

COURT OF APPEALS
STATE OF NEW YORK

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

Plaintiff-Movant,

-against-

Appellate Division: First
Department
Docket No.: 2018-1298

D'AGOSTINO SUPERMARKETS, INC.,

New York County
Index No. 655914/2016

Defendant-Respondent.

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PLEASE TAKE NOTICE that upon the Memorandum of Law, dated February 27, 2019, the exhibits annexed thereto, and all the pleadings and prior proceedings had herein, Plaintiff-Movant THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK will respectfully move this Court at the Courthouse located at 20 Eagle Street, Albany, New York 12207 on the 11th day of March, 2019, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to N.Y. C.P.L.R. § 5602(a)(1) and 22 N.Y.C.R.R. 500.22 granting Plaintiff permission to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, First Department, entered January 29, 2019, which affirmed the Decision and Order of Supreme Court, New York County (Scarpulla, J.), which, to the extent appealed from as limited by the briefs, (1) denied Plaintiff's motion for summary judgment, (2) granted Defendant-Respondent D'AGOSTINO SUPERMARKETS, INC.'s

cross-motion for summary judgment, and (3) awarded judgment to Plaintiff and against Defendant in the amount of \$175,751.73, plus interest.

Dated: Uniondale, New York
February 27, 2019

Respectfully submitted,
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Court of Appeals
State of New York

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

Plaintiff-Movant,

-against-

D'AGOSTINO SUPERMARKETS, INC.,

Defendant-Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR LEAVE TO APPEAL**

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IN THE CITY OF NEW YORK

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Plaintiff-Movant THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK (“Plaintiff”) submits this Memorandum of Law in support of its motion for leave to appeal to the Court of Appeals from a Decision and Order of the Appellate Division, First Department, entered January 29, 2019 (the “Appellate Division Order”), which affirmed the Decision and Order of Supreme Court, New York County (Scarpulla, J.), which, to the extent appealed from as limited by the briefs, (1) denied Plaintiff’s motion for summary judgment, (2) granted the cross-motion of Defendant-Respondent D’AGOSTINO SUPERMARKETS, INC. (“Defendant”) for summary judgment, and (3) awarded judgment to Plaintiff and against Defendant in the amount of \$175,751.73, plus interest.

TIMELINESS

On January 29, 2019, Defendant served Plaintiff with a copy of the Appellate Division Order along with written notice of its entry via electronic filing. A copy of the Appellate Division Order, dated January 29, 2019, with notice of entry, dated January 29, 2019, is annexed as **Exhibit A**. Plaintiff’s deadline to move for leave to appeal was thirty (30) days from January 29, 2019, or February 28, 2019. See N.Y. C.P.L.R. § 5513(b) (requiring motions for leave to appeal to be made within thirty (30) days from the order appealed from).

Plaintiff served this motion for leave to appeal on February 27, 2019. A copy of the affidavit of service is annexed as **Exhibit B**.

Accordingly, this motion is timely under N.Y. C.P.L.R. § 5513(b).

JURISDICTION

The Court has jurisdiction over this appeal. Under N.Y. C.P.L.R. § 5602(a)(1)(i), an appeal to the Court of Appeals can be taken by permission “from an order of the appellate division which finally determines the action and which is not appealable as of right.” The Appellate Division Order is not appealable as of right, as none of the four grounds enumerated in N.Y. C.P.L.R. § 5601 apply.

Further, the Appellate Division order finally determines the action. The New York State Constitution provides jurisdiction to the Court of Appeals to review final judgments or orders. See N.Y. Const. Art. VI, § 3(a), (b); N.Y. C.P.L.R. § 5501(a). A final order or judgment “disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters.” Burke v. Crosson, 85 N.Y.2d 10, 15 (1995). Here, the Appellate Division affirmed the denial of Plaintiff’s motion for summary judgment, the grant of Defendant’s cross-motion for summary judgment, and the award of judgment to Plaintiff and against Defendant in the amount of \$175,751.73, plus interest. The Appellate Division Order finally determines the action and “leaves nothing for further judicial action

apart from mere ministerial matters.” Id.; see Arthur Karger, The Power of the New York Court of Appeals § 4:10 n.4 (2005) (citing Spiegel v. Ferraro, 73 N.Y.2d 622 (1989); In re Schneider’s Will, 298 N.Y. 532 (1948)). Thus, the Appellate Division Order finally determines the action.

