To Be Argued By:
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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.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rule of Practice for this Court, the undersigned counsel for D'Agostino Supermarkets, Inc. certifies that Defendant-Respondent does not have any parents, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This case presents a textbook example of an appellant improperly seeking to reargue before the Court of Appeals factual determinations made at the trial level and unanimously affirmed by the Appellate Division. This Court of Appeals' scope of review is limited by Art. VI, § 3(a) of the Constitution of the State of New York and CPLR 5501(b) to questions of law. Even if the determinations below are considered mixed questions of law and fact, they are beyond the constitutional and statutory scope of review of this Court of Appeals. *See People v. Brown,* 25 NY3d 973 [2015]; *In re Giessette Angela P.,* 80 NY 2d 863 [1992]. It is respectfully submitted that the applicable principles of law at issue are all well established and without need for review and reconsideration.

The law governing enforceability of liquated damage provisions – that Courts will not enforce "penalties" and that liquidated damages must be proportionate to the actual loss, particularly when damages are ascertainable – dates back hundreds of years. The principle that Courts will not enforce penalties designed to have an "in terrorem" effect has been long recognized not only by this Court of Appeals, but also by the Supreme Court of the United States as well-established English Common law. The law of liquidated damages is also statutorily ensconced in the Section 2-718 of the Uniform Commercial Code, which has been adopted by the New York legislature in 1962 and has remain unchanged ever since. Assertions that general

principles of freedom of contract somehow justify overturning hundreds of years of settled jurisprudence should be firmly rejected. Precluding enforcement of punitive penalties (*i.e.,* preventing Courts from enforcing contracts for the proverbial "pound of flesh" for a breach of contract) serves an important public policy purpose rooted in preventing Courts from becoming an instrument of injustice.

Hon. Salliann Scarpulla, as affirmed by the Appellate Division correctly found, either as a matter of fact or a mixed question of law and fact, that a particular liquidated damage provision (the "Liquidated Damage Provision") contained in a leasehold surrender agreement (the "Surrender Agreement")[1] was "an unenforceable penalty." (R. 15; 235.) Judge Scarpulla determined, as a matter of fact or mixed question of fact and law, that that the Liquidated Damage Provision imposed a

[1] Although Plaintiff-Appellant characterizes and defines the agreement in question as a "settlement agreement," (Plaintiff-Appellant's Brief at Page 1, line 20), it is important for this Court to recognize that the underlying agreement was a leasehold "Surrender Agreement," not any type of settlement. (R. 105.) The document is entitled "Surrender Agreement" and expressly recites that Landlord has "agreed to accept … surrender" of a fifteen (15) year lease which commenced in 2003 and had less than two (2) years to run at the time it was terminated. This is very important because Plaintiff-Appellant recovered possession in 2016 of highly valuable commercial retail space on Broadway in Manhattan and was able to promptly re-rent space at likely significantly increased rents. A significant factor justifying Judge Scarpulla's determination to award the payments under Surrender Agreement rather than hold a hearing on damages was the fact that, in response to Defendant-Respondent's cross-motion summary judgment determining the amount due under the Surrender Agreement, Plaintiff-Appellant refused to come forward with the actual replacement lease and explain how it calculated actual damages. Plaintiff-Appellant's failure to come forward with evidence was itself an admission that it was likely better off having Defendant-Respondent surrender the store and then release it at market rates to a new tenant – in this case, H-Mart, a Korean specialty store.

penalty of over five and one half (5.5) times the amount due under the Surrender Agreement. Judge Scarpulla's determination was based upon the undisputed facts and circumstances that Plaintiff-Appellant was seeking over $1,324,969.52[2] for a default in payment of $175,751.73 out of total due of $261,751.73 under a particular contract. The Appellate Division further found the liquidated damage award "unreasonable and confiscatory" recognizing that since, as a matter of fact or mixed question of law and fact, the amount actually not timely unpaid under the Surrender Agreement was only $175,751.73, the penalty being sought was in reality over "7 ½ times" the damage attributable to the breach in question. (R. 235.) This is exactly the type of factual, or mixed fact and law, determination which settled law gives the lower Courts the power to determine and which is not properly subject to review by this Court.

Both Judge Scarpulla and the Appellate Division also recognized that the Liquidated Damage Provision was improper since damages were readily "ascertainable." (R. 13; 234.) At the time of the Surrender Agreement, the Plaintiff-Appellant had already relet, or was finalizing a lease for, the Demised Premises.

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[2] Plaintiff-Appellant's first cause of action sought $1,029,969.54 for rent due under the lease with Defendant-Appellant even though the premises were already re-rented, an additional amount "in excess of $275,000" for future taxes and an additional $20,000 for water charges. (R. 36 – 38.). Judge Scarpulla noted that even considering the total due under the Settlement Agreement of $261,751.73 (R. 13) of which $86,000 was actually paid, the purported liquated damage claim was over "five and one half time the amount [Plaintiff-Appellant]" would have received if the Surrender Agreement had been fully performed." (R.15.)

Having Defendant-Respondent pay rent, tax escalations and water usage under the Terminated Lease would effectively allow double-dipping, in violation of ordinary mitigation of damage rules, rather than a reasonable estimate of damages[3]. Plaintiff-Appellant's representative had stated it had a new tenant in place when the Surrender Agreement was negotiated. Thus, under undisputed circumstances and giving full consideration to the unique factual circumstances of this case, the Appellate Division correctly determined that the Liquidated Damage provision "sought to 'secure performance by threat of a large payment rather than to provide a reasonable assessment of probable damages.'" (R. 19.)

Plaintiff-Appellant's suggestion (see Plaintiff-Appellant's Brief at Page 35), that the Appellate Division analyzed the Surrender Agreement without consideration of its context is unjustified speculation disproven by the Archive of Oral Argument maintained by the Appellate Division which clearly establishes that the Appellate Division was fully cognizant of the context of the case such that its factual determinations should not be second guessed.

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[3] In its brief, Plaintiff-Appellant incorrectly asserts that it merely preserved "pre-existing rights" from a terminated lease in a surrender agreement. This argument is demonstrably false because under the terms of the lease here, if the tenant vacated and the landlord re-rented, the demised premises, the tenant would be responsible only for the difference between the rent collected from the replacement tenant and rent payable under the defaulted leased. In other words, Plaintiff-Appellant's pre-existing right was to the normal measure of damages based upon ordinary mitigation of damages rules. The claim here for a draconian penalty of all future rent under a terminated lease regardless of whether landlord was also collecting rent for a new tenant was in no way, shape of form a pre-existing right.

