No. 117204

In the
Supreme Court of Illinois

GK DEVELOPMENT, INC., an Illinois Corporation, and COLLEGE SQUARE MALL DEVELOPMENT, LLC, a Delaware Limited Liability Company,

Plaintiffs-Petitioners,

v.

IOWA MALLS FINANCING CORPORATION, a Delaware Corporation, COLLEGE SQUARE MALL ASSOCIATES, LLC, a Delaware Limited Liability Company, and CHICAGO TITLE AND TRUST COMPANY, an Illinois Corporation,

Defendants-Respondents.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District,
Case Nos. 1-11-2802 & 1-12-0432 (Consolidated)
There on Appeal from the Circuit Court of Cook County, Illinois, Chancery Division,
Case Nos. 06 CH 3427 & 06 CH 3586 (Consolidated)
The Honorable Carolyn Quinn, Judge Presiding

ANSWER TO PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

The trial court awarded a $4.3 million escrow balance ("the Hy-Vee Holdback") to Plaintiffs (also referred to collectively herein as "Buyer") as liquidated damages for a third party's inconsequential 91-day delay in obtaining building permits for a new 20-year lease, thereby imposing an unconscionable, disproportionate, and abhorrent forfeiture. Defendants appealed. On appeal, Plaintiffs argued, as they had in the trial court, that the absurd result was required by the well-established Illinois law of liquidated damages, as summarized in *Jameson Realty Group v. Kostiner*, 351 Ill.App.3d 416, 423 (1st Dist. 2004) (hereinafter "*Jameson*"), because liquidated damages are scrutinized *ex ante*, as a prediction, and, as such, may entail damages that are grossly disproportionate to actual damages.

Significantly, "[n]o fixed rule applies to all liquidated damages provisions, and courts must evaluate each one on its own facts and circumstances." *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670 (*citing Jameson*, 351 Ill. App. 3d at 423); *Penske Truck Leasing Co.*, 311 Ill.App.3d 447, 454 (5th Dist. 2000) (*citing Likens v. Inland Real Estate Corp.*, 183 Ill.App.3d 461, 465 (1st Dist. 1989)); *Gobble v. Linder*, 76 Ill. 157, 159 (1875). In a detailed, 42-page Opinion issued December 19, 2013, the First District Appellate Court evaluated the Hy-Vee Holdback on its own unique and idiosyncratic facts and circumstances and found that it was "invalid and unenforceable" as an award of liquidated damages because it (1) does not meet the three requirements necessary under *Jameson* to validate a liquidated damages clause; (2) results in a windfall to Plaintiffs; and (3) functions as a penalty for nonperformance. APLA-23, APLA-39-40.[1]

[1] Citations herein employ the following protocol: "C__" refers to the record on appeal; "APLA-__" refers to plaintiffs' Rule 315 appendix; and "A___" refers to defendants' Supreme Court Rule 342 Separate Appendix to the Opening Brief.

Now, in a sudden about-face, Plaintiffs attack the existing Illinois law of liquidated damages as "outmoded" and ask this Court to overrule *Jameson* in order to "formulate new factors in keeping with modern contract principles for courts to apply when considering the enforceability of liquidated damages provisions agreed to by sophisticated commercial entities." PLA p.1. According to the PLA, "[a]lthough the current rule in Illinois has a long pedigree, its underlying justifications no longer make sense. It stands as an outmoded aberration of the common law that this Court should correct." PLA p.20. Plaintiffs' sudden disenchantment with *Jameson* is purportedly motivated by a desire to promote freedom of contract and economic efficiency. However, the notion that *Jameson* is economically inefficient or unconstitutional (as a limitation on freedom of contract) was never raised by Plaintiffs in any of the proceedings below; and this case is not a case where application of *Jameson* threatened constitutional rights or led to an economically inefficient result.

Moreover, even if this Court wished to embark on a radical re-thinking of the Illinois law of liquidated damages, this case would not be the vehicle for that, for at least two reasons. First, as Defendants argued below, there is substantial doubt that the Hy-Vee Holdback was drafted or intended as a liquidated damages clause, because, *inter alia*, it does not employ the traditional language of such clauses. *See* Reply Brief pp.17-18. Second, adopting the proposed rule enforcing liquidated damages so long as they are not unconscionable would not change the result here. Awarding $4.3 million to compensate for a loss that was never reasonably predicted to occur – and never in fact occurred – is nothing if not unconscionable.