Accordingly, the Court has jurisdiction over this appeal.

QUESTION OF LAW TO BE REVIEWED

Where sophisticated parties represented by counsel enter into a settlement agreement resolving a contract dispute and that agreement contains a liquidated damages provision that puts the parties back into their pre-resolution positions in the event of breach, is such liquidated damages provision enforceable?

Yes.

PRELIMINARY STATEMENT

This case presents a novel question of law that is greatly important and that warrants this Court's consideration – whether a liquidated damages provision is enforceable where sophisticated parties, represented by counsel, enter into a settlement agreement resolving a contract dispute and that agreement contains a liquidated damages provision that puts the parties back into their pre-resolution positions in the event of breach.

This Court has communicated a long-standing policy in favor of settlements of disputes and has long held that it is not for the judiciary to re-write settlement agreements negotiated by parties. This Court has also provided, however, general guidelines for the enforceability of liquidated damages provisions in contracts, enforcing a contractual provision fixing damages in the event of a breach when the amount liquidated is reasonable in proportion to the probable loss and the amount of actual loss is not easy to ascertain.

What the Court has yet to address is the interaction between the accepted principle that parties are free to settle their disputes without risk of a court undoing such agreement, on the one hand, and the enforceability of a liquidated damages provision in traditional contractual arrangements, on the other. Moreover, the Court has not analyzed this interaction in the context of a settlement negotiated by sophisticated and counseled parties that contains a liquidated damages provision

intended to place the parties back in their pre-settlement positions in the event of breach.

The Appellate Division appears to have found that the liquidated damages provision in the settlement agreement at issue was a penalty because, in the Appellate Division's view, the differential between the debt being settled and the compromised amount agreed upon by the parties was "unreasonable and confiscatory." Liquidated damages, however, are not transformed into a penalty merely because they seem to operate as a penalty. Rather, courts assessing such provisions must give due consideration to the nature of the contract and the totality of the circumstances.

Here, the circumstances are such that the Appellate Division Order affects every person or entity involved in a commercial dispute that is attempting to negotiate a pre-litigation resolution. The Appellate Division Order substantially limits the options available to such parties and creates the risk that creditors will be dis-incentivized from agreeing to any compromise that allows for payment in installments – a posture that will greatly disfavor debtors experiencing cash flow issues, such as Defendant herein – because, under the Appellate Division Order, the installment terms of any such deal will not be enforceable. This result runs contrary to this Court's long-standing view that favors settlement agreements and that courts will not re-write them.

Succinctly, this case provides a perfect vehicle to decide whether the principles it has crafted for liquidated damages provisions in traditional contractual arrangements should equally apply when addressing the inclusion of such a provision in a settlement agreement, where the provision simply restores the parties to their pre-resolution position upon breach. The Court's construction of the issue will provide much needed authority and certainty, permitting parties to fashion their settlement agreements accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background Facts

Plaintiff owns a building known as, and located at, 2828 Broadway in New York, New York (the "Building"). (R. 125)¹ On or about December 22, 2002, Plaintiff, as landlord, and Defendant, as tenant, entered into a written lease agreement that, subject to a rider and as amended by a commencement date agreement (collectively, the "Lease"), provided for Defendant's leasing of certain space located on the ground floor and basement levels of the Building (the "Demised Premises") (R. 125). The Lease, which commenced on August 23, 2003 and was set to expire on August 23, 2018, provided that for the period after August 23, 2015 through expiration, Defendant would pay Plaintiff fixed rent at the rate of \$457,764.27 per annum, payable in equal monthly installments at the rate of

¹ "R" denotes references to the Record on Appeal.

\$38,147.02 per month, plus certain additional rent and water costs. (R. 48, 52, 59, 125). Pursuant to the Lease, Defendant entered into possession of the Demised Premises (R. 125).

