SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WILMINGTON TRUST COMPANY, not in its individual capacity but solely as Owner under Trust Agreement dated as of April 3, 2006,

Plaintiff,

-against-

PHILIP A. FALCONE and LISA M. FALCONE,

Defendants.

Index No. 654001/2018

Justice: Hon. Charles E. Ramos

DEFENDANTS PHILIP AND LISA FALCONE'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT

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Defendants Philip A. Falcone and Lisa Falcone respectfully submit this memorandum of law, together with the October 5, 2018 Affidavit of David Crick and the exhibit thereto and the October 5, 2018 Affirmation of John P. Curley and the exhibit thereto, in opposition to the motion by Plaintiff Wilmington Trust Company ("Plaintiff") for summary judgment in lieu of complaint.

PRELIMINARY STATEMENT

In 2009, Falcone V, LLC leased an airplane from Plaintiff Wilmington Trust Company. Defendants Philip and Lisa Falcone were guarantors on the lease and on a related forbearance agreement that Plaintiff and Falcone V entered into in May 2018. In July 2018, with less than two years left on the lease, Plaintiff asserted that Falcone V defaulted on the forbearance agreement. Although Falcone V did not (and does not) concede that a default occurred, and despite the fact that Falcone V had actually paid Plaintiff more rent than had actually accrued on a monthly basis under the lease, Plaintiff cancelled the lease and Falcone V returned the aircraft. Had the lease not been cancelled, Plaintiff would have received an additional $2.2 million in rent payments through April 2020.

Plaintiff has now sued the Falcones for more than $20 million, including $19.7 million in liquidated damages that it characterizes as "Supplemental Rent." Plaintiff's papers do not explain how it reached this figure, and the guarantees that the Falcones signed do not mention this sum. Presumably, though, Plaintiff is relying on a liquidated damages clause in the lease that calculates damages on the basis of the aircraft's "casualty value." This calculation applies only to scenarios in which Plaintiff has sold the aircraft following the cancellation of the lease, and Plaintiff has presented no proof that it has done so. Moreover, had Plaintiff in fact sold the plane, the proceeds of the sale would be credited to the Falcones under the same damages formula on which Plaintiff relies. Plaintiff's failure to establish its damages with any proof is

fatal to a motion for summary judgment in lieu of complaint, which permits judgment to be entered only upon evidence of an unambiguous and unconditional promise to pay a sum certain.

This failure of proof aside, Plaintiff has no contractual right to recover $19.7 in liquidated damages because the lease explicitly limits the damages to the extent permitted by New York law, and New York law prohibits such an obvious windfall. Liquidated damages clauses are enforceable in New York only if they are reasonable—*i.e.*, they leave the lessor in roughly same position as if the lease had been fully performed. Damages that are disproportionate to the lessor's actual loss will not be enforced. Here, Plaintiff's actual losses are its lost rent for the period following the cancellation of the lease: $2.2 million, which is a worst-case figure that assumes Plaintiff could not mitigate its damages by re-letting the aircraft. Yet in this action Plaintiff is seeking $19.7 million in liquidated damages, almost nine times Plaintiff's worst-case losses. Put differently, Plaintiff, having already received both the return of the aircraft and more than $15.4 million in rental payments, is now claiming an additional $19.7 million in liquidated damages based on a default at the tail-end of the lease. Plaintiff agreed in the Lease that it could not recover damages greater than what would be allowed by New York law, and New York law forbids such a disproportionate penalty. Plaintiff's motion should be denied.

BACKGROUND

This action concerns a lease for an airplane, a Gulfstream Aerospace G-V (the "Aircraft") that Falcone V, LLC leased from Plaintiff Wilmington Trust Co. (the "Plaintiff"). *See* Wittenberg Ex. A (the "Lease"). Philip and Lisa Falcone signed Guarantees that guarantee Falcone V's obligations under the Lease. On May 1, 2018, Plaintiff and Falcone V entered into a Forbearance and Waiver Agreement (the "Forbearance Agreement") which was amended on

June 4, 2018. Wittenberg Exh. C. The Falcones were parties to the Forbearance Agreement as well. *Id.*

Lease Term & Payments

Falcone V leased the Aircraft beginning in February 2009. The original lease term was for 62 months, *i.e.*, until April 2014. *See* Wittenberg Ex. A at 4, Lease, Section 3(a) & at 44, Schedule No. 2 to Lease Supplement.[1] The Lease was amended several times, however, including to extend the lease term until April 2020. *See* Wittenberg Aff. ¶ 5 and Ex. A at 104, First Revised Schedule No. 2 to Lease Supplement. For the first 62 months of the Lease, rental payments were due monthly and were calculated as 0.515691% of the Lessor's Cost of $28,000,000, or $144,393.48 per month. *See* Wittenberg Ex. A at 105, First Revised Schedule No. 2-A to Lease Supplement. For the remainder of the Lease, rental payments were due annually, and were calculated as 5.1785714% of the Lessor's Cost, or approximately $1,450,000 per year. *Id.*

The Lease is governed by New York law. *See* Wittenberg Ex. A at 20, Lease § 16(f). When they entered the Lease, Plaintiff and Falcone V agreed that "in no event shall [Plaintiff] be entitled to recover any amount in excess of the maximum amount recoverable under Applicable Law with respect to any Event of Default." Wittenberg Ex. A at 16, Lease § 13(f).

