

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

**ABERCROMBIE & FITCH STORES,
INC.,**)

Plaintiff,)

vs.)

SIMON PROPERTY GROUP, LP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

SIMON PROPERTY GROUP, INC.)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

BATTLEFIELD MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

**BELLWETHER PROPERTIES OF
MASSACHUSETTS LIMITED
PARTNERSHIP**)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

**BELLWETHER PROPERTIES OF
SOUTH CAROLINA LIMITED
PARTNERSHIP**)
P.O. Box 7033)
Indianapolis, IN 46207)

Case No. _____

COMPLAINT

H – OTHER CIVIL

and)
)
CASTLETON SQUARE, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
COCONUT POINT TOWN CENTER, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
COLUMBIA MALL PARTNERSHIP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)
)
CRYSTAL MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
DEL AMO FASHION CENTER)
OPERATING COMPANY, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
DOVER MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
EMI SANTA ROSA LIMITED)
PARTNERSHIP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)
)
FASHION VALLEY MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
FLORIDA MALL ASSOCIATES, LTD)
225 W. Washington St.)
Indianapolis, IN 46204)

and)
)
GALLERIA AT WOLFCHASE, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)
GRAPEVINE MILLS MALL LIMITED)
PARTNERSHIP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)
)
GREENWOOD PARK MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)
)

HG GALLERIA I, II, III, LP)
P.O. Box 7066)
Indianapolis, IN 46207)

and)

JG ELIZABETH II, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

KING OF PRUSSIA ASSOCIATES)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

LAKELINE DEVELOPERS)
P.O. Box 7066)
Indianapolis, IN 46207)

and)

LIVINGSTON MALL VENTURE)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

MALL AT AUBURN, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT GURNEE MILLS, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT INGRAM PARK, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT KATY MILLS, LP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

MALL AT LEHIGH VALLEY, LP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

MALL AT MIAMI INTERNATIONAL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT POTOMAC MILLS, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT SMITH HAVEN, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT SOLOMON POND, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL AT SUMMIT, LLC)
c/o CT Corporation System)
4400 Easton Commons Way, Suite 125)
Columbus, OH 43219)

and)

MALL AT TUTTLE CROSSING, LLC)
c/o CT Corporation System)
4400 Easton Commons Way, Suite 125)
Columbus, OH 43219)

and)

MALL AT WHITE OAKS, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MALL OF GEORGIA, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MAYFLOWER CAPE COD, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MAYFLOWER EMERALD SQUARE, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MAYFLOWER SQUARE ONE, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

MILPITAS MILLS LIMITED PARTNERSHIP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

MNH MALL, LLC)
c/o CT Corporation System)
2 1/2 Beacon St.)
Concord, NH, 03301)

and)

NEWPORT CENTRE, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

ONTARIO MILLS LIMITED)
PARTNERSHIP)
5425 Wisconsin Ave., Suite 500)
Chevy Chase, MD 20815)

and)

OPRY MILLS MALL LIMITED)
PARTNERSHIP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

ORANGE CITY MILLS LIMITED)
PARTNERSHIP)
5425 Wisconsin Ave., Suite 500)
Chevy Chase, MD 20815)

and)

ORLAND, LP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

PENN ROSS JOINT VENTURE)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

PENN SQUARE MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

PIER PARK, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

PREMIUM OUTLET PARTNERS, LP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

ROCKAWAY CENTER ASSOCIATES)
225 W. Washington St.)
Indianapolis, IN, 46204)

and)

SDG DADELAND ASSOCIATES, INC.)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

SDG FASHION MALL LIMITED)
PARTNERSHIP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

SHOPPING CENTER ASSOCIATES)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

SHOPS AT ST. JOHNS, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

SIMON PROPERTY GROUP (TEXAS),)
LP)
P.O. Box 7066)
Indianapolis, IN 46207)

and)

SOUTH HILLS VILLAGE ASSOCIATES,)
LP)
225 W. Washington St.)
Indianapolis, IN 46204)

and)

SOUTHPARK MALL LIMITED)
PARTNERSHIP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

ST. LOUIS PREMIUM OUTLETS, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

STONERIDGE PROPERTIES LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

SUNRISE MILLS (MLP) LIMITED)
PARTNERSHIP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

TACOMA MALL PARTNERSHIP)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

THE FALLS SHOPPING CENTER)
ASSOCIATES, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

THE RETAIL PROPERTY TRUST)
CT Corporation System)
28 Liberty St.)
New York, NY 10005)

and)

