*To Be Argued By:*
David M. Grill
*Time Requested: 15 Minutes*

APL-2019-00089

*New York County Clerk's Index No. 655914/16*
*Appellate Division, First Department Case No. 2018-1298*

# Court of Appeals

STATE OF NEW YORK

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK,

*Plaintiff-Appellant,*

*against*

D'AGOSTINO SUPERMARKETS, INC.,

*Defendant-Respondent.*

## REPLY BRIEF FOR PLAINTIFF-APPELLANT


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*Date Completed: November 21, 2019*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes and Other Authorities**

## PRELIMINARY STATEMENT

In this commercial real estate dispute, The Trustees of Columbia University in the City of New York (the "University") submits this brief in further support of its appeal from an order of the Appellate Division, First Department affirming a Supreme Court order that: (1) denied the University's motion for summary judgment on the complaint, and (2) granted the cross-motion of defendant D'Agostino Supermarkets, Inc. (the "Corporation") for: (a) summary judgment striking the University's claim for liquidated damages and (b) entry of judgment against itself and in favor of the University for $175,751.73, with interest accrued from October 14, 2016 to the date of the judgment. The Corporation advances several arguments on appeal. None has merit.

Contrary to the Corporation's contentions, the lower courts did not make factual findings when erroneously determining that the University's losses were readily ascertainable and that the liquidated damages clause was disproportional to the University's actual losses. See, e.g., Resp. Br. at 1, 4, 30. This Court has repeatedly held that whether an agreement contains an enforceable liquidation of damages or an unenforceable penalty is a question of law, not of fact. Further, the lower courts decided this question as a matter of law to resolve the motion and cross motion for summary judgment, and courts do not make factual findings when deciding summary judgment motions.

On the substance, the Corporation argues the liquidated damages clause was not proportional to the University's actual damages, which are limited to the remaining amount the Corporation agreed to pay under the Agreement's payment schedule, $175,000. This argument is totally without merit. The Agreement's payment schedule was not meant to compensate the University for its actual damages. It was a discounted amount to resolve the dispute quickly and allow the Corporation to vacate the premises, as it requested. By breaching both the Lease and the Agreement, the Corporation forfeited this discount and became responsible for the parties' estimate of the University's actual damages. The University's discounted offer to resolve a dispute does not transform its fair approximation of actual damages into a penalty.

The Court must also reject the Corporation's argument that the damages were capable of precise estimation because the Corporation, having secured a new tenant, could precisely estimate its damages at the time the Agreement was entered. The Corporation refutes its own argument by acknowledging that the University had not yet signed a lease with a new tenant at the time the Agreement was entered. Without a binding lease with a new tenant, the University did not have the assurance of a new tenant, and under the Agreement, unlike the Lease, the University – not the Corporation – bore the risk of a vacancy.

The Corporation's claim that the damages were easily ascertainable also fails because the University's actual damages include more than the lost rent covered by the Agreement's payment schedule. The University's losses also include significant costs to find a new tenant. These quantifiable damages, all of which could have been recovered by the University under the Lease, amount to $851,000. This amount is comparable to the $1.2 million owed under the Agreement, especially given the risk of a much larger loss due to a protracted vacancy.

The Corporation also complains that the University should not be allowed to receive liquidated damages while at the same time collecting rent from the new tenant, falsely accusing the University of "double-dipping." This argument lacks a valid basis, because the liquidated damages clause compensates the University for damages it suffered *before* the new tenant took possession. Moreover, the Agreement did not contain a rent mitigation clause similar to the one in the Lease. The Corporation could have insisted on such a clause, but did not. The parties did not include such a provision because the University bore the risk of a vacancy and the potential benefit of a new tenant, an arrangement that benefitted both sides.

The Corporation seeks to undo this deal so that it can receive the benefit of the discounted payment plan, breach the material term for the timing of payments, and suffer no consequences for their breach. In the Corporation's view, the only

consequence for its breach is to pay that which it already owed. This Court should not allow the Corporation to eat its cake and have it too.

The Corporation also argues that the freedom to contract does not overturn the principle that penalties are unenforceable. This argument is academic because the University has not advanced this legal theory. The Corporation also argues that the University did not have a pre-existing right to future rent because the agreement, dated May 27, 2016 ("the Agreement"), terminated the lease, dated December 27, 2002 ("the Lease"), and even under the Lease, the University would have to offset the amount the Corporation owed by the amount of rent received by the new tenant. Although the Lease, but not the Agreement, contained a mitigation provision based on the amount of rent received from a future tenant, this fact does not mean the University never had a right to future rent.

