No. 11-2802

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, 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	Circuit Court No.: 06 CH 3427 06 CH 3586 Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Trial Judge: Hon. Carolyn Quinn

BRIEF OF DEFENDANTS-APPELLANTS

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Oral Argument Requested

POINTS AND AUTHORITIES

NATURE OF THE ACTION

This is a dispute over $4.3 million escrowed out of the purchase price for four shopping malls (hereinafter the "Hy-Vee Holdback" or "Holdback"). The Hy-Vee Holdback "contained" that portion of the $117 million purchase price which Buyer attributed to the incremental value of Hy-Vee, a Mall tenant, expanding its supermarket into a larger (and more expensive) leasehold at the Mall, pursuant to a new 20-year lease (the "Hy-Vee Lease"). Hy-Vee's expansion (the "Hy-Vee Expansion") was under development, but was not complete at the time of the December 2004 sale. An escrow agreement directed an escrowee to disburse the Hy-Vee Holdback to Seller if by October 31, 2005 Hy-Vee had taken possession of the new leasehold pursuant to a written lease with remodeling permits in hand; and, if not, to deliver the "forfeited" Holdback to Buyer. Thereafter, a new lease executed by Buyer and Hy-Vee contemplated that Hy-Vee would receive a building permit by February 2006, at the latest. Hy-Vee took possession of the new leasehold on January 30, 2006. By that time, both Buyer and Seller had demanded escrowee disburse the Holdback. Thereafter, both Buyer and Seller filed actions seeking declaratory relief in respect of the Holdback. The trial court found a provision in the parties' written agreements was ambiguous as to whether "any delays in approving plans" included delays of Hy-Vee in obtaining permits. The new Hy-Vee opened the doors of its new, remodeled leasehold on November 16, 2006. After a bench trial in 2011, the court found a) the parties intended October 31, 2005 as a "drop-dead deadline"; b) buyer had proven a breach of contract; and c) that Buyer was entitled to the $4.3 million Hy-Vee Holdback as liquidated damages for the breach of contract. This appeal was taken from that ruling. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in finding the "delay provision" in the parties' contract was ambiguous as to whether "any delay in approving plans" included (and excused) a delay of Hy-Vee in obtaining a building permit from Cedar Falls, Iowa.

2. Whether the trial court erred in finding that Buyer was entitled to the Hy-Vee Holdback because the parties intended October 31, 2005 as a "drop-dead deadline."

3. Whether the trial court erred in construing the Hy-Vee Holdback as liquidated damages-for-delay, as distinct from a price adjustment triggered only by a complete failure of the Hy-Vee Expansion.

4. Whether the trial court award to Buyer of the full $4.3 million value of the Hy-Vee Lease was disproportionate liquidated damages for Hy-Vee's 91-day delay.

5. Whether the trial court erred in finding the $4.3 million Hy-Vee Holdback satisfied all three prongs of the conjunctive three-prong test for valid "liquidated damages" set forth by this Court in *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004.

6. Whether the trial court heard any evidence that the parties intended the $4.3 million Holdback as a reasonable estimate of damages that would accrue to Buyer from a 91-day delay, where actual damages difficult or impossible to ascertain.

7. Whether the trial court erred by construing the parties' contract pertaining to the Holdback in a manner that deprived the contract of mutuality, and therefore rendered it illusory.

8. Whether the trial court's interpretation of the parties' contract violated rules of contract construction by: a) failing to construe the contract in its economic context, b) failing to construe the contract as a whole, c) failing to give effect to multiple contract terms (including a proviso excusing delays in plan approvals); and d), failing to give effect to the intent of both

parties.

9. Whether the trial court's interpretation of the parties' contract violated rules of contract construction by failing to consider the sequence in which various agreements were executed and the manner in which earlier agreements deferred to, and incorporated later agreements by reference.

10. Whether the trial court violated rules of contract construction by interpreting the parties' contract as contemplating an absurd, abhorrent, unjust, disproportionate, and facially improper result.

11. Whether the trial court erred as a matter of law in failing to award attorneys fees to Seller under the Reaffirmation Agreement.

STATEMENT OF JURISDICTION

On August 24, 2011, after a bench trial, the trial court entered judgment in favor of Plaintiffs-Appellees GK Development, Inc. and College Square Mall Development, LLC (collectively "Buyer"), and against Defendants-Appellants Iowa Malls Financing Corp. and College Square Mall Associates, LLC (collectively "Seller"). On September 22, 2011, Seller timely filed its timely Notice of Appeal, within 30 days of the trial court's final, appealable order. A0061-62.

STATEMENT OF FACTS

In 2004, Seller was the owner of four regional shopping malls in the eastern half of Iowa (the "Iowa Malls"), including the College Square Mall in Cedar Falls, Iowa (the "Mall"). A0135-70. The Mall consisted of various buildings covering a total of 572,373 square feet, with adjacent parking, on 54.86 acres. *Id.* For some years, the Mall had been anchored by retailers Von Maur, Younkers, and Wal-Mart; and by a Hy-Vee grocery store. *Id.* The Wal-Mart

occupied a large (106,128 square-foot) space at the Mall. *Id.* The Hy-Vee occupied a smaller, 59,860 square foot building adjacent to the Wal-Mart. A0111, A0144-45. Hy-Vee occupied the 59,860-square foot leasehold pursuant to a 1976 lease serially amended in 1978, 1989, 1991, 1992, 1993, 1994, and 2002. A0077-125. Hy-Vee's 1976 lease, as amended, was due to expire on December 31, 2010, subject to three 5-year renewal options. Pursuant to that lease, Hy-Vee was required to pay, from January 1, 2006 through December 31, 2010 fixed minimum rent of $26,166.67 each month, or $314,000 per annum (*i.e.*, $5.25 psf), plus a pro-rata share of real estate taxes and common area maintenance ("CAM"). There was no assurance that Hy-Vee would remain a tenant of the Mall after December 31, 2010.

By late 2003, Wal-Mart had given notice that it did not intend to renew its lease, which was due to expire on March 31, 2004. By means of a letter dated December 29, 2003, Seller's leasing agent for the Mall proposed that Hy-Vee relocate and expand its leasehold to a portion of the larger Wal-Mart leasehold.

On February 4, 2004, Hy-Vee responded to the leasing agent's proposal with a letter of intent (the "February LOI") to lease 75,000 square feet of space in the former Wal-Mart building. A0127-29. The February LOI was for 75,000 square feet, but indicated that Hy-Vee "would consider taking all the [former Wal-Mart] space at a negotiated price." *Id.* The February LOI contemplated a long-term lease, *i.e.*, a lease with a fixed minimum term of 20 years, followed by five successive 5-year options to renew, with "laddered" fixed minimum base rents per square foot. *Id.* The February LOI contemplated that Hy-Vee would also pay, in addition to the fixed minimum base rents scheduled above, a pro-rata share of the Mall's real estate taxes and CAM. *Id.* Such pro-rata shares would begin to accrue and become payable on the date Hy-Vee took possession of the new leasehold. *Id.* By contrast, the February LOI contemplated that

Hy-Vee would commence paying minimum fixed base rent after the earlier of: a) 240 days after Hy-Vee taking possession of the new leasehold; or b) the opening of the newly-relocated Hy-Vee supermarket for business. *Id.*

As such, the February LOI contemplated a lease term of at least 20 years, and potentially up to 45 years, with total minimum fixed base rent payments in excess of $12 million over the minimum term of 20 years, and additional minimum fixed base rent payments totaling more than $20 million in years 21 through 45, if the five 5-year renewal options were exercised, not including additional amounts payable as Hy-Vee's pro-rata share of the Mall's real estate taxes and CAM. By all accounts, if it went forward, the Hy-Vee Expansion meant a substantial increase in Hy-Vee's required rent payments and its pro-rata share of the Mall's real estate taxes and CAM.

While negotiations regarding the Hy-Vee Expansion were ongoing, Seller engaged CBRE to broker a sale of the Iowa Malls. CBRE issued an offering memorandum pertaining to the Iowa Malls, including the Mall, in June 2004 (the "Offering Memorandum"). A0135-70. The Offering Memorandum predicted that Hy-Vee would relocate from its then-existing leasehold to a larger leasehold of 75,000 square feet in the former Wal-Mart space, and that "[t]he current Hy-Vee space will be divided to accommodate two new big box anchors." A0136.

In June 2004, Seller began discussions with Buyer regarding a sale of the Iowa Malls to Buyer or its assignees. A0064-65. By that time, the Hy-Vee Expansion was predicted to increase Hy-Vee's rented square footage in the Mall by approximately 15,000 square feet, leased at a minimum initial fixed base rent of $6 per square foot, which, along with larger pro-rata shares of real estate taxes and CAM, would generate increased cash flow for the owner of the Mall. *Id.* To the extent that the value of commercial real estate is determined largely by its

ability to generate cash flow, the Hy-Vee Expansion would arguably support a higher value – and higher sale price – for the Mall.

In July 2004, Buyer entered into a letter of intent to purchase the Mall as well as the three other Iowa Malls for $117 million. A0065.

On September 17, 2004, Buyer entered into a Real Estate Sale Contract with the various owners of Iowa Malls -- including the Mall -- for a total purchase price of $117 million. A0172-195. The "specified outside date" for closing the sale of the Iowa Malls to Buyer was December 17, 2004. A0176.

On October 12, 2004, Hy-Vee executed a revised Letter of Intent for the Hy-Vee Expansion (the "October LOI"). A0197-99. The October LOI contemplated that Hy-Vee would lease 78,337 square feet (as distinct from the February LOI, which contemplated a leasehold of 75,000 square feet) in the former Wal-Mart space for a fixed minimum term of 20 years, followed by five 5-year options to extend the lease term, subject to minimum fixed base rents "laddered," as previously. *Id.* Like the February LOI, the October LOI contemplated that Hy-Vee would pay a pro-rata share of real estate taxes and CAM, in addition to the minimum fixed base rents set forth above. *Id.* The October LOI defined Hy-Vee's "possession date" as occurring "[u]pon lease execution, receipt of all governmental approvals and delivery of space from [Buyer]." *Id.* While the October LOI reconfirmed Hy-Vee's continuing intent to proceed with the Hy-Vee Expansion, it did not constitute a binding obligation. As a result, to the extent that the Hy-Vee Expansion was viewed as a fait accompli in arriving at the $117 million purchase price, that price was more than the Buyer would have been willing to pay if the Hy-Vee Expansion failed to go forward.

On October 26, 2004, "[u]pon completion of [Buyer's] review of the [Iowa Malls]," Tom

Rogers, Buyer's primary negotiator, sent a letter to CBRE outlining "issues of concern, the resultant economic impact and the terms under which [Buyer] would be willing to proceed with this transaction." A0201-03. Under the heading "Leasing/Holdback Issues," Rogers listed the Hy-Vee Expansion as one "issue of concern" with a potential "economic impact" of $4.3 million, and suggested a holdback of $4.3 million to resolve that concern. A0202.

