaintiff as required, Defendant intends to force Plaintiff out of business so that it can find a new tenant for the Premises that will generate more rental income than Defendant is to receive from Plaintiff. In addition, Defendant believes that if it forces Plaintiff out of business, it will no longer have an obligation to pay Plaintiff the monthly NOI Reconciliation Amounts.

50.

Despite being in the throes of the COVID-19 pandemic, which has had an enormous negative impact on the restaurant industry, including

Plaintiff, Defendant is flagrantly violating the terms and conditions of the Lease, including the 3<sup>rd</sup> Amendment.

51.

At all times Plaintiff has remained in full compliance with the terms and conditions of the Lease, including all amendments thereto.

**COUNT I**  
**BREACH OF CONTRACT**

52.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-51 above.

53.

The Lease, as amended, is valid and enforceable contract.

54.

Pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment, Plaintiff is to provide Defendant with its monthly Reconciliation Statements and, after review, Defendant is to pay Plaintiff all undisputed amounts.

55.

Any disputes of Plaintiff's monthly Reconciliation Statements are to be exercised in good faith by Defendant.

56.

Almost immediately after executing the 4<sup>th</sup> Amendment, Defendant started disputing portions of the monthly Reconciliation Statements without any good faith.

57.

These disputes included, but were not necessarily limited to, expenses incurred by Plaintiff for consulting fees and legal fees, both of which were in the monthly financial statements provided to Defendant prior to executing the 3<sup>rd</sup> Amendment, and for which Defendant issued payment after execution of the 3<sup>rd</sup> Amendment.

58.

For the time period of July 1, 2019 through February 28, 2020, Defendant, without any basis or good faith, disputed monies due and owing to Plaintiff in the amount of One Hundred Thirty-Two Thousand Eight Hundred Thirteen and 01/100 Dollars (\$132,813.01).

59.

Beginning with the March 2020 Reconciliation Statement, Defendant has refused to issue any monies due and owing to Plaintiff, even those not in dispute.

60.

Despite multiple demands for payment of these monies, Defendant has refused to comply with the terms and conditions of the Lease, including the amendments.

61.

Defendant's actions are a clear violation of the terms and conditions of the Lease, and amendments, and as a result thereof, Plaintiff has incurred damages in an amount to be proven at trial.

**COUNT II**  
**FRAUDULENT INDUCEMENT**

62.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-61 above.

63.

Pursuant to the clear terms and conditions of the 3<sup>rd</sup> Amendment, as of April 30, 2019, Defendant owed Plaintiff a total of Eight Hundred Seventy-Eight Thousand Five Hundred Seventy-One and 78/100 Dollars (\$878,571.78) for Landlord Delay, in addition to monies pertaining to the February 2019, March 2019 and April 2019 Reconciliation Statements.

64.

Based on representations made by Defendant regarding their willingness to comply with the terms and conditions of the 3<sup>rd</sup> Amendment, Plaintiff and Defendant entered into the 4<sup>th</sup> Amendment, where Defendant agreed to pay Plaintiff the total sum of Three Hundred Seventy-Nine Thousand Four Hundred Fifty-Eight and 88/100 Dollars (\$379,458.88), and to comply with the terms and conditions of the Lease, including the 3<sup>rd</sup> Amendment.

65.

Plaintiff reasonably relied upon Defendant's representations, and as a result thereof, entered into the 4<sup>th</sup> Amendment.

66.

However, almost immediately after entering into the 4<sup>th</sup> Amendment, Defendant made it clear they had no intentions of complying with the terms and conditions of the 3<sup>rd</sup> Amendment, as they failed to pay monies due and owing for expenses incurred by Plaintiff for which Defendant had already paid pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment.



67.

Furthermore, beginning in March 2020, Defendant has refused to issue any payments due and owing to Plaintiff pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment.

68.

Defendant's actions have made it clear that they made false representations to Plaintiff in an attempt to induce Plaintiff to enter into the 4<sup>th</sup> Amendment.

69.

Plaintiff reasonably relied on these false representations, and as a result thereof, has suffered damages in an amount to be proven at trial.

**COUNT III**  
**SPECIFIC PERFORMANCE/TEMPORARY RESTRAINING ORDER**

70.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-69 above.

