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Samuel L. Butt
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



NORBERTO JORGE LEVIN, FONDO DE
INVERSION PRIVADO LEVIN GLOBAL,

Plaintiffs-Appellants,

against

CARLOS LUIS SALVINI, MAURICIO VALENTIM GUGLIANO,

Defendants-Respondents.

Case No.
2025-00782

BRIEF FOR PLAINTIFFS-APPELLANTS

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Table of Contents

| | |
|--|----|
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF QUESTIONS PRESENTED..... | 6 |
| STATEMENT OF THE FACTS AND THE CASE..... | 7 |
| A. Levin Global And The Origin Of The Levin Global Fund..... | 7 |
| B. The 2011 Contributors Agreement..... | 8 |
| C. Berrocal Gonzalez Breaches The Non-Compete Clause | 9 |
| D. The 2015 Contributors Agreement..... | 9 |
| E. Defendants’ Work At Organizacao Levin Do Brasil Ltda. And The Energisa Project..... | 12 |
| F. Gugliano Secretly Establishes A Competing Company In Brazil Called Real Valor..... | 13 |
| G. Gugliano Is Caught In The Act Using Levin Global’s Computer Networks To Create Real Valor | 13 |
| H. Gugliano Pushes Ahead With Real Valor Before Abruptly Quitting His Employment With Levin Global..... | 14 |
| I. Salvini Also Suddenly Leaves His Employment With Levin Global On July 31, 2015 | 14 |
| J. Evidence Emerges That Salvini And Gugliano Sabotaged The Energisa Project To Hobble Levin Brazil As They Exited To Run Real Valor | 15 |
| K. Levin Global Suffers Extensive Damages As A Result Of Defendants’ Sabotage And Competition | 16 |
| THE TRIAL AND JUDGMENT..... | 17 |
| ARGUMENT | 18 |

| | | |
|------|--|----|
| I. | STANDARDS OF REVIEW..... | 18 |
| II. | THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD IN HOLDING THAT THE LIQUIDATED DAMAGES PROVISION WAS UNENFORCEABLE AND DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROOF ON THE ISSUE | 19 |
| | A. The “Well Established” Legal Standard | 20 |
| | B. This Court Has Enforced Liquidated Damages Clauses Providing For Two To Three Times The Foreseeable Damages | 23 |
| | C. The Trial Court’s Decision Disregarded The Correct Legal Standard, Relied Upon An Irrelevant Inquiry, And Improperly Shifted the Burden Of Proof..... | 24 |
| | D. The Trial Record Is Devoid Of Evidence Showing The Foreseeable Damages Were “Readily Ascertainable” At The Time Of Contracting | 29 |
| | E. The Trial Record Is Devoid Of Evidence Showing Gross Disproportionality | 30 |
| | F. Section 13.1 Is Not Rendered Unenforceable By Section 13.2’s Allowance Of “Other Applicable Damages In Accordance With General Rules Of Law” | 33 |
| III. | THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE RELATING TO COSTS AND LOSSES AS WELL AS EXHIBIT P-47 | 35 |
| | A. The Trial Court Erroneously Excluded Evidence Substantiating The Levin Global Fund’s Costs and Losses | 35 |
| | B. Mr. Levin Was Competent To Testify About The Fund’s Lost Profits As A Fact Witness And His Trial Testimony Should Have Been Permitted | 37 |
| | C. Exhibit P-47 Is Also Admissible As A Summary Of Voluminous Material..... | 38 |
| | CONCLUSION..... | 40 |