See Archive of Oral Argument at the First Department. (Mins:Secs) 38:10-40:22. (http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2018_Jan03_13-58-48.mp4 [accessed Sept. 20, 2019)].

Finally, Judge Scarpulla properly determined that Plaintiff-Appellant had failed to come forward with evidence justifying a hearing on actual damages since the damages for breach of the Surrender Agreement were the stipulated payments which had not been paid. In response to Defendant-Respondent's cross-motion for entry of judgment in the amount of $175,751.73, plus statutory interest, Plaintiff-Appellant made a tactical decision not to come forward and produce the lease with its new tenant and an explanation of any alleged actual damage or even request a hearing on actual damages. Having made a tactical decision to withhold from the Court its lease which would have established actual damages and might actually show that Plaintiff-Appellant benefitted by having a new long term tenant paying a substantially higher rent, Plaintiff-Appellant should not be heard to ask, as "alternative" relief, for a remand and hearing. (See Plaintiff-Appellant's Brief at Pages 6 and 41.)

Thus, as more fully set forth below, under firmly established law governing enforceability of liquidated damage provision as enunciated by this Court of Appeals, as well as by the Supreme Court of the United States and English Common Law, the below decision should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

When a trial judge determines, and the Appellate Division affirms, as a matter of fact or mixed question of fact and law, that a particular liquidated damage clause is a penalty because damages were likely ascertainable at the time and the purported liquidated damage was disproportionate to the likely actual damages, can and should the Court of Appeals reconsider?

Answer: No.

Is a liquidated damage clause which imposes a penalty of over seven and one half times the amount in actual default an excessive penalty?

The Appellate Division correctly answered: Yes.

Is a liquidated damage clause which imposes a penalty of over five and one half times the maximum amount which could ever be in default an excessive penalty?

The Trial Court correctly answered: Yes (and was affirmed by the Appellate Division)

Does the common law prohibition against excessive and punishing penalties in liquidated damage provisions apply to contracts made by sophisticated parties?

Both the Trial Court and Appellate Division correctly answered: Yes.

Do limitations on excessive and punitive contractual penalties serve the public interest?

Both the Trial Court and Appellate Division correctly answered: Yes.

BACKGROUND FACTS

A. The Parties

Plaintiff-Appellant, The Trustees of Columbia University in The City of New York, in addition to running the world renowned university, is one of the largest land owners in the City of New York. *See* Wikipedia, *Columbia University*, https://en.wikipedia.org/wiki/Columbia_University [accessed Sept. 20, 2019]) (identifying Columbia as the second largest landowner in the City of New York, after the Catholic Church).

At all relevant times, Defendant-Respondent, D'Agostino Supermarkets, Inc. ("Defendant-Respondent"), was a family-owned supermarket business. (R. 163.)

By way of background, Defendant-Respondent traces its history to the mid-1920s, when two teenagers – Nicola (Nick) and Pasquale (Patsy) D'Agostino – set out from Italy to pursue the American dream. By 1931, they had worked as pushcart peddlers, mill workers and apprentice butchers. One year later, in 1934, at the depth of the Great Depression, Nick and Patsy D'Agostino opened a small grocery store on Lexington Avenue and 83rd Street in Manhattan. The brothers initially stocked their store with groceries and baked goods, and later added a fresh meat section and trained butchers, to become what is believed to be the first full service supermarket ever seen in New York City. (R. 163.)

Defendant-Respondent eventually opened more stores in New York and became "New York's Grocer." Movies and television shows shot on location in New York frequently use Defendant-Respondent's stores and "DAG BAGS" to help impart a sense of New York City realism. Will met Grace in a D'Agostino. Most long time New Yorkers remember the radio jingle, "Please Mr. D'Agostino, Move Closer to Me." (R. 163.)

At the height of its success, Defendant-Respondent provided employment for over 1,000 local people in 26 stores. (R. 163.)

B. The Subject Store

The store in question (the "Surrendered Store") was comprised, at all relevant times, of the ground floor and basement levels of the building located at 2828 Broadway. The parties' lease (the "Terminated Lease" for the Surrendered Store) was dated as of December 2002, and was modified by a rider and as amended by a commencement date agreement dated as of 2004. (R. 42-104, 165.) The Terminated Lease recited that it was for a supermarket on the ground floor and part of the basement in a building to be constructed. Although the Terminated Lease is dated December 22, 2002, at that time the building was still under construction and the fifteen (15) year term did not commence until August 2003. (R. 165.)

C. The History of the Surrendered Store

The market for traditional supermarkets has suffered since the Surrendered Store was first opened in 2003. Unfortunately, the economics of running local family-owned business, particularly traditional supermarkets have changed, and chains like A&P, Pathmark and Waldbaum's have disappeared. Other chains, such as Food Emporium and Fairway, have been through bankruptcy reorganizations. (R. 163-164.) Today, there is extreme competition from internet companies like Amazon as well as a variety of other brick and mortar stores like CVS, Rite Aid, Costco, Target and Walmart selling items previously sold only in traditional supermarkets. Smaller traditional grocers are often being replaced with specialty and gourmet stores. (R. 163-164.)

At the time in question when payments for the Surrendered Store to Plaintiff-Appellant began to fall into arrears, Defendant-Respondent did not have sufficient funds on hand to continue operating, paying employees and keeping shelves stocked with food and pay other expenses, including payments under the Surrender Agreement. Simply put, Defendant-Respondent was in emergency, triage mode. (R. 164.)

In August 2016, as part of complex negotiations aimed at a potential eventual merger with the Gristedes chain, Gristedes loaned money to Defendant-Respondent to allow it to continue to keep food on its shelves and make payroll. The failure to

make timely payment to Plaintiff-Appellant occurred while Defendant-Respondent was trying to avoid a complete shutdown which would have imperiled jobs for approximately six hundred (600) employees. (R. 164, 176-177.)

In 2016, Defendant-Respondent hired a reorganizational officer who attempted to reach out to landlords of several stores operating at a loss and negotiate, among other things, to surrender stores on mutually acceptable terms. In early 2016, Defendant-Respondent reached out to Plaintiff-Appellant to discuss the situation and they eventually entered into a dialogue. As reflected in emails dated March 8, 2016 with Mr. Chandra, Plaintiff-Appellant's Assistant Director of University Acquisitions and Leasing, discussions were already ongoing and Plaintiff-Appellant represented that it was already looking for replacement tenants. (R. 165-166.) Mr. Chandra wrote:

> The feedback I have received thus far does not indicate replacement tenants have an inclination to pay for FF&E [furnishings, fixtures and equipment]

(R. 166; 180.)

