Nos. 11-2802 & 12-0432
(Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GK DEVELOPMENT, INC., an Illinois corporation and COLLEGE SQUARE MALL DEVELOPMENT, LLC, a Delaware limited liability company,

Plaintiffs-Appellees/Separate-Appellants,

v.

IOWA MALLS FINANCING CORP., a Delaware corporation, COLLEGE SQUARE MALL ASSOCIATES, LLC, a Delaware limited liability company, and CHICAGO TITLE AND TRUST COMPANY, an Illinois corporation, as escrowee,

Defendants-Appellants/Separate-Appellees.

On Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, Nos. 06 CH 3427 & 06 CH 3586
The Honorable Judge Carolyn Quinn, Judge Presiding

COMBINED RESPONSE AND OPENING BRIEF OF PLAINTIFFS-APPELLEES/SEPARATE-APPELLANTS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE 1

ISSUES PRESENTED FOR REVIEW 2

JURISDICTION 3

STATUTES INVOLVED 4

1. 735 ILCS 5/2-1303 4

2. 735 ILCS 5/12-109(a) 4

STATEMENT OF FACTS 4

I. The Seller and Buyer Enter into the Purchase Agreement 5

II. The Seller and Buyer Enter into the Third Amendment 6

III. The Seller and Buyer Enter into the Deed and Money Escrow Agreement, Establishing the Hy-Vee Holdback 8

IV. Seller and Hy-Vee Negotiate the New Hy-Vee Lease, Excluding Buyer 9

V. Buyer and Hy-Vee Execute the Hy-Vee Lease 10

VI. Buyer Approves Hy-Vee's Expansion Plans Within the Timeframe Dictated by Seller 12

VII. Seller Attempts to Renegotiate the October 31, 2005 Deadline after It Expires ... 13

VIII. Hy-Vee Obtains the Required Construction Permits and Takes Possession of the New Lease Premises 13

IX. Seller Directs Chicago Title to Release the Hy-Vee Holdback in Its Favor and Buyer Objects 14

X. The Parties Bring the Instant Lawsuits 14

XI. The Trial Court Proceedings 15

A. Summary Judgment 15

B. Trial 16

ARGUMENT 20

I. **STANDARD OF REVIEW** 20

People v. R.J. Reynolds Tobacco Co., 2011 IL App (1st) 101736 20

Goldberg v. Astor Plaza Condominium Ass'n, 2012 IL App (1st) 110620 20

Best v. Best, 223 Ill. 2d 342 (2006) 20

Fuller Family Holdings, LLC v. Northern Trust Co.,
371 Ill. App. 3d 605 (1st Dist. 2007) 20

Installco Inc. v. Whiting Corp., 336 Ill. App. 3d 776 (1st Dist. 2002) 20

Diaz v. Home Federal Sav. and Loan Ass'n of Elgin,
337 Ill. App. 3d 722 (2nd Dist. 2002) 21

Timan v. Ourada, 2012 IL App (2d) 100834 21

II. **THE TRIAL COURT CORRECTLY AWARDED THE HY-VEE HOLDBACK TO BUYER AS REASONABLE LIQUIDATED DAMAGES** 21

A. **THE TRIAL COURT'S FINDING THAT THE TERMS OF THE AGREEMENTS WERE AMBIGUOUS AND THUS REQUIRED RESORT TO EXTRINSIC EVIDENCE TO ESTABLISH THE PARTIES' INTENT WAS REASONABLE** 21

1. The Scope of the Delay Provision Has Two Reasonable Interpretations 20

Carey v. Richards Bldg. Supply Co., 367 Ill. App. 3d 724 (1st Dist. 2006) 21

2. Illinois Courts Do Not "Lean Toward a Construction Which Excludes the Idea of Liquidated Damages" In These Circumstances 23

Grossinger Motorcorp, Inc. v. American Nat'l Bank & Trust Co.,
240 Ill. App. 3d 737 (1st Dist. 1992) 23, 24

M.I.G. Investments, Inc. v. Marsala, 92 Ill. App. 3d 400 (2nd Dist. 1981) 23, 24

Lu-Mi-Nus Signs, Inc. v. Jefferson Shoe Stores, Inc.,
257 Ill. App. 150 (1st Dist. 1930) 24

B. **THE HY-VEE HOLDBACK WAS A VALID AND ENFORCEABLE LIQUIDATED DAMAGES PROVISION** 25

Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416
(1st Dist. 2004) 25

Karimi v. 401 N. Wabash Venture, LLC, 2011 Ill App (1st) 102670 25

Grossinger Motorcorp, Inc. v. American Nat'l Bank & Trust Co.,
240 Ill. App. 3d 737 (1st Dist. 1992) 25

1. Liquidated Damages Provisions Can Be Imposed for Delayed Performance and Seller Has Forfeited Its Right to Argue Otherwise on Appeal.....26

Berggren v. Hill, 401 Ill. App. 3d 475 (1st Dist. 2010) 26

Calumet Const. Corp. v. Metropolitan Sanitary Dist. of Greater Chicago,
178 Ill. App. 3d 415 (1st Dist. 1988) 26, 27

Dana Point Condominium Ass'n, Inc. v. Keystone Svc. Co.,
141 Ill. App. 3d 916 (1st Dist. 1986) 27

Weiss v. United States Fidelity & Guaranty Co., 300 Ill. 11 (1921) 27

Illinois State Toll Highway Auth. v. Gust K. Newberg, Inc.,
177 Ill App. 3d 6 (2nd Dist. 1988).....27

Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965) 27

Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416
(1st Dist. 2004).....27

Lazenby v. Mark's Construction, Inc., 236 Ill. 2d 83 (2010).....28

2. The Third Amendment Was Breached and Seller Has Forfeited its Right to Argue Otherwise on Appeal.....28

Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965) 27

Lazenby v. Mark's Construction, Inc., 236 Ill. 2d 83 (2010).....29

3. The Parties' Use of the Word "Forfeit" Does Not Preclude a Finding that the Hy-Vee Holdback Is a Liquidated Damages Provision 29

Bauer v. Sawyer, 8 Ill. 2d 351 (1956) 29

4. A Liquidated Damages Provision Need Not Be Expressly Labeled as Such to Be Enforceable and Seller Has Forfeited Its Right to Argue Otherwise on Appeal.....30

InsureOne Indep. Ins. Agency, LLC v. Hallberg, 2012 IL App. (1st) 092395.....30

Lazenby v. Mark's Construction, Inc., 236 Ill. 2d 83 (2010).....30

5. The Hy-Vee Holdback Was an Intentionally Negotiated Liquidated Damages Provision Meant to Protect Buyer in the Event of a Breach 30

6. The Amount of the Hy-Vee Holdback Was Reasonable at the Time of Contracting and Bore Some Relation to the Damages Buyer Might Have Sustained 34

Restatement (Second) of Contracts §356 (1981) 34

Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416 (1st Dist. 2004) 34

Karimi v. 401 N. Wabash Venture, LLC, 2011 Ill App (1st) 102670 34

Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965) 35

Penske Truck Leasing Co., L.P. v. Chemetco, Inc., 311 Ill. App. 3d 447 (5th Dist. 2000) 35, 36

7. At the Time of Contracting, Actual Damages Were Uncertain in Amount and Difficult to Prove 37

Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416 (1st Dist. 2004) 37

C. **THE TRIAL COURT'S CONSTRUCTION DOES NOT IMPLY THAT THE PARTIES INTENDED AN ABSURD RESULT** 38

Lazenby v. Mark's Construction, Inc., 236 Ill. 2d 83 (2010) 38

D. **THE HY-VEE HOLDBACK DOES NOT DEPRIVE THE AGREEMENT OF MUTUALITY** 38

Lazenby v. Mark's Construction, Inc., 236 Ill. 2d 83 (2010) 39

E. **SELLER IS NOT ENTITLED TO ATTORNEYS' FEES** 39

PLAINTIFFS' SEPARATE APPEAL 39

THE TRIAL COURT ERRED IN DEPRIVING BUYER OF ITS STATUTORY RIGHT TO POST JUDGMENT INTEREST 39

735 ICLS 5/2-1303 39

735 ILCS 5/12-109 40

1. **Plaintiffs' Claims Were Not Entirely Equitable in Nature** 39

Zurich Ins. Co. v. Raymark Industries, Inc., 118 Ill. 2d 23 (1987) 40

Noren v. Metropolitan Property and Cas. Ins. Co., 369 Ill. App. 3d 72 (1st Dist. 2006) 40

Pettey v. First Nat. Bank of Geneva, 225 Ill. App. 3d 539 (2nd Dist. 1992) 40

Villiger v. City of Henry, 47 Ill. App. 3d 565 (3rd Dist. 1977) 40

Vermilion County Good Government League, Inc. v. Smith, 64 Ill. App. 2d 270 (4th Dist. 1965) 40

Burnett v. Safeco Ins. Co. of Illinois, 227 Ill. App. 3d 167 (5th Dist. 1992) 40

Bowman v. Armour, 17 Ill. 2d 43 (1958) 40

Ives v. Town of Limestone, 62 Ill. App. 3d 771 (3rd Dist. 1978) 41

2. **Post-Judgment Interest Is Statutorily Mandated and Circuit Courts Have No Discretion to Deprive Plaintiffs of That Relief** 41

735 ILCS 5/2-1303 ..... 41, 42, 43, 44

People ex rel. Illinois Dep't of Corrections v. Hawkins, 2011 IL 110792 41

Holly v. Montes, 231 Ill. 2d 153 (2008) 41

People v. O'Brien, 197 Ill. 2d 88 (2001) 41

Cerajewski v. Kunkle, 285 Ill. App. 3d 222 (1st Dist. 1996) 41

Jahn v. Kinderman, 351 Ill. App. 3d 15 (1st Dist. 2004) 41, 42, 43

Contract Development Corp. v. Beck, 255 Ill. App. 3d 660 (2nd Dist. 1994) 42

Illinois Department of Healthcare and Family Services ex rel. Wiszowaty v. Wiszowaty, 239 Ill. 2d 483 (2011) 42, 43

First Federal Savings & Loan Ass'n of Chicago v. Walker, 91 Ill. 2d 218 (1982) 42