As stated by Rogers, i) the new lease to replace Hy-Vee's existing 1976 lease (such new lease is hereinafter the "Hy-Vee Lease") would not likely be signed by the December 2004 closing, ii) the Hy-Vee Expansion and Hy-Vee Lease would remain uncertain at the time the $117 million purchase price was to change hands; iii) if consummated, the Hy-Vee Lease would in the future generate "incremental income of $430,000" (per annum); and iv) such incremental annual income, when discounted "at a 10% cap rate," had a present value of $4.3 million. *Id.* As such, the $4.3 million Holdback proposed by Rogers "contained" that portion of the $117 million purchase price that Buyer had agreed to pay for the right to receive $430,000 of incremental annual revenue from the 20-year Hy-Vee Lease. A0065.

Rogers suggested that the present value of *incremental* income from the Hy-Vee Lease was $4.3 million. A0202. Therefore, $4.3 million represented that portion of the $117 million purchase price which Buyer was paying to Seller for the Hy-Vee Lease. Because the Hy-Vee Lease would remain uncertain as of the closing date, Rogers proposed that its $4.3 million value be held back from the $117 million purchase price, and that such amount be "[r]eleased [to Seller] after [Hy-Vee] signed [the Hy-Vee Lease], [the new Hy-Vee supermarket was] open for business and [the Hy-Vee] facility [was] lien free." *Id.*

Rogers' calculation of the value of the Hy-Vee Lease did not speculate as to precisely when its 20-year stream of $430,000 in annual incremental income might begin. To value the

Hy-Vee Lease, Rogers simply quantified the average incremental income that the Lease would generate per annum, on a long-term basis. After calculating that amount ($430,000), Rogers divided it by a 10% cap rate, in order to obtain its $4.3 million present value, thus:

$$\$430,000 \div .10 = \$4,300,000$$

Having introduced the concept of the Holdback, and determined the amount of the Holdback by calculating the present value of the Hy-Vee Lease, Rogers then proposed to define the moment when the Hy-Vee Lease (and its concomitant 20-45-year stream of incremental revenue) could be deemed sufficiently certain to justify releasing the Holdback to Seller. Rogers' October 26, 2005 letter proposed holding the Holdback in escrow until i) Hy-Vee had signed the Hy-Vee Lease, ii) the new, "21st Century" Hy-Vee was open for business, and iii) the new Hy-Vee leasehold was "lien-free." *Id.*

By November 2004 – before the execution of the Third Amendment, DME, and Hy-Vee Lease -- both parties knew that completing the Hy-Vee Expansion was going to be time-consuming, because the former Wal-Mart space required extensive remodeling (including asbestos abatement) to be suitable as a "21st Century prototype Hy-Vee Food and Drug Store" (270 days from Hy-Vee taking possession was specified in the October LOI -- *see* A0066), and because the scope and cost of the remodeling -- and allocation of that cost between landlord and tenant -- had not yet been negotiated. *Id.*

On November 10, 2004, with the December 17, 2004 "outside date" for the closing only about a month away, Buyer and Seller entered into the Third Amendment to Real Estate Sale Contract ("Third Amendment"). A0205-15. Consistent with Rogers' October 26 letter, the Third Amendment defined the "Hy-Vee Holdback" as a $4.3 million holdback from the $117 million sale price to be escrowed at the closing of the sale of the Iowa Malls, and released when

it appeared certain that the Expansion would go forward (or not), and yield the 20+ years of $430,000 in incremental revenue anticipated by Rogers. A0207. The Third Amendment states in pertinent part:

> With respect to [the Mall], [Buyer] and the Seller . . . agree that at Closing they will enter into a [$4.3 million] holdback agreement from the purchase price of [the Mall] . . . . The holdback amount shall not be released until all of the following are satisfied: (1) execution of a lease with Hy-Vee, Inc. on terms in accordance with the [October LOI] . . . in a form that is commercially reasonable [(the Hy-Vee Lease)]; (2) delivery of the premises to the tenant in the condition . . . specified in [the Hy-Vee Lease]; and (3) acceptance by [Hy-Vee] of the premises and the obtaining by [Hy-Vee] 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 [Buyer].

Id.

In advance of the closing, Buyer advised Seller that Buyer wished the Mall to be legally described as two parcels, and conveyed as such, to two separate buyers. Parcel 1 was legally described as the entire Mall except the former Wal-Mart and then-current Hy-Vee leasehold. Parcel 2 was legally described to include the area of the Mall that included the Wal-Mart and then-current Hy-Vee leasehold, which area was excluded from Parcel 1.

On December 15, 2004, as anticipated and required by the Third Amendment, Buyer and Seller entered into a Deed and Money Escrow Agreement ("DME"). A0228-44. The purpose of

the DME was to escrow a number of discrete amounts incident to the $117 million sale of the Iowa Malls, including the $4.3 million Hy-Vee Holdback. *Id.* Chicago Title and Trust Company signed the DME as Escrowee. *Id.* Among other things, the DME instructed the Escrowee when to disburse the Holdback amount. Section VII of the DME (hereinafter "Section VII") is captioned "The Hy-Vee Holdback." Section VII directs Escrowee as follows:

> [If] [a]t any time after the Closing Date that [sic] [Seller] shall advise [**Escrowee, Chicago Title & Trust**], 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 [the Mall] by Wal-Mart (the "Hy-Vee Space") substantially in accordance with the [October LOI], (b) that the Hy-Vee Space has been delivered to Hy-Vee in the condition required by the terms of [the Hy-Vee Lease], (c) that [Hy-Vee] has accepted the Hy-Vee Space, and (d) that [Hy-Vee] has obtained all government approvals and permits necessary to complete its work, then [Escrowee] shall advise [Buyer] in writing of such demand for payment and, unless you receive objection in writing of such demand for payment within five (5) days, the Hy-Vee Holdback shall be made [sic] to [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 the court. In the event that [Seller] is unable to make the representation contained in Subparagraph (b) above because all that is required of [Buyer] is work to be completed by [Buyer] under the terms of the Contract . . . [then] Seller shall not be deemed to have failed to comply with such Subsection (b).

A0239-40 (emphasis supplied). In sum, Section VII directs Escrowee to release the Holdback to

Seller when four events (hereinafter the "Four Events") have occurred. The Four Events are: (1) **Lease Execution**, by August 31, 2005; execution **by Hy-Vee** of the forthcoming Hy-Vee Lease on commercially reasonable terms, in conformity with the October LOI ("Event 1"); (2) **Delivery of Premises by Buyer**, by October 31, 2005; delivery **by Buyer** of the premises to Hy-Vee in the condition required by the forthcoming Hy-Vee Lease ("Event 2"); (3) **Acceptance of Premises by Hy-Vee**, by October 31, 2005; acceptance **by Hy-Vee** of the new premises from Buyer ("Event 3"); and (4) **Permits And Governmental Approvals For [Hy-Vee]'s Work**, by October 31, 2005; obtaining, **by Hy-Vee**, of all permits and other governmental approvals necessary to complete the tenant's work ("Event 4"). A0070-71.

None of Events 2, 3, or 4 required or contemplated any action by Seller. Conversely, all of Events 2, 3, and 4 required Buyer and Hy-Vee to exercise diligence and take action, either jointly or severally. Events 2 and 3 were entirely and exclusively within the control of Buyer and Hy-Vee. Event 4 -- concerning governmental approvals necessary for the Hy-Vee Expansion -- required Hy-Vee to prepare and submit plans to the City of Cedar Falls, Iowa for approval (evidenced by the issuance of a building permit), after obtaining Buyer's approval. As such, the "permitting" contemplated by Event 4 was outside of Seller's purview and control.

Significantly, Section VII subjects Event 4 to a "provided, however" clause that anticipates and incorporates by reference terms from a further agreement -- the anticipated, but not then extant Hy-Vee Lease. A0240. Section VII excuses "any" delay in "producing, approving, or revising . . . plans," with such "delay" "to be determined in accordance with the [forthcoming] [Hy-Vee Lease]." *Id.* This clause – which the trial court referred to, in its opinion, as a "delay provision" – qualifies the October 31, 2005 date applicable to Event 4 by stating ". . . provided, however, if the [Hy-Vee Expansion] 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 Hy-Vee's Lease), then . . . the October 31, 2005 date shall be extended by one day for each day or delay in the delivery of plan approval." *Id.*

In addition, Section VII of the DME contemplates that Buyer will perform certain parking lot improvements (paving) at a cost to be reimbursed by Seller (the "Parking Lot Improvements"). A0239-40. Section VII provides that if the Four Events have not occurred solely because Buyer has not completed Parking Lot Improvements, then 105% of the cost of those Improvements (determined by competitive bidding) will be netted out of the Hy-Vee Holdback, with the remaining balance paid to Seller. *Id.*

Subject to all of the foregoing, the DME advises the Escrowee that "[s]hould the lease not be executed by August 31, 2005 [(Event 1)], or all of the other conditions [(*i.e.*, Events 2, 3, and 4)] 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 Purchaser." *Id.* The timeliness of Event 1 is not at issue in this litigation.

On December 17, 2004 the parties closed the purchase and sale of the four Iowa Malls. A0064. At the closing, affiliates of Seller sold the Mall (as two parcels, Parcel 1 and Parcel 2), as well as the three other Iowa Malls, to five affiliates of Buyer, for a total sale price of $117 million. A0230. Of that amount, Buyer allocated $38.5 million to the Mall. *Id.* Of the amount allocated to the Mall, Buyer allocated $33.5 million to Parcel 1, and $5 million to Parcel 2, which included the Wal-Mart and the original Hy-Vee leasehold. *Id.* Of the sales price allocated to Parcel 2 ($5 million), $4.3 million was escrowed. There were two purchasers for the two Parcels of the Mall. A0228-29. College Square Mall Partners LLC purchased Parcel 1. *Id.* College Square Mall Development, LLC purchased Parcel 2, with 86% of allocated purchase

price going directly into escrow. A0228-30.

After the closing, Buyer repeatedly admonished Seller to slow the negotiations of the Hy-Vee Lease. On March 26, 2005, Buyer requested that Seller refrain from contacting Hy-Vee. A0250. Specifically, Buyer requested "that Hy-Vee not be contacted again until [Buyer has] had a chance to digest the most recent documents." *Id.* On April 14, 2005, Buyer again asked Seller to "refrain from sending ... any more language to Hy-Vee until a fully revised lease incorporating our concerns has been reviewed and approved by us." A0258.

While negotiations for the Hy-Vee Lease continued, Seller contracted for and paid the cost of asbestos abatement in the entire Wal-Mart space. R.V22, Ex. 52. That abatement was complete by June 2005.