The Alleged Default and Plaintiff's Remedies Under the Lease

In July 2018, Plaintiff asserted that Falcone V defaulted on the Forbearance Agreement by failing pay the Forbearance "Cure Amount" in full. Wittenberg Ex. D. Accordingly to Plaintiff, Falcone V paid $700,000 of the $1.5 million Cure Amount. Wittenberg Aff. ¶¶ 11-13.

[1] Wittenberg Ex. A [NYSCEF Doc. 4] is a 119-page document consisting of the original Lease, all schedules thereto, and several amendments and other documents. For ease of reference, the Falcones will refer to the page of the PDF on which the cited information appears.

Citing this alleged shortfall as the basis for a default, Plaintiff has now sued the Falcones for more than $20 million, the vast bulk of which—$19,790,680.00—it describes as "Supplemental Rent." Wittenberg Aff. ¶ 15.[2] Plaintiff's papers do not explain how this figure was reached, and the Guarantees the Falcones signed do not mention this sum.

Although not clear from its papers, Plaintiff is presumably relying on a liquidated damages provision in the Lease that incorporates the concept of the Aircraft's "Casualty Value." Section 13(b) of the Lease sets forth the Plaintiff's purported remedies in the event of default. Wittenberg Ex. A at 15-16, Lease § 13(b). These include "Liquidated Damages," *id.* § 13(b)(vii), which contemplates that when the Aircraft is returned to Plaintiff, Plaintiff will either (i) sell the Aircraft, (ii) re-let the Aircraft on terms substantially similar to the terms of the Lease; or (iii) either keep the Aircraft or re-let the Aircraft on terms that are not substantially similar to the terms of the Lease, *id.* at 28-29 (definition of "Liquidated Damages").

If Plaintiff sells the Aircraft, the liquidated damages would be equal to the "Casualty Value" minus a credit to Falcone V for proceeds of the sale (after certain administrative expenses and interest). Wittenberg Ex. A at 28-29.

If Plaintiff re-lets the Aircraft on substantially similar terms, the liquidated damages would be equal to the difference between the value of Plaintiff's remaining rental payments through the end of the Lease term and the value of the rental payments for the same period in the new lease. *See id.*

If Plaintiff keeps the Aircraft or re-lets the Aircraft on terms that are not substantially similar to the Lease, the liquidated damages would be equal to the difference between the value of Plaintiff's remaining rental payments through the end of the Lease term and the fair market

[2] The Falcones do not concede that there has been a default under the Lease or the Forbearance Agreement, but will assume for the purposes of this motion only that a default occurred.

rent for the same period. *See id.* Notably, the Lease also anticipates what would happen if Plaintiff could not sell or re-let the Aircraft. If Plaintiff "is unable after reasonable effort to dispose of the Aircraft at a reasonable price or the circumstances reasonably indicate that such an effort will be unavailing, the "market rent" in such event will be deemed to be $0.00…." *Id.*

In this case, Plaintiff is apparently relying on the first formula, which we will refer to as "Casualty Value Damage," to calculate its $19.7 million claim for "Supplemental Rent." This formula applies "[i]f [Plaintiff] recovers and sells the Aircraft, or [Falcone V] has not returned the Aircraft in the manner and condition required by the Lease…" Wittenberg Aff. Ex. A at 28. In this scenario, liquidated damages are determined with reference to the Aircraft's Casualty Value. That figure is defined in the Lease as a function of the "Lessor's Cost," or $28,000,000, multiplied by a percentage that slowly decreases over the life of the Lease. Ex. A at 25-26 (definition of "Casualty Value") and at 108, First Revised Schedule No. 3 to Lease Supplement. To calculate $19.7 million in liquidated damages, Plaintiff apparently multiplied $28,000,000 by 70.681%. *See id.*

Remaining Lease Term and the Return of the Aircraft

Before the lease was cancelled with less than two years left, Falcone V paid $700,000 of the $1,450,000 rent due for 2018-19. It has not paid the $1,450,000 for 2019-20. Wittenberg Aff. ¶¶ 13, 15.

Falcone V returned the Aircraft to Plaintiff in July 2018, and Plaintiff is marketing it for sale. *See* Exhibit 1 to the October 5, 2018 Affirmation of John P. Curley ("Curley Aff."). The listed sale price is $10,995,000. *Id.* at 1-2 (2000 Gulfstream GV S/N 612). An independent appraiser has determined that the Aircraft's market value is $10,100,000. October 5, 2018

Affidavit of David Crick ("Crick Aff.") ¶ 3 & Exhibit 1. To our knowledge, the Aircraft has not yet been sold or re-let. *See* Curley Ex. 1.

ARGUMENT

A party seeking summary judgment bears a high burden. It must make a *prima facie* showing with evidence sufficient to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986); *Wilmington Trust Co. v. Global Areo Logistic, Inc.* (hereafter, "*Global*"), No. 600401/2009, 2011 WL 11075177, at *2 (Sup. Ct. Apr. N.Y. Co. 11, 2011) (Ramos, J.). A party whose moving papers do not meet this threshold cannot prevail on its motion without even regard to the sufficiency of the opposing papers. *Winegrad v. N.Y. Univ. Medical Center*, 64 N.Y.2d 851, 853 (1985); *Global*, 2011 WL 11075177, at *2. The opposing party may also defeat summary judgment by offering admissible evidence that raises a material question of fact. *Amatulli v Delhi Construction Corporation*, 77 N.Y.2d 525, 533 (1991); *Global*, 2011 WL 11075177, at *2. Plaintiff's motion should be denied for the reasons that follow.