Negotiations continued and a final proposal was made on May 4, 2016 (approximately sixty (60) days after the above-quoted email), for surrender as of May 31, 2016, when the total arrears would be $261,751.70. Mr. Chandra proposed the following payment schedule, which was eventually confirmed in the Surrender Agreement:

43,000 paid on execution of the document
43,000 paid on June 1, 2016
Every month thereafter for 11 months, 15,977.43

(R. 166; 181.)

In April and May 2016, Defendant-Respondent assisted Plaintiff-Appellant in showing the Surrendered Store to a few prospective tenants. (R. 188-189.) An email dated May 23, 2016 – before the Surrender Agreement was signed – confirms that Plaintiff-Appellant already had a "new tenant" in place and was asking Defendant-Respondent to leave certain equipment in place. (R. 187.) Further, a review of New York City Department of Buildings' online database reveals that renovation plans were approved shortly after Defendant-Respondent surrendered the Surrendered Store. (R. 190-200.) Given the approval date of these plans, they were necessarily developed months earlier, likely around the time the Surrender Agreement was executed.

D. The Surrender Agreement

The Surrender Agreement was executed on or about May 27, 2016. (R. 105-111.) The Surrender Agreement called for "surrender to Landlord the Lease and the Premises" and Landlord agreed to accept said surrender as of May 31, 2016. (R. 105; 106.)

Defendant-Respondent timely surrendered the Surrendered Store to Plaintiff-Appellant. (R. 167.)

Plaintiff-Appellant accepted Defendant-Respondent's surrender of the Surrendered Store and had a new tenant in place. (R. 167.) While Plaintiff-Appellant has, through the date of this appeal[4], withheld disclosing its actual lease with the new tenant (even for an in-camera review), it is believed that this is a long-term lease with more favorable lease terms than Plaintiff-Appellant was receiving from Defendant-Respondent.

The Initial Surrender Payment and the Second Surrender Payment of $43,000.00 each were timely paid under the Surrender Agreement (R. 37, Complaint at ¶ 10), but Defendant-Respondent neglected to pay the Monthly Surrender Payments as it was in the midst of reorganization.[5]

On or about October 14, 2016, Plaintiff-Appellant served a Notice of Default and Opportunity to Cure, referencing the Surrender Agreement and alleging that Defendant-Respondent failed to tender four (4) Monthly Surrender Payments. (R. 130.)

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[4] At oral argument in the Appellate Division, the Panel questioned counsel about the terms of the new lease, and Counsel acknowledged that the new lease was never produced and in fact asserted that he had never seen the new lease. *See* Archive of Oral Argument at 38:10- 40:22. (http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2018_Jan03_13-58-48.mp4 [accessed Sept. 20, 2019])

[5] This terms in this paragraph are the actual defined terms in the Surrender Agreement. To better serve its cause, Plaintiff-Appellant removed the word "Surrender" in each and every instance in its brief.

After this action was commenced, on or about December 29, 2016, Defendant-Respondent tendered $175,751.73, representing all eleven (11) Monthly Surrender Payments due to Plaintiff-Appellant under the Surrender Agreement, approximately half of which would not be due until the following year. (R. 168-169; 171-172.)

Rather than accept the check or open a dialogue about a reasonable calculation of damages since the Surrendered Store had been re-rented, the check was returned with a letter from counsel stating:

> It is Plaintiff's position that Defendant is indebted to Plaintiff in a sum in excess of $1,000,000. Thus plaintiff will not accept the $175,751.73 payment.

(R. 151.)

E. The New Tenant

In conferences and motion practice in the lower Court, Plaintiff-Appellant failed and refused to produce an actual copy of the lease it entered into with a new tenant (the "New Tenant").

However, Plaintiff-Appellant ultimately acknowledged in opposing Defendant-Respondent's cross-motion that the Surrendered Store was re-rented to the New Tenant as of June 30, 2016. (R. 221.) The New Tenant turned out to be H-Mart, a Korean specialty grocery store.

PROCEDURAL HISTORY

Plaintiff-Appellant commenced this action on November 10, 2016 by the filing of a summons and complaint seeking damages based upon the Surrender Agreement. (R. 36-38, Complaint at ¶¶ 3-17.)

The complaint (R. 35-41), was filed November 10, 2016, long after the Surrendered Store had been re-rented to the New Tenant. (R. 221, ¶ 4, and R. 226, ¶ 13.) The complaint omitted any reference to the fact that the Surrendered Store was re-rented, did not seek actual damages, and instead only sought the full rent and additional rent as liquidated contractual damages.

The Complaint contains three (3) causes of action. The first cause of action sought, as liquidated damages, the full rent due under the terminated lease from June 1, 2016 through August 31, 2018, even though the Surrendered Store had been re-rented to an H-Mart operator (as of June 26, 2016, according to Plaintiff-Appellant). (R. 36-38, R. 222 at ¶ 4.) The second cause of action sought, as further liquidated damages, tax escalations due under the Terminated Lease from June 1, 2016 through August 31, 2018, in an amount to be established at trial, but believed to exceed $275,000.00. The third cause of action sought, as even further liquidated damages, water used at the store by Defendant-Respondent (even though it was no longer in possession) in an amount to be established at trial, but believed to exceed $20,000.00.

Defendant-Respondent filed an answer on December 5, 2016. (R. 118-123.)

On December 19, 2016, Plaintiff-Appellant filed a pre-discovery motion for summary judgment seeking, in pertinent part, summary judgment on its first cause of action for "the principal sum of $1,020,125.15, together with legal interest thereon," on its first cause of action for base rent under its first cause of action, and severing the claims for further liquidated damages on its second and third causes of action for tax escalations and water usage, which it alleged were for damages in an amount to be established at trial but believed to exceed $295,000.00 as additional liquidated damages. (R. 18-19.)

In its initial moving papers filed December 19, 2016, even though Plaintiff-Appellant had already re-rented the Surrendered Store to the New Tenant, this fact was conveniently omitted and kept secret from the lower Court.