Table of Authorities

| Cases | Page(s) |
|--|----------------|
| <i>Addressing Sys. & Prod., Inc. v. Friedman</i> , 59 A.D.3d 359 (1st Dep’t 2009) | 28 |
| <i>Ashland Mgmt. Inc. v. Janien</i> , 82 N.Y.2d 395 (1993) | 37 |
| <i>Bates Adv. USA, Inc. v. 498 Seventh, LLC</i> , 7 N.Y.3d 115 (2006) | 28 |
| <i>Carlyle, LLC v. Quik Park Beekman II, LLC</i> , 59 Misc. 3d 35, 74 N.Y.S.3d 434 (1st Dep’t 2018) | 23 |
| <i>Ed Guth Realty, Inc. v. Gingold</i> , 34 N.Y.2d 440 (1974) | 39 |
| <i>Fed. Realty Ltd. P’ship v. Choices Women’s Med. Ctr., Inc.</i> , 289 A.D.2d 439 (2d Dep’t 2001) | 21, 22, 23, 25 |
| <i>GFI Brokers, LLC v. Santana</i> , No. 06-cv-3988 (GEL), 2008 WL 3166972 (S.D.N.Y. Aug. 6, 2008) | 34 |
| <i>Greasy Spoon, Inc. v. Jefferson Towers, Inc.</i> , 75 N.Y.2d 792 (1990) | 37 |
| <i>Grynberg v. Advance Nanotech, Inc.</i> , 79 A.D.3d 480 (1st Dep’t 2010) | 33 |
| <i>In re Richmond Garden Views, LLC</i> , No. 23-cv-22381 (SHL), 2024 WL 4455437 (Bankr. S.D.N.Y. Oct. 9, 2024) ... | 34 |
| <i>Jefferies LLC v. Gegenheimer</i> , 2020 WL 3268536 (S.D.N.Y. June 17, 2020) | 33 |
| <i>JMD Holding Corp. v. Cong. Fin. Corp.</i> , 4 N.Y.3d 373 (2005) | 21, 22, 25, 36 |
| <i>Kalt v. Ritman</i> , 50 A.D.3d 469 (1st Dep’t 2008) | 19 |

| | |
|--|----------------|
| <i>Matter of Thomma</i> , 232 A.D.2d 422 (2d Dep’t 1996) | 39 |
| <i>Nat. Grid Corporate Services, LLC v. Lehack & Grodensky, PC</i> , 2014 WL 5468309 (Sup. Ct. Nassau Co. Mar. 27, 2014)..... | 39 |
| <i>Noboa-Jaquez v. Town Sports Int’l, LLC</i> , 138 A.D.3d 493 (1st Dep’t 2016) | 32 |
| <i>Pastreich v. Pastreich</i> , 176 A.D.3d 449 (1st Dept 2019)..... | 19 |
| <i>Seymour v. Hovnanian</i> , 211 A.D.3d 549 (1st Dep’t 2022) | 20, 22, 23, 32 |
| <i>State v. Jesus H.</i> , 176 A.D.3d 646 (1st Dep’t 2019) | 19 |
| <i>Szczerbiak v. Pilat</i> , 90 N.Y.2d 553 (1997) | 32 |
| <i>Tate-Mitros v. MTA New York City Transit</i> , 144 A.D.3d 454 (1st Dep’t 2016) | 19 |
| <i>Tenber Assocs. v. Bloomberg L.P.</i> , 51 A.D.3d 573 (1st Dep’t 2008) | 20, 23 |
| <i>Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.</i> , 41 N.Y.2d 420 (1977) | passim |
| <i>Trustees of Columbia Univ. in City of New York v. D’Agostino Supermarkets, Inc.</i> , 36 N.Y.3d 69 (2020) | 21, 23 |
| <i>Tulin v. Bostic</i> , 152 A.D.2d 887 (3d Dep’t 1989)..... | 37 |
| <i>United Air Lines, Inc. v. Austin Travel Corp.</i> , 867 F.2d 737 (2d Cir. 1989)..... | 21 |
| <i>United Title Agency, LLC v. Surfside-3 Marina, Inc.</i> , 65 A.D.3d 1134 (2d Dep’t 2009)..... | 25, 26 |

| | |
|--|--------|
| <i>Wathne Imports, Ltd. v. PLR USA, Inc.</i> , 125 A.D.3d 434 (1st Dep’t 2015) | 37, 38 |
| <i>Withers Bergman LP v. Solus Alternative Asset Mgmt. LP</i> , 35 Misc. 3d 138(A), 951 N.Y.S.2d 84 (1st Dep’t App. Term 2012)..... | 23 |
| <i>Zeer v. Azulay</i> , 50 A.D.3d 781 (2d Dep’t 2008)..... | 20 |
| Rules | |
| CPLR 4401 | 32 |

Plaintiffs-Appellants Norberto Jorge Levin and Fondo de Inversion Privado Levin Global (“Levin Global” or the “Fund”) (collectively, “Plaintiffs”) submit this brief in support of their appeal from the Judgment of the Supreme Court of the State of New York, New York County (Schechter, J.), dated January 22, 2025 (the “Judgment”). (A. 4-7).