Stone v. Gardner, 20 Ill. 304 (1858) 42

Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill. 2d 218 (2006) 43

Finley v. Finley, 81 Ill. 2d 317 (1980) 43, 44

CONCLUSION 44

NATURE OF THE CASE

This matter concerns a dispute over entitlement to $4,300,000, plus interest ("Hy-Vee Holdback"), held in an escrow account. As explained more fully below, the Hy-Vee Holdback arose out of the sale of the College Square Mall ("Mall"), in Cedar Falls, Iowa, by defendants Iowa Malls Financing Corp. and College Square Mall Associates, LLC (collectively "Seller"), to plaintiffs GK Development, Inc. and College Square Mall Development, LLC (collectively "Buyer"). The Hy-Vee Holdback represented a negotiated portion (approximately 3.6%) of a larger $117,000,000 transaction that the parties attributed to the incremental value of an existing tenant in the Mall, Hy-Vee Food Stores, Inc. ("Hy-Vee"), or rather to the difference between Hy-Vee's then current lease and the more valuable lease it was expected to sign after Buyer purchased the Mall from Seller. An amendment to the purchase agreement between the Buyer and Seller directed the escrowee to disburse the Hy-Vee Holdback to Seller if, by October 31, 2005, Hy-Vee had executed the new lease, taken possession of the new lease premises, and obtained all permits and other governmental approvals necessary to complete its remodeling of the premises. Although Seller asserts in its "Nature of the Action" section that "a new lease executed by Buyer and Hy-Vee contemplated that Hy-Vee would receive a building permit by February 2006" (Defs.' Br. 1), this and related timing issues are, in fact, points of contention. After Hy-Vee took possession of the new lease premises, both Buyer and Seller demanded the disbursement of the Hy-Vee Holdback in their own favor, and both parties subsequently filed suit claiming ownership of the escrowed funds.

An additional point of dispute between the parties was the reconstruction of that part of the Mall parking lot that would be used by Hy-Vee. Buyer agreed to reconstruct the Hy-Vee parking lot and Seller agreed that it would reimburse Buyer for the cost. The

reimbursement would be paid from the Hy-Vee Holdback. Seller refused to reimburse Buyer for the amount of the work done. The court did not rule on this issue, however, because it awarded the entire Hy-Vee Holdback to Buyer.

Following a three-week bench trial, the trial court found that Buyer was entitled to the Hy-Vee Holdback as liquidated damages for breach of contract. The trial court subsequently granted Seller's posttrial motion to "Stay Enforcement of the Circuit Court's Order and Judgment and Not Apply Post-Judgment Interest During Appeal." Both parties appealed and those appeals were later consolidated. No issues are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred as a matter of law in finding that the terms of the relevant agreements were ambiguous as to the meaning of the delay provision of the Deed and Money Escrow Agreement and thus required the consideration of extrinsic evidence.

2. Whether the trial court's finding that the parties intended October 31, 2005, to be a "deadline" and not merely a soft "target" was against the manifest weight of the evidence.

3. Whether the trial court's finding that the parties intended the Hy-Vee Holdback to be a liquidated damages provision was against the manifest weight of the evidence.

4. Whether the trial court's finding that the amount of liquidated damages was reasonable at the time of contracting was against the manifest weight of the evidence.

5. Whether the trial court's finding that the actual amount of potential damages was, at the time of contracting, uncertain or difficult prove was against the manifest weight of the evidence.

6. If the trial court's above-stated findings that (a) the parties intended the Hy-Vee Holdback to be a liquidated damages provision, (b) the amount of liquidated damages was reasonable at the time of contracting, and (c) the actual amount of potential damages was, at the time of contracting, uncertain or difficult prove, were not against the manifest weight of the evidence, whether the trial court's finding that the Hy-Vee Holdback was a valid and enforceable liquidated damages provision was incorrect as a matter of law.

7. Whether the defendants forfeited, *inter alia*, their arguments that the trial court's interpretation of the Hy-Vee Holdback rendered it "illusory" or otherwise resulted in an "absurd, abhorrent, unjust, disproportionate, and facially improper result"; and, if not, whether those arguments have merit.

8. Whether the trial court erred as a matter of law in refusing to award Buyer post-judgment interest pursuant to 735 ILCS 5/2-1303 and 735 ILCS 5/12-109.

JURISDICTION

For purposes of case number 11-2802, plaintiffs-appellees adopt defendants-appellant's statement of jurisdiction.

With regard to case number 12-0432, plaintiffs as separate appellants add the following. On December 22, 2011, the trial court granted seller's posttrial motion to "Stay Enforcement of the Circuit Court's Order and Judgment and Not Apply Post-Judgment Interest During Appeal." Pls.' A2. On January 23, 2012, pursuant to Supreme Court Rule 305(d), plaintiffs filed their Motion to Require Bond for Post-Judgment

Interest on Appeal in case number 11-2802 and, on January 24, 2012, filed an Amended Motion to Require Bond for Post-Judgment Interest on Appeal. On January 25, 2012, the Appellate Court denied plaintiffs' Amended Motion for Bond. On February 15, 2012, pursuant to Supreme Court Rule 303(d), plaintiffs filed a Motion for Extension of Time to File Notice of Appeal *Instanter* in case number 12-0432. On February 29 2012, this Court granted plaintiffs' Motion for Extension of Time to File Notice of Appeal *Instanter*. The separate appeals were consolidated by this court on April 14, 2012.

STATUTES INVOLVED

1. 735 ILCS 5/2-1303

> Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section 1 of Article VII of the Constitution, a school district, a community college district, or any other governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

2. 735 ILCS 5/12-109(a)

> Interest on judgments. Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303.

STATEMENT OF FACTS

As stated above, this matter concerns a dispute over the distribution of the $4,300,000 Hy-Vee Holdback, held in an escrow account by defendant Chicago Title &

Trust ("Chicago Title"). The Hy-Vee Holdback arose out of the sale of the College Square Mall by Seller to Buyer in 2004.

I. The Seller and Buyer Enter into the Purchase Agreement

The Seller began marketing the Mall for sale in June 2004, by preparing and circulating an Offering Memorandum in which Seller predicted that an existing anchor grocery store tenant, Hy-Vee, was interested in relocating to a larger space within the Mall that became available with the departure of a WalMart store in March 2004. Pls.' A3, pp. 1-2.[1] Hy-Vee's lease for its then existing space would expire in December 2010, and if Hy-Vee relocated to the larger space, it would be renting an additional 15,000 square feet at a rate of $6 per square foot. *Id.* at 2. At that time, however, Hy-Vee's relocation was only speculative; Hy-Vee had not yet entered into any binding agreement to relocate to the former WalMart space or even to stay in its current space in the Mall. *Id.*

In July 2004, Buyer entered into a letter of intent to purchase the Mall from Seller. *Id.* Three months later, on September 17, 2004, Buyer and Seller entered into a Real Estate Sale Contract ("Purchase Agreement") for the purchase of the Mall and three other shopping centers for $117,000,000, and set an outside closing date of December 17, 2004. Pls.' A4.

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[1] For ease of reference, defendants' appendix is cited herein as "Defs.' A__," plaintiffs' appendix is cited herein as "Pls.' A__," and the Record on Appeal is cited as "R. Vol.__" with a page or other identifier following for pin cites. This is necessary because defendants have failed to properly catalogue the Record in their appendix, for instance, labeling 6 record volumes simply as "Report of Proceedings" followed by a date, rather than enumerating the names of all witnesses and the pages on which their direct examination, cross examination, and redirect examination begin as is required. Ill. S. Ct. R. 342(a).

On October 12, 2004, Hy-Vee executed a letter of intent to lease for 20 years (with options to extend) 78,337 square feet of the former WalMart space at an initial rental price of $7 per square foot, which would gradually increase to $9.35 per square foot. Defs.' A197. Since the value of the Mall was dictated by the rental income, the new Hy-Vee lease would increase the fair market value of the Mall substantially and, therefore, at least an incremental value of the Mall depended on delivery of an executed lease with Hy-Vee as an anchor tenant in the larger space. However, if Hy-Vee took the new lease, which was still not certain, it would not be entered into until after the scheduled closing between Buyer and Seller for the purchase of the Mall. Pls.' A3, p. 2. Moreover, both parties understood that the WalMart space required extensive remodeling to make it suitable for Hy-Vee's use, which would take some time to complete. *Id.* at 3. In the letter of intent, Seller and Hy-Vee agreed that Hy-Vee would need 270 days to complete the improvements. *Id.* The allocation of the cost of that remodeling between Hy-Vee and its new landlord, Buyer, was also not yet negotiated. *Id.*

II. The Seller and Buyer Enter into the Third Amendment

Consequently, on November 10, 2004, Buyer and Seller entered into a "Third Amendment to Real Estate Sale Contract ("Third Amendment"). The Third Amendment stated, in pertinent part, that:

> With respect to the College Square Mall, [Buyer] and the Seller of said Property agree that at Closing they will enter into a Four Million Three Hundred Thousand and 00/100 Dollar ($4,300,000.00) holdback agreement from the purchase price of said Property . . . . The holdback amount shall not be released until all of the following are satisfied: (1) execution of the lease with Hy Vee, Inc. on terms in accordance with the Letter of Intent, dated October 12, 2004, attached hereto as Exhibit C, *and in a form that is commercially reasonable*; (2) delivery of the premises to the tenant in the condition required of Landlord as specified in the lease; and (3) acceptance by tenant of the premises *and the obtaining by tenant*

> *of all permits and other governmental approvals necessary to complete the tenant's work.* Should the lease not be executed by August 31, 2005, *or all of the other conditions not be satisfied by October 31, 2005, the holdback amount shall not be released to Seller, but is and shall be forfeited and delivered to [Buyers].*

Pls.' A5. (emphasis added).