On December 24, 2016, Defendant-Respondent filed an amended answer, which contained an expanded ninth (9th) affirmative defense which alleged that the Surrendered Store had been re-rented and that even if Plaintiff-Appellant was entitled to damages, such damages needed to be reduced by rent received from the New Tenant and that Plaintiff-Appellant was seeking an improper windfall and an unconscionable and unenforceable penalty. (R. 148-149.)

On December 29, 2016, Defendant-Respondent tendered to Plaintiff-Appellant a check for full payment of the Monthly Surrender Payments due under the Surrender Agreement in the amount of $175,751.53. (R. 171-172.)

By letter dated January 6, 2017, counsel for Plaintiff-Appellant notified counsel for Defendant-Respondent that his client would not accept the check for $175,751.53, because "Defendant is indebted to Plaintiff for a sum in excess of $1,000.000.00." (R. 151-152.)

On January 23, 2017, Plaintiff-Appellant filed a supplemental affirmation in support of its motion for summary judgment disclosing to the lower Court that his client had rejected the tender of $175,751.53. The January 23, 2017 supplemental affirmation of attorney David Grill expressly asserts and confirms that Plaintiff-Appellant was pursuing a liquidated damage theory and therefore claiming as liquidated damages the full rent, including tax escalations and water meter charges under the Terminated Lease from June 1, 2016 through August 31, 2018, even though the Surrendered Store was re-rented as of June 30, 2016. (R. 140-141 and 221 at ¶ 4.)

On February 8, 2017, Defendant-Respondent opposed Plaintiff-Appellant's motion and cross-moved for summary judgment striking Plaintiff-Appellant's claim for liquidated damages and providing entry of a judgment against Defendant-Respondent in the amount of $175,751.73, with accrued interest from October 14,

2016, or in the alternative, denying Plaintiff-Appellant's motion and permitting discovery on the issue of damages and mitigation based upon the new lease. (R. 158-159.)

In support of its cross-motion striking the claim for liquidated damages, Defendant-Respondent submitted affidavits explaining the relevant facts and providing the lower Court with an email from Plaintiff-Appellant's assistant director of acquisitions and leasing dated May 23, 2016 (four (4) days before the Surrender Agreement was signed) discussing a request by the "new tenant" that Defendant-Respondent leave certain equipment when it vacated the Surrendered Store. (R. 187.) Defendant-Respondent also submitted an affidavit from its director of operations who explained that prior to the Surrender Agreement, he assisted Plaintiff-Appellant in showing the store to prospective new tenants, including showing it to persons of Asian descent who mentioned that the store might become an "H-Mart." (R. 189.) The affidavits in support of the cross-motion further explained that work permits for a new store were approved as of September 21, 2016, which had been filed by Lihong Zhang. In support of its cross-motion, Defendant-Respondent also asserted that it was likely that Plaintiff-Appellant had obtained a significantly increased rent under its new lease with H-Mart and also that even if it paid a brokerage commission, it would have still needed to pay a brokerage commission had the Terminated Lease remained in effect until August 30, 2018. (R.

168.) Thus, the papers in support of the cross-motion asserted that Plaintiff-Appellant was improperly attempting to "double dip" by collecting rents from both the old and New Tenant and that if its cross-motion were not granted, it was entitled to discovery on the issue of mitigation of damages.

In opposition to the cross-motion, Plaintiff-Appellant failed to come forward and produce a copy of the lease for the New Tenant and/or attempt to establish actual damages. Instead, Plaintiff-Appellant persisted in its theory that it was entitled to the full rental due from Plaintiff-Appellant through August of 2018 as "liquidated damages" regardless of whether it was paid by the New Tenant. (R. 212-215.) Indeed, at page 5 of attorney David Grill's affidavit in opposition to cross-motion, he has an entire section titled in bold letters: "The Surrender Agreement's Liquidated Damage Provisions Is [sic] Enforceable." (R. 213.) It appears that Plaintiff-Appellant made a calculated decision not to produce the new lease and ask for actual damages likely because it was aware that it would show that Plaintiff-Appellant actually benefitted from the new lease by obtaining a substantially higher rent.

Finally, without producing the New Tenant's actual lease, Plaintiff-Appellant conceded that a new lease for the store was signed on June 30, 2016 (R. 221, ¶ 4) and acknowledged that Plaintiff-Appellant had been in negotiations with prospective tenants prior to the date of the Surrender Agreement. (R. 222, ¶¶ 7-8.)

i. The Trial Court Decision

Judge Scarpulla issued a lengthy and reasoned decision finding that the claim for rent and additional rent for the entire period of June 1, 2016 through August 30, 2018, regardless of the fact that the Surrendered Store was re-rented as of June 30, 3018, was an unenforceable liquidated damage provision based upon clear authority from the Court of Appeals and the Appellate Divisions. (R. 11-16.) Judge Scarpulla's decision carefully and properly analyzes the undisputed facts of the case and properly applies the applicable principles governing liquidated damages. In analyzing the case Judge Scarpulla correctly found:

> "[T]his action is a breach of the *Surrender Agreement*, not a breach of the Lease." [R. 13] (emphasis added).

Judge Scarpulla denied Plaintiff-Appellant's motion to enforce a liquidated damage provision and granted Defendant-Respondent's cross-motion to strike the liquidated damage provision. Judge Scarpulla held that Plaintiff-Appellant was not without remedy and that Defendant-Respondent must pay the full amount due under the Surrender Agreement with interest. (R. 16.)

No judgment was ever entered by Plaintiff-Appellant. While briefing was ongoing before the Appellate Division, Defendant-Respondent tendered the full amount, with interest, which Judge Scarpulla found due.

ii. The Appellate Division Affirmance

The Appellate Division unanimously affirmed. After reciting the facts, the Appellate Division stated:

> 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]).

(R. 234-235.)

For the reasons set forth below, the decisions below should be affirmed.

ARGUMENT

I. THE LOWER COURT AND APPELLATE DIVISION BOTH CORRECTLY DETERMINED THAT THE LIQUIDATED DAMAGE PROVISION IN THIS CASE IS UNENFORCEABLE

A. Grossly Disproportionate Liquidated Damage Provisions Are Penalties that Violate Public Policy and Are Not Enforceable In Court

It is well established that a liquidated damage clause that is “grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable.” *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance*, 24 NY3d 528, 536, 2 NYS3d 39, 44 [2014]; *see also Truck Rent-A-Ctr. Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424, 393 NYS2d 365 [1977], *JMD Holding Corp. v Congress Fin. Corp.*, 795 NYS2d 502, 4 NY3d 373, 379, [2005]; *Mosler Safe Co. v Maiden Lane Safe Deposit Co.*, 199 NY 479, 485 [1910]; *Colwell v. Lawrence & Folks*, 38 NY 71 [1868]; *Sina Drug Corp. v Mohammed Ali Mohyuddin*, 2013 NY Slip Op 32984(U) [Sup Ct, NY County 2013, Kornreich, J.], *aff’d* 122 AD3d 444 [1st Dept 2014].