On June 16, 2005, approximately six months after the closing of the purchase and sale, Hy-Vee signed the Hy-Vee Lease. The Hy-Vee Lease demised 79,750 square feet of space in the former Wal-Mart leasehold. A0068. The Hy-Vee Lease was negotiated bilaterally by Seller and Hy-Vee, subject to constraints imposed by the Second LOI and commercial reasonability. *Id.* As contemplated by the October LOI, the Hy-Vee Lease was long-term, that is, it contemplated a fixed minimum term of 20 years, followed by five successive five-year renewal options, such that the Hy-Vee Lease could, at Hy-Vee's option, run for a total term of up to 45 years. A0264-324.

The Hy-Vee Lease contemplated that during the remodeling of the new leasehold, the old Hy-Vee Lease would remain in full force, Hy-Vee would continue to operate in the old store, and Hy-Vee would continue to pay rent and pro-rations under the 1976 Lease until 30 days after the opening of the new store. *See* A0302 (Section 52 of the Substituted Hy-Vee Lease). The 20-year term of the Hy-Vee Lease would begin to run on the possession date, with minimum fixed

rents coming due on the rent commencement date. *See* A0273 (Section 4 of the Substituted Hy-Vee Lease). As a result, a delay in remodeling Hy-Vee's new leasehold would not shorten the length of the 20-year term subject to higher rents. Later, the final Hy-Vee leasehold occupied 80,189 square feet. Adjusted for that measurement change, the Hy-Vee Lease contemplated fixed minimum rent payments in excess of $13 million during its first twenty years, and additional rent payments in excess of $22 million in the option years, 16 through 45.

After receiving the Hy-Vee Lease executed by Hy-Vee (but not dated), Buyer demanded that Hy-Vee make two revisions. A0068. Buyer abandoned its objection about a month later. *Id.* On or around July 15, 2005, Buyer dated the Hy-Vee Lease as of July 15, 2005 and executed it. A0264-324. Section VII of the DME had indicated that "delay" for purposes of Section VII would be defined by the Hy-Vee Lease. Section 3(A) of the Hy-Vee Lease was expressly dedicated to "Plans and Approvals," as follows:

> (1) **Plans and Approvals**. [Buyer] and [Hy-Vee] have reviewed and approved [Hy-Vee]'s preliminary site plan for the Hy-Vee Expansion . . . . On or before the 75th day following the date of this lease [(*i.e.*, by September 28, 2005)], [Hy-Vee] . . . shall submit to [Buyer] detailed plans and plans and specifications for the Hy-Vee Expansion (the "Final Plans and Specifications") . . . for [Buyer's] approval . . . . [Buyer] shall within ten (10) business days after receipt [(*i.e.*, by October 12, 2005)] . . . notify [Hy-Vee] in writing of its approval or disapproval thereof. If [Buyer] does not approve the Final Plans and Specifications as initially submitted, [Hy-Vee] shall within ten (10) business days thereafter [(*i.e.*, by October 26, 2005)] submit for approval revised Final Plans and Specifications addressing any objections. [Buyer] shall then have seven (7) business days after

receipt of said revised Final Plans and Specifications [(*i.e.*, by November 4, 2005)] 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 [Buyer] and [Hy-Vee] to the plans and specifications for the Hy-Vee Expansion, as provided and within the time parameters set forth in Section 3(A)(1) [(*i.e.*, Buyer's approval of Final Plans and Specifications by November 4, 2005)];

* * *

(d) [Hy-Vee] 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 [Buyer]'s approval of the . . . Final Plans and Specifications; provided, however, if [Hy-Vee] timely submits such permit applications and diligently pursues obtaining such permits, upon the written request of [Hy-Vee], [Hy-Vee] may obtain a sixty (60) day extension of the Construction Condition set forth in this subsection 3(A)(1)(d).

Tenant shall provide written notice to [Buyer] when all of the Construction Conditions have been satisfied and/or waived . . . . In the event that (i) the Construction Condition set forth in subparagraph (a) is not satisfied within one hundred and twenty (120) days following the date of this Lease [(*i.e.*, by Saturday, November 12, 2005)] . . . or (iv) the Construction Condition set forth in subparagraph (d) is not satisfied within 30 days after [Buyer] approves the Tenant's plans and specifications (or 90 days if extended for the additional 60-day

period as provided [in Section 3(A)(1)(d)] above), are not satisfied and/or waived by Tenant within (w) the 120 day-period as to clause (i) set forth above, . . . and (z) the 30-day period (or 90-day period, if extended the additional 60-day period [sic]) as to clause (iv) set forth above, Tenant may, as Tenant's sole and exclusive remedy, elect to terminate this lease by written notice . . . to [Buyer] . . . .

A0268-70.

Thus, the Hy-Vee Lease provided that: i) Hy-Vee had until 75 days after July 15, 2005 – *i.e.*, until September 28, 2005 -- to submit Final Plans and Specifications to Buyer for approval; ii) Buyer had until November 4, 2005 to approve or reject the Final Plans and Specifications submitted by Hy-Vee; iii) Hy-Vee and Buyer had an "outside date" of 120 days after July 15, 2005 - *i.e.*, until Saturday, November 12, 2005 - to reach agreement on Final Plans and Specifications; and iv) Hy-Vee had to apply for and obtain "Governmental Approvals" within 30 days of [Buyer]'s approval of Hy-Vee's Final Plans and Specifications – which, at the latest, was either December 4, 2005, the date 30 days after November 4, 2005, or December 12, 2005, the date 30 days after November 12, 2005.

The December deadline for Hy-Vee to obtain Governmental Approvals was qualified by a "provided, however," clause, as follows: "provided, however, if [Hy-Vee] timely submits such permit applications and diligently pursues obtaining a such [sic] permits, upon the written request of [Hy-Vee], [Hy-Vee] may obtain a sixty (60) day extension of the Construction Condition set forth in this subsection 3(A)(1)(d)." Thus, pursuant to the Hy-Vee Lease, Hy-Vee had a deadline of December 4, 2005 or December 12, 2005 to apply for Governmental Approvals, and an outside deadline of February 2, 2006 or February 10, 2006 to obtain Governmental Approvals. By executing the Hy-Vee Lease, Buyer agreed to these deadlines,

notwithstanding the DME's October 31, 2005 date for Event 4.

On September 28, 2005, approximately two months after Buyer's execution of the Hy-Vee Lease, Hy-Vee submitted its Final Plans and Specifications to Buyer. A0071.

On October 12, 2005, or 19 days before the October 31 "deadline" for Event 4, Buyer disapproved Hy-Vee's Final Plans and Specifications and sent comments and requested revisions to Hy-Vee. A0071.

On October 31, 2005, the date applicable to Buyer and Hy-Vee's realization of Events 2, 3, and 4, Hy-Vee submitted its revised Final Plans and Specifications to Buyer and applied to the Cedar Falls Building Department for a construction permit. *Id.*

On November 2, 2005, Seller sent to Buyer a draft letter agreement to expressly continue the October 31, 2005 date applicable to Events 2, 3, and 4. A0378-82. The draft letter agreement proposed that "Section 1(k) of the Third Amendment to Real Estate Contract dated November 10, 2004 . . . be amended by deleting the words 'October 31, 2005' and replacing them with the words 'January 31, 2006.'" A0378-82.

On November 8, 2005, four days *after* the November 4, 2005 deadline contemplated by the Hy-Vee Lease for Buyer's acceptance of plans, and four days *before* the outside date for Buyer and Seller to agree on plans, Buyer sent a letter to Hy-Vee conditionally approving Hy-Vee's revised Final Plans and Specifications. A0384-85.

On November 16, 2005, Buyer sent Seller a proposed letter agreement (the "November 16 Proposal") in response to Seller's letter to Buyer of November 2, 2005. A0389-91. The November 16 Proposal agreed to continue the October 31, 2005 date to January 31, 2006 if Seller made monthly payments to Buyer, beginning as of November 2005, equal to the monthly rent payments of Hy-Vee contemplated by the Hy-Vee Lease, with those amounts to be

increased by $100,000 for any month after January 2006. A0389-91. *Id.* The monthly payments consisted of fixed minimum monthly base rent of about $47,000, plus a pro-rata share of real estate taxes and CAM. *Id.* In addition, the November 16 Proposal contemplated that "the parties hereto will instruct the escrowee that after January 31, 2006, the escrowee may disburse amounts to [Buyer] at the sole direction of [Buyer] and that any contrary direction by [Seller], or any party on behalf of [Seller], may be disregarded." *Id.* At the time Buyer sent the November 16 Proposal, Buyer was receiving monthly rent and pro-rations from Hy-Vee under the 1976 lease.

Seller declined to make the accelerated quasi-rent payments demanded by Buyer in the November 16 Proposal, and declined to cede unilateral control over the Hy-Vee Holdback to Buyer as a condition of continuing the October 31 date.

On January 6, 2006, 67 days after October 31, 2005, Buyer sent a letter directing Escrowee to pay the *entire* $4.3 million Hy-Vee Holdback to Buyer because Events 2, 3, and 4 "were not fulfilled by October 31, 2005." A0396. *See also* A0071.

On January 9, 2006, Seller sent a letter to Escrowee objecting to the release of the Hy-Vee Holdback to Buyer. A0396. In that letter Seller "claim[ed] the benefit of the delay and extension provision referred to in Section VII of [the DME] by reason of the fact that the plans for the Hy-Vee space have not been finalized by reason of delay in producing, approving or revising such plans." *Id.*

A trial exhibit that both parties stipulated to be part of the record on appeal contains internal January 2006 email correspondence of Buyer about the Hy-Vee Holdback. A0401-11. That correspondence contains a draft letter addressed to Seller asserting that Seller had forfeited the Holdback because Hy-Vee did not obtain permits and accept its new space by October 31, 2005. Ira Fierstein, the letter's drafter, asked Sullivan to confirm that Hy-Vee had not accepted

its new leasehold by October 31, 2005 inasmuch as Hy-Vee was "[waiting] for permits before taking possession." *Id.* Fierstein admonished Sullivan not to respond to his questions in writing "because of the assertions we made to the title company," and noted that "Seller is disputing that [the Four Events] have not occurred or alternatively, did not occur because of a delay in the preparation or revision of plans." *Id.* Fierstein concluded an email to Buyer's principal, Garo Kholamian, as follows:

> In responding this way [in the draft response to Seller], I am intentionally not providing many details. I don't want to continue to argue the matter with them, but on the other hand, I don't want to come across as being non-responsive. Please make sure the statements I make above are correct before asserting them. It is what I am being told, but certainly, the construction provisions in the [Hy-Vee Lease] are less than clear. [Hy-Vee] has the obligation to perform much of the construction itself, and [Seller] will certainly claim they had nothing to do and were waiting for [Hy-Vee] to do the construction and therefore the premises were properly delivered to [Hy-Vee]. This differs from my understanding that the landlord had some work to do before delivering the space to [Hy-Vee].