I. PLAINTIFF HAS NOT OFFERED PROOF THAT IT IS ENTITLED TO LIQUIDATED DAMAGES IN THE AMOUNT IT CLAIMS.

Plaintiff's motion should be denied because it has not offered evidence that it has sold the Aircraft, which is required to trigger the liquidated damages clause on which Plaintiff apparently relies. This is fatal to a motion under N.Y. C.P.L.R. § 3213, which may be brought only in matters that are "based upon an instrument for the payment of money only." N.Y. C.P.L.R. § 3213. Motions under this section are designed "to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless." *Weissman v. Sinorm Deli, Inc*., 88 N.Y.2d 437, 443 (1996). An instrument does not qualify for summary

judgment under § 3213 "if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document." *Weissman*, 88 N.Y.2d at 444; *Kerin v. Kaufman*, 296 A.D.2d 336, 337, 745 N.Y.S.2d 22 (1st Dep't 2002).

A. Plaintiff Has Not Offered Any Proof that the Casualty Value Damages Formula Is Applicable.

The Lease has three formulas for determining liquidated damages, and Plaintiff has opted to calculate damages using the only one of the three methods that relies on "casualty value." But that formula only applies if Plaintiff "recovers and sells the Aircraft." Wittenberg Aff. Ex. A at 28 (subpar. (i) of Liquidated Damages definition). Plaintiff has not offered any proof that the Aircraft has been sold (and, to our knowledge, it has not been sold).

This failure of proof is fatal to a motion for summary judgment in lieu of a complaint. Where "proof outside of the guaranty and underlying agreement" is required to establish the amount of the defendant's obligation pursuant to the agreement, relief pursuant to § 3213 is unavailable. *Oak Rock Fin., LLC*, 148 A.D.3d at 1040; *accord Kerin*, 296 A.D.2d at 337; *see also Bonds Fin., Inc. v. Kestrel Techs., LLC*, 48 A.D.3d 230, 231, 850 N.Y.S.2d 429, 430–31 (1st Dep't 2008) (plaintiff failed to establish *prima facie* case under § 3213 because claim required resort to external document); *Ian Woodner Family Collection, Inc. v. Abaris Books, Ltd*., 284 A.D.2d 163, 164, 726 N.Y.S.2d 420, 421 (1st Dep't 2001) (promissory note not an instrument for the payment of money where extrinsic evidence was required to determine amount of each quarterly installment due, raising triable issues of material fact that would bar summary judgment).

This shortcoming in Plaintiff's case is especially significant because the liquidated damages would be far less if, instead of selling the Aircraft, Plaintiff re-lets or keeps it. For example, the Lease provides that if the Aircraft is not sold or re-let, then damages are to be

calculated using rental value, not "Casualty Value." The Lease provides that if Plaintiff "elects not to dispose of the Aircraft," liquidated damages are the sum of Falcone V's remaining rent payments as if the Lease had been fully performed minus the fair rental value of the Aircraft. Wittenberg Ex. A at 29 (subpar. (iii) of Liquidated Damages definition). In the same subparagraph, the Lease provides that "if [Plaintiff] is unable after reasonable effort to dispose of the Aircraft at a reasonable price or the circumstances reasonably indicate that such an effort will be unavailing, the "market rent" in such event will be deemed to be $0.00…." *Id.*

Plaintiff has not provided any proof or any explanation about what it intends to do with the Aircraft. Without any proof, Plaintiff cannot establish that it is entitled to damages based on casualty value or damages based on rental value. The difference is significant: $19.7 million in casualty value as opposed to, at most, $2.2 million in lost rental value (a worst-case figure that, as discussed below, assumes Plaintiff could not mitigate its damages).

B. Plaintiff Has Not Established that the Falcones Agreed to Pay a Sum Certain.

The uncertainty in the proper damages calculation underscores another problem with Plaintiff's motion: Plaintiff has not established that the Falcones agreed to an unambiguous and unconditional obligation to pay a specified sum. "[S]ummary judgment under CPLR 3213 requires an unequivocal and unconditional promise to pay a *sum* of money." *Kerin*, 296 A.D.2d at 337 (emphasis added). A motion under § 3213 should be denied where neither the guarantee nor the underlying agreement contains "an unconditional promise to pay a *sum certain*, signed by the maker and due on demand or at a definite future time." *Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036, 1039, 50 N.Y.S.3d 108 (2d Dep't 2017) (emphasis added); *see also Tradition N. Am., Inc. v. Sweeney*, 133 A.D.2d 53, 54, 518 N.Y.S.2d 982, 983 (1st Dep't 1987) (denying summary judgment where defendant "has not made an unconditional promise to pay a sum

certain at a given time"); *HCG Mezzanine Dev. Fund, L.P. v. Jreck Holdings, LLC*, 37 Misc. 3d 1217(A), 964 N.Y.S.2d 59, at *3 (Sup. Ct. N.Y. Co. 2012) (§ 3213 applies "so long as an instrument creates an unambiguous and unconditional obligation to pay a specified sum"); *Smith v. Shields Sales Corp*., 22 A.D.3d 942, 944, 802 N.Y.S.2d 764 (3d Dep't 2005) (same).