The $4,300,000 figure represented a negotiated estimate of the incremental value of the anticipated Hy-Vee lease as compared to the then current Hy-Vee Lease. Pls.' A3, p. 2. Tom Rogers ("Rogers"), Buyer's primary negotiator, testified via evidence deposition that he negotiated this figure with Michael Fontana ("Fontana"), Seller's primary negotiator and a senior property accountant who holds a MBA, attended law school for a time and practiced law. Pls.' A6, pp. 21, 27, 29-31, 41-42. Rogers also testified that the October 31, 2005 deadline was a negotiated date *proposed* by Seller. *Id.* at pp. 52-3. This was verified by Seller's own witness, Gerry Curciarello ("Curciarello"). Curciarello is a 50% owner and co-managing partner of Seller, holds a JD, MBA and CPA certification, has extensive real estate experience and, along with his co-owner and co-managing partner, Patrick O'Leary ("O'Leary"), oversaw the sale of the Mall to Buyer, including the negotiation over the amount of the Hy-Vee Holdback. Pls.' A15, p. 12. Curciarello testified that the $4.3 million figure was the product of an arm's length negotiation between Buyer and Seller and, according to him, "was a representation of the incremental value in the old versus new lease." Pls.' A7, pp. 1002-03. He also testified that the October 31, 2005 deadline was a negotiated terms that he approved and that he felt comfortable was sufficiently distant to allow Seller to meet all its obligations. *Id.* at 1004-07.

III. The Seller and Buyer Enter into the Deed and Money Escrow Agreement, Establishing the Hy-Vee Holdback

On December 15, 2004, shortly before the closing, the Buyer and Seller entered into the Deed and Money Escrow agreement ("DME") providing for the Hy-Vee Holdback contemplated in the Third Amendment. Pls.' A8. Section VII of the DME, entitled "Hy-Vee Holdback," stated:

> At any time after the Closing Date that the Seller . . . shall advise you, in writing, and under oath, that (a) a lease *in a commercially reasonable form* has been signed by [Hy-Vee] for the space previously occupied at College Square Mall by Wal-Mart ("the Hy-Vee Space") substantially in accordance with the Letter of Intent dated October 12, 2004, (b) that the Hy-Vee Space has been delivered to Hy-Vee in the condition required by the terms of such lease, (c) that the tenant thereunder has accepted the Hy-Vee Space and (d) *that such tenant has obtained all government approvals and permits necessary for it to complete its work*, then you shall advise the . . . Buyer in writing of such demand for payment and, unless you receive objection in writing within five (5) days, the Hy-Vee Holdback shall be made to the . . . Seller. If said objection is timely made, you are to continue to hold the Hy-Vee Holdback subject to the joint direction of the parties or order of court. In the event that the Seller . . . is unable to make the representation contained in Subparagraph (b) above because all that is required of the landlord under the Hy-Vee lease is work to be completed by the owner . . . under the terms of the Contract (the "Owner's Work"), such Seller shall not be deemed to have failed to comply with said Subsection (b). In such event or in the event there is any other Owner's Work to be performed by the Buyer under the terms of the Hy-Vee Lease for which . . . Seller is obligated to make payment to . . . Buyer under the terms of the Contract, then and in either such event 105% of the cost (determined by competitive bidding) of such Owner's Work shall be paid to the Owner . . . and the balance of the Hy-Vee Holdback shall be paid to the . . . Seller. In the event that the Seller is unable to deliver such a lease signed by Hy-Vee on or before August 31, 2005, or *in the event the conditions of Subsections (b), (c) and (d) are not satisfied on or before October 31, 2005, without default of the owner or purchaser . . . then, and only in such event, the Hy-Vee Holdback shall be paid to the . . . Buyer; provided, however, if the plans have not been finalized by reason of any delay in producing, approving or revising such plans (such delay to be determined in accordance with the terms of the Hy-Vee lease), then, and in all such events, the October 31, 2005 date shall be extended by one day for each day of delay in the delivery of plan approval.* If . . . Seller shall notify Escrowee [Chicago Title] that it claims a delay and extension,

> Escrowee shall retain the Hy-Vee Holdback subject to a joint direction of the parties or an order of court.

Id. (emphasis added).

Thus, if, by October 31, 2005, (1) Seller failed to deliver a "commercially reasonable" Hy-Vee Lease to Buyer, (2) Seller failed to deliver the former WalMart space to Hy-Vee in the agreed upon condition, (3) Hy-Vee did not accept the new space, and (4) Hy-Vee did not "obtain[] all government approvals and permits necessary for it to complete its [renovation] work," then Buyer would be entitled to the Hy-Vee Holdback, "provided, however, if the plans have not been finalized by reason of any delay in producing, approving or revising such plans (such delay to be determined in accordance with the terms of the Hy-Vee lease) [which did not yet exist], then, and in all such events, the October 31, 2005 date shall be extended by one day for each day *of delay in the delivery of plan approval*." *Id.*

Curciarello testified that when the DME was executed, Seller continued to believe that the October 31, 2005 deadline was sufficiently distant to allow Seller to complete all of its contractual obligations, including the requirement that Hy-Vee obtain all governmental approvals and permits. Pls.' A7 at 1006-07.

IV. Seller and Hy-Vee Negotiate the New Hy-Vee Lease, Excluding Buyer

The closing on the sale of the Mall occurred on December 17, 2004. Pls.' A3, p. 5. Thereafter, Seller began to negotiate the terms of the new Hy-Vee lease with Hy-Vee. It is undisputed that Seller intentionally excluded Buyer from the lease negotiations, and that so long as Seller negotiated a "commercially reasonable" lease that conformed to the letter of intent, Buyer was obligated to accept and sign the lease. Pls.' A3, p. 5; Pls. A15, pp. 12, 18, 20. Although Buyer could comment on and suggest lease terms, it could not

dictate them, nor could it contact Hy-Vee directly. *Id.* Seller, however, ignored the concerns Buyer raised about the lease terms. Indeed, the same – and only – evidence Seller relies on to support its assertion that "[a]fter the closing, Buyer repeatedly admonished Seller to slow the negotiations of the Hy-Vee Lease" (Defs.' Br. 13) illustrates the extent of Seller's disregard for any input by Buyer regarding the terms of the lease. On Saturday, March 26, 2005, Tom Rogers sent Curciarello, O'Leary and Fontana an email asking that before Seller responded to concerns raised by Hy-Vee during the lease negotiations, Buyer be given some time "to digest the most recent documents," which Seller sent it just two days before. Defs.' A250. Curciarello's internal response to Roger's email, which he sent to O'Leary, simply stated "Blow me, Tom." Pls.' A7, pp. 1087-89. Contrary to Seller's assertions, Curciarello, O'Leary and Fontana all testified that they were not aware of any action by Buyer to disrupt or slow down the lease negotiation and approval process. Pls.' A7, p. 1052 (Curciarello); Pls.' A9, p. 1280 (O'Leary); Pls.' A10, pp. 985-86 (Fontana).

V. Buyer and Hy-Vee Execute the Hy-Vee Lease

On June 16, 2005, Hy-Vee signed the Substituted Lease Agreement ("New Hy-Vee Lease") to take, as tenant, the space previously occupied by WalMart. Pls.' A3, p. 5. The New Hy-Vee Lease provided for a rental space of 79,750 square feet at a rental price of $7 per square foot. *Id.* Seller then sent the New Hy-Vee Lease to Buyer without stating or otherwise indicating that the dates therein might preclude Seller's ability to meet the October 31, 2005 deadline. On July 15, 2005, one and a half months before the August 31, 2005 execution deadline, Buyer, as landlord, signed the New Hy-Vee Lease after Hy-

Vee rejected two revisions suggested by Buyer. Pls.' A11. The New Hy-Vee Lease stated, in relevant part, that:

> (1) Plans and Approvals. Landlord and Tenant have reviewed and approved Tenant's preliminary site plan for the Hy-Vee Expansion . . . . On or before the 75th day following the date of this lease, Tenant at its expense shall submit to Landlord detailed plans and specifications for the Hy-Vee Expansion (the "Final Plans and Specification"), prepared by Tenant for Landlord's approval, which approval Landlord shall not unreasonably withhold, condition or delay. . . . Landlord shall within ten (10) business days after receipt of all of said Final Plans and Specifications notify Tenant in writing of its approval or disapproval thereof . . . . If Landlord does not approve the Final Plans and Specifications as initially submitted, Tenant shall within ten (10) business days thereafter submit for approval revised Final Plans and Specifications addressing any objections. Landlord shall then have seven (7) business days after receipt of said revised Final Plans and Specification to approve or disapprove same. . . .
>
> The construction of the Hy-Vee Expansion shall be further subject to the satisfaction of the following conditions (the "Construction Conditions"):
>
> (a) The mutual agreement of Landlord and Tenant to the plans and specifications for the Hy Vee Expansion, as provided and within the time parameters set forth [above];
>
> ***
>
> (d) Tenant agrees to promptly submit an application for building permits *and shall obtain all such permits and other governmental authorizations* (the "Governmental Approvals") required for construction of the Hy-Vee Expansion within thirty (30) days after the Landlord's approval of the Tenant's Final Plans and Specifications; *provided, however*, if Tenant timely submits such permit applications and diligently pursues obtaining such permits, *upon the written request of Tenant*, Tenant may obtain a sixty (60) days extension of the Construction Condition set forth [above].

Id.

Thus, under the New Hy-Vee Lease, Hy-Vee had until September 28, 2005 (75 days after July 15, 2005), to submit construction plans to Buyer for approval, and Buyer had until November 13, 2005 (102 business days after July 15, 2005), to reach an agreement with Hy-Vee on such plans. If Hy-Vee and Buyer could not come to an agreement on the plans, Hy-Vee could abandon the New Hy-Vee Lease. More importantly, Hy-Vee was required to "obtain" all permits and governmental approvals within 30 days of Buyer's final approval of the plans. However, if within that time period Hy-Vee had timely submitted its permit applications and diligently pursued obtaining them, it could, solely upon *its* request, obtain a 60-day extension. These are the terms Seller negotiated with Hy-Vee without Buyer's participation. Hy-Vee did not abandon the lease, and it never submitted a written request for an extension

VI. Buyer Approves Hy-Vee's Expansion Plans Within the Timeframe Dictated by Seller

On September 28, 2005, Hy-Vee submitted its expansion plans to Buyer. Pls.' A3, p. 8. Ten business days later, on October 12, 2005, Buyer disapproved of a portion of those plans and sent detailed comments Hy-Vee requesting revisions. *Id.* On October 31, 2005, the same day that the Third Amendment and DME provided as the deadline for obtaining "all permits and other governmental approvals," Hy-Vee submitted its revised plans to Buyer and simultaneously applied to the Cedar Falls Building Department for a construction permit and any other necessary approvals. *Id.* Six business days later, on November 8, 2005, Buyer approved Hy-Vee's revised plans. *Id.* As Seller's own witnesses testified, at all times during this process, Buyer operated within the time frame Seller had negotiated with Hy-Vee, causing no delay in accordance with the terms of the Hy-Vee Lease.