Id. (emphasis supplied). In fact, Seller did have one item of work to do before the new leasehold was delivered to Hy-Vee. That was the asbestos abatement referred to above. However, that work had been completed by June 2005 -- before Hy-Vee Lease signed the Hy-Vee Lease. In the same email exchange, on January 10, 2006, Fierstein suggested that Buyer resolve the dispute over the Holdback by negotiating "[an] extension similar to [the November 16 Proposal], which gave you disbursements equal to lost revenue, etc.," as one means of resolving a dispute over the Holdback. *Id.* (emphasis supplied).

On January 27, 2006, 88 days after October 31, 2005, Hy-Vee obtained a construction permit from the City of Cedar Falls. A0072.

On January 30, 2006, 91 days after October 31, 2005, Buyer delivered the new space to Hy-Vee and Hy-Vee accepted it with all necessary permits in hand. *Id.* In a letter of even date to Buyer, Hy-Vee stated "[p]ursuant to the [Hy-Vee Lease] . . . this letter shall serve as [Hy-Vee]'s notice that all of the Construction Conditions have been satisfied and/or waived, and [Hy-Vee] hereby accepts possession of the premises from [Buyer]. The possession date shall be January 30, 2006." A0413.

Hy-Vee's acceptance of the new leasehold as of January 30, 2006 triggered Hy-Vee's obligation to begin paying a pro-rata share of the Mall's real estate taxes and CAM on its new leasehold, in addition to its existing one. No more than 270 days thereafter (*i.e.*, by October 27, 2006, or earlier, if the new supermarket opened before then), Hy-Vee was obligated to begin paying minimum fixed base rent of $46,521 per month, as contemplated by the Hy-Vee Lease, in addition to real estate tax and CAM pro-rations.

On February 9, 2006, Michael Fontana, a representative of Seller, sent a letter directing Escrowee to pay $4.1 million of the Hy-Vee Holdback to Seller. A0416-17. The letter indicated the fulfillment of all conditions for the release of the Holdback except for the completion of the Parking Lot Improvements. *Id.* Fontana's request therefore deducted the adjusted cost of the Parking Lot Improvements (*i.e.*, $200,000) from the Holdback and demanded the resulting net amount. *Id.*

On February 10, 2006 and February 14, 2006, Buyer sent letters objecting to Fontana's direction to pay $4.1 million of the Hy-Vee Holdback to Seller and directed Escrowee to continue to hold the Hy-Vee Holdback until receiving a joint direction from the parties or a court

order. A0421, A0423.

On February 17, 2006, Buyer filed a civil action against Seller seeking a declaration that it was entitled to the $4.3 million held in escrow as the Holdback. Buyer claimed that Seller forfeited the Holdback when Buyer and Hy-Vee failed to achieve the Four Events by October 31, 2005. A0425-37.

On February 22, 2006, Seller filed an action seeking declaratory relief against Buyer in respect of the Holdback. A0439-54. Seller argued that Hy-Vee's failure to obtain building permits by October 31, 2005 did not amount to a violation of any contractual obligation of Seller, and that the October 31, 2005 date had been modified by the "provided, however" clause of the Hy-Vee Lease. A0441. Seller asserted that the Third Amendment, DME, and the Hy-Vee Lease, when read together, had extended the date applicable to the Four Events. A0444.

The parties' actions were thereafter consolidated.

On or about November 16, 2006, while the litigation below was pending, Hy-Vee opened its new food and drug store in the former Wal-Mart leasehold. A0074. Since then, Hy-Vee has been operating there -- and making the increased rent and rent-related payments to Buyer anticipated by Rogers in his valuation of the Hy-Vee Expansion. A0075.

On December 4, 2008, Seller moved for summary judgment. A0472-90. Seller argued that the clear and unambiguous language of the Hy-Vee Lease controlled the timeliness of Event 4 (Hy-Vee obtaining Governmental Approvals), and that in the Hy-Vee Lease Buyer had, in any event, extended the October 31, 2005 date for obtaining Governmental Approvals to February 2006. *Id.* Buyer countered that under the Hy-Vee Lease, only a delay of *Buyer* in delivering plan approvals could extend Hy-Vee's October 31, 2005 "deadline" for obtaining construction permits. A0492-508.

The trial court denied summary judgment to Seller on grounds that the Third Amendment, DME, and Hy-Vee Lease, when read together, were "ambiguous as to whether . . . government approvals and authorizations fall within the delay provision of Section VII of the DME." A0026-33. Thereafter, the case proceeded to trial for a hearing of extrinsic evidence as to "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." A0032.

On August 24, 2011, after a three-week bench trial, the trial court found that notwithstanding the "provided, however" clause of Section VII and the provisions of the Hy-Vee Lease incorporated by reference into Section VII, Buyer and Seller "intended October 31, 2005, to serve as the deadline for plan and permit approval." A0052. The court held, "because *Hy-Vee* did not obtain the necessary [governmental] permits by October 31, 2005, *Buyer* has proved a breach of the DME *by Seller*." *Id.* Based on the notion that Hy-Vee's tardiness in obtaining a building permit constituted a breach of contract *by Seller*, the trial court found that Buyer was entitled to the full amount of the $4.3 million Holdback as liquidated damages for Seller's breach. A0059. In construing the Holdback as liquidated damages, the trial court stated that "[i]n Illinois, in the absence of an express provision to the contrary, a forfeiture provision in a contract will be construed as a liquidated damages clause." A0048. Based on this notion, and the notion that Hy-Vee's delay in receiving a building permit constituted a breach by Seller, the trial court found the Hy-Vee Holdback was a valid and enforceable liquidated damages provision, and ordered that the Holdback be disbursed to Buyer. A0054.

On September 22, 2011, Seller timely appealed.

ARGUMENT

I. SUMMARY OF THE ARGUMENT

In *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004), this Court held that "a liquidated damages clause that operates as a penalty for nonperformance or as a threat to secure performance will not be enforced," and that a conjunctive three-prong test determines the enforceability of a liquidated damages provision. *Id.* Under that three-prong test, parties must intend the sum of money to be paid upon the occurrence of default as a reasonable estimate of actual harm, when actual harm is difficult to quantify. *Id.* Because the three prongs are conjunctive, an Illinois court will not order an agreed-upon amount of money to be paid as "liquidated damages" if such amount does not constitute a reasonable estimate of actual damages that are difficult or impossible to quantify.

In this case, the trial court misconstrued and misapplied *Jameson* and imposed a forfeiture that is so unjust, egregious, and abhorrent that it should shock the conscience of this Court. Accordingly, this case represents an opportunity for this Court to reaffirm the vitality of *Jameson*, and clarify that *Jameson's* three-prong test requires more than just lip service.

In imposing the forfeiture at bar, the trial court not only disregarded *Jameson*. It also found that the phrase "any delay" does not mean "any delay;" that the parties intended a provision contemplating only a complete failure of consideration to measure and award liquated damages for delay; and that Buyer was entitled to keep an asset that *Buyer* valued at $4.3 million without paying a single penny for it, because of a "breach" that was no breach at all. The so-called "breach" of Seller found below was indisputably not a breach of Seller, let alone a breach that could justify liquidated damages of $4.3 million -- the entire value of the asset in question. The lack of any evidence of a breach by Seller – to say nothing of the three prongs of *Jameson* -- entirely eliminates the basis for an award of liquidated damages. Since time immemorial, Courts

of equity have abhorred forfeitures. The decision below erred by enforcing an unjust and disproportionate penalty that does not pass muster under *Jameson* and by rejecting a reasonable interpretation of the parties' contract in favor of an interpretation implying the contract was illusory for lack of mutuality, and contemplated an absurd, improper, and ultimately abhorrent purpose.

II. STANDARD OF REVIEW

A judge's rulings of law are reviewed under the nondeferential *de novo* standard. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1139 (2d Dist. 2004), *citing T. O'Neill & S. Brody, Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341,* 83 Ill. B.J. 512, 517 (1995). The interpretation of the terms of a written contract involves a question of law, which is reviewed *de novo*. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007). A court's ruling that a contract is reasonably susceptible of more than one meaning and therefore ambiguous is a ruling of law and therefore subject to *de novo* review. *Newcastle Properties v. Shalowitz*, 221 Ill. App.3d 716, 723 (1st Dist. 1991). The construction of written agreements is subject to *de novo* review because the determination of their content does not depend on demeanor or credibility of witnesses, but on the construction of the written word. *Grossinger Motorcorp v. Am. Nat'l Bk. & Tr.*, 240 Ill. App. 3d 737, 747 (1st Dist. 1992), *citing Schlobohm v. Police Board*, 122 Ill. App. 3d 541, 544 (1st Dist. 1984) (when evidence is documentary in nature, "a reviewing court is not bound by the circuit court's findings and may reach an independent decision on the facts"). By contrast, whether a breach of contract has occurred is a question of fact, such that a reviewing court finding of a breach will not be disturbed unless such a finding is against the manifest weight of the evidence. *Grossinger Motorcorp, Inc.*, 240 Ill. App. 3d 737.

The objective in interpreting a contract is to ascertain and give effect to the intent of the parties. *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724,726-27 (1st Dist. 2006); *Farwell Construction Co. v. Ticktin*, 84 Ill. App. 3d 791, 796 (1st Dist. 1980). The pertinent inquiry focuses on the objective manifestations of the parties' intent, including the language they used in the contract. *Carey*, 367 Ill. App. 3d at 727. "Where the language of a contract is plain, it provides the best evidence of the parties' intent and will be enforced as written." *Id.*; *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (1st Dist. 2000). Illinois courts apply the "four corners rule," in which courts look initially to the language of the contract alone; and, if the language is facially unambiguous, interpret that language as a matter of law without resort to parol (or extrinsic) evidence. *Air Safety v. Teachers Realty Corp.*, 185 Ill. 2d 457 (1999). A contract term is ambiguous if it is susceptible of more than one reasonable interpretation. *Carey*, 367 Ill. App. 3d at 727; *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (5th Dist. 2004). Whether an ambiguity is present is a question of law for the court. *Installco, Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (1st Dist. 2002).

Generally, the intention of the parties is to be determined from the final agreement executed by them rather than from preliminary negotiations and the construction placed upon the agreement by the parties. But when there is an ambiguity arising from terms of a contract, meaning may be derived from extrinsic facts. *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447 (5th Dist. 2000) (*citing Hickox v. Bell*, 195 Ill. App. 3d 976, 989-990 (5th Dist. 1990)). However, the language of a contract is not ambiguous simply because the parties purportedly disagree upon its meaning (*Omnitrus Merging Corp. v. Illinois Tool Works*, 256 Ill. App. 3d 31, 37 (1st Dist. 1993)), nor is it ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of

language in general, its meaning depends. *Shultz v. Delta-Rail Corp.*, 156 Ill. App. 3d 1, 10 (2d Dist. 1987)).