This Court’s analysis of the law in *Van Duzer* is consistent with jurisprudence dating back over 150 years ago when this Court stated:

> forfeiture named for non-fulfillment of a contract, **where excessive**, will not be construed as intended to be liquidated damages. [Emphasis added.]

Colwell v Lawrence & Folks, 38 NY 71 [1868].

It is worth noting that New York's well established jurisprudence is consistent with long established common law. In *Priebe & Sons v United States,* 332 US 407, 413, 68 S Ct 123, 126-27, 92 L Ed 32 [1947], the Supreme Court of the United States applied "principles of general contract law" (i.e., general common law), to strike down a liquidated damage provision of a government contract. In the context of a war-time government contract for purchase of dried eggs for shipment to England and Russia, the Supreme Court of the United States explained

> "Under these circumstances this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an in terrorem effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements. See Kothe v. R. C. Taylor Trust, supra; Restatement, Contracts s 339. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust. See Salmond & Williams on Contracts (2d Ed. 1945) s 202." [Emphasis added.]

Id.

In 1822, Chief Justice Marshall of the Supreme Court of the United States found a contractual provision to be an unenforceable penalty, stating:

> The Court is well satisfied that this stipulation is in the nature of a penalty and consequently, that there is no error in rejecting it.

Tayloe v. Sandiford, 20 US 13, 18 [1822].

New York's common law of liquidated damages is fully consistent with the Restatement of Contract which explains:

> The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.

Restatement (Second) of Contracts § 356 (1981; June 2019 Update).

Moreover, New York's common law of liquidated damages has been statutorily adopted in the Uniform Commercial Code which provides in §2-718:

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Parties entering into contracts, particularly sophisticated parties like Columbia University, are certainly aware of the law of liquidated damages. Where parties choose to request unreasonably and disproportionately punishing penalties in contracts, they are, or should be, on notice that such provisions will not be enforced

by the Courts. Parties seeking draconian penalties should not blame the other side for accepting the agreement, but rather should blame themselves for being excessively greedy in asking for something that established law does not permit.

B. *Arguments that A Party Agreed to An Unconscionable Penalty Does Not Make It Judicially Enforceable.*

While recognizing in general that parties are free to agree to liquidated damage clauses, in 2014 this Court of Appeals explained:

> Liquidated damages that constitute a penalty, however, **violated public policy and are unenforceable**. A provision which required damages grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable. [Emphasis added.]

Van Duzer, 24 NY3d at 536 (internal citations omitted). The public policy recognized by this Court in 2014 has not changed.

It worth noting that in the all above cited cases, the parties opposing liquidated damages were generally sophisticated companies or individuals, without any claim of lack of legal representation, and this was not a factor that influenced the legal issues. For example, in the *Van Duzer,* the tenant which argued that the leasehold provision was an unenforceable, was a for-profit school renting a large commercial space. In *Truck Rent-A-Ctr. Inc.*, the party which argued against liquidated damage provisions was a company renting a fleet of 25 delivery trucks. In the 1947 US Supreme Court case *Priebe & Sons*, the contract with an unenforceable liquidated

damage provision was a wartime government contract for sale of dried eggs to England and Russia. Thus, the fundamental rules of law governing judicial disfavor and refusal to enforce grossly disproportionate penalties is fully applicable to sophisticated and legally represented defendants. Parties seeking to enforce grossly disproportionate liquidated damage provisions do not get a free pass on asking the Court to enforce unconscionable penalties simply because the other party is allegedly a sophisticated party or was represented by counsel.[6]

The discussion in *Truck Rent-A-Center, Inc.* is particularly relevant:

> Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract. In effect, a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy. Provisions for liquidated damage have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage. In such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury.
>
> On the other hand, liquidated damage provisions will not be enforced if it is against public policy to do so and public

[6] In Shakespeare's The Merchant of Venice, the sovereign would have no part of enforcing an unconscionable bargain of a pound of flesh for late payment of a loan. It did not matter that the victim of the liquidated damage provision for "a pound of flesh" was a member of the wealthy merchant class.

> policy is firmly set against the imposition of penalties or forfeitures for which there is no statutory authority. It is plain that a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for penalty and is unenforceable. A liquidated damage provision has its basis in the principle of just compensation for loss. A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promisee, in the event of default, would reap a windfall well above actual harm sustained. As was stated eloquently long ago, to permit parties, in their unbridled discretion, to utilize penalties as damages, 'would lead to the most terrible oppression in pecuniary dealings'.

Id at 423-25 (emphasis added) (internal citations omitted).

The public policy which this Court said in 1977 was "firmly set against the imposition of penalties or forfeitures for which there is no statutory authority" has not changed. The legislature has not enacted any laws suggesting that long-established common-law limits on liquidated damage are no longer applicable in New York. Indeed, as explained above, the common law of liquidated damages was statutorily adopted in Section 2-718 of the Uniform Commercial Code in 1962 and has not been amended since.

Plaintiff-Appellant's suggestion that public policy requires enforcement of unreasonable contractual penalties, simply because they are written into a contract, must be rejected. Plaintiff-Appellant's reliance on this Courts recent decision in *159*

MP Corp v Redbridge Bedford, LLC, 33 NY3d 353 [2019] is misplaced. The *159 MP Corp* case involved the question of whether the waiver of the right to seek a *Yellowstone* injunction violated public policy. Unlike the law of liquidated damages, which involves substantive rights and public policy concerns which have been uniformly enforced in New York, throughout the United States, and even in England for centuries, a *Yellowstone* injunction is a procedural question which arose out of a case decided in 1968. *See First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630, 634 [1968]. While a *Yellowstone* injunction is an important procedural vehicle allowing a party to stay/toll the default cure period, while they litigate whether something is a default, its waiver does not bar the tenant from litigating whether they are in default in the first place if the landlord attempts to terminate the lease and evict the tenant. Moreover, in the majority opinion in *159 MP Corp* , the Court recognized that there are situations where a freedom of contract can be overridden by another "countervailing public policy." 33 NY3d at 360. In *159 MP Corp,* while not directly discussing liquidated damages, the Court recognized that public policy supports the doctrine of "unconscionability." *Id.* In any event, the public policy precluding enforcement of liquidated damage clauses which are in actuality unenforceable penalties is well established. Nothing in *159 MP Corp* in any way justifies reconsideration of the well-established law governing

liquidated damages which was properly applied by both Judge Scarpulla and the Appellate Division.