PRELIMINARY STATEMENT

This appeal primarily concerns the Trial Court’s Decision After Trial (the “Decision”), which erred by applying an incorrect legal standard to conclude that the liquidated damages clause contained in a contract was unenforceable as a matter of New York public policy. The Trial Court cited no legal authority in support of its Decision, nor did it perform the legal analysis required by Court of Appeals precedent and numerous prior decisions from this Court. Instead, the Trial Court disregarded case law to fashion its own unprecedented and legally unsupported test. This was a clear error of law. Accordingly, the Decision should be reversed and, because Defendants-Respondents (“Defendants”) failed to present any evidence to meet their burden under the correct legal standard, judgment should be entered in favor of Plaintiffs.

After a five-day trial, a jury found both Defendants liable for breach of contract. Under the terms of that contract (the “Contributors Agreement”), the Defendants had become part-owners (known as “Contributors”) in Levin Global, a

multinational valuation and asset-management business. Defendants paid nothing for their shares. Nor did they make any capital contribution. Defendants accepted their ownership interest in Levin Global and made a contractual commitment not to start any other companies that competed with Levin Global for as long as they remained Contributors.

The evidence presented at trial established that, mere months after signing an amended agreement in 2015 that reaffirmed their commitment not to compete, Defendants secretly formed their own, competing Brazilian valuation and asset-management firm, Real Valor Avaliacoés e Assessoria Empresarial Ltda. (“Real Valor”). Defendants then deliberately mismanaged and sabotaged Levin Global’s operations in Brazil to make way for their new venture. With their corporate sabotage complete, Defendants left Levin Global. The fallout from Defendants’ sabotage caused millions of dollars in damages to Levin Global and its owner, Norberto Levin. After hearing the evidence, the jury returned a unanimous verdict that both Defendants breached the non-compete provision of the Contributors Agreement based on their conduct concerning Real Valor.

Section 13.1 of the Contributors Agreement contained a liquidated damages clause that provided for damages of \$1 million for Defendants’ breaches. However, in response to Defendants’ motion for a directed verdict, the Trial Court invalidated

the clause on the basis that it violated New York public policy as an unenforceable penalty.

Nearly 50 years ago, the Court of Appeals held that courts considering whether liquidated damages were an unenforceable penalty should analyze whether “the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.” *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425 (1977). The Court held that liquidated damages should only be invalidated if “the amount fixed is plainly or grossly disproportionate to the probable loss.” *Id.* The Court of Appeals has repeatedly reaffirmed this standard throughout the years, and lower courts—including this Court—have consistently applied this analysis.

The Trial Court did not perform this analysis. Its Decision did not consider whether the actual loss was incapable or difficult of precise estimation at the time of contracting. And it did not analyze whether \$1 million was “plainly or grossly disproportionate” to the probable loss. Instead, the Trial Court created its own *sui generis* test. The Decision focused solely on whether “the parties actually discussed the difficulty of estimating damages, what the actual monetary damages to the Fund looked like . . . or any actual Fund financial metrics.”

Whether the contracting parties “discussed” these topics is not part of the legal test. *Truck Rent-A-Center* and its progeny require courts to engage in their own

analysis of potential estimation and proportionality, not base their decision on whether the parties did. Nevertheless, the Trial Court erroneously looked at whether the record supported such deliberations by the parties themselves and concluded that, because “[n]o specifics were provided of any substantive discussions [by the parties] of potential damages that were tethered to any contemplated financial harm that the Fund would suffer,” the liquidated damages provision was an unenforceable penalty.