Prior to the expiration of the Lease, Defendant stopped paying the amounts due under the Lease until the arrears exceeded \$261,000.00 (R. 166). In 2016, Defendant approached Plaintiff in an effort to resolve its conceded breaches of the Lease caused by its non-payment and to have Plaintiff release Defendant from its future obligations through the expiration of the Lease.

On or about May 27, 2016, Plaintiff and Defendant entered into a settlement agreement (R.105-111), which constituted an arms-length, business transaction fully negotiated by and between sophisticated entities, each assisted by counsel of their choice. Pursuant to the settlement agreement, Defendant agreed to surrender the Demised Premises on May 31, 2016, more than two years before the expiration of the term of the Lease, and to pay Plaintiff the sum of \$261,000.00, which corresponded to the rent arrears already due and owing to Plaintiff under the Lease (R. 125, 105, 166). The arrears were to be paid with: (i) a \$43,000.00 payment concurrent with the execution of the settlement agreement; (ii) a \$43,000.00 payment on or before June 1, 2016; and (iii) payments of \$15,977.43 on the first day of each month during the period commencing on July 1, 2016 and ending on May 1, 2017 (the "Monthly Payments") (R. 105-106).

A specific and critical inducement for Plaintiff to enter into this agreement, and part of the benefit of the bargain for the early Lease termination, was Defendant's express written agreement to unconditionally pay, in the form of liquidated damages, the monies that would have accrued under the Lease in the event that Defendant breached the settlement agreement and failed to cure such breach. In other words, in the event that the rent arrears were not paid pursuant to the terms negotiated by the parties, the parties agreed that Defendant's liabilities under the Lease would be reinstated and Defendant would be fully responsible for all monies due under the Lease for the balance of its term (R. 125, 105-106). This liquidated damages provision ensured that, if Defendant breached the settlement agreement, there would be no uncertainty as to the reasonable and enforceable remedy available to Plaintiff, who was agreeing to forego its remedies under the Lease at a time when Plaintiff had yet to execute a lease for the Demised Premises with a new tenant (R. 221).

Defendant timely made the two \$43,000.00 payments, but failed to make any Monthly Payments, including, but not limited to, the Monthly Payments due on (i) July 1, 2016, (ii) August 1, 2016, (iii) September 1, 2016, and (iv) October 1, 2016 (collectively, the "Defaulted Monthly Payments") (R. 126). On or about October 14, 2016, Plaintiff, in accordance with the notice provisions of the settlement agreement, sent Defendant a written notice of default (the "Notice")

stating that Defendant was in default of its obligation to pay Plaintiff the Defaulted Monthly Payments (R. 126, 130). Despite this, Defendant failed to pay the Defaulted Monthly Payments within five (5) business days of Plaintiff's delivery of the Notice to Respondent (R. 127).

As a result of Defendant's failure to make the Defaulted Monthly Payments, the express terms of the settlement agreement obligated Defendant to make Fixed Rent payments to Plaintiff pursuant to the terms of the Lease in the amount of \$38,147.02 per month for the period of June 1, 2016 through August 23, 2018, resulting in an aggregate amount of \$1,020,125.15 in Fixed Rent during this period (R. 127). The express terms of the settlement agreement also obligated Defendant to pay certain additional rent and water costs for the period of June 1, 2016 through August 23, 2018 (R. 127).

B. The Motion and Cross-Motion for Summary Judgment

Plaintiff commenced this action on or about November 10, 2016 by the filing of a Summons and Complaint (R. 33). Defendant filed and served its answer on December 5, 2016, and amended the answer on December 24, 2016 to assert a counterclaim² (R. 118, 145).

On January 23, 2017, Plaintiff moved for summary judgment, seeking, among other things, summary judgment against Defendant on the first cause of

² The Supreme Court dismissed Defendant's counterclaim upon Plaintiff's pre-answer motion and Defendant did not challenge that prong of its decision on appeal (R. 17).

action for breach of the settlement agreement in the amount of \$1,020,125.15, as well as for liability in connection with the second and third causes of action (for additional rent and water costs), as well as an award of attorneys' fees (R. 18-21). In the alternative, Plaintiff sought a hearing to determine the measure of its actual damages.