It is submitted that it would be highly problematic for this Court to issue a decision varying well established law of liquidated damages. This might have the unintended consequence of encouraging parties who want to contract for draconian and unreasonable penalties to believe that New York would enforce contractual clauses which are otherwise unenforceable based upon established law and using choice of law provisions thereby making New York law a haven for unconscionable contracts. It would also be highly problematic for this Court to announce a change in common law which is directly inconsistent with the Uniform Commercial Code.

Thus, the simplistic argument that the Liquidated Damage Provision should be enforced because of general concepts of freedom of contract should be firmly rejected.

C. The Liquidated Damage Provision at bar for seven and one-half times the actual damages under the Surrender Agreement was effectively a late fee of over 2000% per annum and is grossly disproportionate as a matter of fact or mixed question of fact and law

The key point of this Court's decision in *Van Duzer* and prior case law is that trial judges can and should analyze claims to avoid liquidated damage clauses by "giving due consideration to the nature of the contract and the circumstances." 24

NY3d at 536. These are questions of fact, or at minimum mixed questions of fact and law, which are not properly subject to review by this Court.

Judge Scarpulla's thorough decision demonstrates that she did exactly what this Court directed in *Van Duzer* by determining that the Liquidated Damage Provision called for payment of five and one half (5.5) the maximum amount of 261,751.73 due under the Surrender Agreement. (R. 13.) The Appellate Division affirmed and added to this by finding that the Liquidated Damage Provision called for payment of seven and one half (7.5) the amount of $175,751.73 which was actually unpaid. (R. 235.) The thorough decision at the trial level demonstrates that the Court properly considered all facts and circumstances.

The decision by the Appellate Division to rely upon its own precedent, *Clean Air Options, LLC and Human Scale Corp.,* 142 AD3d 923, 924 [1st Dept. 2016] and *Sandra's Jewel Box Inc. v 401 Hotel, L.P.*, 273 AD2d 1, 3, 708 NYS2d 113, 115 [1st Dept 2000], was proper. In *Clean Air Options,* the First Department found that the late fee, which according to the parties' calculations results in an annual interest rate of 78%, is "unreasonable and confiscatory in nature," and thus unenforceable." 142 AD3d at 924. In *Sandra's Jewel Box,* the First Department found that late fees in a lease awarded a three hundred sixty-five (365%) per cent per annum penalty. The Appellate Division noted that, while technically not interest, the late fees of three hundred sixty five (365%) per cent per annum was unreasonable and confiscatory in

nature and therefore unenforceable when examined in light of the public policy expressed in Penal Law § 190.40, which makes an interest charge of more than twenty five (25%) per cent per annum a criminal offense.

Here, disproportionality is established because the claimed liquidated damages of $1,020,000 plus another amount believed to exceed $295,000 are over seven and one half (7.5) times the actual damages of approximately $175,000.00. (R. 235.) Given that the amount was actually tendered on December 29, 2017, approximately seventy-seven (77) days after it was due under the notice of default and opportunity to cure, the claimed liquidated damages are in fact a late fee of over two thousand (2,000%) per cent per annum.

These types of determinations are necessarily case specific and do not lend themselves to review by the Court of Appeals.

D. Defendant-Appellant's damages were readily calculable when the Surrender Agreement was signed and bore no relation to the Liquidated Damage Provision

Defendant-Respondent came forward with substantial evidence demonstrating that Plaintiff-Appellant's damages were ascertainable at the time it executed the Surrender Agreement. Defendant-Respondent demonstrated that by the time the Surrender Agreement was signed, Plaintiff-Appellant had already either re-rented the Surrendered Store or was close to signing a new lease with the New

Tenant. On May 23, 2016, before the Surrender Agreement was signed, Plaintiff-Appellant's director of leasing was discussing the "new tenant." (R. 187.)

Documentary evidence, from which both Judge Scarpulla and the Appellate Division drew inferences and made findings of fact, confirms that Plaintiff-Appellant had the "New Tenant" as early as May 23, 2016 as evidenced by the email dated May 23, 2016 at 10:12AM (R. 187) from Mr. Anil D. Chandra, Plaintiff-Appellant's Assistant Director of University Acquisitions and Leasing.[7] (R 187.) Mr. Chandra's May 23, 2016 email states the following:

> The **new tenant** wants to know if you are leaving the baler and conveyor belt?

(R. 18) (emphasis added.) In other words, at the time of the Surrender Agreement, Plaintiff-Appellant was fully aware that the Surrendered Store was or would shortly be re-rented, when it sought a penalty of over $1.3 Million if Defendant-Respondent failed to pay monthly installments of approximately $15,000 totaling approximately $175,000. Plaintiff-Appellant's refusal to accept the full amount due when tendered on December 29, 2016, which included both five (5) late payments of $15,000 and an additional six (6) payments which were not yet due (R. 151-152; 171-172), demonstrates a desire to be punitive and greedy rather than seek just compensation.

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[7] New York City Building Department online records also show that construction plans were filed and approved shortly after Defendant-Respondent surrendered the Surrendered Store which confirm that a new tenant was in place.

It is therefore beyond dispute, as found by the Appellate Division, that Plaintiff-Appellant was improperly seeking to impose a punitive and crippling penalty rather than seeking proportionate compensation for any future breach.

In response to the cross-motion, Plaintiff-Appellant offered nothing more than the self-serving affidavit of Mr. Chandra wherein he cavalierly suggests that he misspoke when he used the word "new" tenant and should have used the word "prospective," even though he acknowledges that a lease was actually signed on June 30, 2016 with the New Tenant. (R 221, ¶ 4.) Plaintiff-Appellant made the strategic decision to deliberately withhold the lease (which it did not disclose in its original motion, or at any other point for that matter) that Plaintiff-Appellant executed with the New Tenant. Having withheld the new lease from the trial court, Plaintiff-Appellant should not be heard to complain that it did not have the opportunity to prove its damages.