Not only did the Trial Court fail to conduct the proper legal inquiry, but the analysis it erroneously performed had the additional effect of turning the burden of proof on its head. Despite correctly stating that Defendants bore the burden of proof on this issue, the Trial Court shifted the burden to Plaintiffs by requiring that they present evidence affirmatively supporting the existence of relevant discussions by the parties. That was clear error.

Well-established law gives Defendants the burden of proving that (1) probable losses were “readily ascertainable” at the time of contracting and (2) the liquidated amount was “plainly and grossly disproportionate” to the probable loss. Defendants failed to do this. There was no testimony or other evidence at trial suggesting that the parties had the ability to measure, with any precision, the foreseeable damage from a breach of the non-compete in the Contributors Agreement. Nor did the Trial Court’s Decision mention any. In fact, the Trial Court’s finding in the Decision that “[n]o specifics were provided of any substantive discussions of potential damages”

acknowledged the absence of such evidence. Without this evidence, the Trial Court could not possibly have assessed the disproportionality or foreseeability of damages under the correct legal standard. Defendants therefore failed to carry their burden, and judgement should have been entered for Plaintiffs. The Trial Court's mistaken use of the absence of evidence against Plaintiffs flipped the burden of proof and is reversible error.

The Trial Court also erred in precluding, just four days before trial, Plaintiffs' proposed Exhibit P-47, which was a summary of voluminous material demonstrating the losses and costs suffered by Mr. Levin and Levin Global as a result of Defendants' breach of contract, as well as preventing Mr. Levin from testifying at trial about the Fund's lost profits. The Trial Court ruled that the damages reflected in Exhibit P-47 "are not recoverable, period" and that Plaintiffs could not take into account costs and losses initially felt by the Fund's operating companies in calculating the Fund's damages. (A. 175-76). During the trial, the Court also precluded Mr. Levin from testifying about the Fund's lost profits and directed the jury not to consider such lost profits despite case law from this Court allowing owners and CEOs like Mr. Levin to give such testimony as a fact witness. (A. 471). As explained below, these rulings were in error and, given the finding of a breach by the jury, the case should be remanded for further proceedings on actual damages as to Defendants' breach only.

Accordingly, Appellants respectfully request that this Court: (1) reverse the Decision holding the liquidated damages provision unenforceable and, because Defendants failed to present any evidence at trial supporting their burden under the correct legal standard, direct entry of judgment in favor of Plaintiffs for \$1,000,000 each against Defendants Salvini and Gugliano, for a total of \$2,000,000, in accordance with said provision, plus pre- and post-judgment interest; and (2) reverse the Trial Court's ruling precluding Plaintiffs from presenting evidence concerning the costs and losses felt by the operating companies and, by extension, damages to the Fund and Mr. Levin, as well as testimony concerning lost profits, and remanding the case for further proceedings to determine the amount of Plaintiffs' actual damages.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Trial Court err by holding that the liquidated damages provision in Section 13.1 of the Contributors Agreements was an unenforceable penalty as a matter of New York public policy by applying an incorrect legal standard, failing to engage in the proper analysis required by Court of Appeals precedent and numerous decisions from this Court, and reversing the proper burden of proof?

Answer: Yes.

2. Did the Trial Court err by precluding Plaintiffs from offering evidence of the costs and losses incurred by Levin Global's operating companies and by

preventing Mr. Levin from testifying, as the owner and CEO of Levin Global, concerning lost profits?

Answer: Yes.

STATEMENT OF THE FACTS AND THE CASE

A. Levin Global And The Origin Of The Levin Global Fund

In 2011, Levin Global's owner, Norberto Levin, granted Defendants and several other longstanding employees an ownership interest in Levin Global. (A. 927). Those individuals were Pablo Tricci, Aldo di Paolantonio, Pablo Otero, Adriana Maria Berrocal Gonzalez, and the two Defendants Carlos Salvini and Mauricio Gugliano. (*Id.*) Including Mr. Levin, the seven individuals became known as "Contributors" (or "Aportantes" in Spanish).