Defendant cross-moved for summary judgment, conceding liability but asserting that the bargained-for liquidated damages provision should be deemed unenforceable and that Plaintiff's damages should be limited to the amount of the missed payments due under the settlement agreement – i.e., the remaining approximately \$175,000.00 in rent arrears that Defendant failed to timely pay both under the Lease and then again under the settlement agreement (R. 158).

C. The Supreme Court's Order

The Supreme Court denied Plaintiff's motion and granted Defendant's cross-motion, awarding judgment to Plaintiff in the amount of \$175,751.73. While the Supreme Court correctly found that Defendant had breached the settlement agreement by failing to make the Defaulted Monthly Payments, the Supreme Court held that the negotiated and agreed-upon liquidated damages provision in the settlement agreement was unenforceable. The Supreme Court based its decision on the finding that, at the time that the parties entered into the settlement agreement, actual damages in the event of a breach were readily ascertainable (R.

13). The Supreme Court seemingly credited the claim that Plaintiff knew who the replacement tenant would be and knew what the new lease terms would be, despite the record evidence that, at the time it executed the settlement agreement, Plaintiff had yet to execute a lease for the Demised Premises with a new tenant (R. 221).

The Supreme Court further found determinative that the amount of damages equivalent to the remaining sums due under the Lease exceeded the arrears due under the settlement agreement. From this, the Supreme Court found that the liquidated damage provision in the settlement agreement constituted a penalty, despite the record evidence that the liquidated damage amount closely approximated Plaintiff's actual damages (R. 13).

D. The Appellate Division's Order

Plaintiff appealed the Supreme Court's determination to the Appellate Division, arguing that the Supreme Court committed reversible error and summary judgment should have been granted to Plaintiff with Defendant's cross-motion denied. Plaintiff argued that, in the alternative and at the very minimum, the matter should have been remanded to the Supreme Court for an evidentiary hearing to determine Plaintiff's actual damages.

On January 29, 2019, the Appellate Division entered the Appellate Division Order affirming the determination of the Supreme Court. The Appellate Division based its determination on its finding that Plaintiff's damages in the event of a

breach of the settlement agreement by Defendant were ascertainable at the time of the settlement agreement and that the liquidated damages provision was unenforceable as “unreasonable and confiscatory” since it resulted in an award of 7½ times the amount that Plaintiff was entitled to receive had Defendant fully performed the settlement agreement. See Ex. A.

ARGUMENT

POINT I

THIS CASE MERITS REVIEW BY THE COURT OF APPEALS

An issue merits review by this Court when “the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division.” 22 N.Y.C.R.R. § 500.22(b)(4).

This case presents a novel issue of law that is profoundly important: whether, where sophisticated parties represented by counsel enter into a settlement agreement resolving a contract dispute and that agreement contains a liquidated damages provision that puts the parties back into their pre-resolution positions in the event of breach, such liquidated damages provision is enforceable.

The resolution of this question affects every person or entity involved in a commercial dispute that is attempting to negotiate a pre-litigation resolution.

This Court has long favored settlements of disputes. See IDT Corp. v. Tyco Grp., 13 N.Y.3d 209, 213 (2009); Hallock v. State of New York, 64 N.Y.2d 224, 230 (1984); see also Martin v. Martin, 5 A.D.2d 307, 309 (2d Dep't 1958) (“[P]ublic policy holds competent contracting parties to bargains made by them, freely and voluntarily, and requires the courts to enforce such agreements. The interests of society and public policy require the utmost freedom of contract, within the law.”).

Likewise, this Court has long held that it is not for the judiciary to re-write settlement agreements negotiated by parties. See Blackmon v. Estate of Battcock, 78 N.Y.2d 735, 740 (1991) (stating that “courts should not innovate for parties after the fact”); see also Murphy v. Murphy, 166 A.D.3d 779, 779 (2d Dep't 2018) (“A court should not, under the guise of contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract.”); Mill Rock Plaza Assocs. v. Lively, 224 A.D.2d 301, 301 (1st Dep't 1996) (“Strict enforcement of the parties’ stipulation [of settlement] . . . is warranted based upon the principle that the parties to a civil dispute are free to chart their own litigation course.”).