In this case, summary judgment in lieu of complaint is not appropriate because each of the three liquidated damages formulas present issues of fact. The first formula, the casualty value calculation on which Plaintiff relies here, provides Falcone V with a setoff or credit for the sale proceeds. This presents issues of fact concerning the sale of the Aircraft, the sale price, and whether the sale price was reasonable. *See* Wittenberg Ex. A at 28; *see also id.* at 29 (subpar. (iii) of Liquidated Damages definition (requiring Plaintiff to use "reasonable efforts" and to obtain a "reasonable price" when it disposes of the Aircraft).

These questions bear on mitigation, and it is axiomatic that issues of fact about the reasonableness of mitigation efforts preclude summary judgment. *See, e.g.*, *Ambac Assur. Corp. v. Countrywide Home Loans, Inc*., 151 A.D.3d 83, 90, 56 N.Y.S.3d 21, 28 (1st Dep't 2017), *aff'd sub nom. Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (1st Dep't 2018) (denying summary judgment where movant failed to present sufficient evidence to establish mitigation); *Enman v. Pers.*, 155 A.D.2d 376, 548 N.Y.S.2d 7, 8 (1st Dep't 1989) (summary judgment precluded by triable issues of fact regarding reasonableness of mitigation efforts); *NAB Const. Corp. v. Consol. Edison Co. of N.Y*., 242 A.D.2d 480, 480–81, 662 N.Y.S.2d 471, 472 (1st 1997) (summary judgment denied where reasonableness of mitigation of damages presented issue of fact); *Show Lain Cheng v. Young*, 25 Misc. 3d 1227(A), 906 N.Y.S.2d 776 (Sup. Ct. Kings Co. 2008), *aff'd*, 60 A.D.3d 989, 878 N.Y.S.2d 367 (2d Dept.

2009) (issues of regarding whether plaintiff failed to mitigate her damages precluded summary judgment pursuant to § 3213).

Moreover, disputes that involve issues including setoffs, adjustments, and credits are not properly enforced on § 3213 motions. *See CSS Works, Inc. v. Tele Tech, Inc.*, 272 A.D.2d 288, 289, 707 N.Y.S.2d 355 (2d Dep't 2000) (summary judgment pursuant to § 3213 denied where there was issue of fact as to whether defendant was entitled to certain credits against amount due); *Gusmano v. Four Seasons Messenger Serv.*, 209 A.D.2d 379, 618 N.Y.S.2d 730 (2d Dep't 1994) (factual question involving application of setoff contained in note defeated § 3213 motion); *Spilky v. Atkin*, 120 A.D.2d 581, 582, 502 N.Y.S.2d 68 (2d Dep't 1986) (§ 3213 motion properly denied where guarantor's right to set off presented question of fact); *Bragarnik v. Zodiac on Brighton Cafe, Inc.*, 189 A.D.2d 744, 745-46, 592 N.Y.S.2d 425 (2d Dep't 1993) (summary judgment denied where buyer's successor claimed right to set off insurance proceeds received by seller).

The remaining two liquidated damages formulas also present issues of fact. Each considers whether or not the Aircraft has been re-let on terms "substantially similar" to the Lease. Wittenberg Ex. A at 28-29 (subpars. (ii) and (iii) of Liquidated Damages definition). And each formula considers substitute rental value as a way to calculate losses (either the actual rental value of the Lease, in a situation where the Aircraft was re-let on similar terms, or the fair market rent, in a situation where the Aircraft was not re-let or re-let on different terms). Both questions are issues of fact. *See, e.g.*, *White v. Farrell*, 20 N.Y.3d 487, 489 (2013) (question of market rent was issue of fact that precluded summary judgment); *Estate of Spitz v. Pokoik*, 83 A.D.3d 505, 506, 921 N.Y.S.2d 58, 60 (1st Dep't 2011); *Klein v. CAVI Acquisition, Inc.*, 57 A.D.3d 376, 378, 871 N.Y.S.2d 19 (1st Dep't 2008).

C. Plaintiff May Not Use a § 3213 Motion to Obtain the Full Casualty Value Now and Credit the Falcones Later.

To the extent Plaintiff is relying on language in the Lease that purports to obligate Falcone V to pay Plaintiff the full casualty value upon a default and then wait for Plaintiff to credit Falcone V (or the Falcones) with proceeds from a sale of the Aircraft, *see* Wittenberg Ex. A at 15, Lease § 13(b), this language is not enforceable on a motion for summary judgment in lieu of complaint because it is intertwined with issues of fact as to the extent of the Falcones' obligation.[3] Without knowing whether and at what price the Aircraft has been sold or re-let, no judgment can issue because the parties' rights cannot be finally determined.