THE TOWN CENTER AT BOCA RATON)
TRUST)
P.O. Box 7033)
Indianapolis, IN 46207)

and)

TOWN CENTER AT COBB, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

UNIVERSITY PARK MALL, LLC)
c/o The Corporation Trust Company)
Corporation Trust Center)
1209 Orange St.)
Wilmington, DE 19801)

and)

WEST TOWN MALL, LLC)
 c/o The Corporation Trust Company)
 Corporation Trust Center)
 1209 Orange St.)
 Wilmington, DE 19801)
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 and)
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 WESTCHESTER MALL, LLC)
 c/o The Corporation Trust Company)
 Corporation Trust Center)
 1209 Orange St.)
 Wilmington, DE 19801)
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 and)
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 WOODFIELD MALL, LLC)
 c/o The Corporation Trust Company)
 Corporation Trust Center)
 1209 Orange St.)
 Wilmington, DE 19801)
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 Defendants.)
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**PLAINTIFF’S COMPLAINT FOR DECLARATORY JUDGMENT,
 BREACH OF CONTRACT, SPECIFIC PERFORMANCE,
PROMISSORY ESTOPPEL, AND UNJUST ENRICHMENT**

Plaintiff Abercrombie & Fitch Stores, Inc. (“ANF”) hereby files this Complaint against Simon Property Group, L.P. (“Simon Group”) and the above-captioned landlord entities (“Simon Lessors”) (Simon Group and Simon Lessors collectively referred to as “Simon”) as follows:

INTRODUCTION

1. This action arises from contract disputes between ANF and Simon wherein Simon wrongfully extracted rent payments from ANF for retail properties leased from Simon.

2. During the relevant time periods, ANF was prohibited from using the leased premises as they were subjected to government-mandated closures as a result of changes to applicable laws and regulations because of the COVID-19 pandemic.

3. The government-mandated closures amounted to “Prohibitions” under the terms of the lease agreements such that ANF was, and is, entitled to an abatement of any and all rent and other charges for the period between the imposition of the Prohibition and the lifting of the same (“Prohibition Periods”). Nevertheless, Simon demanded, in breach of its contractual obligations, that ANF pay rent and other charges for retail space ANF was prohibited from using.

4. ANF brings this action for: (i) a declaratory judgment concerning the interpretation of the Force Majeure and Prohibition Clauses under the leases at issue (“Lease Agreements”); (ii) breach of contract; (iii) specific performance; (iv) promissory estoppel; and (v) unjust enrichment. In addition to its requested declaratory relief, ANF seeks the return of any and all rent payments made to Simon during the Prohibition Periods.

PARTIES

5. Plaintiff Abercrombie & Fitch Stores, Inc. is an Ohio corporation with its principal place of business in Franklin County, Ohio.

6. Defendant Simon Property Group, L.P. (“Simon Group”) is registered in Ohio as a foreign corporation, formed under Delaware law, with its principal place of business in Indianapolis, Indiana.

7. Defendant Simon Lessors are paper subsidiaries of Simon Group and are primarily Delaware entities.¹

¹ See Exhibit A for a list of the Lease Agreements and Simon Lessors.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to Ohio Revised Code Chapter 2721, as well as Ohio Revised Code Section 2305.01. The amount in controversy exceeds fifteen thousand dollars (\$15,000.00).

9. At all relevant times, Simon regularly transacted business in Ohio and/or was licensed to do business in Ohio. The Lease Agreements were negotiated, contracted for, issued, and delivered to ANF in Ohio. Moreover, two of the Lease Agreements relate to property located in Ohio. Accordingly, this Court has jurisdiction over Simon because it regularly transacted business in Ohio and has an interest in property located in Ohio. *See* Ohio Rev. Code §§ 2307.382(A)(1), 2307.382(A)(8).

10. Venue is proper in Franklin County because all or part of the claim for relief arose in this County.

BACKGROUND

ANF's Business.

11. ANF is a global retailer that sells apparel, personal care products, and accessories for men, women, and children under its Hollister, Abercrombie & Fitch, and abercrombie kids brands.

12. All of ANF's Hollister, Abercrombie & Fitch, and abercrombie kids retail stores are located in leased facilities, primarily in shopping centers. In the United States alone, ANF leases and operates approximately 647 retail stores.

13. In addition to selling its products through traditional brick and mortar retail stores, ANF's online and mobile platforms allow customers to purchase merchandise remotely and pick it up at an ANF retail store. Nevertheless, ANF has historically generated the majority of its revenue from retail stores sales.