VII. Seller Attempts to Renegotiate the October 31, 2005 Deadline after It Expires

On November 2, 2005, two days after the October 31, 2005 deadline expired, Seller sent a letter to Garo Kholamian ("Kholamian"), GK Development, Inc.'s president, proposing that the October 31, 2005 deadline be retroactively moved to January 31, 2006. Pls.' A12. Seller also proposed that most of the Hy-Vee Holdback be disbursed to it, less only that part needed to cover the cost Buyer spent on the construction of Hy-Vee's parking lot. *Id.* Seller offered Buyer no financial compensation in return. Buyer responded with a counterproposal agreeing to accommodate Seller by reestablishing the already expired October 31, 2005 deadline for Seller's performance as January 31, 2006, in exchange for Seller paying the rent Hy-Vee would have paid to Buyer under the New Hy-Vee Lease had the October 31, 2005 deadline been met. Pls.' A13. Buyer also proposed that if the January 31, 2006 deadline expired before terms of the Hy-Vee Lease were met, Buyer could direct Chicago Title to pay it $100,000 per month from the Hy-Vee Holdback in lieu of the aforementioned rent payments from Seller. *Id.* Seller never responded.

VIII. Hy-Vee Obtains the Required Construction Permits and Takes Possession of the New Lease Premises

On January 27, 2006, Hy-Vee obtained a construction permit from the City of Cedar Falls. Pls.' A3, p. 9. Three days later, on January 30, 2006, the new space, which totaled 80,189 square feet, was delivered to and accepted by Hy-Vee. *Id.* Under the terms of the New Hy-Vee Lease, Hy-Vee was required to complete construction within 330 days of the date Buyer delivered possession of the premises. *Id.*

IX. Seller Directs Chicago Title to Release the Hy-Vee Holdback in Its Favor and Buyer Objects

On January 6, 2006, after Seller had rejected Buyer's offer to renegotiate the amount of the liquidated damages, Buyer sent a letter to Chicago Title stating that Seller had not satisfied the requirements of the DME and requesting that Chicago Title release the holdback to Buyer. Defs.' A396. On January 9, 2006, Seller sent a letter to Chicago Title instructing it to retain the Hy-Vee Holdback subject to the joint direction of the parties or court order. Defs.' A398. Buyer sent a second letter to Chicago that same day, stating that it agreed Chicago Title should retain the holdback until the dispute was settled. *Id.* Despite this, on February 9, 2006, Seller sent another letter to Chicago Title stating that it had fulfilled all the required conditions and directing Chicago Title to release the Hy-Vee Holdback to Seller. Defs.' A416. The next day, on February 10, 2006, Buyer sent a letter to Chicago Title objecting to Fontana's direction and instructing Chicago Title to continue to hold the Hy-Vee Holdback until it received a joint direction from the parties or a court order. Defs.' A421.

X. The Parties Bring the Instant Lawsuits

On February 17, 2006, Buyer filed the instant action against Seller, bringing claims for declaratory judgment and specific performance, and seeking the recovery of the Hy-Vee Holdback. Defs.' A425. Buyer alternatively sought the recovery of $530,294.86 from the Hy-Vee Holdback that it spent completing construction work on that portion of Mall parking lot servicing Hy-Vee.

On February 22, 2006, Seller filed a countersuit against Buyer, in relevant part bringing claims for breach of contract, declaratory judgment and unjust enrichment, and

also seeking the recovery of the Hy-Vee Holdback. Defs.' A445.[2] The matters were subsequently consolidated.

XI. The Trial Court Proceedings

A. Summary Judgment

On April 9, 2009, the trial court entered an order denying Seller's motion for summary judgment, finding that the Third Amendment, DME and New Hy-Vee Lease created an ambiguity and thus required resort to extrinsic evidence to determine the parties' intent with regard to the October 31, 2005 deadline. Pls.' A14.

The court explained that the Third Amendment requires the parties to enter into the Hy-Vee Holdback and provides that it would be released upon (i) execution of the New Hy-Vee Lease, (ii) delivery and acceptance of the premises, and (iii) "the obtaining by tenant of all permits and other governmental approvals necessary to complete the tenant's work." *Id.* at 6. The Third Amendment also provides an August 31, 2005 deadline for the first requirement, and an October 31, 2005 deadline for meeting conditions (ii) and (iii). *Id.*

The court further stated that Section VII of the DME added a delay provision providing that if the "plans" for the Hy-Vee Expansion were not finalized "by reason of any delay in producing, approving or revising *such plans*," then the October 31, 2005 deadline would be extended by "one day for each day of the delay in the *delivery of plan approval*." *Id.* at 7. (emphasis original). Section VII of the DME also states that any delay in producing, approving or revising the plans provided a basis for extending the October 31, 2005 deadline. *Id.*

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[2] Summary judgment was entered by the trial court on Seller's remaining counterclaims which are not at issue in this appeal.

Reading these provisions of the Third Amendment and DME together, the trial court found that the agreements were "ambiguous as to whether the governmental approvals and authorizations fall within the delay provision of Section VII of the DME." *Id.* The court noted that the use of the terms "plans" and "plan approval" were not clearly defined and were not used consistently between the Third Amendment, DME and New Hy-Vee Lease. *Id.* According to the trial court "it is not clear whether the October 31, 2005 deadline would be extended only for delays in approving the Plans and Specifications or for delays in approving the Plans and Specifications and obtaining the Governmental Approvals." *Id.*

B. Trial

Following a three-week bench trial, during which the court heard testimony from Kholamian, Dan Sullivan (Buyer's senior vice president for development), Fontana, Curciarello, and O'Leary, reviewed the evidence depositions of Rogers and David Bailey (Hy-Vee's assistant vice president who served as Hy-Vee's "point person" for negotiations of the New Hy-Vee Lease with Seller), and considered the documentary evidence, the court concluded that "[t]he evidence adduced at trial proves that the parties intended October 31, 2005, to serve as the deadline for plan *and* permit approval. Therefore, because Hy Vee did not obtain the necessary permits by October 31, 2005, Buyer . . . proved a breach of the DME by Seller." Pls.' A15, p. 18.

In reaching that conclusion, in addition to the findings of fact recited above, the trial court found that:

- When Buyer and Seller negotiated the Third Amendment and DME, they intended October 31, 2005, to be the deadline for Hy-Vee to obtain plan approval and government permits. *Id.* at 13.
- When Seller and Buyer executed the Third Amendment and DME, they both believed the New Hy-Vee Lease would be executed by August 31, 2005, and that Hy-Vee could obtain plan approval and necessary permits by October 31, 2005. In fact, as late as March 2005, Fontana believed a lease could be executed by April and, as of July 15, 2005, it was still possible that the October 31, 2005 deadline could be met. *Id.*
- Seller negotiated the terms of the New Hy-Vee Lease, and although Buyer was permitted to suggest lease contents, it had no right to dictate terms. *Id.* at 12.
- None of the changes to the lease that Buyer suggested concerned deadlines for the submission or approval of the plans or permits. *Id.*
- If Buyer had refused to sign a lease that Seller deemed "commercially reasonable," Seller would have sued Buyer for breach of contract. *Id.*
- Seller never informed Hy-Vee that the deadlines calculated in the New Hy-Vee Lease needed to be shortened to comply with the October 31, 2005 deadline. *Id.* at 13.
- Seller was aware of the October 31, 2005 deadline and associated penalties, and yet Seller "made no attempt to reconcile these terms." *Id.* at 18.
- Prior to the expiration of the October 31, 2005 deadline, Seller referred to that date as a "deadline" and not a "target" date. *Id.*

- Evidence introduced at trial undermined the testimony of Fontana, O'Leary and Curciarello that the October 31, 2005 deadline was merely a "target" date that the parties understood would be subject to change as events unfolded. *Id.* at 19.
- The November 2, 2005 letter from Seller was the result of an October 27, 2005 telephone conversation held "on the eve" of the October 31, 2005 deadline, in which Garo, Fontana, Curciarello, Sullivan and Rogers discussed the possibility of extending that deadline; however, no agreement to amend the deadline was reached. *Id.* at 18-19.
- Curciarello was impeached by his prior deposition testimony indicating that the October 27, 2005 telephone conversation was held to negotiate an extension of the October 31, 2005 deadline, and not "merely to cement the parties' existing understanding" that the deadline was only a "target" date. *Id.* at 19.
- The difference in value between the prior Hy-Vee lease and the New Hy-Vee Lease was approximately $430,000 in additional annual income to the Buyer. *Id.* at 14.
- The $4,300,000 that comprised the Hy-Vee Holdback was a term negotiated by the parties at the time of contracting and fairly represented the incremental value of the new lease. *Id.*
- Hy-Vee was an anchor store for the Mall; its prior space could be modified to house new, additional anchors; and the new "21st century prototype" Hy-Vee was marketed as a draw for other retailers to the Mall. *Id.*

From this testimony and the documentary evidence, the trial court found that the October 31, 2005 deadline was reasonable because, at the time the DME was signed, the

deadline for obtaining plan approval and permits (not for completing the actual construction) was more than ten months in the future and Seller believed it was realistically achievable. Further, given that Seller negotiated the New Hy-Vee Lease and, the court found, Buyer was obligated to accept it so long as it was "commercially reasonable," the court stated that it was reasonable to infer that Buyer signed off on the New Hy-Vee Lease because rejecting it could mean forfeiture of the Hy-Vee Holdback. *Id.* at 20. On the other hand, the court found that it was "not reasonable to infer that, via a document it did not negotiate, that Buyer also intended to release Seller of a separate contract term that was the product of bargaining directly between Buyer and Seller." *Id.*

After finding that the Hy-Vee Holdback constituted a valid and enforceable liquidated damages provision, the trial court entered judgment for Buyer on its breach of contract and specific performance claims, rejected all of Seller's claims, and awarded the $4,300,000 to Buyer. *Id.* at 25. The court did not decide what portion of the holdback Buyer was entitled to for its construction work on the parking lot because it would have been paid from the Hy-Vee Holdback, which the court found Buyer was entitled to receive. *Id.*

On Seller's posttrial motion to "Stay Enforcement of the Circuit Court's Order and Judgment and Not Apply Post-Judgment Interest During Appeal," the circuit court agreed to stay the enforcement of its judgment and ordered that post-judgment interest would not apply to that judgment, denying Buyer the security of a bond on appeal. Pls.' A2.