Summary judgment "results in a final judgment on the merits." *Collins v. Bertram Yacht Corp.*, 42 N.Y.2d 1033, 1034 (1977). A final judgment disposes of all the issues between the parties and "leaves nothing for further judicial action apart from mere ministerial matters." *McCormack v. Maloney*, 148 A.D.3d 1268, 1268-69, 48 N.Y.S.3d 822, 823 (3d Dep't 2017); *accord Slewett & Farber v. Bd. of Assessors*, 80 A.D.2d 186, 200, 438 N.Y.S.2d 544, 556 (2d Dep't 1981), *modified sub nom. Slewett & Farber v. Bd. of Assessors of Nassau Cty.*, 54 N.Y.2d 547 (1982). "Its function is to conclude the controversy between the parties;" that is, it is "the law's last word in a judicial controversy." 46 Am. Jur. 2d Judgments § 1, *Towley v. King Arthur Rings, Inc*., 40 N.Y.2d 129, 132 (1976). A judgment "does not look to the future in an attempt to judge the unknown" and can issue "only after all factual and legal issues have been

[3] Section 13(b) of the Lease reads in part: "(A) upon the occurrence of an Event of Default, Lessor may, among other things, demand and recover from Lessee the Casualty Value (calculated as contemplated in the definition of Liquidated Damages) or other applicable Liquidated Damages (in lieu of future Basic Rent, and not as a penalty) and other Rent then due, and/or demand that Lessee return the Aircraft in accordance with this Lease; and (B) if Lessee returns the Aircraft, and after Lessor disposes of it, Lessor will determine the amount, if any, of any credit or reimbursement or deficiency, as applicable, with respect to Lessee's obligation to pay such Casualty Value or other Liquidated Damages (all as contemplated in the definition of such term). Wittenberg Ex. A at 16.

decided." 46 Am. Jur. 2d Judgments § 1; *Slewett & Farber*, 80 A.D.2d at 200; *see also O'Brien v. Lehigh Valley R. Co*., 176 Misc. 404, 405, 27 N.Y.S.2d 540, 541 (Sup. Ct. Monroe Co. 1941) (no judgment can be entered until all issues between the parties have been decided in some fashion).

A judgment for Plaintiff that includes $19.7 million in liquidated damages would not dispose of the issues between the parties here because, even assuming the $19.7 figure is enforceable at all, the Falcones would be entitled to credits against that sum. Judgment should not be entered now because public policy favors procedures that are intended to "ensure finality and promote judicial economy." *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100 (2005); *accord In re New York City Asbestos Litig.,* 153 A.D.3d 461, 473, 62 N.Y.S.3d 309, 318 (1st Dep't 2017).

II. PLAINTIFF HAS NO CONTRACTUAL RIGHT TO RECOVER DAMAGES THAT WOULD BE IMPERMISSIBLE UNDER NEW YORK LAW.

Even a motion under § 3213 were viable, Plaintiff's demand for $19.7 million in "Supplemental Rent" would still be improper because the Lease explicitly limits damages to only those that would be available under New York law, and New York law does not permit liquidated damages that result in windfalls.

A. Falcone V and Plaintiff Agreed that Lease Damages Would Not Exceed What Is Permissible Under New York Law.

When they entered into the Lease, Falcone V and Plaintiff agreed that Lease damages would not exceed what is permissible under New York law. They agreed that "in no event shall Lessor be entitled to recover any amount in excess of the maximum amount recoverable under Applicable Law with respect to any Event of Default." Wittenberg Aff. Ex. A at 16, Lease § 13(f). The "Applicable Law" is New York law, Wittenberg Aff. Ex. A at 20, Lease § 16, which has adopted Article 2-A of the Uniform Commercial Code for leased goods. As discussed

more below, New York law limits the enforceability of liquidated damages provisions. *See* Section II.B, *infra*.

Basic rules of contract interpretation require courts to give "'effect and meaning ... to every term of [a] contract' and strive 'to harmonize all of its terms.'" *Spinelli v. Nat'l Football League*, No. 17-0673-CV, 2018 WL 4309351, at *8 (2d Cir. Sept. 11, 2018). "It is fundamental that…courts should read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent." *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581, 92 N.E.3d 743, 747-48 (2017).

Here, the liquidated damages clause must be interpreted in a way that harmonizes it with Falcone V's and Plaintiff's express intent to limit damages in accordance with New York law. In other words, the Lease provides that Plaintiff only has a contractual right to recover liquidated damages to the extent those damages would be permissible under New York law.

B. The Liquidated Damages Provision Cannot Be Interpreted In a Way that Gives Plaintiff a Windfall.

New York's UCC permits liquidated damages "only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission." N.Y. U.C.C. § 2-A-504(1). A liquidated damages clause is reasonable if it leaves the lessor "in no better position than it would be in had the lease been fully performed." *ePlus Grp., Inc. v. Panoramic Commc'ns LLC*, No. 02 CIV. 7992, 2003 WL 1572000, at *7 (S.D.N.Y. Mar. 27, 2003); *accord, In re Montgomery Ward Holding Corp*., 326 F.3d at 388 ("no true liquidated damages provision can put the lessor in a position legally superior to the one that it would have occupied had the lease been fully performed").