Further, the Corporation's position overlooks that the liquidated damages clause was also designed to compensate the University for its actual damages. The parties recognized that the amount equal to past rent would not compensate the University for its actual damages. As a result, the parties allowed the University to retain the right to an estimate of its actual damages if the Corporation failed to uphold its end of the bargain a second time. The University's business decision to give the Corporation an opportunity to settle the dispute for less than its actual

damages does not preclude it from obtaining an estimate of its actual damages upon a second default.

Finally, the Court must reject the Corporation's argument that the University waived its right to a hearing in the event the Court finds the Agreement contained an unenforceable penalty. The University requested a hearing in the attorney affirmation opposing the Corporation's cross motion for summary judgment and further supporting its summary judgment motion. The absence of the new lease in the record does not preclude a hearing, as the Corporation suggests. The lower courts refused to order a hearing not because the new lease was absent from the record, but because they restricted the University's actual damages to the amount remaining on the Agreement's payment schedule. As discussed, limiting the University's damages to the Agreement's payment schedule was a legal error. Accordingly, this Court must reverse.

## ARGUMENT

## POINT I

### THE LOWER COURTS RESOLVED THE PARTIES' SUMMARY JUDGMENT MOTIONS ON THE LAW WITHOUT MAKING ANY FINDINGS OF FACT

The Corporation's primary contention on appeal seeks to avoid the merits of the case by arguing that the lower courts made factual findings that are beyond this Court's power to review. According to the Corporation, the lower courts made factual findings when determining that the University's losses were readily ascertainable and that the liquidated damages clause was disproportional to the University's actual losses. See, e.g., Resp. Br. at 1, 4, 30. This argument misperceives the questions raised on appeal and this Court's power to resolve them.

### A. General Legal Principles

The New York State Constitution and the Civil Practice Law and Rules limit this Court's scope of review to questions of law, except in rare circumstances not presented here. See NY Const, art. VI, §3; CPLR 5501(b). Applying these principles, this Court has held that whether an agreement contains "an enforceable liquidation of damages or an unenforceable penalty is a question of law[.]" See JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 379 (2005); see also 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Ass'n, Inc., 24 NY3d

528, 536 (2014); Bates Adv. USA, Inc. v 498 Seventh, LLC, 7 NY3d 115, 120 (2006). When resolving such a legal question in the procedural context of summary judgment, the function of the court is "issue finding, rather than issue-determination." Suffolk County Dept. of Social Services on Behalf of Michael V. v James M., 83 NY2d 178, 182 (1994); see Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). As a consequence, the courts do not "make credibility determinations or findings of fact" when deciding summary judgment motions regarding whether a liquidated damages clause constitutes an unenforceable penalty. Vega v Restani Const. Corp., 18 NY3d 499, 505 (2012).

**B. This Appeal Presents Questions Of Law, Not Questions Of Fact**

Here, the substantive question and the procedural context in which it was decided refute the Corporation's contention that the lower courts made factual findings. The lower courts concluded that the Agreement contains an unenforceable penalty. The lower courts arrived at this conclusion by making the legal, albeit erroneous, determination that the University's actual damages were limited to the amounts due under the Agreement's payment schedule (16, 234-235). While a legal question may depend upon facts that, if disputed, would require a factual finding, that factual finding does not occur on summary judgment because a court's function on summary judgment is "issue finding, rather than issue determination." James M., 83 NY2d at 182; Vega, 18 NY3d at 505. The

lower court decisions do not contain any suggestion that they ignored these elementary rules of New York civil procedure when they denied the University's summary judgment motion and granted the Corporation's cross motion for summary judgment. Thus, the Court must reject the Corporation's argument that this appeal presents questions of fact beyond this Court's power to review.

## POINT II

## THE CORPORATION'S ARGUMENTS ON THE SUBSTANCE LACK MERIT

### A. The Liquidated Damages Clause Is Proportional To The University's Actual Damages

On the merits, the Corporation argues that the Agreement contained a liquidated damages clause that was disproportionate to the University's actual damages. According to the Corporation, the liquidated damages clause provides for $1.2 million while the University's actual damages are $175,000 – the amount remaining under the Agreement's payment schedule. See Resp. Br. at 30.