The determination of whether an ambiguity in a contract exists is a question of law. *Pasulka v. Koob*, 170 Ill. App. 3d 191, 202 (3d Dist. 1978). Thus, it is reviewed *de novo*. *See Vill. of Palatine v. Palatine Assoc. LLC*, 406 Ill. App. 3d 973, 981 (1st Dist. 2010). A contract term is legally ambiguous only if it can reasonably be interpreted in more than one way due to indefiniteness of the language or due to it having a double or multiple meaning. *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324 (1st Dist. 2005). A legal ambiguity does not exist simply because the parties disagree over meaning. *Pasulka*, 170 Ill. App. 3d at 202. Subjective understanding is immaterial; the objective of the court is to determine if the contract is sufficiently definite and certain to enforce its terms after using proper rules of construction and principles of equity to ascertain what the parties agreed to do. *Midland Hotel Corp. v. R.H. Donnelley Corp.*, 118 Ill. 2d 306, 313-314 (1987). Where, as here, two or more contracts are executed in connection with the same transaction(s), the contracts are to be construed in reference to one another. *Tepfer v. Deerfield Sav. and Loan Ass'n*, 118 Ill. App. 3d 77 (1st Dist. 1983). Even if the court determines there is an ambiguity and evidence of prior and contemporaneous transactions and other extrinsic facts are introduced to ascertain the contract's true meaning, the meaning of a contract may be determined as a matter of law where the facts show the contract to have but one meaning. *Pasulka*, 170 Ill. App. at 202.

If a contract term is ambiguous, the trier of fact may look to parol or extrinsic evidence to discern the parties' intent. *Air Safety v. Teachers Realty Corp.*, 185 Ill. 2d at 462-63. However, a court must give meaning and effect to every term or provision, if possible, and should not adopt a construction that renders a contractual term mere surplusage. *River Plaza Homeowner's*

Ass'n v. Healey, 389 Ill. App. 3d 268, 277 (1st Dist. 2009), *quoting Village of Orland Hills v. Citizens Utilities Co. of Illinois*, 347 Ill. App. 3d 504, 516 (1st Dist. 2004) ("When a court interprets a contract, 'meaning and effect must be given to every term and provision, if possible, since it is presumed that every clause in the contract was inserted deliberately and for a purpose, and that the language was not employed idly.'"); *Atwood v. St. Paul Fire and Marine Ins. Co.*, 363 Ill. App. 3d 861, 864 (2d Dist. 2006) ("[A] contract must not be interpreted in a manner that nullifies provisions of that contract."); *Smith v. Burkitt*, 342 Ill. App. 3d 365, 370 (5th Dist. 2003) (stating that "[a] court is not to interpret an agreement in a way that would nullify any of the provisions in the agreement or render them meaningless"); *First Bank & Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 40 (1st Dist. 2003) (stating that "[a] court will not interpret an agreement in a way that would nullify its provisions or render them meaningless"); *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (4th Dist. 1999) (stating that "(i]n interpreting a contract, meaning and effect must be given to every part of the contract including all its terms and provisions, so no part is rendered meaningless or surplusage")).

III. THE TRIAL COURT ERRED IN FINDING THE PARTIES' AGREEMENT AMBIGUOUS

Here, the court disregarded the plain meaning of "any delay in approving plans" in finding that this phrase excluded a delay in approving plans by the City of Cedar Falls. But any delay in approving means just that – *any* delay in approving. There is no basis in the record -- extrinsic or otherwise -- to conclude that the parties intended a result contrary to the plain meaning of the phrase "any delay." More to the point, there is no principled basis in the record -- extrinsic or otherwise – to suggest that Seller had agreed to forfeit $4.3 million if Buyer was slow to approve plans, but not if Hy-Vee was slow to obtain a building permit from Cedar Falls.

A. IF THE CONTRACT IS AMBIGUOUS, THEN THE COURT ERRED IN FINDING IT VALIDLY IMPOSED LIQUIDATED DAMAGES

Assuming, *arguendo*, that the court correctly found the parties' agreement was ambiguous (it was not), then the court erred in reading it as containing a liquidated damages provision. That is because if a court finds, as here, that a 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." *Grossinger*, 240 Ill. App. 3d 737 (citations omitted). *See also M.I.G. Investments*, 92 Ill. App. 3d at 406 ("[I]f from the face of the instrument it appears doubtful whether the parties intended the sum specified as liquidated damages or a penalty, the decisions generally treat it as a penalty to cover the actual damages only, and this is for the reason that the party wronged is entitled to compensation only" (quotation omitted)). *See also* Section IV, *infra*.

IV. THE HY-VEE HOLDBACK DOES NOT PASS ILLINOIS' THREE-PRONG TEST FOR LIQUIDATED DAMAGES

Even if the Hy-Vee Holdback could reasonably be characterized as contemplating liquidated damages-for-delay (it did not), that provision, as applied by the court below, would nonetheless be unenforceable under Illinois law. "It is a general rule of contract law that, for reasons of public policy, a liquidated damages clause that operates as a penalty for nonperformance or as a threat to secure performance will not be enforced." *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004), *citing Med+Plus Neck & Back Pain Center v. Noffsinger*, 311 Ill. App. 3d 853, 860 (2000); *Grossinger Motorcorp, Inc.*, 240 Ill. App. 3d at 749. "A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.'" *Jameson*, 351 Ill. App. 3d at 423, *citing Penske*, 311 Ill. App. 3d at 454, *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979).

From the RESTATEMENT, Illinois courts have parsed three elements that must be met in order to enforce a liquidated damages clause: "(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*, *supra*, *citing Noffsinger*, 311 Ill. App. 3d at 860, *quoting Grossinger*, 240 Ill. App. 3d at 749.

Here, the putative liquidated damages-for-delay provision enforced by the court fails all three prongs of the foregoing test. First, the Holdback was, by the admission of both parties, not intended to specify a "one-size-fits-all" amount of liquidated damages for any delay, regardless of its duration. Second, the $4.3 million Holdback was not a reasonable estimate of the damages that might result from any delay, let alone the 91-day delay that allegedly occurred in this case. Third, the damages to Buyer that might result from a delay in the Hy-Vee Expansion were, at bottom, delays in the receipt of money, and therefore not difficult to prove or uncertain in amount. As discussed below, courts have repeatedly found that it is not difficult to prove or ascertain damages caused by a delay in the payment of money.

A. THERE IS NO EVIDENCE THE PARTIES INTENDED THE HY-VEE HOLDBACK AS LIQUIDATED DAMAGES FOR DELAY

The trial court found that the parties (both of them) intended that *a third party's* delay of about 91 days in the development of a 20-year asset -- that Buyer had valued, without reference to any specific, purportedly talismanic commencement date, at $4.3 million -- would reduce the value of that 20-year asset to nothing. According to the decision below, Seller – described by the court as "sophisticated" -- intended that an alleged delay of 91 days by Hy-Vee meant Buyer could keep a $4.3 million asset without paying a single penny for it.

As stated above, *Buyer* calculated the value of the Expansion as $4.3 million by capitalizing the long-term stream of incremental cash flow associated with the Hy-Vee Expansion at a discount rate of 10% ($430,000 ÷ .10 = $4,300,000). Significantly, Buyer's calculation does not speculate about precisely when the Expansion will first generate incremental cash flow, or attempt to control for that contingency. That is because a 91-day variance in the commencement of a 20-year stream of cash, with "laddered" increases every five years, cannot reasonably be said to significantly change, let alone *destroy* the value of a $4.3 million asset. No reasonable person could argue such a notion with a straight face.

To the extent the parties' agreement contemplates $4.3 million in liquated damages for a 91-day delay in the creation of a 20-year, $4.3 million asset, it is unenforceable under this Court's holding in *Jameson*. Buyer's November 16 Proposal demonstrates that $4.3 million was not an estimate of the damages to Buyer from a 91-day delay. In fact, Buyer candidly admitted, as late as January 10, 2006, that Buyer's damages from the 91-day delay, if any, would consist of monthly "disbursements equal to lost revenue, etc." A0407.

The $4.3 Holdback does not constitute a prediction – let alone a reasonable one -- of the damages that would accrue to Buyer from a 91-day delay in Hy-Vee receiving a building permit. Rather, the Holdback represented the *entire* $4.3 million value of the Expansion, as calculated by Buyer. A0065. As set forth in the parties' Joint Statement of Facts, the Holdback could not have been intended as liquidated damages for delay, because the Hy-Vee Holdback "contained" that portion of the Mall's purchase price -- all of it -- which Buyer attributed to the Hy-Vee Lease.

1. The Trial Court Misconstrued the Nature and Purpose of the Hy-Vee Holdback

At bottom, the Hy-Vee Holdback is simple, and had a simple purpose: If the Hy-Vee Expansion occurred, and triggered the commencement of a 20-year stream of increased rent and

rent-related payments payable to Buyer (*i.e.*, fixed minimum base rent plus a pro-rata share of real estate taxes and CAM), then Seller, which had set that Expansion in motion before the sale, was entitled to be paid $4.3 million – the undisputed incremental value of that asset. Conversely, if the Hy-Vee Expansion did not occur, and did not trigger the commencement of a 20-year stream of increased rent and rent-related payments to Buyer, then Seller was not entitled to be paid $4.3 million, the value that *Buyer* ascribed to the Expansion, and its concomitant steam of increased rents.

If the Holdback is a liquidated damages provision, then it contemplates liquidated damages only for a *complete failure* of the Hy-Vee Expansion – not delay. Buyer's principal, Garo Kholamian, admitted that the purpose of the $4.3 million Holdback was to ensure that payment to Seller of $4.3 million for the Hy-Vee Expansion was deferred until the "deal that was proposed had actually occurred," and that the $4.3 million was the result of a "capitalization rate . . . applied to the increased revenue amount generated by the [Hy-Vee Lease]." A0566-69. Gerry Curciarello, a principal of Seller, testified that the Holdback was "a representation of the incremental value in the old versus new lease," and was "based on someone's capitalization rate." A0575. The $4.3 million Holdback represents the *entire* agreed-upon value of the Hy-Vee Expansion, not a prediction of the loss attributable to a delay in receiving that value. The Holdback was never intended to represent liquidated damages for delay. Unfortunately, this simple fact was lost in the proceedings below.

a. The Trial Court Erred In Finding That Forfeiture Provisions Necessarily Contemplate Liquidated Damages

The Memorandum and Order states that "[i]n Illinois, in the absence of an express provision to the contrary, a forfeiture provision in a contract will be construed as a liquidated

damages clause." A0054, *citing Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (1st Dist. 2010) and *Bamberg v. Griffin*, 76 Ill. App. 3d 138, 144 (1st Dist. 1979). This is incorrect. Illinois courts have held that "the use of the word 'forfeit' [in a putative liquidated damage provision] tends to exclude the idea of liquidated damages" -- not mandate it. *See Bauer v. Sawyer*, 8 Ill. 2d 351 (1956), *citing Steer v. Brown*, 106 Ill. App. 361, 365 (emphasis supplied).