This is in accord with the common law rule, which rejects liquidated damages provisions that result in windfalls. To be enforceable, the damages provision must bear a reasonable proportion to the probable loss and the amount of actual loss must be incapable or difficult of precise estimation. *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 425; *Global*, 2011 WL 11075177, at *2. But if "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced." *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 425; *Global*, 2011 WL 11075177, at *2; *172 Van Duzer Realty Corp.,* 24 N.Y.3d at 536. A penalty results where a liquidated damages provision is designed to "secure performance of the contract by compulsion," as opposed to "provide fair compensation in the event of a breach." *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 425; *Global*, 2011 WL 11075177, at *2, n.4. Moreover, a liquidated damages provision that provides a windfall to the lessor by shifting to the lessee the risk of the market depreciation of the leased goods is an unenforceable penalty. *Global*, 2011 WL 11075177, at *4; *Interface Group-Nevada v. TWA ("In re TWA")*, 145 F.3d 124, 135 (3rd Cir.1998) (applying New York law); *In re Montgomery Ward Holding Corp*., 326 F.3d 383, 391 (3d Cir. 2003).

C. Applying "Casualty Value" to a Plane that Was Safely Returned Creates a Windfall for Plaintiff.

Plaintiff's reliance on "casualty value" to calculate liquidated damage even though the Aircraft was returned safely with less than two years remaining on the Lease results in an obvious windfall: in this scenario, Plaintiff would receive rental payments from 2009 through the July 2018 default *plus* the casualty value in the Lease *plus* a fully working Aircraft.

The unreasonableness of this approach is confirmed by comparing Plaintiff's outcome if the Lease had been fully performed with the result Plaintiff is seeking here. If the Lease had been fully performed, Plaintiff would have received approximately $17.6 million in rental

payments (62 monthly payments of $144,393.48 plus 6 annual payments of $1,450,000), plus the return of the Aircraft when the Lease expired in 2020.

Falcone V's default in July 2018 cost Plaintiff a year-and-a-half's worth of rent, or $2.2 million (Falcone V paid $700,000 of the $1,450,000 it owed for 2018, *see* Wittenberg Aff. ¶ 13). To be made whole, Plaintiff would be entitled to $2.2 million minus the fair market rental value of the Aircraft through the remainder of the lease. Even if the fair market rent were zero, $19.7 million in liquidated damages is almost nine times the $2.2 million in worst-case actual damages. Indeed, even if Plaintiff manages to sell the Aircraft for $10 million, so that the Falcones get a credit for that amount, they would still be liable for close to $10 million, which is more than four times the worst-case actual damages. *See* Curley Aff. Ex. 1 (sale price listed as $10,995,000); *see also* Crick Aff. ¶ 3 & Ex. 1.

The liquidated damages provision was disproportional, and would have resulted in a windfall even at the inception of the Lease. The total rental value of the initial 62-month Lease was $8,952,396 (62 months times $144,393.48, *see* Wittenberg Ex. A at 56, Schedule No. 2-A). If Falcone V had defaulted in the first month, Plaintiff's actual damages would have been $8,952,396 minus whatever amount it could get by leasing the Aircraft to someone else. Yet the liquidated damages provision would have called for $28,975,520 (103.484 % of $28 million, *see* Wittenberg Ex. A at 62, Schedule No. 3 to Lease Supplement), plus Plaintiff would have gotten the Aircraft back.

Courts routinely reject liquidated damages provisions where the disproportionality is not nearly as flagrant as it is in this case. In *CIT Communications Finance Corp. v Lipper & Co., LP*, for example, the lessor sought liquidated damages of $90,000 based on a stipulated loss value. Applying New Jersey law (which is similar to New York law on this issue), the court

found the liquidated damages clause to be an unenforceable penalty because the amount demanded was "grossly disproportionate" to the actual injury caused by lessee's breach, which was 3 months' rent totaling $32,000. No. 600739/04, 2005 WL 6742220, at *2 (Sup. Ct. N.Y. Co. Mar. 30, 2005). *See also, e.g.*, *ePlus Grp., Inc. v. Panoramic Commc'ns LLC*, No. 02 CIV. 7992), 2003 WL 1572000, at *8-9 (S.D.N.Y. Mar. 27, 2003) (refusing to grant summary judgment enforcing liquidated damages clause where casualty value was approximately three times the amount of lease payments lost through default, and exceeded fair market value of leased equipment); *In re Montgomery Ward Holding Corp*., 326 F.3d 383, 390-91 ($3.5 million Casualty Value "excessively large" compared to unpaid rent of $1.4 million).

This Court, too, has rejected liquidated damages that were disproportionate to the plaintiff's actual losses. In *Global*, the Court rejected a liquidated damages clause in an aircraft lease because it "contribute[ed] to a formula that results in a grossly disproportionate amount of damages that bears no reasonable relationship to the anticipated harm at the time of contracting." 2011 WL 11075177, at *2.

Although the liquidated damages provision in *Global* was static—*i.e.*, it did not decline over the life of the lease—even liquidated damage provisions that vary with time will be held to be unenforceable if they result in a penalty that bears no relation to the plaintiff's actual losses. *See CIT Commn'cs.*, 2005 WL 6742220, at *2 ($90,000 in liquidated damages disproportionate to $32,000 in lost rent); *ePlus Grp., Inc.*, 2003 WL 1572000, at *8-9 (liquidated damages that were three times actual lost rent were disproportionate); *In re Montgomery Ward Holding Corp*., 326 F.3d 383, 390-91 ($3.5 million casualty value "excessively large" compared to unpaid rent of $1.4 million).