This argument disregards the damages flowing from the Corporation's breach of the Lease, which was the driving force behind the formation of the Agreement in the first place (105-106). The Corporation never explains what legal principle prevents the parties from using the Agreement to account for the damages caused by the Corporation's breach of the Lease. The Court's long-standing prohibition against penalties surely does not.

The Agreement's payment schedule was not meant to compensate the University for its actual damages. It was a discounted amount to resolve the dispute quickly and allow the Corporation to vacate the premises, as it requested (105). By breaching both the Lease and the Agreement, the Corporation forfeited this discount and became responsible for the parties' estimate of the University's actual damages (106). The University's discounted offer to resolve a dispute does not transform its fair approximation of actual damages into a penalty. No principle of law prevents these sophisticated parties from resolving a dispute through a discounted payment schedule that, upon a second default, reverts back to the parties' estimate of the University's actual damages. The Corporation does not identify any legal authority for its implicit conclusion that the University's decision to offer a discounted amount to settle a dispute precludes it from ever receiving an estimate of its actual damages.

No legal principle prevents the parties from using the Agreement to account for the damages caused by the Corporation's breach of the lease, and this Court should not create such authority here. To do so would flip the law of liquidated damages on its head by allowing an accurate estimate of actual damages to be converted into a penalty simply because a party was willing to accept less than its actual damages to resolve a dispute quickly and assist a struggling tenant. Treating the parties' estimate of actual damages as a penalty because one party

conditionally accepted less than its actual damages would not serve the public policy behind the prohibition against penalties, which is to prevent one party from reaping a windfall and to prevent "'the most terrible oppression in pecuniary dealings.'" See Truck Rent-A-Ctr. v Puritan Farms 2nd Inc., 41 NY2d 420, 424 (1977) (quoting Hoag v McGinnis, 22 Wend. 163, 166 [1839]) (citing Ward v Hudson Riv. Gldg. Co., 125 NY 230, 234-235 [1891]). The lower courts frustrated the public policy of preventing windfalls by giving one to the Corporation, which has brazenly breached two agreements, without being held accountable to pay for the resultant losses suffered by the University.

### B. The University's Damages Were Not Capable Of Precise Estimation At The Time The Parties Entered The Agreement

The Corporation argues that the liquidated damages clause was also unenforceable because the Corporation, having secured a new tenant, could precisely estimate its damages at the time the Agreement was entered. See Resp. Br. at 30-32. When analyzing whether the parties could estimate the University's potential damages, the only relevant time period is the moment the parties entered the Agreement – May 31, 2016. As this Court has explained for nearly a hundred years, an agreement containing a liquidated damages clause "is to be interpreted as of its date, not as of its breach." Seidlitz v Auerbach, 230 NY 167, 172 (1920); see Truck Rent-A-Ctr., 41 NY2d at 425.

The Corporation acknowledges that the University had not yet signed a lease with a new tenant at the time the Agreement was entered. Yet the Corporation argues, with the certitude only hindsight can provide, that the transactions were "close" enough in time to make the new lease inevitable. See Resp. Br. at 30-31. But close is not nearly enough in the New York City commercial real estate market. Without a binding lease with a new tenant, the University exposed itself to the vicissitudes of the marketplace. Anything could have happened during the time between the Lease's termination and the new lease's execution. The prospective tenant could have gone bankrupt, died, or found a better deal. In contrast to the Lease, the University – not the Corporation – assumed these risks under the Agreement. Compare (44) with (105-106). The clarity of hindsight allows the Corporation to blithely dismiss these risks, but the University did not enjoy the luxury of hindsight when the Agreement was entered. In the face of this uncertainty, the Agreement provided the predictability and certainty needed for each side to make its business decisions. The Corporation's craven attempt to undo those business decisions demonstrates its desire to act like a sophisticated business in the marketplace without being treated like one in the courts.