Simon's Business and Structure.

14. Simon Group is a majority-owned subsidiary of Simon Property Group, Inc. ("Simon Inc."). Simon Group "owns all of [Simon Inc.'s] real estate properties and other assets." *See* Simon 2019 Form 10-K at 88.

15. Simon Group owns, or holds an interest in, "204 income-producing properties in the United States, which consist[] of 106 malls, 69 Premium Outlets, 14 Mills, four lifestyle centers, and 11 other retail properties in 37 states and Puerto Rico." *Id.* at 5.

16. Simon's leases are executed by Simon Group and/or Simon Inc. employees, including John Rulli, President of Malls and Chief Administrative Officer, on behalf of dozens of paper entities, including the named Simon Lessors.

17. Simon Group dominates and controls the Simon Lessors to such a degree that the Simon Lessors were no more than alter ego entities of Simon Group. Upon information and belief, the Simon Lessors are judgment proof entities that serve to insulate Simon Group from liability.

The Lease Agreements.

18. ANF has numerous leases with Simon covering store fronts in several states. While these leases themselves are drafted individually, lease economics are generally negotiated in groups based on ANF's annual portfolio review. Thus, the economic terms for leases set to expire on January 31st in a given year are negotiated at one time. Simon Group, not the Simon Lessors, negotiates the leases and their economics, as well as any amendments, extensions, or modifications, with ANF.

19. Once executed, Simon Group, acting as and on behalf of the Simon Lessors, assumes responsibility for the Lease Agreements' obligations, performance, and benefits. For example, Simon Group delivered and provided the leased premises to ANF, responded to

maintenance requests, notified ANF of alleged deficiencies, and addressed rent disputes. In addition, upon information and belief, Simon Group ultimately received the rental payments ANF made under the Lease Agreements, as well as any associated benefits. Thus, there was, and is, no distinction between Simon Group and the Simon Lessors.

20. The Lease Agreements include several standard terms, including terms that control the parties' rights and obligations in the event of an operational interruption.

21. First, each of the Lease Agreements includes a "Temporary Cessation" Clause in substantially the following form:

. . . [A] "Temporary Cessation" shall mean any cessation or discontinuance (i) of thirty (30) consecutive days or less, or (ii) occasioned by fire or other casualty (separate provision for which is made in ARTICLE XIV of this lease), or (iii) occasioned by an eminent domain taking (separate provision for which is made in Article XV of this lease), or (iv) by reason of force majeure (separate provision for which is made in Article XVIII, Section 19 of this lease), or (v) by virtue of remodeling of the demised premises (separate provision for which is made in Section 4 of ARTICLE X of this lease).

*See August 1, 2017 Mall at Tuttle Crossing Lease, Article IX, Section 2(B) (attached as Exhibit B).*²

22. Second, each of the Lease Agreements includes the following Force Majeure Clause in substantially the following form:

Except with respect to the payment of rent and other charges payable hereunder, Tenant shall be excused from the performance of its obligations hereunder for such period of time as it is prevented from performing the same by reason of acts of God, strikes, and other causes beyond its reasonable control. For such period of time as it is prevented from performing the same by reason of acts of God, strikes, and other causes beyond its reasonable control, Landlord shall be excused from the performance of its obligations hereunder. For the purposes of the

² Exhibit B is a representative sample of the Lease Agreements. ANF will provide a complete set of the Lease Agreements, which are voluminous, upon the Court's or Simon's request, although Simon already possesses those documents.

foregoing, financial inability or unavailability of funds shall never be deemed to be a cause beyond a party's reasonable control.

See id. at Article XVIII, Section 19.

23. Finally, each of the Lease Agreements contains a Prohibition Clause in substantially the following form:

If at any time during the term of this lease . . . ***applicable law shall not permit the use of the demised premises as permitted under this lease*** as opposed, for example, to the withdrawal of permission for the sale of a particular item from the demised premises . . . Tenant shall send Landlord written notice thereof and if Landlord shall not, within sixty (60) days following the date of its receipt of Tenant's notice, cause the Prohibition to be lifted (or, if the lifting of the Prohibition shall take more than sixty (60) days, if Landlord shall not have commenced the process of causing the same to be lifted within such sixty (60) day period and shall not diligently prosecute such process to completion thereafter), then Tenant, as its sole remedy therefor, may terminate this lease by giving Landlord notice thereof, and, upon the sending of such notice, this lease and all of the unaccrued rights and obligations of the parties to it shall cease and terminate. ***In the event a Prohibition should occur or be imposed, then for the period between the occurrence or imposition of such Prohibition and the earlier of (a) the lifting of the same or (b) the termination of this lease as provided hereinabove, rent and all other charges payable by Tenant under this lease shall be fully abated and Landlord shall, promptly after such occurrence or imposition, refund any unearned rent and other charges paid by Tenant.***

See id. at Article XVI, Section 2 (emphasis added).