"An unfavorable inference may be drawn when, as in this case, a party fails to produce evidence which is within its control and which it is naturally expected to produce." *Seward Park House. Corp. v Cohen*, 287 AD2d 157, 168 [1st Dept 2001] *citing Ausch v St. Paul Fire and Marine Ins.*, 125 AD2d 43, 48 [2d Dept 1987] *lv. denied* 70 NY2d 610, 522 NYS2d 110 [1987]; II Wigmore, Evidence § 285 [1979 rev ed]; Richardson, Evidence § 3-139 [11th ed]; 57 NY Jur2d, Evidence § 124); *see also Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B*.V., 18 AD3d 286, 287 [1st

Dept 2005] ("[a]n inference may be drawn from plaintiffs' failure to produce their own account statements [which]…are within their control".)

Here, rather than laying bare of its proof in response to a cross-motion to enter judgment for the amount actually not paid under the Surrender Agreement, Plaintiff-Appellant made the calculated decision to withhold the lease with its New Tenant which was within its control along with any other documentation supporting its position. It is submitted that any reasonable review of the lease with the New Tenant, which Plaintiff-Appellant has maintained as a closely guarded state secret, would demonstrate that Plaintiff-Appellant suffered no damages. It likely substantially increased the rent it was receiving and secured a long-term lease with a specialty food store more likely to succeed in the evolving area of Columbia University.

With regard to issues of brokerage fees as a measure of damages, Plaintiff-Appellant failed to produce any credible evidence disputing that there were approximately only two (2) years remaining on Defendant-Respondent's lease and that it would have paid the same brokerage commission two (2) years from the Surrender Agreement had the Terminated Lease not been terminated. (R. 168, ¶ 26.)

II. PLAINTIFF-APPELLANT'S FACTUAL CHARACTERIZATION OF ITS RIGHTS UNDER THE SURRENDER AGREEMENT WERE PROPERLY REJECTED.

The underlying determinations by Judge Scarpulla and the Appellate Division are issues of fact, or mixed questions of law and fact, not properly reviewed by this Court of Appeals. To the extent this Court sees issues of law, Plaintiff-Appellant's analysis of the issues is fundamentally flawed.

A. Appellant's flawed "Pre-Existing Right" Argument.

On appeal to this Court, the Plaintiff-Appellant's brief argues that the Liquidated Damage Provision was not a penalty because it is a "pre-existing contractual right" under the Lease and further asserts that "No court has ever held that a pre-existing right that was bargained for in a separate agreement can qualify as a penalty." [App. Br. at pg 30].

Plaintiff-Appellant's argument fails because the operative document at issue is a "Surrender Agreement" which terminated the Lease in exchange for a total of $261,751.73 in surrender payments, a portion ($175,751.73) of which the Defendant-Respondent defaulted upon. Plaintiff-Appellant bargained for and received, in addition to Surrender Payments, the right to immediately re-rent the

Surrendered Store to a New Tenant, which necessarily had substantial economic benefit to Plaintiff-Appellant.

While in 2016, Defendant-Respondent wanted to terminate the Terminated Lease because it was not operating the store at a profit, the rent Defendant-Respondent was paying was based upon prices negotiated in 2002. The moving affidavit in support of Defendant-Respondent's cross-motion explained that the rent Defendant-Appellant negotiated in 2002 of $31,139.33 had only been increased to $38,147.02 by 2016 and that Plaintiff-Appellant would likely substantially increase its rent with a new tenant, and would also enjoy the benefits of a stable long term tenant which might better serve its students and faculty. (R. 168.) Had Defendant-Respondent fought an eviction and/or sought some form of bankruptcy protection, Plaintiff-Appellant would likely have been much worse off than proceeding with a negotiated Surrender Agreement. In any event, the Surrender Agreement specifically provides in paragraph 4:

> As of the Surrender Date, the Lease and the term thereof and all rights of Tenant thereunder shall expire and terminate ….

Paragraph 9 of the Surrender agreement calls upon both parties to execute any further documents needed to more effectively assure the "termination of the Lease."

The Plaintiff-Appellant's brief deliberately attempts to conceal that the default provision was part of a Surrender Agreement. Instead, the Plaintiff-Appellant's brief

calls it a "*carefully calibrated settlement agreement.*"[8] Plaintiff-Appellant's attempts to confuse the Court with its "pre-existing Lease" argument have already failed at both at the Appellate Division [R. 233] and at the trial court below [R. 6]. However, in its moving affidavit seeking summary judgment in the Supreme Court, Counsel for Plaintiff-Appellant affirmed:

> This is a straightforward breach of contract action pursuant to which Plaintiff seeks summary judgment against Defendant for sums due and owing based upon Defendant's breach of a lease surrender agreement.

(R. 23 at ¶ 6.)

Consistent with Plaintiff-Appellant's counsel's initial characterization of his own case, Justice Scarpulla's decision and order aptly points out:

> "However, this action is a breach of the *Surrender Agreement*, not a breach of the Lease." [R. 13] (emphasis added).

The Appellate Division agreed [R. 235]. Plaintiff-Appellant is attempting (for the third time) to reverse engineer an argument explaining why the Liquidated Damage Provision should not be ruled an "unenforceable penalty," by seeking some shelter in pre-existing rights which were specifically terminated by the Surrender Agreement and replaced with a new contractual obligation to pay $261,751.73.

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8 Plaintiff-Appellant's Br. at pg 1, 1st paragraph.

The essence of Plaintiff-Appellant's flawed argument seems to be that the Surrender Agreement's Liquidated Damages Provision should not be viewed as a penalty because the provision merely represents all "*future*" rent and additional rent that would have been owed under the Lease. However, had the Terminated Lease not been terminated, then ordinary mitigation of damage principles would preclude Plaintiff-Appellant from double dipping and re-renting the Surrendered Store and then collecting rent and additional rent from both the old tenant and the New Tenant. Indeed, Section 18 of the Terminated Lease (R. 44) provides that if the premises is vacated and then re-rented, the tenant is liable for:

> any deficiency between the rent reserved and/or covenants to be paid and the net amount, if any, of rent collected on account of the subsequent lease or leases of the demised premises …

Having chosen to enter into the Surrender Agreement which gave Plaintiff-Appellant the right to contemporaneously release the Surrendered Store, likely at a much higher rent, and certainly to a more stable long term tenant, it simply makes no sense for Plaintiff-Appellant to continue to argue that the Liquidated Damage Provision is somehow enforceable based upon rights under a terminated lease agreement, which rights would have been subject to mitigation of damage rules Plaintiff-Appellant seeks to avoid by claiming liquidated damages. Plaintiff-Appellant's utter greed and bad faith desire to exact a punitive penalty was revealed when it refused to accept

the tender, on December of 2016, of both the payments in default as of that time and the additional five (5) payments which were not yet due. (R. 151 – 152).