In *In re TWA,* 145 F.3d at 134-36, the court rejected a non-static damages clause because the formula "simply ha[d] no bearing on [lessor's] probable loss in the event of breach." *Id.*at 135. The court noted that the lessor had not explained why actual damages could not be ascertained upon breach. *Id.* Indeed, the court held, the lessor's probable loss could be easily calculated by totaling the remaining rental payments at the time of default, plus the lessor's consequential or incidental damages. *Id.*; *see also Wells Fargo Equip. Fin., Inc. v. Woods at Newtown, LLC*, No. 10 CIV. 9439 CM, 2011 WL 4433108, at *4 (S.D.N.Y. Sept. 23, 2011) (finding clause that provided for lessor to recover 35% of the cost of the leased equipment an unenforceable penalty where damages caused by default would be "readily ascertainable").[4]

D. Damages Based on Casualty Value Improperly Shift the Risk of Depreciation to the Lessee.

Courts routinely strike down liquidated damages provisions, such as this one, that attempt to impermissibly shift the risk of the aircraft's depreciation from the lessor to the lessee. For example, in *GC Air, LLC,* 2012 WL 6021359, at *2, the court held that the liquidated damages clause effectively forced the lessees to purchase the aircraft upon default and thus "force[d] them to bear the risk" that the value of the aircraft had decreased at a greater rate than anticipated. A property owner, the court pointed out, has the opportunity to profit from an increase in value and the risk of suffering loss from a decrease. *Id*. at *4. The court concluded that the lessor's "attempt to transfer the risk of a decrease in value" to the lessee, while retaining for itself the opportunity to profit, indicated that the liquidated damages clause was, in fact, an unenforceable penalty, and thus it could not be enforced against the guarantors. *Id*.; *see also In re TWA,* 145

[4] *Wilmington Tr. Co. v. Aerovias de Mexico, S.A. de C.V.*, 893 F. Supp. 215, 219 (S.D.N.Y. 1995), is distinguishable because there the court held that liquidated damages of $16 million were not disproportionate to lessor's actual lost damages of $16-21 million.

F.3d at 135 (refusing to allow lessor "to protect its multi-million dollar aircraft investment by shifting to [the lessee] the risk of a market drop in the [a]ircraft's value"); *In re Montgomery Ward Holding Corp*., 326 F.3d at 391 (lessor not permitted shift risk of loss to lessee).

In this case, the arithmetic confirms that the Lease was structured to shift the risk of depreciation onto Falcone V and it guarantors. The assigned casualty multiplier for a point this late in the lease is 70%, yet the Aircraft has lost almost two-thirds of its initial value. Compare, for example, the $28,000,000 "Lessor's Cost" figure in the Lease with the $10,995,000 price at which the Aircraft is currently for sale. Wittenberg Ex. A at 105, First Revised Schedule No. 2-A to Lease Supplement (Lessor's Cost figure); Curley Aff. Ex. 1 at 1-2 (2000 Gulfstream GV S/N 612); *see also* Crick Aff. ¶ 3 & Ex. 1.

A liquidated damages provision that is designed to compel performance and shift the risk of depreciation to the lessee is a penalty and should not be enforced. *GC Air, LLC,* 2012 WL 6021359, at *4; *In re TWA*, 145 F.3d at 135; *In re Montgomery Ward Holding Corp*., 326 F.3d at 391.

E. The Guarantees Do Not Foreclose the Falcones' Defenses.

Plaintiff may try to argue that the Defendants are foreclosed from challenging the liquidated damages provision because they are guarantors. *Cf. 136 Field Point Circle Holding Co., LLC v. Invar Int'l Holding, Inc*., 644 F. App'x 10, 12 (2d Cir. 2016). This argument is misplaced because the Falcones are not asserting an affirmative defense to the damages provision. Rather, the inquiry is one of contract interpretation: does Plaintiff, having agreed that it cannot recover damages beyond what would be permitted under New York law, have a contractual right to recover liquidated damages in an amount that would be considered an

unenforceable penalty? The distinction is nuanced but significant because, as discussed above, Courts should honor the intent of the parties who entered into the Lease. *See* Section II.A, *supra*.

In any event, *136 Field Point* is an unpublished and non-precedential opinion, as another court has recognized, and is thus not dispositive on this issue. *See In re Republic Airways Holdings Inc*., 565 B.R. 710, 725, n.11 (Bankr. S.D.N.Y. 2017) (declining to follow *136 Field Point Circle*); *see also In re Republic Airways Holdings Inc*., 582 B.R. 278, 283, n.2 (S.D.N.Y. 2018) (describing as "dubious" the argument that an otherwise unenforceable liquidated damages provision could be enforced against a guarantor).[5]

Moreover, two New York federal courts have recognized that defenses to unreasonable liquidated damages cannot be waived as a matter of public policy. *Bell v. Ebadat*, No. 08 CIV 8965 RJS, 2009 WL 1803835, at *3 (S.D.N.Y. June 16, 2009) (citing *Wells Fargo Bank Northwest, N.A. v. Energy Ammonia Transp. Corp.*, No. 01 Civ. 5861(JSR), 2002 WL 31368264 (S.D.N.Y. Oct.21, 2002)).