The First District Opinion holds that while Buyer is not entitled to the Hy-Vee Holdback as ***liquidated*** damages, Buyer is, by contrast, "entitled to any ***actual*** damages it

suffered as a result of the 91-day delay." APLA-39 (emphasis supplied). Accordingly, the First District remanded this cause to the trial court to afford Buyer an opportunity to prove its actual damages from the 91-day delay. *Id*. (*citing Grossinger Motorcorp v. Am. Nat'l Bk. & Tr.*, 240 Ill.App.3d 737, 752 (1st Dist. 1992)). The qualification, "if any [actual damages] can be proven" is significant, because the Opinion expresses doubt that any actual damages were caused by the 91-day delay. APLA-31 n.3 ("it appears that Buyer did not suffer any 'lost' rent as the 20-plus-year lease was merely pushed back 91 days. Buyer will still receive the entire profit anticipated from the 20-year lease.").

Rather than accept the First District's invitation to prove actual damages from a 91-day delay in the onset of increase in rents, or rely on the notion that this Court will accept their invitation to re-write Illinois law on liquidated damages, Plaintiffs also ask this Court to resuscitate the $4.3 million forfeiture as a liquidated damages award on grounds that a discretionary Rule 315 review by this Court will show that the appellate court erred in rejecting the Hy-Vee Holdback as liquidated damages under *Jameson*. PLA p.1. As demonstrated below, that notion is demonstrably meritless.

BACKGROUND

In 2004, Defendants were the owner of a regional shopping mall in Iowa ("Mall"). A0135-70. For some years, the Mall had been anchored by various big-box retailers including Wal-Mart and 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. 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. Thereafter, Hy-Vee expressed an interest in remodeling and moving into the larger Wal-Mart

space (hereinafter "the Hy-Vee Expansion").

In June 2004, Defendants (also collectively referred to herein as "Seller") began discussions with Buyer regarding a sale of the Mall to Buyer. A0064-65. By that time, the Hy-Vee Expansion, if consummated, was predicted to increase Hy-Vee's rented square footage in the Mall by approximately 15,000 square feet. *Id.* To the extent that the value of commercial real estate is determined by its ability to generate cash flow, the Hy-Vee Expansion, if consummated, would arguably support a higher value – and higher sale price – for the Mall.

On September 17, 2004, Buyer entered into a contract to purchase the Mall. A0172-195. The "specified outside date" for closing the purchase was December 17, 2004. A0176. The Hy-Vee Expansion was then in process but not expected to be complete by the closing. Buyer calculated the present value of the potential *incremental* income to be received over a period spanning at least 20 years – if the Hy-Vee Expansion were consummated – at $4.3 million. A0202. Because the Hy-Vee Expansion was uncertain at the time of the closing, Buyer proposed that $4.3 million be held back from the 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.*

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. The Third Amendment defined the "Hy-Vee Holdback" as a $4.3 million holdback from the sale price to be escrowed at the closing of the sale, and released when it appeared certain that the Expansion would go forward (or not), and thereby commence to yield the 20+ years of $430,000 in annual incremental revenue

anticipated by Buyer. A0207.

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 sale, 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." The DME directed the 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 (*i.e.*, 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 (*i.e.*, 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 (*i.e.*, 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 (*i.e.*, 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, the DME 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.* Subject to 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 Mall. A0064. After the closing, Seller was responsible for negotiating the lease for the Hy-Vee Expansion

and attempted to do that with all due dispatch. However, 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.

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 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 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 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 for Buyer's review and approval. 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 Buyer a draft letter agreement that would, if adopted, 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 still receiving monthly rent and pro-rations from Hy-Vee under Hy-Vee's original 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.*

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.

On February 9, 2006, Michael Fontana, a representative of Seller, sent a letter directing Escrowee to pay the Hy-Vee Holdback to Seller. A0416-17.

On February 10, 2006 and February 14, 2006, Buyer sent letters objecting to Fontana's direction to pay 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 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.* (emphasis supplied). 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 December 19, 2013, the First District Appellate Court reversed the trial court's order of August 24, 2011.

OBJECTIONS TO MISTATEMENTS OF FACT IN PLAINTIFFS' POINTS RELIED UPON

The PLA contains significant misstatements of fact. Without citation to any record evidence, Plaintiffs contend that the parties anticipated a delay in the Hy-Vee Expansion would substantially affect the "value" *of the Mall*, instead of simply delaying the inception of the 20-year stream of increased cash flow associated with the Hy-Vee Expansion. PLA p.12-13. The PLA suggests that a delay in the Hy-Vee Expansion was anticipated to cause lost "value" by inducing "an unpredictable cascade of consequences," meaning that existing Mall tenants would abandon the Mall and prospective new tenants would stay away. PLA pp. 2, 12. The PLA also states that "[t]he risk to plaintiffs was increased by the fact that defendants prohibited them from pursuing other potential tenants in case defendants' negotiations with Hy-Vee failed, which prevented plaintiffs from mitigating its potential loss." PLA p.13.