The court's reliance on *Berggren* and *Bamberg* is misplaced. *Berggren* and *Bamberg* considered a buyer's "forfeiture" of earnest money for failing to consummate a contract to purchase land, and found that the "forfeited" earnest money constituted liquidated damages. In cases where earnest money is treated as liquidated damages, the purpose is to compensate a party for complete nonfeasance: "if a purchaser repudiates a contract he then can have no right to recover the deposit . . . . [T]he purchaser cannot insist on abandoning his contract and yet recover the deposit because that would enable him to take advantage of his own wrong." *Bamberg*, 76 Ill. App. 3d 138, 144 (1st Dist. 1979), *citing Summers v. Hedenberg*, 198 Ill. App. 460, 466-67 (1916). Neither *Berggren* nor *Bamberg* holds that all "forfeiture" provisions are reflexively construed as contemplating liquidated damages. Neither *Berggren* nor *Bamberg* concerns liquidated damages for delay. Rather, they concern a party's complete failure to perform under a real estate sales contract. The fact that the trial court found *Berggren* and *Bamberg* applicable to this, a "delay" case, is indicative of the court's conflation of liquidated damages for nonfeasance with liquidated damages for delay. By contrast, in this case, a failure to meet the parties' initial, overly optimistic estimate of the time Hy-Vee would need to obtain a building permit did not constitute nonfeasance, or deprive Buyer of the value "contained" in the Hy-Vee Holdback.

2. In Their Dealings, Buyer and Seller Demonstrate That, When Liquidated Damages Are Intended, They Are Explicitly Labeled As Such

Neither the DME nor the Third Amendment mentions "liquidated damages." By contrast, Section 14 of the September 15, 2004 Real Estate Sale Contract states:

> In the event of a default by Purchaser, Sellers may terminate this Agreement and retain Purchaser's Earnest Money as liquidated damages. The parties have agreed that Sellers' actual damages, in the event of such a default by purchaser, would be extremely difficult or impracticable to determine. Therefore, by placing their initials below, the parties acknowledge that the deposit has been agreed upon, after negotiation, as the parties' reasonable estimate of Sellers' damages and as Seller's exclusive remedy against purchaser, at law or in equity, in the event of such a default under this agreement solely on the part of purchaser.

A0191 (emphasis omitted). Buyer and Seller knew how to contract for liquidated damages when that was what they intended. The Hy-Vee Holdback was not intended, by either party, to award liquidated damages for delay.

3. Liquidated Damages Cannot Apply Where, As Here, No Breach Has Occurred

Black's Law Dictionary defines liquidated damages as "[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party *if the other party breaches.*" Black's Law Dictionary 395 (7th ed. 1999), quoted with approval in *Penske*, 311 Ill. App. 3d 447 (emphasis supplied). Here, Seller committed no breach. The failure of Event 4 was caused by Hy-Vee, not Seller. Without a breach, there is no damage caused by a breach, and no basis for an award of liquidated damages.

B. THE HY-VEE HOLDBACK CANNOT BE CONSTRUED AS A REASONABLE PREDICTION OF DAMAGES CAUSED BY DELAY

As a general rule, "[t]he purpose of damages [for breach of contract] is to place the nonbreaching party in a position that he or she would have been in had the contract been performed, not to provide the nonbreaching party with a windfall recovery." *Jones v. Hryn Development, Inc.*, 778 N.E.2d 245, 249 (1st Dist. 2002) (emphasis supplied). This rule applies to liquidated damages. *Id.* Thus, "[d]amages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981). *See also Penske*, 311 Ill. App. 3d at 454, *citing* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979).

Courts considering liquidated damages provisions have determined proportionality by looking for damages in "a specific amount for a specific breach." *Jameson*, 351 Ill. App. 3d 416 (*citing Noffsinger*, 311 Ill. App. 3d at 860 (2nd Dist. 2000)). *See also Grossinger*, 240 Ill. App. 3d 737; *Builder's Concrete Co. v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 107 (3rd Dist. 1978) ("The damages provided must be a specified amount for a specific breach to be paid as an alternative to performance and not as a penalty for nonperformance."). Thus it follows that "[t]he element common to most liquidated damages clauses that get struck down as penalty clauses is that they specify the same damages regardless of the severity of the breach." *Xco Intern. Inc. v. Pacific Scientific Co.*, 369 F.3d 998, 1004 (7th Cir. 2004) (emphasis added) (*citing, inter alia, Checkers Eight Ltd. Partnership v. Hawkins*, 241 F 3d 558, 562 (7th Cir 2001) (Illinois law), *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (same), and *M.I.G. Investments, Inc. v. Marsala*, 92 Ill. App. 3d 400 (2d Dist. 1981)).

Liquidated damages that lack proportionality are unenforceable because, in the absence of proportionality, such provisions "serve as a threat to secure performance or as a means to punish nonperformance." *Jameson*, 351 Ill. App. 3d 416.

1. The Liquidated Damages for Delay Enforced by the Court Amount To A Windfall

While $4.3 million may be enforceable as liquidated damages for a complete failure of the Hy-Vee Expansion, it is not enforceable when awarded as liquidated damages for a trivial delay. A $4.3 million penalty for a 91-day delay, in the context of a 20-45-year lease, is clearly disproportionate to any damages actually suffered by Buyer. Enforcement of such a forfeiture acts as a penalty.

The case of *Penske Truck Leasing Co., L.P. v. Chemetco, Inc.*, 311 Ill. App. 3d 447 (5th Dist. 2000) is instructive. In that case, a liquidated damages provision specified alternate methods of computing liquidated damages that depended on whether Penske, the non-breaching party, retained or sold certain trucks. By calculating liquidated damages just before it sold trucks, Penske was able to reap a windfall. *Id.* at 457. On 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 and because "the award entered by the trial court [thereunder] was well in excess of the actual damages suffered by [the nonbreaching party]." *Id.* at 457. The court reversed and remanded with instructions that the trial court determine damages in a manner that more accurately reflected Penske's actual losses. *Id.*

In this case, the trial court conferred a windfall on Buyer by enforcing what it wrongly construed as liquidated damages for delay. The "damages" were grossly in excess of any actual damages Buyer suffered. In this case, as in *Penske*, the "damages" to be paid were subject to manipulation by the nonbreaching party. None of the Four Events could occur without action by

Buyer. Not surprisingly, the record shows that Buyer tried to slow the development process before October 31, 2005. A0252; A 0258.

2. The Liquidated Damages for Delay Enforced By The Court Fail To Establish Specific Damages For a Specific Breach

The Hy-Vee Holdback, as construed by the trial court, imposes a $4.3 million penalty regardless of whether Hy-Vee takes possession of the new space one day late, 91 days late, or never at all, and regardless of when Buyer begins to receive the benefits of the Hy-Vee Lease. Such a liquidated damages provision "fails to provide a formula that takes into account different variables relevant to determining a specific sum to be paid," and thus demonstrates an utter failure to undertake a reasonable estimate of likely damages. *Rose Marine Transp., Inc. v. Kaiser Aluminum & Chemical Corp.*, 758 F. Supp. 1218, 1224 (N.D. Ill. 1990). The trial court construed the Hy-Vee Holdback as dictating a single sum of liquidated damages payable for *any* delay, of *any* duration. However, a valid liquidated damages provision provides "a specific amount for a specific breach." *Jameson*, 351 Ill. App. 3d at 423 (*citing Noffsinger*, 311 Ill. App. 3d at 860).

"When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by *a minor breach*, its character as a penalty becomes unmistakable." *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (Illinois law) (emphasis supplied). *See also Checkers Eight Ltd. Partnership v. Hawkins*, 241 F 3d 558, 562 (7th Cir. 2001) (Illinois law) ("If the amount of damages is invariant to the gravity of the breach, the clause is probably not a reasonable attempt to estimate actual damages and thus is likely a

penalty."); *Rose Marine*, 758 F. Supp. at 1223 (Illinois law) (Refusing to enforce a liquidated damages provision which "utterly fails to undertake a reasonable estimate of whatever damages would likely result from a breach" by neglecting "the cost of a breach over time" relative to the value of goods to be surrendered as liquidated damages).

As applied by the trial court, the $4.3 million forfeiture was grossly disproportionate to any harm actually suffered by Buyer, as Buyer's own November 16 Proposal illustrates. Even if the Holdback was intended as liquidated damages for delay (it was not), it is not enforceable because it lacks any relationship to any actual loss suffered by Buyer.

3. Buyer's Own Valuation of the Hy-Vee Expansion Did Not Ascribe Any Significance to the Precise Date On Which the Benefits of the 20-Year Asset First Began

The Holdback valuation performed by Buyer does not purport to assign a date on which the incremental income associated with the Holdback will commence. The Holdback does not contain a mechanism that calculates damages-for-delay as a function of time, such as a specified amount of "damage" to be awarded for each month that the Expansion is delayed. Rather, the Hy-Vee Holdback is an "all or nothing" adjustment to be made to the $117 purchase price, if the Hy-Vee Expansion does not occur at all, as distinct from a function calculating damages-for-delay. The DME lacks any mechanism to adjust the Holdback amount as a function of a delay, as distinct from a complete failure of the Hy-Vee Expansion.

C. Actual Damages From Delay In the Commencement of Hy-Vee's Increased Rents Were Neither Difficult to Prove Nor Uncertain In Amount

The Hy-Vee Holdback also fails the third element of the test for enforceability because it does not provide an estimate of damages that would have been difficult to predict at the time of contracting. In cases where actual damages would be "easy to determine," a liquidated damages

provision is likely to be considered a penalty. *Rose Marine*, 758 F. Supp. 1218, *quoting Lake River*, 769 F.2d at 1290. In *M. I. G. Investments, Inc. v. Marsala*, the court refused to enforce a liquidated damages provision in a contract pursuant to which a waste disposal service agreed exclusively to use a particular dump, and to pay a set price for each cubic yard of waste dumped at that facility. 92 Ill. App. 3d 400 (2d Dist. 1981). A provision of the contract specified liquidated damages for breach of its exclusivity provision as an award of a fixed sum of money for each cubic foot of waste dumped at another disposal site, but the resulting amount of variable damages was subject to a mandatory minimum amount. *Id.* at 407. This "floor" applicable to liquidated damages was invalid and unenforceable, because actual damages could easily be calculated as a function of the volume of waste dumped in breach of the exclusivity provision. *Id.* Here, a "floor" of $4.3 million for entirely speculative damages is unenforceable, because the court could have easily adopted Buyer's own approach in the November 16 Proposal to calculate the dollar value of actual harm, if any actual harm had been shown.