On the other hand, this Court has also set some general guidelines for the enforceability of liquidated damages provisions in contracts. See 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc., 24 N.Y.3d

528, 536 (2014); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 380 (2005); Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 423-24 (1977). Specifically, this Court has directed that “[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.” JMD Holding Corp., 4 N.Y.3d at 380 (citing Truck Rent-A-Center, 41 N.Y.2d at 425).

What this Court has not addressed, however, is the interplay between the special favor courts grant upon settlement agreements and the hesitancy to re-write them when negotiated by parties, on the one hand, and the enforceability of liquidated damages provisions in traditional contracts, on the other. It is not uncommon for a creditor to premise its agreement to accept a compromised amount in satisfaction of a claim on the condition that should the debtor fail to abide by the terms negotiated by the parties, the parties will be placed back into the positions they occupied prior to their agreement. See ABCO Refrigeration Supply Corp. v. Designs by Keiser Corp., 239 A.D.2d 165, 165 (1st Dep’t 1997). This is especially true in the landlord/tenant context. See NTL Capital, LLC v. Right Track Recording, LLC, 73 A.D.3d 410, 411 (1st Dep’t 2010) (addressing situation

where remedy for breach of settlement agreement was enforceability of lease that was subject of settlement agreement). But is such an arrangement enforceable?

Under the Appellate Division Order, the answer is no. And the ramifications of that answer are numerous and far reaching.

The Appellate Division Order substantially limits, if not altogether eliminates, the viable options available to commercial parties trying to settle a dispute pre-litigation. Under the Appellate Division Order, every settlement runs the risk of the debtor agreeing to terms on a compromised amount and then simply ignoring those terms. The result of such bad faith, under the Appellate Division Order, is that the debtor has achieved a reduction in its liability, not bothered by any negotiated terms associated with the payment of that reduced liability, while the creditor has, as they say, given the farm away for free. Indeed, in such a case, it is difficult to articulate any consideration given by the debtor, as the debtor receives the benefit of the bargain plus some, while the creditor ends up with a reduced asset.

That is exactly what happened here. Plaintiff and Defendant negotiated a fair compromise of Defendant's liability under the Lease. If Defendant paid Plaintiff a compromised amount (which it already owed) pursuant to certain terms regarding when that payment would be made, Plaintiff would release Defendant from its further obligations under the Lease. While Defendant did make certain

timely payments under the settlement terms, it defaulted on others and failed to cure after receiving notice from Plaintiff. Yet under the Appellate Division Order, Defendant is rewarded for its breaching conduct with the benefit of the parties' bargain (the reduced amount) plus some (excusal from the negotiated terms of when the payment was due), while Plaintiff is left with nothing in return but the need to chase Defendant down on an amount that is now twice past due and without the negotiated security to which the parties agreed.

The Appellate Division Order will have a chilling effect on commercial parties attempting to resolve disputes pre-litigation. It will strongly disincentive creditors from entering into compromises that allow for payment in installments – a posture that will greatly disfavor debtors experiencing cash flow issues, such as Defendant herein. Stated differently, after the Appellate Division's holding, creditors will undoubtedly be inclined to accept only upfront, lump sum payments or, more problematically, refuse to deal with debtors who cannot make such payments.

Just as this Court has noted the strong preference for freedom of contract in the creation of leases, especially in the case of arm's length commercial contracts negotiated by sophisticated and counseled entities, see Eujoy Realty Corp. v. Van Wagner Comm., LLC, 22 N.Y.3d 413, 424 (2013), so too should that preference extend to the negotiated resolution of disputes between such parties. It is clear that

liquidated damages provision can be enforceable in an underlying contract (i.e. a lease). See Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573 (1979). The Appellate Division Order, however, would preclude the parties from making an identical provision enforceable in a settlement agreement, despite its express incorporation of the terms of the contract governing the underlying dispute. That is in contrast to this Court's prior holdings which require that review of a liquidated damages provision must give due consideration to the nature of the contract and the circumstances. See 172 Van Duzer Realty Corp., 24 N.Y.3d at 536 (citing JMD Holding Corp., 4 N.Y.3d at 379).