As described in the parties' statements of jurisdiction, these consolidated appeals followed.

ARGUMENT

I. STANDARD OF REVIEW

The applicable standards of review are well-settled. Questions of law are reviewed *de novo*. *People v. R.J. Reynolds Tobacco Co.*, 2011 IL App (1st) 101736, ¶ 17. A trial court's factual findings, on the other hand, will be overturned only where they are against the manifest weight of the evidence. *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 60. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006). Under the manifest weight standard, a reviewing court "give[s] deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses." *Id.* "A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.* at 350-51.

"Where the terms of a contract are clear and unambiguous, they must be given effect as written, and under those circumstances, the meaning of the contract is a question of law," and is thus reviewed *de novo*. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 620 (1st Dist. 2007). "A contract is ambiguous if it is susceptible to more than one reasonable interpretation." *Id.* The issue of whether the terms of a contract are ambiguous also presents a question of law. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (1st Dist. 2002). "However, where the provisions of a contract are ambiguous, its construction becomes a question of fact, and parol evidence is admissible to resolve the ambiguity." *Fuller*, 371 Ill. App. 3d at 620. Under those circumstances, the trial court's fact-based construction of the contract is thus

reviewed under a manifest weight standard. *Diaz v. Home Federal Sav. and Loan Ass'n of Elgin*, 337 Ill. App. 3d 722, 725 (2nd Dist. 2002).

Further, "[w]hether a breach of contract occurred . . . is a question of fact, and the [trial] court's finding will not be disturbed on appeal unless it was against the manifest weight of the evidence." *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24.

II. THE TRIAL COURT CORRECTLY AWARDED THE HY-VEE HOLDBACK TO BUYER AS REASONABLE LIQUIDATED DAMAGES

A. THE TRIAL COURT'S FINDING THAT THE TERMS OF THE AGREEMENTS WERE AMBIGUOUS AND THUS REQUIRED RESORT TO EXTRINSIC EVIDENCE TO ESTABLISH THE PARTIES' INTENT WAS REASONABLE

1. The Scope of the Delay Provision Has Two Reasonable Interpretations

Sellers assert, without analysis, that "there is no principled basis in the record" for the trial court's finding that an ambiguity existed as to the proper interpretation of the delay provision. Defs.' Br. 27. Buyer disagrees. The trial court's reasoning was sound and its finding of ambiguity was reasonable.

The rules of contract construction are well-established.

> [T]he objective in interpreting a contract is to ascertain and give effect to the intent of the parties. Though the term "intent" is frequently used in this context, subjective intentions are irrelevant; rather, the pertinent inquiry focuses upon the objective manifestations of the parties, including the language they used in the contract. Thus, it is commonly stated that undisclosed intentions are not relevant. Where the language of a contract is plain, it provides the best evidence of the parties, intent and will be enforced as written. However, if a term of an agreement is susceptible to more than one reasonable interpretation, it is ambiguous. Mere disagreement between the parties does not make a term ambiguous, which follows naturally from the principle that the subjective intentions of the parties are not relevant. To find an ambiguity, then, it is necessary that two objectively reasonable interpretations exist.

Carey v. Richards Bldg. Supply Co., 367 Ill. App. 3d 724, 726-27 (1st Dist. 2006).

Here, the trial court was presented with three agreements, the Purchase Agreement and Third Amendment thereto, the DME, and the New Hy-Vee Lease. Although related to the same broad transaction, these agreements were not, despite Seller's unsupported assertion to the contrary, all part of the same contract; indeed, they did not even involve all the same parties. The Third Amendment, entered into by Buyer and Seller, stated that Buyer was entitled to the Hy-Vee Holdback if, by October 31, 2005, the premises were not delivered to Hy-Vee and if Hy-Vee had not "obtain[ed] . . . all permits and other governmental approvals necessary to complete [its] work." Pls.' A5. Section VII of the DME, which incorporated the requirements of the Third Amendment – and to that extent can be read with it – added a delay provision stating that if the Hy-Vee Extension "plans" were not finalized "by reason of any delay in producing, approving or revising such plans (such delay to be determined in accordance with the terms of the Hy-Vee lease)" then the October 31, 2005 deadline would be extended "one day for each day of delay in the delivery of plan approval." Pls.' A8. The New Hy-Vee Lease, entered into by Hy-Vee and Buyer, set forth dates for Hy-Vee to submit its plans to Buyer for approval, and dates by which Hy-Vee had to apply for governmental permits from the City of Cedar Falls. Pls.' A11.

There were two sets of "plans" that Hy-Vee would need approved, one to Buyer as landlord, and one to the City of Cedar Falls for the required permits and other approvals. *Id.* Seller contends that the only reasonable interpretation of the DME is one that includes "all permits and governmental approvals" in the term "plans." Defs.' Br. 27. As the trial court found, however, neither the Third Amendment nor the DME defines these terms, and they are not used consistently throughout the documents. Pls.' A14, p. 7.

Seller does not appear to contest this finding and, indeed, fails to identify any part of either agreement in which the term "plan" is used in a way that plainly encompasses permits and governmental approvals, as opposed to Buyer's approval.

Further, the New Hy-Vee Lease, which did not exist when the DME was executed, is of no definitive aid in interpreting these terms. As the trial court observed, the New Hy-Vee Lease refers to "Final Plans and Specifications" and delineates between the approval of the those plans by Buyer and the issuance of government permits and approvals, which it designates as "Construction Conditions," but, rather circularly, the "Construction Conditions" provisions are found in the "Plans and Approvals" section. Pls.' A11.

Considering the terms of Third Amendment, DME and New Hy-Vee Lease and nothing else, the trial court's finding on summary judgment that there were two reasonable interpretations of these documents (one in which the October 31, 2005 deadline would be extended only for delays in approving the "Plans and Specifications," and one in which the deadline would be extended for delays in approving the "Plans and Specifications" and for delays in obtaining permits and governmental approvals) was sound, and Seller has not met its burden by proving otherwise. A trial aimed at discovering the intent of the parties was, therefore, appropriate in these circumstances.

2. Illinois Courts Do Not "Lean Toward a Construction Which Excludes the Idea of Liquidated Damages" In These Circumstances

Seller asserts that if the "purported contractual provision for liquidated damages is ambiguous, then 'courts lean toward a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained.' " Defs.' Br.

28 (quoting *Grossinger Motorcorp, Inc. v. American Nat'l Bank & Trust Co.*, 240 Ill. App. 3d 737, 749 (1st Dist. 1992)). The cases on which Seller relies in making that statement of law do not, however, support its proposition.

In *Grossinger*, the court did not, as Seller suggests, state that if an ambiguity is found in a liquidated damages provision "then" courts automatically lean against the enforcement of that provision. Rather, the court stated, as a general proposition, that "in interpreting provisions which affix the amount of damages in the event of a breach, courts lean toward a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained." 240 Ill. App 3d at 749 (internal quotations omitted). Seller thus uses the quotation out of context.

Rather, *Grossinger* and *M.I.G. Investments, Inc. v. Marsala*, 92 Ill App 3d 400 (2nd Dist. 1981), the other case cited by Seller, stand for the proposition that where it is unclear whether the parties intended a contractual term to be a liquidated damages provision, courts are disinclined to interpret it as such. *M.I.G.*, 92 Ill. App. 3d at 405-406 (citing *Lu-Mi-Nus Signs, Inc. v. Jefferson Shoe Stores, Inc.*, 257 Ill. App. 150, 154 (1st Dist. 1930) (stating that where " 'from the fact of the instrument it appears doubtful whether the parties intended the sum specified as a liquidated damages provision or a penalty, the decisions generally treat it as a penalty' ").

In contrast, the ambiguity found by the trial court here related to whether the delay provision in the DME applied to only delays in Buyer's approval of the "Plans and Specifications," or to the City of Cedar Fall's approval of the "Plans and Specifications" as a basis for obtaining permits and governmental approvals. Importantly, it did not relate to whether the Hy-Vee Holdback is or is not a liquidated damages provision, which was

the issue presented in both *Grossinger* and *M.I.G.* Those cases do not, therefore, stand for the proposition Seller asserts and they are, in that regard, irrelevant to the proper analysis.

B. THE HY-VEE HOLDBACK WAS A VALID AND ENFORCEABLE LIQUIDATED DAMAGES PROVISION

In Illinois, liquidated damages provisions are valid and enforceable if:

> (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove.

Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416, 424 (1st Dist. 2004). "The purpose of a liquidated damages provision is to provide parties with a reasonable predetermined damages amount" *Karimi v. 401 N. Wabash Venture, LLC*, 2011 Ill. App. (1st) 102670, ¶25. Courts generally give effect to such provisions if the parties have expressed their agreement in clear and explicit terms and there is no evidence of fraud or unconscionable oppression. *Id.* Seller has made no claim of fraud or unconscionable oppression. "The nature of a liquidated damages provision is such that the set amount may at times exceed actual damages, and other times actual damages may exceed the set amount." *Id.*

Although the determination of whether a contractual provision for damages in a valid liquidated damages provision is a question of law (*Grossinger*, 240 Ill. App. 3d at 749), a court must make a number of factual findings before it reaches that conclusion. In this case, the trial court expressly found that: (1) "the insertion and amount of the liquidated damages clause was intentional and negotiated through an arms-length transaction" (Pls.' A15, p. 21); (2) witnesses for both parties confirmed that in devising the amount of the Hy-Vee Holdback they "attempted to capture the increased value added

to the property by virtue of Hy Vee's intended occupancy of the Wal Mart space," and $4,300,000 the figure represented a compromise meant to protect the interests of both parties (*Id.*); and (3) given the numerous and uncertain scenarios that could have occurred had the New Hy-Vee Lease not been executed or was executed late, "the liquidated damages provision in this case was related to Buyer's potential damages which were uncertain and difficult to prove" (*Id.* at 22). Seller's hyperbolic and unsupported assertions aside, it has not shown that these findings were erroneous.