When the only breach alleged is a delay in the payment of money, actual damages are easy to calculate. "Actual damages caused by monetary payment being late are not difficult to measure because interest rates can be used to estimate the time value of money." *Checkers Eight*, 241 F. 3d at 563. In the November 16 Proposal, Buyer suggested a simple way to calculate damages for delay from the alleged breach – payments by Seller of Hy-Vee's rent under the Hy-Vee Lease. "There is absolutely no reason that the parties would not have assumed at the contract formation stage that such an obvious and customary damage measure would be applicable in the event of a breach." *Rose Marine*, 758 F. Supp. at 1223.

1. Buyer Provided a Candid Valuation of Damages For Delay In Its November 16 Proposal

Buyer's own conduct demonstrates that the Hy-Vee Holdback did not purport to measure

damages for delay. On November 2, 2005, Seller asked Buyer expressly to continue the October 31, 2005 date for the Four Events to January 31, 2006. A0378-82. By means of the November 16 Proposal, Buyer expressed its willingness voluntarily to do so, in consideration of monthly payments equal to about 1% of the $4.3 million asset in question for each month of delay. A0389-91. By contrast, Buyer valued the Hy-Vee Holdback at $4.3 million. In the November 16 Proposal, Buyer placed a value – albeit an inflated one – of $46,777, exclusive of pro-rations, on each month of "delay." *Id.* As such, the November 16 Proposal constitutes Buyer's admission that the true cost of a 91-day "delay" in respect of the Expansion was not $4.3 million, but rather something akin to lost rents or the interest on a $4.3 million loan.[1]

V. THE TRIAL COURT'S CONSTRUCTION SUGGESTS THE PARTIES INTENDED AN ABHORRENT FORFEITURE

It is well established that courts of equity abhor forfeitures, and that an alleged forfeiture clause will be strictly and narrowly construed against the party seeking to enforce it. *See, e.g., Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879); *City of Wood v. Hart,* 23 Ill. 2d 199, 123 (1961); *Lake Shore Country Club v. Brand*, 339 Ill. 504 (1930); *Aden v. Alwardt*, 76 Ill. App. 3d 54, 59 (3rd Dist. 1979); *Allabastro v. Wheaton National Bank*, 77 Ill. App. 3d 359, 364 (2nd Dist. 1979); *Hickox v. Bell*, 195 Ill. App. 3d 976, 992 (5th Dist. 1990); *Krentz v. Johnson*, 36 Ill. App. 3d 142, 145 (2d Dist. 1976). Significantly, Illinois courts have held that "the use of the word 'forfeit' [in a putative liquidated damage provision] tends to exclude the idea of liquidated damages" -- not mandate it. *See Bauer v. Sawyer*, 8 Ill. 2d 351 (1956) (*citing Steer v. Brown*, 106 Ill. App. 361, 365) (emphasis supplied). That is because a forfeiture, to the extent it

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[1] A $4.3 million loan, with interest accruing at 10% per annum, would imply monthly payments of about $35,833 ($4,300,000 X .1 = $430,000; $430,000 ÷ 12 = $35,833).

implies a penalty, is antithetical to the concept of liquidated damages.

The parties' contract, as construed by the trial court, contemplated that Seller would forfeit $4.3 million for a transitory and insignificant delay of *Buyer and Hy-Vee* – not Seller – in reaching certain developmental milestones – and that such forfeiture was required without any proof that Buyer suffered an actual loss. The only finding of loss in the Order is gratuitous speculation by the court that without the Hy-Vee Expansion the Mall *might* not be "viable." This makes no sense. Buyer contracted to purchase the Mall *with or without the Expansion*, subject only to an adjustment in the purchase price. As construed by the court, the parties' contract contemplated an illogical, unenforceable, and abhorrent forfeiture.

VI. THE TERM "ANY DELAY IN APPROVING," AS USED IN THE DME, SHOULD BE GIVEN ITS PLAIN AND ORDINARY MEANING

Buyer contends that "any delay" means only delays caused by Buyer. By contrast, Seller contends that "any delay" is unambiguous and should have been given its plain and ordinary meaning, without resort to extrinsic or parol evidence to ascertain the parties' intent. Seller contends that "any delay in producing, approving or revising . . . plans [of Hy-Vee]" plainly and unambiguous refers to any approval of Hy-Vee's plans, including an approval of Hy-Vee's plans by the City of Cedar Falls. This is consistent with the common sense, every day meaning of the word "any."

The trial court, purportedly reading the Third Amendment, the DME, and the Hy-Vee Lease together, found those agreements ambiguous as to whether a building permit from Cedar Falls is within the "delay provision" of Section VII. A0026-33; A0050-52. In so doing, the trial court effectively reads the word "any" out of the phrase "any delay in approving," a cardinal violation in interpreting a contract. If "any delay in approving plans" means only *Buyer's* delays in approving plans, then "any delay," as construed by the trial court, is narrower than mere

"delay," and the notion that "any" means "only Buyer's" is inconsistent with the plain meaning of the word "any."

VII. THE TRIAL COURT'S INTERPRETATION OF THE PARTIES' CONTRACT VIOLATES ILLINOIS RULES OF CONTRACT CONSTRUCTION

A. THE TRIAL COURT'S CONSTRUCTION FAILS TO READ THE CONTRACT AS A WHOLE

As a general rule, "in the absence of evidence of a contrary intention, where two or more instruments are executed by the same contracting parties in the course of the same transaction, the instruments will be considered together and construed with reference to one another because they are, in the eyes of the law, one contract." *Tepfer v. Deerfield Sav. & Loan Ass'n*, 118 Ill App. 3d 77, 80 (1st Dist 1983). Buyer concedes as much in its opposition brief to Seller's motion for summary judgment. A0502, *citing Tepfer*, 118 Ill App. 3d at 80). *Tepfer* also says the court must "suppose such a priority in the execution of [such multiple Agreements] as shall best effect the intention of the parties." *Tepfer*, 118 Ill App. 3d at 82 (*citing* 17 AM. JUR. 2D CONTRACTS § 264 at 671 (1964)). Here, the Third Amendment expressly contemplated the DME; the DME expressly contemplated the New Hy-Vee Lease; and the latter two instruments were executed after the Third Amendment. Moreover, the treatment of Governmental Approvals in the Hy-Vee Lease is not only later than the DME and Third Amendment, it is also more detailed.

A fair reading of the whole contract shows that the sole purpose of the Hy-Vee Holdback, as proposed by Rogers, Buyer's chief negotiator, was to prevent Buyer from paying for the increased rental payments associated with the Hy-Vee Expansion if that Expansion did not occur. The record is bereft of any evidence that the Hy-Vee Holdback was an attempt by the parties to predict and quantify the amount of damage that would accrue to Buyer in the event the Four

Events did not occur by October 31, 2005. There is no evidence in the record that any of the Four Events had any significance other than as leading indicators signaling the commencement of higher rent payments under the Hy-Vee Lease. That commencement in fact occurred, and was not shown to have been delayed by Hy-Vee's 91-delay in obtaining a permit.

B. THE TRIAL COURT'S CONSTRUCTION FAILS TO GIVE EFFECT TO THE INTENT OF *BOTH* PARTIES

The objective in interpreting a contract is to ascertain and give effect to the intent of the parties. *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724, 726-27, 856 (2d Dist. 2006); *Farwell Construction Co. v. Ticktin*, 84 Ill. App. 3d 791, 796 (1st Dist. 1980). The court's inquiry must focus on the objective manifestations of the parties, including the language they used in the contract. *Carey*, 367 Ill. App. 3d at 727. "Where the language of a contract is plain, it provides the best evidence of the parties' intent and will be enforced as written." *Id.*; *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (1st Dist. 2000). "[A]n instrument should be given a fair and reasonable interpretation . . . . In attempting to arrive at a fair and reasonable construction, 'courts are not confined to a strict and literal construction of the language used, when such construction will frustrate the intention of the parties, gathered from a consideration of the whole instrument.'" *Shelton v. Andres*, 106 Ill. 2d 153, 159 (1985) (citation omitted). Significantly, it is not what *one* of the parties may have intended that controls, but what is shown by the contract to have been the intention of *both* parties. *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524 (2d Dist. 1997), *citing Blackhawk Hotel Associates v. Kaufman*, 80 Ill. App. 3d 462, 465 (1st Dist. 1979). *See also National Acceptance Co. of America v. Exchange National Bank*, 101 Ill. App. 2d 396, 402, (1st Dist. 1968), *Jacobson v. Devon Bank*, 39 Ill. App. 3d 1053, 1055-56 (1st Dist. 1976).

Here, the trial court failed to give effect to the provision that "delay [in the DME was] to

be determined in accordance with Hy-Vee's Lease"; and that "the October 31, 2005 date shall be extended by one day for each day of delay in the delivery of plan approval." The court did this by finding, without reference to any extrinsic evidence, that "*any* delay in producing, approving, or revising . . . plans" somehow did not include *Hy-Vee's* 91-day delay in obtaining a building permit from the City of Cedar Falls. If "any delay in . . . approving . . . plans" does not include a delay in the "approving" of plans by the City of Cedar Falls – a factor necessarily outside of Seller's control -- then the trial court ought to have explained precisely what the parties intended to include therein, and how the parties could have sensibly intended to exclude the most important approvals from this general statement. As it is, the trial court eviscerated the proviso by applying an absurdly narrow construction. There is no evidence in the record that Buyer was surprised that Hy-Vee would be obtaining a building permit from Cedar Falls, or that Cedar Falls would be required to issue an approval. Even so, the court found the "delay provision" of Section VII applied only to Buyer. However, that is not what the plain language says.

The trial court found that both parties intended the October 31, 2005 date to serve as a "drop-dead deadline" for a 20-year asset that would, if missed by a trivial amount of time, permit Buyer to keep an asset -- worth $4.3 million *according to Buyer* --without paying a single penny for it. The trial court's Order correctly found that both parties were sophisticated real estate professionals. However, no sophisticated real estate professional would enter into a contract that gratuitously placed a $4.3 million "all or nothing" bet on an arbitrary date and events not under Seller's control. This is especially true, where, as here, at least one of those third persons (Buyer) stood to reap a $4.3 million windfall by simply dragging its feet.

C. THE TRIAL COURT'S CONSTRUCTION FAILS TO GIVE EFFECT TO MULTIPLE SECTIONS OF THE PARTIES' CONTRACT

1. The Trial Court's Construction Fails to Give Effect To the DME's "Provided, However" Language

Under Illinois law, a court construing a contract must give meaning and effect to every contract term or provision, if possible, and should not adopt a construction that renders a contractual term mere surplusage. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 277 (1st Dist. 2009) (*quoting Village of Orland Hills v. Citizens Utilities Co. of Illinois*, 347 Ill. App. 3d 504, 516, (1st Dist. 2004); *Smith v. Burkitt*, 342 Ill. App. 3d 365, 370 (2003); *First Bank & Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 40 (2003); *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999).