71.

At the conclusion of each month, Plaintiff provides Defendant with its Reconciliation Statement, along with its monthly general ledger and profit/loss statement.

72.

Pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment, Defendant has up to thirty (30) days to review and thereafter issue payment for all undisputed amounts due and owing, and to raise in good faith any amounts in dispute.

73.

Beginning with Plaintiff's March 2020 Reconciliation Statement, Defendant has informed Plaintiff that it will not be making any payments to Plaintiff, including all undisputed amounts.

74.

Despite requests for payment of all undisputed amounts, as well as a basis for failing to pay same, Defendant has refused to issue any payments and has not provided any good faith basis for its failure to pay undisputed amounts.

75.

If Defendant continues its action of failing to pay undisputed amounts due and owing to Plaintiff, Plaintiff will suffer irreparable injury, including losing its ability to operate its business.

76.

Plaintiff is extremely likely to prevail on the merits of this matter, Defendant will not suffer any irreparable injury in being required to simply comply with the terms and conditions of the 3<sup>rd</sup> Amendment, and the public interest will be served by requiring Defendant to comply with the terms and conditions of the 3<sup>rd</sup> Amendment.

**COUNT IV**  
**PUNITIVE DAMAGES**

77.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-76 above.

78.

Defendant's actions in willfully failing to pay monies due and owing to Plaintiff in an effort to run Plaintiff out of business, particularly in light of the COVID-19 pandemic, it is clear Plaintiff's actions arise to willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

79.

As a result of Defendant's conduct, Plaintiff should be awarded punitive damages in an amount to be determined at trial.

**COUNT V**  
**ATTORNEY'S FEES AND COURT COSTS**

80.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-79 above.

81.

Plaintiff has made multiple attempts at trying to resolve this matter without having to resort to litigation, but Defendant's actions have left Plaintiff with no other option but to initiate this action.

82.

Defendant has acted in bad faith and has caused Plaintiff unnecessary trouble and expense in having to bring this action, and as a result thereof, Plaintiff shall be awarded its expenses of litigation, including its reasonable attorney's fees.

**COUNT VI**  
**ATTORNEY'S FEES AND COURT COSTS**  
**PURSUANT TO O.C.G.A. § 13-1-11**

83.

Plaintiff hereby reincorporates by reference the allegations contained in Paragraphs 1-82 above.

84.

Notice for attorneys' fees, as required under O.C.G.A. § 13-1-11, is now given stating as follows:

Pursuant to O.C.G.A. § 13-1-11, unless Defendant makes payment in full of the past due monies owed in the amount of \$341,687.28 within ten (10) days from receipt of this Complaint, Plaintiff will seek to enforce collection of the principal, interest and attorneys' fees as provided in the Lease.

Plaintiff makes demand for payment of this obligation sued upon; and upon failure to pay same as provided by law within ten (10) days from receipt of this Complaint, Plaintiff will claim attorneys' fees pursuant to the Lease and applicable law.

### **PRAYER**

WHEREFORE, Plaintiff prays:

- a. That the Court issue a temporary restraining order prohibiting Defendant from failing to pay all undisputed amounts due and owing pursuant to the terms and conditions of the 3<sup>rd</sup> Amendment;
- b. That the Court set down at the earliest possible time a hearing on an interlocutory injunction;

- c. That Plaintiff be awarded judgment for damages on the foregoing counts in such amounts as will completely make them whole;
- d. That Plaintiff be awarded all reasonable attorney's fees and costs of litigation incurred by Plaintiff for the prosecution of this action;
- e. That judgment be entered against Defendant in accordance with the evidence presented and applicable law; and
- f. That the Court award it such other relief as it deems just and proper.

Plaintiff requests a trial by jury.

Respectfully submitted this 13<sup>th</sup> day of July 2020.

**MBW LAW, LLC**

/s/Michael B. Weinstein  
Michael B. Weinstein  
Georgia Bar No. 746386  
3050 Amwiler Road, Suite 200-C  
Atlanta, GA 30360  
(404) 228-2629 (Office)  
mike.weinstein@mbwlaw.net

*Attorney for Plaintiff*