1. Liquidated Damages Provisions Can Be Imposed for Delayed Performance and Seller Has Forfeited Its Right to Argue Otherwise on Appeal

Before addressing in detail the three-factor test referenced above, it is necessary to first address Seller's legal argument (raised in a number of forms throughout its brief) that liquidated damages cannot be applied to "delay" cases and are only enforceable for complete "nonfeasance." Defs.' Br. 32.

"Parties to real estate transaction often include a liquidated damages provision to avoid the difficulty in ascertaining and proving damages by such methods as market value, resale value or otherwise." *Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (1st Dist. 2010) (internal quotations omitted). Indeed, liquidated damages provisions are increasingly recognized as appropriate in scenarios such as this, where the complexity of the contractual relationships make damages difficult to determine or predict. *Calumet Const. Corp. v. Metropolitan Sanitary Dist. of Greater Chicago*, 178 Ill. App. 3d 415, 419 (1st Dist. 1988). Such provisions are enforceable unless they are determined to be a penalty. *Berggren*, 401 Ill. App. 3d at 479-80.

> It is well settled that public policy strongly favors the right of individuals to freely contract. Courts will generally not interfere with

> contracts to which parties have agreed unless there existed, at the time the contract was formed, a defect in the negotiation process. Such defects include disparity in bargaining power, the absence of meaningful choice on the part of one party, and the existence of fraud, duress, or mistake. Absent any such defect, however, a contract will be enforced as written and a court will not set aside a contract merely because that agreement later turns out to be a bad bargain for one of the parties.

Dana Point Condominium Ass'n, Inc. v. Keystone Svc. Co., 141 Ill. App. 3d 916, 920 (1st Dist. 1986).

Illinois and federal courts have long recognized the validity of liquidated damages where a party's performance is delayed. This is especially true in cases where construction, which inherently involves delays and speculative damages estimates, is involved. *See, e.g., Weiss v. United States Fidelity & Guaranty Co.*, 300 Ill. 11 (1921) (upholding an liquidated damages provision assessed for construction delays); *Illinois State Toll Highway Auth. v. Gust K. Newberg, Inc.*, 177 Ill App. 3d 6 (2nd Dist. 1988) (same); *Bethlehem Steel Corp. v. City of Chicago*, 350 F.2d 649 (7th Cir. 1965) (*en banc*) (same). Indeed, were this not the case, then the rule of apportionment, which permits a court to apportion fault for mutual delay between two contracting parties pursuant to a liquidated damages clause, would not exist. *Cf., Calumet Const.*, 178 Ill. App. 3d at 421 (recognizing and adopting the rule of apportionment in a "delay" case).

As the plain language of *Jameson* makes clear, the rule turns on whether there has been a breach and the liquidated damages provision meets the three criteria listed above. 351 Ill. App. 3d at 424 ("[i]n the real estate sales contract context, where the requisite three elements are met, courts will generally enforce the liquidated damages provision"). If so, the provision is valid and enforceable. In this case, as is discussed more fully below, the Hy-Vee Holdback was a liquidated damages provision negotiated by the

parties, both of which were sophisticated real estate companies. As the Seller's own witnesses testified, the amount of the Hy-Vee Holdback was reasonable at the time of contracting and bore relation to the damages Buyer might have sustained. At the time of contracting, the relevant damages were uncertain in amount and could be difficult to prove. This was due in part to the fact that while Seller negotiated with Hy-Vee, Buyer was precluded from attracting other anchor tenants. Thus, if Sellers did not deliver the New Hy-Vee Lease in the prescribed timeframes, Buyer could be forced to search for new tenants after having waited over a year, the Mall would have no anchor tenant to attract smaller tenants, and while Buyer looked for another anchor tenant, it would lose the projected income from Hy-Vee. The Hy-Vee Holdback therefore meets the criteria of a valid and enforceable liquidated damages provision.

Regardless, Sellers did not raise the argument that liquidated damages cannot be applied to "delay" cases before the trial court and, therefore, they may not do so for the first time on appeal. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 92 (2010) (issues raised for the first time on appeal are forfeited).

2. The Third Amendment Was Breached and Seller Has Forfeited its Right to Argue Otherwise on Appeal

Seller further argues, citing no evidence or testimony, that "no breach occurred" because "[t]he failure of Event 4 [obtaining the necessary permits and governmental approvals] was caused by Hy-Vee, not Seller." Defs.' Br. 33, 42-43. The trial court disagreed and Seller has not shown that finding is against the manifest weight of the evidence.

The fact is that Seller committed itself to certain deadlines and thereby agreed to accept the inherent risk that those deadlines entailed. Now Seller seeks to relieve itself

from those deadlines and the consequences of that risk by substituting them with aspirational "target" dates, all the while blaming its failure on Buyer and Hy-Vee without presenting any evidence to suggest they were at fault. This should not be countenanced. *See Bethlehem Steel*, 350 F.2d at 651. Moreover, as is discussed more fully below, and as the trial court found, Seller's efforts to extend the October 31, 2005 deadline on the eve of its arrival and immediately after its passage belies its assertions that the date was merely an aspirational target subject to developing events.

Regardless, Seller has forfeited this argument regarding the existence of a breach, not only by failing to raise it before the trial court, but also by failing to cite any authority here to support it. *Lazenby*, 236 Ill. 2d at 92 (issues raised for the first time on appeal are forfeited); Supreme Court Rule 341(h)(7) (requiring appellants to cite authority).

3. The Parties' Use of the Word "Forfeit" Does Not Preclude a Finding that the Hy-Vee Holdback Is a Liquidated Damages Provision

Further, Seller's reliance to *Bauer v. Sawyer*, 8 Ill. 2d 351 (1956), for the proposition that "the use of the word 'forfeit' tends to exclude the idea of liquidated damages," is of no avail. That statement was made where the court was determining whether the parties intended to forecast and fix the damages that could result from a breach. *Id.* at 359-60. Here, for the reasons explained immediately below, there is no question that that the amount of the Hy-Vee Holdback was the product of negotiation between the Buyer and Seller and that it was an attempt to forecast Buyer's potential damages should any one of a number of scenarios occur.

4. A Liquidated Damages Provision Need Not Be Expressly Labeled as Such to Be Enforceable and Seller Has Forfeited Its Right to Argue Otherwise on Appeal

As for Seller's assertion that the Hy-Vee Holdback is not a liquidated damages provision because it is not "explicitly" labeled as such, as with any contract, it is the intent of the parties that governs and not the labels they place on a given term or provision. *InsureOne Indep. Ins. Agency, LLC v. Hallberg*, 2012 IL App. (1st) 092395, ¶ 101. Negotiating the terms of the Hy-Vee Holdback and accepting the inherent risks involved in doing so, both sophisticated and experienced parties plainly acknowledged the possibility of a breach when preparing and executing the Third Amendment, as well the necessity of taking into account the scope of potential damages for such breaches. The evidence is clear that Seller was well aware of the risk it was undertaking in setting those deadlines and it should not be permitted to retroactively shift that risk to improve the outcome of the deal it made.

Regardless, Seller has forfeited the argument that the Hy-Vee Holdback is not a liquidated damages provision because it is not "explicitly" labeled as such, not only by failing to raise it before the trial court, but also by failing to cite any authority here to support it. *Lazenby*, 236 Ill. 2d at 92 (issues raised for the first time on appeal are forfeited); Supreme Court Rule 341(h)(7) (requiring appellants to cite authority).

5. The Hy-Vee Holdback Was an Intentionally Negotiated Liquidated Damages Provision Meant to Protect Buyer in the Event of a Breach

Seller asserts that there is "no evidence" that the parties intended the Hy-Vee Holdback as liquidated damages for delay. Defs.' Br. 29. According to Seller, the parties contemplated that the Hy-Vee Holdback would be released to Buyer only for a "complete

failure of the Hy-Vee Expansion." *Id.* at 31. The trial court, however, found otherwise, and that finding is supported by the manifest weight of the evidence.

Rogers, Buyer's primary negotiator, testified that the difference in value between the old Hy-Vee Lease and the New Hy-Vee Lease was $430,000 annually, the incremental value. Pls.' A6, pp. 27-28, 29. Rogers stated that the Hy-Vee Holdback was a term he negotiated with Fontana, and the total $4,300,000 figure (based on a 10% cap rate) was a compromise figure that they agreed to because of the still uncertain nature of the contemplated New Hy-Vee Lease; without a tenant, the empty space formerly occupied by WalMart would not generate revenue or attract other tenants. *Id.* at 42-44, 72-73. This evidence supporting the court's finding that the $4,300,000 was a reasonable estimation of potential damages was uncontradicted. In fact, Curciarello, one of Seller's principals who oversaw the sale of the Mall, also testified that the $4,300,000 figure was the product of an arm's length negotiation and "was a representation of the incremental value in the old versus new lease." Pls.' A7, pp. 1002-03. Curciarello also testified that while he was negotiating the Third Amendment, he purposely moved the deadline back several times until he agreed to October 31, 2005, a deadline he felt they could meet. *Id.* at 1004-07.

As the trial court noted, the presence of an anchor tenant was an important marketing tool. Pls.' A15, p. 14. In addition to the income lost from an empty anchor space, had the space not been rented, smaller tenants may have abandoned the Mall or refused to locate there for the first time. *Id.* In fact, Seller admitted as much previously, arguing on summary judgment that:

> It is clear that shopping centers are valued based upon the quality, duration, and amount of rent flow from retained tenants. It is also clear

> that the purpose of the $4.3 million holdback of the purchase price was to insure that the Buyer got the benefit of the Hy-Vee lease. In December, 2004, no one knew whether or not Hy-Vee would sign a lease for the vacant Wal-Mart space. Buyer did not want to pay a purchase price that included the new lease when it was not in existence.

Defs.' A480. Further, as the trial court found, Seller was negotiating the lease with Hy-Vee, Buyer had no right to pursue other potential tenants to fill the vacant space. Pls.' A15, p. 19. Buyer was in this way at the mercy of Seller. If the Seller did not deliver the New Hy-Vee Lease, or if Hy-Vee did not get its permits, Buyer would have no anchor tenant and would have paid a large price for a nonexistent asset. Taking all this into consideration, one could reasonably conclude that the amount of the Hy-Vee Holdback did in fact represent a middle ground figure, accounting for potential losses directly attributable to the loss of a new Hy-Vee lease, but not for other uncertain collateral losses that could result if Hy-Vee did not occupy the new space or was delayed in doing so.