This case is no different from *Global,* in which this Court allowed the guarantor, who had given an "irrevocable, absolute and unconditional guaranty," to assert that the liquidated damages provision in an aircraft lease was unreasonable under § 2-A-504(1). This Court denied summary judgment to Wilmington Trust against the guarantor, holding that the liquidated damages clause was an unenforceable penalty. 2011 WL 11075177, at *6. *See also GC Air, LLC*, 2012 WL 6021359, at *4 (refusing to enforce liquidated damages provision in aircraft lease against guarantors); *Rallye Leasing, Inc. v. L.I. Seafood & Dumpling House*, 213 A.D.2d

[5] *136 Field Point* relies heavily on *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485 (2015), in which the court rejected a guarantor's argument that the underlying default was obtained through collusion. *Cooperatieve Centrale* did not involve liquidated damages at all, much less a claim that such damages were foreclosed by the underlying contract itself.

533, 534, 624 N.Y.S.2d 57, 58 (2d Dept. 1995) (affirming determination, in suit against guarantor of lease, that liquidated damages clause was unenforceable as a penalty).

F. Plaintiff's Other Likely Arguments Are Unavailing.

Plaintiff's other likely arguments are equally unavailing. Plaintiff may not enforce an unreasonable liquidated damages clause simply because the parties were sophisticated and represented by counsel. This Court rejected this argument in *Global*, reasoning that "there is no principle that a sophisticated party should be bound by a patently unreasonable liquidated damages provision." 2011 WL 11075177, at *5; *see also In re TWA*, 145 F.3d 124, 135 (refusing to disregard requirement of proportionality on the grounds that the lessee (an airline) was well represented, enjoyed equal bargaining power, and never objected to the reasonableness of the liquidated damages provision or requested that it be taken out of the lease); *Northwest Airlines*, 393 B.R. at 358 (refusing to hold sophisticated airline to unreasonable liquidated damages clause in aircraft lease); *In re Ionosphere Clubs, Inc*., 262 B.R. 604, 617 (Bankr. S.D.N.Y. 2001) ("court must not enforce an otherwise invalid liquidated damages provision merely because it was freely negotiated by sophisticated counsel").

Nor may Plaintiff rely on language in the Lease that characterized the liquidated damages as "in lieu of future basic rent, and not as a penalty." *See* Wittenberg Ex. A, Lease, §13(b). In *Global*, the parties agreed to "liquidated damages for loss of a bargain and not as a penalty (in lieu of the installments of Basic Rent for the Aircraft due on or after such date)." 2011 WL 11075177, at *3. As this Court recognized, [c]ontracts that are void as against public policy are unenforceable regardless of how freely and willingly they were entered into." 2011 WL 11075177, at *5; *accord In re Montgomery Ward Holding Corp*., 326 F.3d 383, 387 (3d Cir. 2003) (fact that parties expressly characterized casualty value "as liquidated damages for loss of

a bargain and not as a penalty," was not dispositive where court found provision to be unenforceable penalty); *GC Air, LLC*, 2012 WL 6021359, at *1-4 (same); *ePlus Grp., Inc*., 2003 WL 1572000, at *5 (fact that party enters into contract containing liquidated damages clause does not prevent that party from later litigating validity of clause).

III. PLAINTIFF HAS NOT PROVEN ACTUAL DAMAGES.

Where a liquidated damages clause is "rejected as being a penalty, the recovery is limited to actual damages proven." *JMD Holding Corp*., 4 N.Y.3d at 380; *172 Van Duzer Realty Corp*., 24 N.Y.3d at 536.

N.Y. U.C.C. § 2-A-504(2) provides that where, as here, a liquidated damages provision is unenforceable, the parties must look to other provisions of the U.C.C. for a remedy. Pursuant to N.Y. U.C.C. § 2-A-528(1), in the absence of a valid liquidated damages provision, where a lessor elects to dispose of the goods by a substitute lease agreement, by sale or otherwise, the lessor may recover from the lessee as damages:

> (a) accrued and unpaid rent . . . as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, [plus]
>
> (b) the present value as of [said] date . . . of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and
>
> (c) any incidental damages . . . less expenses saved in consequence of the lessee's default.

N.Y. U.C.C. § 2-A-528(1).

In *Global*, this Court found that § 2-A-528(1) applied to the calculation of damages where the liquidated damages provision was unenforceable and the Lessor had sold the aircraft. 2011 WL 11075177, at *6. It therefore ordered the parties to conclude fact and expert discovery

and proceed to a trial to ascertain any monetary values to be applied under the §2-A-528 formula that remained in factual dispute. *Id.*

In the present case, the Aircraft has not yet been sold. But under applicable law, the ultimate sale price of the leased property is irrelevant to Plaintiff's damages. Plaintiff's damages are the present value of the unpaid future rent under the Lease minus the fair market rental value of the Aircraft. N.Y. U.C.C. § 2-A-528(1). Plaintiff has failed to establish this amount, and therefore summary judgment is inappropriate. As in *Global*, the Court should deny summary judgment, and order that the case proceed to discovery.

CONCLUSION

For all of the above reasons, this Court should deny Plaintiff's motion for summary judgment under § 3213, find that the liquidated damages provided in the Lease constitute an unenforceable penalty, and order the case to proceed to discovery.

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