These assertions are demonstrably false and incorrect. Not one of them is supported by any citation to the record. That is not surprising, inasmuch as there is no evidence that the parties anticipated that a transitory delay in "pulling" routine building permits by Hy-Vee – which had recently entered into a binding 20-year lease – would scare away tenants, let alone cause Buyer to suffer a $4.3 million monetary loss; and no evidence that Defendants "prohibited" (or could have) Buyer from pursuing a backup tenant for the new Hy-Vee space.

It is true that, in its order, the trial court gratuitously speculated about various "scenarios" that "could have," or "may or may not have" arisen, not as a result of Hy-Vee's delay in obtaining building permits, but rather as a result of a complete failure of the Hy-Vee Relocation – something that neither occurred nor was predicted to occur as a result of Hy-

Vee's 91-day delay. A0056. However, there is no evidence that any tenant left the Mall or came to the Mall because of any fact relating to the Hy-Vee Expansion. Indeed, the parties stipulated, in their Joint Statement of Facts (A0064; C02356), that *Plaintiffs* had calculated the $4.3 million amount of the Hy-Vee Holdback as the net present value of incremental lease income, over a twenty-year term, associated with the Hy-Vee Expansion. A0038, A0065, A0202, A0566-69, A0575; C02357-58; C02517-18. As such, Plaintiffs long ago admitted that the Hy-Vee Holdback was not a prediction of uncertain lost "value" from discouraged tenants. Their recent assertion to the contrary contradicts Plaintiffs' express stipulation before trial. A0038; C00618; C02357-58.

Additionally, the PLA incorrectly and gratuitously asserts that the Hy-Vee Expansion was in doubt for over a year after the parties documented the Hy-Vee Holdback in the December 2004 DME; that during that time "dangers to plaintiffs' interests [from such 'doubts'] were very real;" and that "[t]he New Hy-Vee Lease was not executed until June 2006" (PLA p.13). The PLA chides the First District because it "got it [sic] dates wrong" by suggesting otherwise. *Id*. However, it is the PLA – not the First District – that got it wrong. The new Hy-Vee Lease, dated as of July 15, 2005, was executed by Hy-Vee on June 16, 2005 (as the parties stipulated in their Joint Statement of Facts (A0064; C02356, C02360)), and was fully executed in July 2005 (only about six months after the DME, not over a year later). *Id*.; A0264. Moreover, "danger" or "doubt" associated with Hy-Vee needing time to remodel its new leasehold would have come as no surprise to Plaintiffs. The parties' Joint Statement of Fact stipulates that "[b]oth parties understood [as early as November 2004] that the Wal-Mart space required extensive remodeling" and that 270 days had been specified for remodeling in Hy-Vee's Letter of Intent. C02358; C02519.

REASONS FOR DENYING THE PETITION

Illinois Supreme Court Rule 315(a) ("Rule 315") lists the factors this Court considers when determining whether to conduct a discretionary review of a lower court decision. Those factors are: 1) the general importance of the question presented; 2) the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; 3) the need for the exercise of the Supreme Court's supervisory authority; and 4) the final or interlocutory character of the judgment sought to be reviewed. Ill. S. Ct. R. 315. None of these factors – other than the final character of the appellate court Opinion, after years of seemingly endless litigation – is satisfied here.

A. The First District Order is a Final Judgment

While there is no dispute that the Opinion is a final judgment as to the invalidity of the Hy-Vee Holdback as liquidated damages, this one factor is not, by itself, dispositive of the need for discretionary review by this Court under Rule 315.

B. There Is No Need for This Court to Exercise Its Supervisory Authority

While the Court's power to exercise its supervisory authority is broad, the use of that power in practice has traditionally been narrow and limited. *Weems v. Appellate Court,* 2012 III. LEXIS 2118, *2 (Ill. Dec. 11, 2012) (Theis, J. and Burke, J., concurring). This Court has stated that "[a]s a general rule, [the Court] will not issue a supervisory order unless the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority." *People ex rel. Birkett v. Bakalis,* 196 Ill.2d 510, 513 (2001); *see also City of Urbana v. Andrew ALB.,* 211 Ill. 2d 456, 470 (2004) (Court's supervisory authority extends to adjudication and application of law and procedural

administration of courts). The PLA does not suggest that the normal appellate process will afford inadequate relief in a matter important to the administration of justice; or that intervention by this Court is necessary to keep an inferior tribunal from acting beyond the scope of its authority. Plaintiffs fail to identify how the First District overstepped its legal authority by applying *Jameson* to the Hy-Vee Holdback. Nor do they explain how the application of settled Illinois law in this case is a matter of great import to the administration of justice.