That Plaintiff herein ultimately entered into a new lease with a new tenant after executing the settlement agreement with Defendant does not detract from the importance of this issue, nor is it relevant to the legal analysis. Whether a liquidated damages provision constitutes an unenforceable penalty must be assessed as of the time the parties entered into the agreement and not based on factors that post-date such execution. See JMD Holding Corp., 4 N.Y.3d at 380.

Simply put, this Court has not addressed whether the guidelines it has crafted for liquidated damages provisions in traditional contractual arrangements should equally apply when addressing a settlement agreement that resolves a commercial dispute pre-litigation. The Appellate Division Order ignores the postures of the parties at the time they entered into the settlement agreement, thus

militating in favor of a policy that is at odds with Eujoy Realty Corp. That said, bringing a settling party back to its pre-resolution position in the event of a breached settlement agreement bears a reasonable proportion to the probable loss, when giving due consideration to the nature of the contract and the circumstances.

To date, this Court has not reviewed a liquidated damages provision contained in a settlement agreement. See, e.g., 172 Van Duzer Realty Corp., 24 N.Y.3d 528 (addressing a lease); Bates Adv. USA, Inc. v. 498 Seventh, LLC, 7 N.Y.3d 115, 120 (2006) (addressing a lease); JMD Holding Corp., 4 N.Y.3d 373 (addressing a commercial revolving loan agreement); Truck Rent-A-Center, 41 N.Y.2d 420 (addressing a truck lease agreement); Fifty States Management Corp., 46 N.Y.2d 573 (addressing a lease). Moreover, this Court has not analyzed a liquidated damages provision contained in a settlement agreement that purports to revert the parties to their pre-settlement position, a unique inquiry. As demonstrated above, the prevailing principles favoring settlement, as articulated by the Court, are in contrast to a straight application of the liquidated damages principles applied to a settlement agreement without context of the underlying dispute being resolved. This Court should address this novel issue of public importance to provide clarity to how these competing factors should be balanced.

POINT II

**THIS CASE IS THE RIGHT VEHICLE
FOR RESOLUTION OF THESE ISSUES**

This case is the right vehicle for the resolution of the important questions identified above. This case presents a discrete legal issue that warrants this Court's guidance and is not clouded by factual, jurisdictional, or other ancillary issues – whether sophisticated parties resolving a commercial dispute can include as part of their settlement agreement a liquidated damages provision that puts the parties back into their pre-resolution positions in the event of breach.

There is no reason to wait for another case to get a Court of Appeals ruling on this important issue. The impact of the Appellate Division Order is likely already affecting commercial parties, especially landlords and tenants. Absent the security of being placed back into its pre-resolution position, some landlords will undoubtedly refuse to enter into settlement agreements with tenants that can no longer afford to pay their rent, furthering their financial troubles. Indeed, if given the benefit of prescience of the Appellate Division Order, it is hard to imagine Plaintiff agreeing to anything but an upfront, lump sum payment from Defendant – something Defendant was apparently unable to provide.

Deferring a definitive, authoritative statement from the State's highest Court on this issue will only aggravate the hardship and serve no useful purpose. Rather,

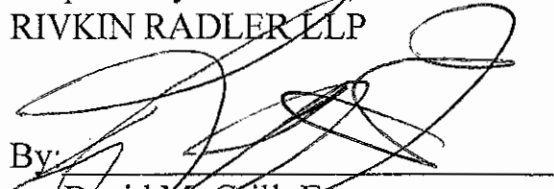
this Court should provide commercial parties with clarity on how to balance the act of resolving a commercial dispute with the standards for liquidated damages.

CONCLUSION

Plaintiffs respectfully request that leave be granted so that this important case can be resolved by this Court.

Dated: Uniondale, New York
February 27, 2019

Respectfully submitted,
RIVKIN RADLER LLP



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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK certifies that THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK does not have any parents, subsidiaries, or affiliates.

Exhibit A

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

-----x Index No. 655914/2016

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

Plaintiff,

NOTICE OF ENTRY

-against-

D'AGOSTINO SUPERMARKETS, INC.