The Corporation's claim that the damages were easily ascertainable also fails because the University's actual damages include more than simply lost rent. The University's losses also include significant costs to find a new tenant (60,

223). These quantifiable damages, all of which could have been recovered by the University under the Lease, amount to $851,000. This amount is comparable to the $1.2 million owed under the Agreement, especially given the risk of a protracted vacancy.[1]

Further, even if the new tenant were paying a higher rent, the University's actual damages would not be reduced by the difference between the Corporation's rent and the new rent. The Corporation bargained for the Lease to include a rent mitigation clause, which reduced the Corporation's obligation by the amount of rent paid by a new tenant on a monthly, not an aggregate, basis. The Corporation did not bargain for such a clause in the Agreement. Moreover, the University is entitled to any increased rent because the University – not the Corporation – bore the risk of a vacancy or a new tenant who was not willing to pay the same or higher rent as the Corporation.

### C. The Agreement Fairly Allows The University To Relet The Premises While Also Receiving Compensation For Its Actual Damages Arising From Lost Rent, The Vacancy, And The Cost Of Finding A New Tenant

The Corporation nevertheless complains that the University should not be allowed to receive liquidated damages while at the same time collecting rent from the new tenant, falsely accusing the University of "double-dipping." See, e.g., Resp. Br. at 18. This argument is not persuasive.

[1] The amount the Corporation paid under the Agreement's payment plan ($86,000) will naturally be credited to the Corporation's payment of the liquidated damages (126).

The liquidated damages clause compensates the University for damages it suffered *before* the new tenant took possession. Such damages include but are not limited to past rent, interest, the unquantifiable damages of a vacancy, and the costs of finding a new tenant (44, 60, 223). The University suffered these damages before it found a new tenant, and the University has never claimed actual damages after the new tenant took possession. The University received rent from another tenant during the former period of the Lease because the Corporation insisted on terminating the Lease early. Thus, the Agreement does not allow the University to "double-dip" by receiving rent from the Corporation and the new tenant.

In the Agreement, the parties agreed to give the University compensation for the losses it suffered before the new tenancy began and the freedom to receive rent from a new tenant after the Corporation abandoned the premises. The Corporation could have insisted that the Agreement contain a rent mitigation clause similar to the one in the Lease. The parties, for obvious reasons, did not include such a provision. The University bore the risk of a vacancy by giving up its right under the Lease to insist on collecting the rent without the duty to find a new tenant whose rent would offset the Corporation's obligations. Compare (44) with (105-113). In exchange, the University would receive the benefits, if any, associated with finding a new tenant.

This exchange, when considered at the moment the parties entered the Agreement, made sense for both sides. The Agreement terminated the Lease early, as the Corporation requested, and required the Corporation to pay an amount equal to the rent it already owed in installments over the course of a year (105-106). Because this amount did not come close to compensating the University for its actual losses, which included, among other things, past rent, interest and the costs of finding a new tenant (44, 60, 223), the parties agreed to give the University a mechanism to recover an estimate of its actual damages in the event that the Corporation defaulted yet again after the Lease was terminated (106). As a result, the parties estimated that the University's actual damages for a second default would be equal to the amount of future rent due under the Lease and incorporated that estimate into the Agreement.

The University's business decision to give the Corporation an opportunity to settle the dispute for less than its actual damages does not preclude it from obtaining an estimate of its actual damages upon a second default. Yet, that is precisely what the Corporation argues by insisting that the University's actual damages are limited to the amount remaining on the payment schedule in the Agreement. See, e.g., Resp. Br. at 30. The Corporation does not cite any authority for this radical proposition, and none exists.

## D. The Corporation's Arguments On Freedom To Contract Are Based On A False Premise

Next, the Corporation argues that the freedom to contract does not overturn the principle that penalties are unenforceable. See Resp. Br. at 24-28. This argument is theoretical because the University has never argued that a penalty is enforceable when sophisticated parties agree to it. The University argued that this particular agreement did not contain a penalty because "[a] penalty does not exist when sophisticated parties, who are represented by counsel, enter into a settlement agreement bargained for at arm's length and agree to resolve a commercial real estate dispute by allowing one party to retain one of the rights it had previously bargained for in a commercial lease" and when that pre-existing right accurately approximates one party's actual damages. See App. Br. at 3-4.