Although Fontana, O'Leary and Curciarello testified that the deadlines were mere "target" dates, the trial court found that the documentary evidence undermined their testimony. Pls.' A15, p. 19. Amongst that evidence was a January 10, 2005 email sent by Fontana to O'Leary and Curciarello discussing the status of the New Hy-Vee Lease negotiations. Pls.' A16. In that email, Fontana stated that "[o]ur contract with [Buyer] requires us to deliver the space to Hy-Vee with plans approved and permits issued by October 31, 2005, or forfeit the money held back." *Id.* Fontana went on to reiterate the mechanics of the delay provision, which he described to Seller's principles as being designed by Seller to "protect" their interest in the holdback in case the "generous" deadlines "get blown." *Id.* In a subsequent email from Fontana to Curciarello, dated March 2, 2005, Fontana repeated that "[t]he contract with [Buyer] requires a lease to be

signed by August 31, and the space to be delivered with all delivery conditions met by October 31." Pls.' A17. Providing a timeline of the parties' obligations, Fontana also listed October 31, 2005 as the "[d]eadline under the Agreement between Buyer and Seller to satisfy all conditions to delivery of premises to HyVee." *Id.*

Further, the trial court found that Curciarello's testimony that the October 31, 2005 date was a mere "target" was not credible. Pls.' A15, p. 19. Indeed, at trial, Curciarello was impeached at trial with his own deposition testimony, in which he previously indicated that the purpose of the October 27, 2005 telephone call between Buyer and Seller was to negotiate an extension of the October 31, 2005 deadline. *Id.* As the trial court observed, "had the purpose of the call been merely to cement the parties' existing understanding that October 31, 2005, was only a 'target date' for obtaining construction permits (as Seller insists), one would expect Buyer's follow up [facsimile] to confirm that understanding. It does not." *Id.* Instead, Seller opened that communication by stating: "Attached is the letter agreement that we *propose* with respect to the Hy-Vee holdback at College Square Park. If it is acceptable, please sign and send it back. Otherwise, please let us have your comments." *Id.*; Pls.' A12. (emphasis added). If Seller believed that October 31, 2005 was merely a soft "target" date subject to developing events, why would it feel compelled to negotiate an extension? More fundamentally, why would Seller have insisted on the delay provision in the DME if it did not think those dates were binding? Interpreting the Hy-Vee Holdback in the manner argued for by Seller would not only ignore all these facts, it would render the dates themselves meaningless aspirational terms at best, and mere surplusage at worst.

6. The Amount of the Hy-Vee Holdback Was Reasonable at the Time of Contracting and Bore Some Relation to the Damages BuyerMight Have Sustained

Damages for a breach of contract may be liquidated where, as even Seller acknowledges, the amount of the liquated damages "is reasonable in the light of the *anticipated or actual loss* caused by the breach and difficulties of proof of loss." Defs.' Br. 34 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (emphasis added); *see also*, *Jameson*, 351 Ill. App. 3d at 423 (stating the second prong of the test is whether "the amount of liquidated damages was reasonable at the time of contracting" and "under Illinois law, a liquidated damages provision will be enforced if it satisfies the test outlined in section 356 of the Restatement (Second) of Contracts"). Comment (b) to the Restatement states that the amount fixed is reasonable either "to the extent that it approximates the actual loss that resulted from the particular breach" or "to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss." RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981).

Seller's argument that the amount of the Hy-Vee Holdback is not reasonable focuses on whether "the $4.3 million forfeiture was grossly disproportionate to any harm actually suffered by Buyer." Defs.' Br. 37. In doing so, Seller fails to recognize that "[t]he nature of a liquidated damages provision is such that the set amount may at times exceed actual damages." *Karimi*, 2011 IL App (1st) 1026701, ¶25. Further, in viewing the matter only through hindsight, Seller fails to consider whether that figure was a reasonable prediction of the potential loss to Buyer in November 2004, when the Third

Amendment was executed. As explained above, at that time, the existence of the New Hy-Vee Lease was anticipated but not guaranteed and the financial ramifications of that uncertainty were, through honest arms-length negotiation, estimated to be at least $4,300,000. That valuation could have been higher or lower depending on any number of scenarios and the New Hy-Vee Lease was eventually executed, that fact it is not a defense to liquidated damages where there remains a breach. Had that risk worked to Seller's advantage in a scenario where Buyer's actual damages exceeded $4,300,000, Seller would almost certainly now be arguing that its damages were capped at that "lump-sum" figure.

The only thing that can be said with certainty is that the parties, which were unquestionably sophisticated and suffered from no claimed power imbalance or fraud, "were much more competent to justly determine what the amount of damages would be, an amount necessarily largely conjectural and resting in estimate, than a court or jury would be, directed to a conclusion, as either must be, after the event, by views and testimony derived from witnesses who would be unusual to a degree if their conclusions were not, in a measure, colored and partisan." *Bethlehem Steel*, 350 F.2d at 652. Seller's attempt to have the court rescue it from the risk it devised because that risk ultimately benefited Buyer should not be indulged.

Penske Truck Leasing Co., L.P. v. Chemetco, Inc., 311 Ill. App. 3d 447 (5th Dist. 2000), on which Seller relies, does not compel a different conclusion. There, a lessor brought suit against the guarantor of a vehicle lease agreement, seeking damages for breach of the lease and the liquidated damages provision therein. 311 Ill. App. 3d. at 448-49. The lease agreement provided that in the event of a default by lessee, the lessee would

be obligated to pay the amount then due as well as liquidated damages which, depending on the scenario, could be calculated several different ways. *Id.* at 449-452. Upon default, the lessee and guarantor refused to pay these damages and the lessor brought suit. *Id.* at 452. The trial court found for the lessor and applied the liquidated damages provision. *Id.* at 453.

Contrary to Seller's assertion that "[o]n these facts, the court declined to enforce the liquidated damages provision, because the parties did not intend the liquidated damages provision to confer a windfall" (Defs.' Br. 35), the appellate court, looking to the language of the agreement itself as well as the testimony of the witnesses, found that the guarantor failed to show the liquidated damages provision was unreasonable and thus concluded that "the agreement provided for an enforceable liquidated-damages provision and *not* an unenforceable penalty." *Id.* at 455-56 (emphasis added). Although the court did reverse in part and remand, it did so because it found that the trial court mistakenly selected the incorrect formula from the provision for calculating the damages given the factual circumstances of the default, not because there was anything wrong with the liquidated damages provision or, as Seller here insinuates, because it was subject to "manipulation" by the nonbreaching party. *Id.* at 457-58. In fact, the subject of "manipulation" of the liquidated damages provision was neither claimed nor addressed in *Penske* and, in any event, because Buyer in this case acted diligently and within the timeframe Seller negotiated, any claim of "manipulation" here is unfounded.

Seller further argues that the Hy-Vee Holdback is an unenforceable penalty because it "lacks any mechanism to adjust the Holdback amount as a function of delay, as distinct from a complete failure of the Hy-Vee Expansion." Defs.' Br. 37. Again, this was

a term negotiated honestly and at arm's length by two sophisticated parties operating with a significant amount of uncertainty and with a significant amount of money at stake. Seller should not be rescued from a deal simply because, in hindsight, it could have been structured in a way that was friendlier to its interests. Even if the parties had negotiated a mechanism that assessed damages on a daily, weekly or monthly basis, Seller's actual liability could have been higher had the worst occurred. The fact that Buyer offered to restructure the liquidated damages provision in its November 16, 2005 letter, and Seller rejected that offer makes it clear that Seller's present position is a mere artifice.

7. At the Time of Contracting, Actual Damages Were Uncertain in Amount and Difficult to Prove

Like the other two factors used to evaluate the validity and enforceability of a liquidated damages provision, the requirement that actual damages be uncertain and difficult to prove is considered from the parties' perspective at the time of contracting. *Jameson*, 351 Ill. App. 3d at 423-24 ("When determining whether actual damages would be uncertain in amount and difficult to prove . . . courts must look to 'the time of contracting, not the time of breach.' ") For the reasons stated above, at the time of contracting, damages were uncertain. Any number of scenarios could have occurred. Hy-Vee could have elected to take the WalMart space, renew its old lease, or move to a different shopping center. If the larger WalMart space was left empty or Hy-Vee relocated to a different shopping center, there was no guaranty that Buyer could replace it; and even if it could, there was no guaranty that it could do so quickly enough to prevent other tenants from leaving the Mall. All this makes any valuation of damages extremely difficult to prove, prospectively or retrospectively. Moreover, even if the sophisticated parties had negotiated a daily, weekly or monthly damages formula, had

Seller's breach lasted considerably longer, Buyer's actual damages could have been even greater.

Seller argues, however, that the figure it negotiated with Buyer was "entirely speculative" and "unenforceable, because the court could have easily adopted Buyer's own approach in the November 16 [Counter-]Proposal to calculate the dollar value of actual harm." Defs.' Br. 38. That is not the test and, again, it must be noted that in failing to respond to Buyer's November 16 letter, Seller *rejected* the very type of calculation it now argues the trial court should have imposed.

C. THE TRIAL COURT'S CONSTRUCTION DOES NOT IMPLY THAT THE PARTIES INTENDED AN ABSURD RESULT

Seller also contends that "[a]s construed by the trial court, the Holdback was . . . . [n]o different than a bet on a boxing match or a football game," and is therefore void as against public policy relating to gambling contracts. Defs.' Br. 48. As previously explained, that statement is directly contradicted by the testimony of Seller's own witnesses. Further, the manifest absurdity of the argument illustrates the depth of Seller's desperation to escape its miscalculation and merits no further comment.

Regardless, Sellers did not raise this argument before the trial court and, therefore, may not do so for the first time on appeal. *Lazenby,* 236 Ill. 2d at 92 (issues raised for the first time on appeal are forfeited).