C. Plaintiffs Cite No Conflicting Cases

The PLA cites no conflict between the First District's Opinion and any decision of this Court. Likewise, there is no conflict between the First District's Opinion and any decision of another division of the Appellate Court. The First District correctly applied universally acknowledged, well-settled principles of Illinois law in reaching its decision. The PLA lacks any citation to any legal opinion in conflict with the Opinion's application of *Jameson* or its determination that the Hy-Vee Holdback constitutes an invalid and unenforceable penalty.

Plaintiffs, in their appellee's brief filed in the First District, did not attack the *Jameson* test as paternalistic and outmoded, as they do now. Instead, they cited *Jameson* as the thoroughly sensible basis for their victory in the trial court. Plaintiffs' Response Brief p.25. Only after Plaintiffs failed to persuade the First District that the Hy-Vee Holdback passes muster as liquidated damages under *Jameson* did they began to insist that the *Jameson* test is outmoded and must be abolished. In any event, given the absence of conflicting authority, there is no reason for this Court to exercise Rule 315 discretionary review powers in this matter, let alone adopt a new test more to Plaintiffs' liking.

D. This is an Idiosyncratic, Fact-Specific Case, of Import Only to the Parties

The PLA states that "[t]his case raises questions of *general* importance concerning how Illinois courts should determine the enforceability of liquidated damages provisions agreed to by sophisticated commercial parties." PLA p. 3 (emphasis supplied). That is not true. No fixed rule applies to all liquidated damages provisions, and courts must evaluate each one on its own facts and circumstances. In the First District, neither side disputed the wisdom of the applicable standard employed by Illinois courts to determine the enforceability of liquidated damages provisions. Instead, they disputed whether the unique facts and circumstances of the Hy-Vee Holdback satisfied that standard.

Whether the Appellate Court correctly applied the non-controversial and well-established three-prong legal test of *Jameson* to the undisputed (and idiosyncratic) facts of this case is not a matter of general importance to the citizens of the State of Illinois. Indeed, the answer to this question is of no interest to anyone other than the parties to this unique, complex and fact-intensive dispute. As such, the question presented to the First District, while certainly important to the parties to this dispute, is not likely to be important to anyone else, and is certainly not important generally.

E. The First District Did Not Employ Hindsight to Find That the Hy-Vee Holdback Was Not a Reasonable Prediction of Damages

The PLA seeks discretionary review on grounds that the First District misapplied *Jameson*, because the First District employed "hindsight" to determine that $4.3 million was not a reasonable prediction of the loss caused by any delay, of any duration, in Hy-Vee obtaining building permits. The PLA declares that "in reaching [its] conclusion . . . the appellate court viewed the [reasonableness of the $4.3 million Hy-Vee Holdback as a prediction of potential loss from a 91-day delay in obtaining building permits] in hindsight, reweighing the parties' economic calculations and measuring them in light of its knowledge

of subsequent events." PLA pp.3-4. However, no basis is stated for this contention. Even if this make-weight argument were valid (it is not), it is not the role of this Court to second-guess a lower court's interpretation of the evidence, as stated above.

F. The PLA Attempts Artificially to Create an Issue of General Importance by Asking this Court to Rewrite Illinois' Law of Liquidated Damages

The PLA asks this Court to disregard *stare decisis* and mandate – retroactively – a sweeping change in Illinois law. In order artificially to create the appearance of an issue of general importance, Plaintiffs contend in the PLA, for the first time in this litigation, that the issue presented to this Court is whether this Court should overrule *Jameson* – the case that both parties cited as controlling authority in the First District – and create from whole cloth a new and radically different rule applicable to the enforcement of liquidated damages. Plaintiffs ask this Court to mandate a rule that would require liquidated damages to be enforced without regard to whether they are a penalty, so long as they are not unconscionable. PLA pp.4-5.

The PLA cites six cases from various jurisdictions outside Illinois (including Utah, Missouri, New York, New Jersey and California) as evidence that "[s]ome courts have . . . begun to reconsider the traditional assumptions in this area, concluding that **unless enforcement of a liquidated damages clause would be unconscionable**, they should recognize the parties' right to freely contract at arm's length." PLA p.19 (emphasis supplied). The PLA states: "This Court should do the same." *Id*. However, the PLA omits any explanation as to why this Court should unceremoniously jettison a long-established and venerable feature of the common law, nor does it explain how the proposed "new factors" (which are never specified) would be preferable to, or different than the current standard; or how the proposed new rule would somehow change the result *in this case*.