Defendant.
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PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order of the Appellate Division, First Department, dated January 29, 2019 and entered with the Clerk's Office on January 29, 2019.

Dated: New York, NY
January 29, 2019

D'Agostino, Levine, Landesman &
Lederman, LLP

By: /s/ Eric R. Garcia
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To: **Via NYSCEF**
New York County Clerk's Office
Counsel of Record

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8217 The Trustees of Columbia University Index 655914/16
 in the City of New York,
 Plaintiff-Appellant,

-against-

D'Agostino Supermarkets, Inc.,
Defendant-Respondent.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for
appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H.
Lederman of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla,
J.), entered February 7, 2018, which denied plaintiff The
Trustees of Columbia University in the City of New York
(Columbia)'s motion for summary judgment on the complaint, and
granted defendant D'Agostino Supermarkets, Inc. (D'Agostino)'s
cross motion for summary judgment striking Columbia's claim for
liquidated damages and for entry of judgment against D'Agostino
in the amount of \$175,751.73, with interest accrued from October
14, 2016 to the date of judgment, unanimously affirmed, without
costs.

On or about December 22, 2002, Columbia and D'Agostino
entered into a written lease, modified within and by a separate
rider, and amended by a Commencement Date Agreement dated 2004,

in which D'Agostino agreed to rent space from Columbia to be used as a supermarket. The lease expiration date was August 23, 2018.

Beginning in 2016, D'Agostino stopped paying rent under the lease, and the total arrears was \$261,751.70. On May 27, 2016, with a little over two years remaining on the lease, the parties entered into a Surrender Agreement, in which D'Agostino agreed to make 2 surrender payments of \$43,000.00 each, and 11 monthly payments of \$15,977.43, beginning on July 1, 2016. The Surrender Agreement also provided that if D'Agostino failed to make any of the payments within five days of receiving a notice of default, then the aggregate of all fixed rent, additional rent or all other sums would become due and payable. D'Agostino paid the two surrender payments but failed to make the monthly payments. Columbia sent a notice of default to D'Agostino on October 14, 2016. D'Agostino did not cure the default. On November 10, 2016, Columbia commenced this action seeking the aggregate sum of all fixed rent in the amount of \$1,029,969.54, plus interest, as well as \$295,000.00 in additional rent and charges.

We find that the damages at the time of the Surrender Agreement were ascertainable. Columbia's attempt to enforce the liquidated damages provision sought to "secure performance by threat of a large payment rather than to provide a reasonable

assessment of probable damages" (*Bui v Industrial Enters. of Am., Inc.*, 41 AD3d 238, 238 [1st Dept 2007] [internal quotation marks omitted]).

We also find that the liquidated damages provision is unenforceable as "unreasonable and confiscatory," since it would result in an award 7½ times the amount that Columbia would have received if the Surrender Agreement had been fully performed (see *Clean Air Options, LLC v Humanscale Corp.*, 142 AD3d 923, 924 [1st Dept 2016]; *Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 29, 2019



DEPUTY CLERK

Exhibit B

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS. :
COUNTY OF NASSAU)

I, MARIANN GLANDER, being sworn, say:

I am not a party to the action, am over 18 years of age and reside in Suffolk County, State of New York.

On February 27, 2019, I served the within

**PLAINTIFF-MOVANT'S MOTION FOR LEAVE TO APPEAL
TO THE COURT OF APPEALS AND
MEMORANDUM OF LAW IN SUPPORT**

by depositing **two (2) true copies** thereof enclosed in a wrapper addressed as shown below, into the custody of FedEx for overnight delivery, prior to the latest time designated by that service for overnight delivery, addressed to each of the following persons at the last known address set forth after each name:

Bruce H. Lederman, Esq.
D'Agostino, Levine, Landesman, Lederman, Rivera & Sampson, LLP
Attorneys for Defendant-Respondent D'Agostino Supermarkets, Inc.
345 Seventh Avenue, 23rd Floor
New York, New York 10001


MARIANN GLANDER

Sworn to before me this
27th day of February, 2019


Notary Public

PATRICIA A. WILCOX
Notary Public, State of New York
No. 01WI-4758506
Qualified in Nassau County
Commission Expires on December 31, 2022