At page 27 of Plaintiff-Appellant's brief, it speciously asserts that the Surrender Agreement "Lacks all the Hallmarks of A Penalty." For all the reasons set forth above, this claim must be firmly rejected as a bold-faced lie, without any rationale. At a minimum, the record contained sufficient evidence for the trial Court and Appellate Division to determine, as a question of fact or mixed question of fact and law, that the Liquidated Damage Provision had the "Hallmarks of a Penalty" and was intended to be to be punitive and confiscatory.

III. PLAINTIFF-APPELLANT'S "ALTERNATIVE" REQUEST FOR A HEARING ON ACTUAL DAMAGES WAS PROPERLY REJECTED BECAUSE THIS WAS NEITHER SOUGHT IN THE COMPLAINT NOR REQUESTED IN THE UNDERLYING MOTIONS, AND PLAINTIFF-APPELLANT REFUSED TO PRODUCE THE REPLACEMENT LEASE WHICH WOULD HAVE ESTABLISHED ACTUAL DAMAGES

Judge Scarpulla and the Appellate Division could not have erred in denying a hearing on Plaintiff-Appellant's damages because this "alternative" relief, as suggested at pages 6 and 41 of Plaintiff-Appellant's brief, was not requested in Plaintiff-Appellant's Amended Notice of Motion or in opposition to Defendant-Respondent's cross-motion. Thus, pursuant to CPLR § 5701(a)(2), Plaintiff-

Appellant's request for such relief was properly denied by the Trial Court and was not properly before either the Appellate Division or this Court of Appeals. *See Calderon v Esenova*, 132 AD3d 711, 712, 18 NYS3d 627, 629 [2d Dept 2015]; *see also Jacobs v Choc-Lo Co.*, 216 AD 791, 215 NYS 516 [1st Dept 1926]; *Maleski v. Lenander*, 38 AD3d 1192, 1193, 831 NYS2d 810, 811-12 [4th Dept 2007].

From day one, Plaintiff-Appellant fought for liquidated damages, focusing solely upon its desire for a windfall penalty of over $1 million, with no alternative in its first cause of action. (e.g. R. 18, 20 and 137-144.)

In Plaintiff-Appellant's Amended Notice of Motion, Plaintiff-Appellant sought the following relief, in pertinent part and sum:

> On the first cause of action in the Complaint in the principal sum of $1,020,125.15, together with legal interest thereon.

(R. 20.) Additionally, Plaintiff-Appellant sought to sever additional liquidated damage claims for tax escalations of at least $275,000 and water usage of at least $20,000. (R. 20.)

This "alternative" relief of a hearing on actual damages was neither pleaded nor addressed in Plaintiff-Appellant's underlying motion or opposition to Defendant-Respondent's cross-motion because Plaintiff-Appellant was not seeking that particular relief in the Court below and cannot now seek such new relief on appeal.

Further, Plaintiff-Appellant's failure to request this new "alternative relief" in its Amended Notice of Motion was not an oversight because it proceeded without even disclosing that the Surrendered Store was re-rented.

Procedurally, Defendant-Respondent cross-moved for an order "striking Plaintiff's claim for liquidated damages and providing for entry of a judgment against Defendant in the amount of $175,751.73, with accrued interest from October 14, 2016." (R. 158.) In support of its application, Defendant-Respondent's affidavits explained that Plaintiff-Appellant had a new tenant likely paying a much higher rent and that even if Plaintiff-Appellant paid a brokerage commission, it would have paid a commission two (2) years later had the Terminated Lease run its full course. In response to the cross-motion, Plaintiff-Appellant did not ask for a hearing. Instead, it simply defended its claim for liquidated damages saying "Plaintiff has no obligation to ever address the actual damages incurred because the parties agreed to specified liquidated damages." (R. 223.) Plaintiff-Appellant describes the obligation to pay a brokerage commission in 2016 as "unanticipated" but does not deny that had there never been a surrender it would have needed to pay a brokerage commission in 2018 when the Terminated Lease would have otherwise terminated. (R. 223.) Likewise, while Plaintiff-Appellant attempts to justify its claim for approximately $1.3 Million in liquidated damages by claiming that it gave months of "free rent" to the New Tenant, it refuses to say whether if, after the free

rent period, it obtained increased rent that offset the initial free rent. (R. 223.) Ultimately, Plaintiff-Appellant's refusal to come forward with the actual lease with the New Tenant precludes the request for a remand for a hearing on this appeal since Plaintiff-Appellant did not ask for a hearing on actual damages and instead allowed Defendant-Respondent's cross-motion to be submitted based upon the assertion that Plaintiff-Appellant had "no obligation" to ever address the actual damages "because the parties agreed to specified liquidated damages." (R. 223.)

Thus, Plaintiff-Appellant charted its own course at the trial court, making a strategic decision not to disclose its new lease and not to seek actual damages, and Plaintiff-Appellant should not now be heard to seek a remand for something it never asked for in the first place and which it affirmatively stated it had "no obligation to ever address". (R. 233.)

<u>CONCLUSION</u>

Based upon the foregoing, Defendant-Respondent respectfully submits that the Appellate Division's order should be affirmed in its entirety without remand along with such other relief this Court deems just and proper in the circumstances.

Dated: September 23, 2019
New York, New York

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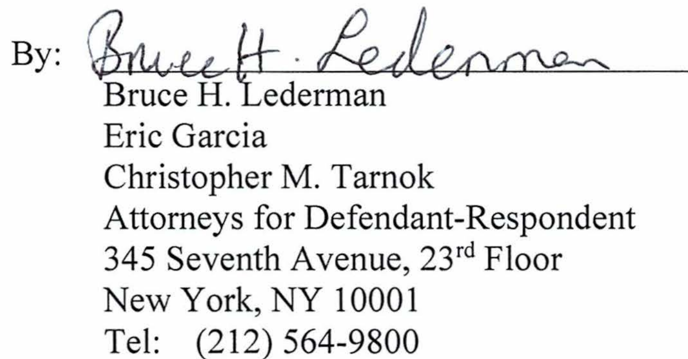
By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 5,989.

Dated: September 23, 2019

Respectfully submitted,

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