The fact that the Corporation and the University are sophisticated players in the commercial real estate market provides important context for understanding the Agreement's purpose and the nuanced way the parties achieved that purpose. The Agreement allowed the Corporation to resolve its default of the Lease without paying the full cost of the University's actual damages, which included but are not limited to past rent, interest, the unquantifiable damages of a vacancy, and the costs of finding a new tenant (44, 60, 223). In exchange for this benefit, the parties agreed the University could preserve the right to receive an estimate of its actual damages should the Corporation default under the Agreement, as it had defaulted

under the Lease. Thus, the University could receive an estimate of its actual damages after the Corporation's second default, but not the first. Conditionally accepting less than a party's actual damages to settle a dispute does not convert a fair estimate of actual damages into a penalty.

The fact that the Corporation and the University are both sophisticated players in the commercial real estate market also undermines the purpose of the public policy against penalties. New York's public policy is set against penalties to prevent one party from reaping a windfall and to prevent "'the most terrible oppression in pecuniary dealings'" that would result from parties using penalties instead of actual damages. See Truck Rent-A-Center, 41 NY2d at 424 (quoting Hoag, 22 Wend. at 166) (citing Ward, 125 NY at 234-235). The existence of sophisticated parties represented by counsel diminishes the risk of the "terrible oppression" that undergirds the public policy against penalties. See id. The risk of oppression is diminished further, when the same counsel who negotiated the liquidated damages clause now argues that the liquidated damages clause is unenforceable.

### E. The Agreement Preserved Key Rights From The Lease To Ensure The University Could Be Adequately Compensated For Its Actual Damages

The Corporation also argues that the University did not have a pre-existing right to future rent because the Agreement terminated the Lease and, even under the Lease, the University would have to offset the amount owed by the amount of

rent received by the new tenant. Resp. Br. at 34-38. These unremarkable observations miss the point altogether.

Although the Lease had a mitigation provision based on the amount of rent received from a future tenant and the Agreement did not, this fact does not mean the University's right to an amount equal to future rent never existed. It means the parties changed the conditions under which the University would receive an amount equal to future rent to account for the business realities existing at the time, including the Corporation's failure to pay rent and desire to terminate the Lease early.

In light of these new realities, the Agreement served a dual purpose. First, it gave the University at least one benefit of its bargain under the Lease, either past or future rent. Second, the Agreement's provision for an amount equal to future rent approximated the University's actual damages from the Corporation's breach of the Lease and the Agreement, which would include, among other things, past rent, interest, the unquantifiable damages of a vacancy, and the costs of finding a new tenant (44, 60, 223). The parties recognized that the amount equal to past rent would not compensate the University for its actual damages and, thus, allowed the University to retain the right to an estimate of its actual damages if the Corporation failed to uphold its end of the bargain a second time.

No principle of law prevents these two sophisticated parties from entering into such an arrangement. To the contrary, as this Court recognized nearly fifteen years ago, the modern trend favors freedom to contract and the enforcement of liquidated damages provisions, as long as they do not *clearly* disregard the public policy against penalties. See JMD Holding Corp., 4 NY3d at 381 (quoting 3 Farnsworth, Contracts § 12.18, at 303-304 [3d ed]). Today, the law continues to favor the trend toward enforcing written agreements absent clear evidence of a strong countervailing public policy, especially when sophisticated parties are involved. See, e.g., 159 MP Corp. v Redbridge Bedford, LLC, 33 NY3d 353 (2019).

**F. The University Preserved Its Right To A Hearing**

Finally, the Corporation argues that the University waived the right to a hearing by not requesting that relief in its summary judgment motion or in opposition to the Corporation's cross motion for summary judgment. See Resp. Br. at 38-41. The Corporation is wrong.

The University requested a hearing at the first possible opportunity: in its affirmation opposing the Corporation's cross motion for summary judgment and further supporting its summary judgment motion (218). Thus, the Corporation's contention that the University did not request this relief in opposition to its cross motion is demonstrably false. See Resp. Br. at 38.