Section VII of the DME anticipates, and defers to the Hy-Vee Lease, when it subjects Event 4 (*i.e.*, Hy-Vee having Government Approvals in place) to the following "provided, however" clause:

> provided, however, if the [Hy-Vee] 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.

A0240. This proviso expressly subjects the DME's "delay provision" to the terms of an agreement that did not exist when the DME was entered into, but would be made in the future, namely, the Hy-Vee Lease. As stated above, the Hy-Vee Lease has a section dedicated to setting forth a detailed timeline applicable to Buyer and/or Hy-Vee for "approving or revising" final construction plans and applying for Governmental Approvals. Under the Hy-Vee Lease, Hy-Vee had until 75 days after July 15, 2005 -- *i.e.*, until September 28, 2005-- to submit construction

drawings to Buyer for approval. A0264-324. Hy-Vee and Buyer had until 120 days after July 15, 2005 -- *i.e.*, until November 12, 2005 - to reach agreement on construction drawings. *Id.* Within 30 days of Buyer's approval of Hy-Vee's drawings -- *i.e.*, no later than December 12, 2005 -- Hy-Vee was required to apply for Governmental Approvals. *Id.* However, Hy-Vee had an additional 60 days -- *i.e.*, until February 10, 2006 -- to obtain Governmental Permits if it timely submitted its application and pursued the Permits "diligently." The foregoing scheme of deadlines was expressly incorporated by reference into the DME and determined "delay" for purposes of that agreement.

Hy-Vee accepted the new leasehold with all necessary Governmental Permits in hand on January 30, 2006. Whether a "delay" had occurred under the DME was to be determined by reference to the Hy-Vee Lease. When the contract terms are properly construed, it is clear there was no "delay" to be excused.

2. Under the Superseding Schedule Established by the Hy-Vee Lease, There Was No Default In Any Deadline

It is undisputed that Buyer gave conditional approval to Hy-Vee's final plans on November 8, 2005. A0068. It is also undisputed that Hy-Vee obtained its construction permit from the City of Cedar Falls on January 27, 2006, and the space was delivered to, and accepted by Hy-Vee on January 30, 2006. A0069. For purposes of the DME, "delay . . . [was] determined in accordance with the terms of the Hy-Vee lease." A0240. When Section VII is read in light of the Hy-Vee Lease, there was no default in respect of the October 31, 2005 date – and certainly no default by Seller in respect of that. Hy-Vee took possession of the new leasehold with all permits in hand before February 2006.

D. THE TRIAL COURT'S CONSTRUCTION IMPLIES THAT THE PARTIES INTENDED AN ABSURD RESULT

Contract terms "should be construed so that the contract is 'fair, customary and such as prudent persons would naturally execute,' and is 'rational and probable.'" *Utility Audit, Inc. v. Horace Mann Serv. Corp.*, 383 F.3d 683, 687 (7th Cir. 2004), *quoting Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524 (2d Dist. 1997). *See also BP Amoco Chem. Co. v. Flint Hills Resources, LLC*, No. 05 C 5661 at 12 (N.D. Ill. April 17, 2009). "[T]o the extent that a contract is susceptible of two interpretations, one of which makes it fair, customary, and such as prudent persons would naturally execute, while the other makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." *Foxfield Realty, Inc.*, 287 Ill. App. 3d at 524.

Here, the court improperly preferred a construction of the contract that was unfair, *un*-customary and such as no sane businessperson would ever execute, "naturally" or otherwise. It is neither rational nor probable to suppose that a prudent businessperson would jeopardize $4.3 million in a senseless "all or nothing" bet on the occurrence of three events devoid of any independent economic significance and entirely outside of his or her control. The October 31 date applicable to the Four Events lacks significance because the Hy-Vee Expansion could go forward even if that date were missed. In fact, that is indisputably what occurred. In determining whether "any delay in approving plans" included a delay in Cedar Falls approving plans the court failed "[to] ascertain the intent of the parties as evidenced in the contract as a whole, and not merely by reference to particular words or isolated phrases." *Id.* at 523, *citing Kennedy, Ryan, Monigal & Associates, Inc. v. Watkins*, 242 Ill. App. 3d 289, 295 (1993).

E. THE TRIAL COURT'S CONSTRUCTION IMPLIES THE PARTIES INTENDED AN ILLUSORY CONTRACT

Under Illinois law, court should not construe contracts in a manner that renders them unenforceable and illusory. "[A] contract should be construed as a whole to give effect to the intention of the parties. Great weight is to be given to the principal, apparent purpose and intention of the parties at the time that they entered into the contract. It follows that a contract should be construed so as to make the obligations imposed by its terms mutually binding upon the parties, unless such a construction is wholly negated by the language used." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461 (1st Dist. 2004) (emphasis supplied; citations omitted). As a matter of law, a bilateral contract in which only one party is obligated is illusory and unenforceable. "In its most elemental sense, the doctrine of mutuality of obligation means that unless *both* parties to a contract are bound by its terms, *neither* is bound." *Schwinder*, 348 Ill. App. 3d 461 (emphasis supplied). *See also Kraftco Corp. v. Kolbus*, 1 Ill. App. 3d 635, 638 (4th Dist. 1971) ("Where the obligations of one party to a contract are totally dependent upon its own actions, the contract is void.").

Notwithstanding the foregoing, the trial court construed the parties' agreement as permitting Buyer to avoid payment by simply dragging its feet. *See* A0570-71 (Cross-examination of Garo Kholamian, "Q: Who could delay [under the DME]? Who are the only two parties that could delay this? A: Either us [Buyer], or Hy-Vee."). As interpreted by the Court, the parties' contract contains an illusory obligation to pay Seller for the Hy-Vee Expansion, because that "obligation" was dependent on conduct of Buyer. All Buyer had to do to avoid paying $4.3 million for the Hy-Vee Expansion was drag its feet before October 31, 2005. If Buyer made scant progress before that date, it would be relieved of any obligation to pay for the Hy-Vee Expansion and receive a $4.3 million windfall. As interpreted by the trial court, the

parties' agreement was therefore illusory for lack of mutuality.

F. THE TRIAL COURT'S CONSTRUCTION IMPLIES THAT THE PARTIES INTENDED AN IMPROPER RESULT

It is axiomatic that courts will not favor a literal construction of contract language if that construction means the parties intended an improper result, or one that is against public policy. It is well settled that where a contract is susceptible of two interpretations, preference will be given to the interpretation that does not violate the law. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686, 691 (1931). It is equally well settled in Illinois that gambling contracts are void and unenforceable as against public policy. *See, e.g., Hall v. Montaleone*, 38 Ill. App. 3d 591, 592 (2d Dist. 1976), *Tomm's Redemption, Inc. v. Park*, 777 N.E.2d 522, 527 (1st Dist. 2002).

Notwithstanding the foregoing, the trial court construed the Holdback Agreement as a $4.3 million wager on events devoid of any independent economic significance and outside of Seller's control. As construed by the trial court, the Holdback was in essence a $4.3 million bet on the diligence and competence of parties outside Seller's control. As such, it was no different than a bet on a boxing match or a football game. No court should construe a valid sale contract as an absurd and improper wager. While Seller does not believe or contend herein that the parties intended an illegal wager, that is the necessary implication of the court's interpretation of their agreement.

VIII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AWARD ATTORNEYS FEES TO SELLER

The trial court erred as a matter of law in failing to award attorneys fees to Seller under the Reaffirmation Agreement. A0346-48. The Reaffirmation Agreement came about when, prior to the closing of the sale of the Mall, Buyer informed Seller that it had assigned its right to

acquire the Mall to two separate limited liability companies. A0573-74. Seller would not "consummate the sale to Buyer's assignees unless and until Buyer reaffirm[ed] its post-closing obligations under the Contract and unconditionally guarant[eed] the performance of such obligations by the Assignees." A0346-48. Buyer agreed to do so and executed a Reaffirmation on December 16, 2004. *Id.* Under the Agreement, Buyer promised to "indemnify and hold harmless the Sellers and each of them from and against any and all loss, cost, debt, damage (including court costs and reasonable attorneys fees) for liability arising out of, directly or indirectly, the failure of any Assignee to perform the Undertakings pursuant to its assignment or arising out of its need to enforce the terms of this Reaffirmation, or both." *Id.*

Indemnity clauses are contracts. *Buenz v. Frontline Tramp. Co.*, 227 Ill. 2d 302, 308 (2008). Where the indemnity clause is unambiguous, it should be given its plain and ordinary meaning. *Id.* The Reaffirmation Agreement captures the Third Amendment and DME, and the three should be read together as a whole. *Shelton v. Andres*, 106 Ill. 2d 153 (1985). Here, as explained above, Buyer breached its obligations to Seller under the Third Amendment and the DME in respect of the Hy-Vee Holdback. As a result of this breach, Seller has incurred substantial attorneys' fees and expenses. Pursuant to the Reaffirmation, an award of attorneys' fees and expenses is appropriate.

CONCLUSION

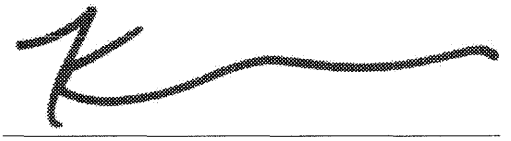
A correct application of *Jameson* in the court below would have prevented the unjust, egregious, and abhorrent forfeiture at bar. As demonstrated above, the three prongs of the *Jameson* test are conjunctive. Thus, even if parties intend and agree to a punitive forfeiture as "liquidated damages," such agreement will not be enforced by an Illinois court. Here, even if twenty bishops intended that Buyer receive a windfall of $4.3 million for a trivial 91-day delay

(they did not), that agreement would nonetheless be unenforceable, because it fails to satisfy all three prongs of the test for liquidated damages in Illinois. For all of the above and foregoing reasons, Defendant-Appellants respectfully request that the Order granting Plaintiff-Appellees' claim to the Holdback be reversed, and Escrowee be ordered to remit the Holdback to Seller.

Dated: May 7, 2012

Respectfully submitted,

IOWA MALLS FINANCING CORP; COLLEGE SQUARE MALL ASSOCIATES, LLC; and CHICAGO TITLE AND TRUST COMPANY, as escrowee, Defendant-Appellants



By: Kent Maynard, Jr., their Attorney

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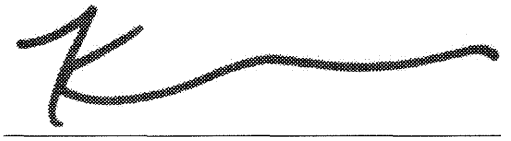
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 50 pages.



Kent Maynard, Jr.

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