24. Thus, business interruptions arising from applicable law are governed by the Prohibition Clause.

Government Orders Related to COVID-19 Pandemic Force Store Closures.

25. Following significant outbreaks in Asia, Europe, and the United States, the World Health Organization declared the COVID-19 outbreak a global pandemic on March 11, 2020.

26. On March 18, 2020, following discussions with "federal, state and local officials and in recognition of the need to address the spread of COVID-19[,] . . . Simon close[d] all of its retail properties, including Malls, Premium Outlets and Mills in the U.S." *Simon Property Group Temporarily Closes All Domestic Properties*, Press Release (Mar. 18, 2020),

<https://investors.simon.com/news-releases/news-release-details/simon-property-group-temporarily-closes-all-domestic-properties>.

27. Simon’s public filings acknowledged that changes in applicable law triggered by the COVID-19 pandemic did not permit the use of its properties for retail purposes. *See* Simon Q1 2020 10-Q at 33 (“The impact of the pandemic has been rapidly evolving and, as cases of the virus have continued to be identified, governments and other authorities, including where we own or hold interests in properties, have imposed measures intended to control its spread, including restrictions on freedom of movement, group gatherings and business operations such as travel bans, border closings, business closures, quarantines, stay-at-home, shelter-in-place orders, density limitations and social distancing measures.”); *id.* at 51 (“[T]he impact of the COVID-19 pandemic, and restrictions intended to prevent its spread, which were implemented through a combination of state, local and federal orders and regulations that were put in place with unprecedented speed and with no opportunity for citizens to challenge their legality . . .”).

Simon Requires ANF to Pay Rent on Closed Stores.

28. Simon’s March 18, 2020 closures as a result of changes to applicable laws and regulations deprived ANF of its ability to operate its stores according to the terms of its leases with Simon. As such, ANF notified Simon that it did not intend to pay April 1, 2020 rent installments for its Simon-leased stores.

29. In response, John Rulli, Simon’s President of Malls and Chief Administrative Officer, sent a letter to Fran Horowitz, ANF’s CEO, as “Simon,” demanding that ANF continue to pay rent because of Simon’s “significant financial demands and obligations with numerous third parties” and arguing that ANF was required to fulfill its payment obligations as the Parties’ Force Majeure Clause “expressly state[s] that Abercrombie must continue to pay all rent charges

required under [its] leases in the event of a force majeure.” *See* March 27, 2020 Rulli Letter (attached as Exhibit C).

30. ANF disagreed with Simon’s interpretation of the Lease Agreements and expressly invoked the Prohibition Clause in an April 14, 2020 letter to Simon and its “affiliated landlord entities.” *See* April 14, 2020 Leino Letter (attached as Exhibit D). Because the government-mandated closures constituted a “Prohibition,” ANF was entitled to an abatement for rent and all other charges accrued during the Prohibition Periods applicable to each store. *Id.* Consistent with the Prohibition Clause, ANF also requested a refund of all prepaid rent advanced for stores closed during the period between March 18, 2020 and March 31, 2020.

31. In response, Simon claimed ANF was obligated to pay all rent charges as the COVID-19 pandemic and the resulting government regulations constituted a Force Majeure event, not a Prohibition. *See* April 17, 2020 Rulli Letter (attached as Exhibit E). Moreover, Simon argued that any closures amounted only to a “Temporary Cessation,” such that “Abercrombie’s refusal to pay April rent [wa]s a willful breach of the leases” such that “any assertion to the contrary [wa]s disingenuous.” *Id.*

32. Yet, Simon itself has recognized, in its recent 10-Q, that COVID-related state, local, and federal orders and regulations have prohibited retailers from using leased properties for their intended purposes:

Not only has the temporary closure of our retail properties and the restrictions put in place by state, local and federal officials caused consumers who otherwise would have purchased from retailers at our properties to increase their utilization of pure online retail websites, but consumers whose previous use of online retail was low or non-existent have recently turned to pure online retail as a necessity due to the inability to access our properties and the ability to purchase nonessential goods from these pure online retailers. Further, the increased utilization of pure online shopping, may lead to the closure of underperforming stores by retailers, which could impact our occupancy levels and the rates that tenants are willing to pay to lease our space.