G. Even If This Court Adopted an Unconscionability Standard the Result in this Case Would Be the Same

The PLA attacks *Jameson* – and the existing rule that liquidated damages will not be enforced as penalties – as outmoded, paternalistic, and out of touch with modern notions of freedom of contract and free-market economics. However, none of the various free-market and free-contract musings offered by the PLA are connected to the facts of this fact-intensive case. How would it promote economic efficiency and freedom of contract to impose a $4.3 million forfeiture on a party who did nothing wrong (Seller), so as to provide a windfall to a party who was not foreseeably or actually damaged (Buyer), by a transitory and inconsequential delay of a third party (Hy-Vee), over whom Seller had no control? How would it promote economic efficiency and freedom of contract to construe the parties' contract as creating a nonsensical wager on the diligence of parties outside Seller's control – including Buyer, the self-proclaimed "winner" of that bet?

Even if economists can conjure up scenarios in which economic efficiency might be promoted if "sophisticated commercial entities" had unfettered power to contract for penalties, this case does not present any such scenario. Treatment of the Hy-Vee Holdback as a not-unconscionable $4.3 million penalty for a third party's transitory and inconsequential delay in "pulling" building permits does nothing to promote economic efficiency or freedom of contract, since that is not and cannot be what both parties intended. While the PLA may counsel slavish devotion to free enterprise and freedom of contract, there is nothing economically efficient about construing a contract as contemplating an absurd and unconscionable result – such as imposing an abhorrent $4.3 million forfeiture on one party, to create a $4.3 million windfall for another, as purported compensation for no actual damage, and no reasonably predicted (liquidated) damage. That is not the law.

H. The First District's Opinion is Carefully and Correctly Reasoned

The trial court's judgment did not run afoul of *Jameson* because it failed paternalistically to rescue a "sophisticated" party from an improvident contract term. The trial court's holding was wrong because it made no sense and construed the parties' contract as making no sense. No sophisticated party agrees to forfeit $4.3 million to compensate another for a loss that never occurred, and was never anticipated to occur, let alone in that amount.

It makes no sense to assert that sophisticated parties would make a $4.3 million bet on the timing of a third party (Hy-Vee) obtaining final building permits. Buyer has had years to concoct explanations as to why it should receive a $4.3 million windfall because a 20-year stream of increased rental income *may have* commenced 91 days late. In response, it offers only after-the-fact speculation about negative marketing effects that the parties *might have* anticipated from a delay of the Hy-Vee Expansion. However, as the parties stipulated before trial (A0064; C02356), Buyer contracted to buy the Mall with or without the Hy-Vee Expansion, and calculated the value of the Hy-Vee Holdback as the total net present value of the Hy-Vee Expansion, if it went forward, not an estimate of loss expected from potential bad publicity. As such, the amount of the Hy-Vee Holdback cannot be an estimate of damages for anything other than a complete failure of the Hy-Vee Expansion, to the extent it is an estimate of damages at all. If the Hy-Vee Expansion was consummated, Buyer would receive, over 20 years, $4.3 million in incremental value. If the Hy-Vee Expansion was not consummated, Buyer would not receive $4.3 million in incremental value – and would receive a refund in that amount. But either way, Buyer would continue to own the Mall and be exposed to vacancy risk. There is no basis to argue that the Hy-Vee Holdback was set at $4.3 million as an estimate of loss from any event

other than a complete failure of the Hy-Vee Expansion. That complete failure never occurred. On the contrary, Buyer received the full benefit of its bargain and seeks in this seemingly interminable proceeding to keep that value, without paying for it.

CONCLUSION

The First District correctly found that the trial court misapplied the three-prong *Jameson* test to the undisputed facts of this case. The First District reversed because a correct application of *Jameson* required that reversal. In reversing the trial court, the First District did not create new law, favor one conflicting Illinois legal precedent over another, or overstep the bounds of its authority. Thus, there is no reason for this Court to exercise its power to conduct a discretionary review under Rule 315.

The Court's application of its Rule 315 discretionary review powers is unwarranted here. Plaintiff has not established any of the requisite factors for review. There is no principled reason for this Court to re-write Illinois' law of liquidated damages. Accordingly, the Petition for Leave to Appeal should be denied.

Dated: March 10, 2014

Respectfully submitted,

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

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Answer To Petition For Leave To Appeal* conforms to the requirements of Rules 341(a), 315(c), and 315(d). The length of the Answer is 20 pages.

Dated: March 10, 2014.

/s/ Kent Maynard, Jr.
Kent Maynard, Jr.