This sequence of events should be expected, given that burden of proof for resolving liquidated damages cases at the summary judgment stage requires the party seeking to avoid the liquidated damages clause to establish the actual damages are disproportional to the liquidated damages. See 172 Van Duzer Realty Corp., 24 NY3d at 536; Bates, 7 NY3d at 120; JMD Holding Corp., 4 NY3d at 379. Applying these principles here, the University met its initial burden of proof on summary judgment by submitting the Lease, which sets forth the liquidated damages clause. The Corporation, in opposition to the University's summary judgment motion and in support of its own cross motion for summary judgment, bore the burden of proving that the University's actual damages were disproportional to the liquidated damages. See 172 Van Duzer Realty Corp., 24 NY3d at 536; Bates, 7 NY3d at 120; JMD Holding Corp., 4 NY3d at 379. The Corporation attempted to meet this burden by showing that the University's actual damages were the amount remaining on the Agreement's payment schedule and therefore readily ascertainable and disproportional to the liquidated damages. This attempt fails as a matter of law because the University's actual damages include the losses from the University's breach of the Agreement and the Lease. These actual damages include, among other things, unpaid rent, interest, the unquantifiable damages of a vacancy, and the costs of finding a new tenant (44, 60, 223). The Agreement's payment schedule was never intended to compensate the

University for its actual damages. Thus, the Corporation failed to raise an issue of fact in opposition to the University's summary judgment motion and failed to meet its initial burden on is cross motion for summary judgment.

Even if the University had met its initial burden of proof, the University at least raised a triable issue of fact. See 72 Van Duzer Realty Corp., 24 NY3d at 536; Alvarez, 68 NY2d at 324. In opposition to the Corporation's cross motion for summary judgment, the University submitted an affidavit establishing the damages associated with finding a new tenant and the past due rent. This affidavit, at the very least, raises an issue of fact as to whether the University's actual damages were disproportionate to the liquidated damages.

The lower courts made a legal error by viewing the University's actual damages as the amounts due under the Agreement's payment schedule. This holding ignored that the University accepted less than its actual damages while preserving the right to receive an estimate of its actual damages, if the Corporation vacated the premises without upholding its end of the bargain.

The absence of the new lease in the record does not change this analysis. The parties do not dispute that the new lease had not been finalized at the time the Agreement was entered – the only time period that is relevant. The amount of rent in the new lease is not necessary because the University already established the losses stemming from past rent and the cost of finding a new tenant (approximately

$850,000) are proportional to the amount required under the liquidated damages clause (approximately $1,200,000).

Even if the amount of the new lease were relevant, a remand for a hearing would be necessary to determine whether the actual damages were proportional to the liquidated damages. Indeed, the Corporation acknowledged that further discovery would be necessary if judgment were not granted to either party as a matter of law (158, 170). The lower courts refused, not because the new lease was absent from the record, but because they restricted the University's actual damages to the amount remaining on the Agreement's payment schedule.

Although the University maintains that the Agreement is enforceable, if this Court disagrees, Van Duzer requires a remand for a hearing on whether the actual damages are disproportional to the University's actual damages. See 24 NY3d at 536.

The lower courts in Van Duzer refused to admit all evidence of actual damages, restricting the inquiry to whether the landowner relet the premises. See id. at 537. Similarly, the lower courts here, like the lower courts in Van Duzer, held that a hearing was unnecessary because the University's actual damages were the amounts due under the Agreement's payment schedule (16, 234-235). As discussed, this was a legal error because the Agreement's payment schedule was never intended to cover the University's actual damages and did not include the

University's significant costs in finding a new tenant to avoid a vacancy, which would cause a whole host of unquantifiable damages, as the parties recognized at the time they executed the Lease (56, 107).

## CONCLUSION

Accordingly, because the Agreement did not contain a penalty, this Court should (1) reverse the order of the Appellate Division, First Department; (2) grant the University's motion for summary judgment on the complaint; (3) deny the cross motion of defendant D'Agostino Supermarkets, Inc. ("Corporation") for (a) summary judgment striking the University's claim for liquidated damages and (b) for entry of judgment against itself for $175,751.73, with interest accrued from October 14, 2016 to the date of the judgment; (4) remand the matter so that the parties can proceed to an inquest to determine the exact amount due under the second and third cause of action; and (5) grant the University any other relief the Court deems appropriate.

In the alternative, if the Court concludes that the Agreement is not enforceable as a matter of law, the Court should remand for a hearing to determine the amount of the University's actual damages from the breach of the Lease and the Agreement and the extent to which those damages were ascertainable at the time of the Agreement.

Dated: New York, New York
November 21, 2019

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## PRINTING SPECIFICATIONS STATEMENT

The undersigned attorney hereby certifies, pursuant to Rule 500.13(c)(1) the foregoing brief was prepared on a computer using Microsoft© Word2000 as following:

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 5,059 according to the word-processing software used to prepare the brief.

4628803 v7