... *With the temporary closure of our retail properties and the restrictions put in place by state, local and federal officials preventing consumers from obtaining goods from our centers*, we may be unable to draw these consumers back to our centers once properties are reopened and restrictions are lifted.

Simon Q1 2020 10-Q at 51 (emphasis added).

33. ANF's losses due to government-mandated closures have been exacerbated by Simon's tactics. Hoping to redirect lost retail store sales to online and mobile platforms, ANF sought to access several Simon locations to fill ship-from-store online orders.

34. On April 23, 2020, however, Simon's General Counsel, Steven E. Fivel, sent ANF a warning that "if A&F must gain access to our shopping centers, certain protocols must be adhered to, and A&F must obtain prior written authorization." *See* April 23, 2020 Fivel Letter (attached as Exhibit F).

35. Despite an email exchange between Fivel and Greg Henchel, ANF's Senior Vice President, General Counsel & Corporate Secretary, in which Henchel expressly requested "immediate access to each and every one of [ANF's] store spaces located in Simon centers," Simon never provided approval. *See* April 23-27, 2020 Email Correspondence between Fivel and Henchel (attached as Exhibit G).

36. On April 24, 2020, ANF sent Simon a letter in response to Simon's April 17, 2020 letter from Rulli. *See* April 24, 2020 Leino Letter (attached as Exhibit H). ANF's letter, in addition to refuting Simon's Force Majeure and Temporary Cessation arguments, again asserted that closures mandated by Simon and state and local governments constituted a Prohibition and entitled ANF to an abatement of any and all rent and other charges payable during the closure period. *Id.* ANF also indicated it was making April 2020 rent payments "under protest" in accordance with the Parties' Lease Agreements. *Id.*

37. As the parties continued to dispute the application of the Force Majeure and Prohibition Clauses to ANF’s leases with Simon, ANF made May rental payments “under protest” on June 11, 2020. *See* June 11, 2020 Leino Letter (attached as Exhibit I). ANF has also paid rent under protest for certain of the Lease Agreements in Exhibit A for April, June, and July. ANF made such payments not because they were rightfully due under the terms of the Parties’ Lease Agreements, but because ANF feared Simon would place it in default and wrongfully seize millions of dollars of ANF inventory located in the stores to which Simon refused access.

38. As of May 11, 2020, Simon had only reopened 77 of its 204 retail properties. *See* Simon Q1 2020 10-Q at 33.

COUNT I: DECLARATORY JUDGMENT

39. ANF incorporates each of the allegations set forth in paragraphs 1 through 38 above as if expressly set forth herein.

40. Pursuant to the Uniform Declaratory Judgment Act, O.R.C. §§ 2721.01 *et seq.*, “any person interested under a . . . written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations under it.”

41. Simon Group and the Simon Lessors are the alter-egos of each other so that the Simon Defendants are parties at interest to the Lease Agreements.

42. ANF seeks a declaration that the laws, regulations, and/or orders issued by federal, state, and/or local governments in response to the COVID-19 pandemic mandating the closure of premises leased through the Lease Agreements constitute Prohibitions under the terms of those Lease Agreements such that ANF was deprived of their intended use of those premises.

43. ANF also seeks a declaration that the government-mandated closures described herein do not amount to a Force Majeure event under the Parties' Force Majeure Clause.

44. ANF further seeks a declaration that, due to the occurrence of a Prohibition, any and all rent and other charges payable by ANF should have been abated during the Prohibition Period for each store noted in Exhibit A and that Simon is obligated to refund any and all rent and other charges.

45. Finally, ANF seeks a declaration that Simon has breached the terms of the Lease Agreements and in doing so has injured ANF.

46. An actual controversy exists between the Parties with respect to the interpretation of the Lease Agreements, and a declaration of the Parties' respective rights and obligations will terminate some or all of the Parties' controversies.

COUNT II: BREACH OF CONTRACT

47. ANF incorporates each of the allegations set forth in paragraphs 1 through 46 above as if expressly set forth herein.

48. Under the terms of the Lease Agreements, the occurrence of a Prohibition entitles ANF to an abatement of any and all rent during the occurrence of a Prohibition—in this case, the government-mandated closures.