D. THE HY-VEE HOLDBACK DOES NOT DEPRIVE THE AGREEMENT OF MUTUALITY

Sellers contend that the trial court's interpretation of the negotiated agreement somehow deprives that agreement of mutuality because it allows Buyer to "drag its feet" to collect the Hy-Vee Holdback. Defs.' Br. 47. First, as discussed above, there is no

evidence of any delay by Buyer, which met all the deadlines Seller negotiated, including those that Seller negotiated with Hy-Vee to the exclusion of Buyer. Further, the $4,300,000 holdback, while substantial, represents approximately 3.6% of the $117,000,000 agreement. No matter how the trial court interpreted that agreement, the court's interpretation as to this relatively small amount cannot be said to render the entire agreement "illusory."

Regardless, Sellers did not raise this argument before the trial court and, therefore, may not do so for the first time on appeal. *Lazenby,* 236 Ill. 2d at 92 (issues raised for the first time on appeal are forfeited).

E. SELLER IS NOT ENTITLED TO ATTORNEYS' FEES

Seller's argument that it is entitled to attorneys' fees is entirely premised on its unproven claim that Buyer breached its obligations to Seller under the Third Amendment and DME. As the losing party, it identifies no other basis for its claim to fees, which, therefore, should be rejected.

PLAINTIFFS' SEPARATE APPEAL

THE TRIAL COURT ERRED IN DEPRIVING BUYER OF ITS STATUTORY RIGHT TO POST JUDGMENT INTEREST

In its summary order granting defendants' posttrial motion, the circuit court found "that post-judgment interest shall not apply to its Order and Judgment" of August 24, 2011. Pls.' A2. Respectfully, the circuit court acted outside the bounds of its authority in making that determination.

Section 2-1303 of the Code provides, in relevant part, that:

> Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied . . . . When judgment is entered upon any award, report or verdict, interest

> shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment.

735 ILCS 5/2-1303. Further, Section 12-109 of the Code states that "[e]very judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303." 735 ILCS 5/12-109. The language of these provisions is mandatory, and under their express terms, plaintiffs are entitled to post-judgment interest.

In denying plaintiffs post-judgment interest, the circuit court did not explain its reasoning; however, in their posttrial motion, defendants argued that post-judgment interest does not apply in these circumstances because all of plaintiffs' claims sound in equity and because this case was heard in chancery. This is simply incorrect.

1. Plaintiffs' Claims Were Not Entirely Equitable in Nature

First, the Illinois Supreme Court has made clear that "[a]ctions for a declaratory judgment were unknown to the common law and are neither legal nor equitable, but are sui generis." *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 57-58 (1987). This is a fact long recognized not only by the Supreme Court, but by every district of the Appellate Court as well. *See, e.g., Noren v. Metropolitan Property and Cas. Ins. Co.*, 369 Ill. App. 3d 72, 76 (1st Dist. 2006); *Pettey v. First Nat. Bank of Geneva*, 225 Ill. App. 3d 539, 547 (2nd Dist. 1992); *Villiger v. City of Henry*, 47 Ill. App. 3d 565, 567 (3rd Dist. 1977); *Vermilion County Good Government League, Inc. v. Smith*, 64 Ill. App. 2d 270, 275 (4th Dist. 1965); *Burnett v. Safeco Ins. Co. of Illinois*, 227 Ill. App. 3d 167, 171 (5th Dist. 1992). The authority relied upon by defendants for their argument that declaratory judgment actions are equitable in nature, namely *Bowman v. Armour*, 17 Ill. 2d 43

(1958), and *Ives v. Town of Limestone*, 62 Ill. App. 3d 771 (3rd Dist. 1978), reference such actions as equitable only in passing, and cannot be fairly said to offset the clear weight of expressly stated authority to the contrary. While specific performance may be an equitable remedy, declaratory judgment actions are not.

2. Post-Judgment Interest Is Statutorily Mandated and Circuit Courts Have No Discretion to Deprive Plaintiffs of That Relief

More importantly, courts of chancery do not have discretion in applying post-judgment interest. Section 2-1303 states that "[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied." 735 ILCS 5/2-1303.

> When [courts] construe statutes, [their] "primary objective" is to ascertain and give effect to the intent of the legislature. The most reliable indication of the legislature's intent is the plain language of the statute. Thus, when the language of the statute is clear and unambiguous, it must be applied as written without resort to extrinsic aids or tools of interpretation.

People ex rel. Illinois Dep't of Corrections v. Hawkins, 2011 IL 110792, ¶ 23 (citations omitted). Section 2-1303 is plain and clear in its application to judgments recovered in "any court," and makes no exception for chancery courts. Further, the "legislature's use of the word 'shall' generally indicates a mandatory requirement." *Holly v. Montes*, 231 Ill. 2d 153, 160 (2008); accord *People v. O'Brien*, 197 Ill. 2d 88, 93 (2001) (the Supreme Court "has construed [the word 'shall'] as a clear expression of legislative intent to impose a mandatory obligation.")

While, for some years, there was an apparent split in authority on the mandatory nature of Section 2-1303 in chancery (compare *Cerajewski v. Kunkle*, 285 Ill. App. 3d 222, 227 (1st Dist. 1996) (Section 1303 is mandatory), with *Jahn v. Kinderman*, 351 Ill. App. 3d 15, 23 (1st Dist. 2004) ("chancery proceedings are not subject to the automatic

statutory accrual of post judgment interest"); *accord Contract Development Corp. v. Beck*, 255 Ill. App. 3d 660, 672 (2nd Dist. 1994) (noting split in authority)), the Supreme Court recently put the issue to rest in *Illinois Department of Healthcare and Family Services ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483 (2011). There, the Supreme Court found that Section 2-1303's express requirement of post-judgment interest is just that – a requirement. 239 Ill. 2d at 487, 489-90. Rejecting the assertion that courts of chancery present an exception, the Supreme Court reiterated the "long-standing law" that:

> " 'We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute; it has been always disclaimed, and the real or supposed hardship of no case can justify a court in doing so. When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it.' "

Id. at 489-90 (quoting *First Federal Savings & Loan Ass'n of Chicago v. Walker*, 91 Ill. 2d 218, 227 (1982) (quoting *Stone v. Gardner*, 20 Ill. 304, 309 (1858))). The legislature could not have been any plainer in its language or clearer in its intent in setting the requirement that "[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied." 735 ILCS 5/2-1303. In accepting defendants' invitation to disregard the plain language of Section 2-1303, the circuit court exceeded the bounds of its authority and erroneously deprived plaintiffs of their right to post-judgment interest.

Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill. 2d 218 (2006), the case defendants primarily relied on in their post-trial motion for their argument that chancery courts present a special case, does not compel a different conclusion. First, *Tri-G* can be distinguished on the ground that its statement concerning discretion in the application of

interest was made in the context of the Supreme Court's discussions of prejudgment interest, which Section 1303 does not address and is not at issue in the instant case.

Further, the Supreme Court in *Wiszowaty* explained that *Tri-G* should not be read to mean that courts of equity are free to ignore the mandate of Section 2-1303. *Wiszowaty*, 239 Ill. 2d at 489-90. Much of the confusion on this point stems from *Finley v. Finley*, 81 Ill. 2d 317 (1980), a child support case. In fact, both of the cases defendants cited for their argument that chancery courts have discretion in applying post-judgment interest, *Tri-G* and *Jahn*, can, in relevant part, be traced back to *Finley*. In *Finley*, the Supreme Court stated:

> This court has held that a divorce proceeding partakes so much of the nature of a chancery proceeding that it must be governed to a great extent by the rules that are applicable thereto. In a chancery proceeding, the allowance of interest lies within the sound discretion of the trial judge and is allowed where warranted by equitable considerations and is disallowed if such an award would not comport with justice and equity. As stated in *Groome*, "In a proper case, equitable considerations permit a court of equity to allow or disallow interest as the equities of the case may demand." We therefore conclude that the allowance of interest on past-due periodic support payments is not mandatory as contended by the plaintiff, but lies within the sound discretion of the trial judge, whose determination will not be set aside absent an abuse of that discretion.

81 Ill. 2d at 332 (citations omitted). Although some courts subsequently read this language broadly, expanding it beyond the context of divorce and child support payment cases to include a number of matters sounding in equity, the Supreme Court in *Wiszowaty* has since made clear that:

> *Finley* . . . stands for the proposition that, where there are no controlling statutes defining unpaid support payments as judgments or providing for interest, interest may be awarded on those payments as a discretionary matter because the divorce proceeding may be likened to a chancery proceeding. But Finley does not stand for the proposition that interest is left to the discretion of the circuit court even when governing statutes have plainly stated otherwise.

81 Ill. 2d at 489 (emphasis in original). In other words, *Finley* does not stand for the proposition that courts, even chancery courts, may exercise their equitable powers at the expense of a controlling statute requiring the application of interest. *Id.* at 489-90. Here, unlike in *Finley*, which was decided two years before Section 2-1303 was first enacted (*see P.A.* 82-280, § 2-1303, eff. July 1, 1992), there is a controlling statute providing for the application of interest, and its mandatory nature is clear. As such, the circuit court was not free to set aside Section 2-1303's requirement of post-judgment interest, regardless of its generally broad equitable powers.

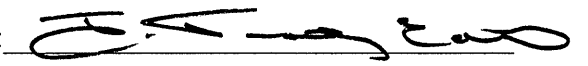
CONCLUSION

The Hy-Vee Holdback represented an honestly negotiated liquidated damages provision agreed to by two sophisticated and experienced parties. The trial court's finding that Seller's testimony was not credible and that the evidence weighed in favor of Buyer is well supported by the record and Seller has not met its burden of proving otherwise. The trial court did, however, err in denying Buyer's statutory entitlement to post-judgment interest.

WHEREFORE, Plaintiffs-Appellees/Separate-Appellants GK Development, Inc. and College Square Mall Development, LLC, respectfully request this court: (1) affirm the trial court's order of August 24, 2011, granting them judgment on their complaint; (2) reverse the trial court's order of December 12, 2011, denying post-judgment interest; and (3) remand with instructions to impose such interest. If, however, the court reverses the trial court's August 24, 2011 order, this matter should be remanded for decision on that part of the Hy-Vee Holdback to which plaintiffs are entitled as a result of the construction they performed on the Hy-Vee parking lot.

Dated: July 23, 2012

Respectfully submitted,

By: 

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SUPREME COURT RULE 341(C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 44 pages.

Respectfully submitted,

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