49. ANF has performed all of its obligations under the Lease Agreements, including: (i) properly providing the required written notice to Simon following the occurrence of a Prohibition; and (ii) paying rent and other charges under protest.

50. Simon Group and the Simon Lessors are the alter-egos of each other so that the Lease Agreements are binding upon all Simon Defendants.

51. In breach of the Lease Agreements' Prohibition Clause, Simon continued to demand and collect rent payments from ANF and declared ANF in default despite the occurrence of a Prohibition.

52. ANF is entitled to an abatement of any and all rent and a refund of any and all rent and other payments during the Prohibition Period for each store noted in Exhibit A in an amount in excess of fifteen thousand dollars (\$15,000.00).

COUNT III: SPECIFIC PERFORMANCE

53. ANF incorporates each of the allegations set forth in paragraphs 1 through 52 above as if expressly set forth herein.

54. The Lease Agreements constitute valid and enforceable agreements based upon valuable consideration.

55. Simon Group and the Simon Lessors are the alter-egos of each other so that the Lease Agreements are binding upon all the Simon Defendants.

56. ANF has performed all its obligations under the Lease Agreements.

57. By refusing to abate any and all rent payments and other charges during the occurrence of a Prohibition and retaining any and all rent payments and other charges paid by ANF, Simon has breached the Lease Agreements.

58. ANF requests that this Court issue a decree for specific performance to compel Simon to abide by the Lease Agreements and provide for the abatement and refunding of any and all rent and other charges paid.

COUNT IV: PROMISSORY ESTOPPEL

59. ANF incorporates each of the allegations set forth in paragraphs 1 through 58 above as if expressly set forth herein.

60. Simon clearly and unambiguously promised that in the event of a Prohibition, any and all rent and other charges payable under the Lease Agreements would be fully abated during the Prohibition Period for each store noted in Exhibit A.

61. Simon also clearly and unambiguously promised to refund any and all rent payments and other charges paid by Plaintiff after the occurrence of a Prohibition.

62. ANF relied on Simon's promises concerning the abatement and refunding of any and all rent payments and other charges payable in entering the Lease Agreements.

63. It was reasonable for ANF to rely on Simon's promises concerning the abatement and refunding of any and all rent payments and other charges payable.

64. ANF relied, to its detriment, on Simon's promises and has been damaged in an amount in excess of fifteen thousand dollars (\$15,000.00).

COUNT V: UNJUST ENRICHMENT

65. ANF incorporates each of the allegations set forth in paragraphs 1 through 64 above as if expressly set forth herein.

66. ANF conferred a benefit upon Simon in the form of rent and other payments under the Lease Agreements.

67. By retaining the payments, Simon has been unjustly enriched in an amount in excess of fifteen thousand dollars (\$15,000.00).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Abercrombie & Fitch Stores, Inc. prays for judgment against Defendant Simon Property Group, L.P. and the Simon Lessors as follows:

1. A declaration that:
 - a. The laws, regulations, and/or orders issued by federal, state, and/or local governments in response to the COVID-19 pandemic mandating the closure of premises leased through the Lease Agreements constitute Prohibitions under the terms of those Lease Agreements such that ANF was deprived of its intended use of those premises;
 - b. The government-mandated closures described herein do not amount to a force majeure event under the Parties' Force Majeure Clause;
 - c. Due to the occurrence of a Prohibition, rent and other charges payable by ANF should have been abated during the period of the Prohibition for each store noted in Exhibit A and Simon is obligated to refund any unearned rent and other charges; and
 - d. Simon has breached the terms of the Lease Agreements and in doing so has injured ANF.
2. The return of all rent payments made to Simon for the Prohibition Periods for each store noted in Exhibit A;
3. Costs, including reasonable attorneys' fees, pre- and post-judgment interest, court costs, and other litigation expenses; and
4. Any further relief that the Court deems just and proper.

Dated: July 10, 2020

Respectfully submitted,

/s/ Michael R. Gladman

Michael R. Gladman (Ohio Bar # 59797)

Trial Attorney

Shalini B. Goyal (Ohio Bar # 96743)

Katherine T. Berger (Ohio Bar # 98872)

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Counsel for Plaintiff

ABERCROMBIE & FITCH STORES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of ANF's Complaint will be served to all parties through the electronic filing system of the Franklin County Court of Common Pleas and served upon all Defendants by the Clerk via U.S. Certified Mail.

Dated: July 10, 2020

/s/ Michael R. Gladman

Michael R. Gladman (Ohio Bar # 59797)

Trial Attorney

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