The Levin Global Fund—sometimes called the "FIP"—is a Chilean private investment fund that was established in 2011 to facilitate the Contributors' ownership of Levin Global. (*See* A. 1027). Each Contributor was given an ownership interest in the Levin Global Fund. (*Id.*) The Levin Global Fund, in turn, owned 100% of a holding company that, in turn, owned 100% or almost 100% of the various operating companies that comprise Levin Global. *See id.*

None of the Contributors to whom Mr. Levin granted the ownership interests paid anything for their shares or made any capital contribution. (A. 264-68).

B. The 2011 Contributors Agreement

On September 9, 2011, each Contributor signed an agreement that governed their participation in the Levin Global Fund (the “2011 Contributors Agreement”). (A. 927-76). Messrs. Levin and Salvini worked with the consulting company KPMG to draft the 2011 Contributor Agreement. (A. 268).

Section 8.1 of the 2011 Contributors Agreement contained a broad non-compete clause that provided:

During the term of this Agreement, Contributors undertake to not engage, directly or indirectly through Related Companies, in any activity whatsoever (investment, administration, advising, etc.) that is currently engaged in by the Fund or by any of the companies or entities controlled by the Fund, or that competes with any commercial or industrial activity carried out by the companies or entities controlled by the Fund.

Included in this non-compete obligation is a prohibition on initiating company operations or operating existing companies which, due to their activity, location or other characteristics, might materially influence, directly or indirectly, the Fund’s revenues or costs.

(A. 936).

Section 13 spelled out the consequences for any Contributor who breached this non-compete by “require[ing] the party in breach or the violator to pay to the Remaining Contributors, a fine equivalent to 20,000 US dollars, to be distributed among the Remaining Contributors prorated for their interests in the Fund.” (A. 939-40). The next subsection further provided that the \$20,000 payment “does

not prevent the Remaining Contributors from requesting payment for other applicable damages in accordance with the general rules of law.” (A. 940).

C. Berrocal Gonzalez Breaches The Non-Compete Clause

Despite the non-competete provision, one of the Contributors, Ms. Berrocal Gonzalez, began offering asset valuation services in Mexico that competed with Levin Global. The Contributors discovered the competition, but Ms. Berrocal Gonzalez refused to pay the \$20,000 in accordance with Section 13.1. (A. 284-85). Although the Contributors considered legal action, they found that the expense of enforcement would far exceed the guaranteed \$20,000. (A. 285-86). The Contributors therefore unanimously resolved to amend the 2011 Contributors Agreement to increase the payment to an amount that made more sense. (A. 290-91).

D. The 2015 Contributors Agreement

In response to their experience with Ms. Berrocal Gonzalez, Levin and Salvini agreed that the payment provided in Section 13.1 should be raised from \$20,000 USD to \$1,000,000 USD. (A. 290-91). In an e-mail to Mr. Levin, dated May 10, 2014, Salvini wrote, “I agree in increasing it to US\$ 1,000,000. . . . The thing with [Berrocal Gonzalez] has revealed that we were naïve and imprecise in the agreement.” (A. 1028). Salvini adamantly supported strengthening the non-competete clause and made specific recommendations to Mr. Levin. (*Id.*) Salvini

supported a broad non-compete and personally participated in drafting amendments to the Contributors Agreement that effectuated it, including a substantial increase in Section 13's estimated-damages payment. (*Id.*).

Mr. Levin gave testimony supporting his consideration of Levin Global's revenues and profits before raising the remedy in Section 13.1 to \$1 million. *See* A. 288 ("Q. How did you come up with that number? A. At that time the firm was booming, particularly Levin Brazil was booming. At the end of the previous year 2014 we had sold a total of about \$15 million in that year . . . and the profits of 2014 were close to one million, slightly under."). Mr. Di Paolantonio also testified as to his considerations. A. 491 ("Q. Why did you agree to the amount of a million dollars? A. Because the exit of a contributing partner by breaching this clause of no-compete causes an economic damage to us. A partner is in charge of a part of the sales and the profits of a company. If a partner takes advantage of that situation for his or her own benefit, it's damaging the rest of us."); A. 492 ("The [main] reason is that the person who breaches that clause retributes the rest of us for an amount that's an estimate of the damage that his actions caused. Q. Did you think a million dollars was a reasonable estimate of those damages? A. Yes, and I continue to do so, yes.")

This information informed the Contributors' belief as to the damages a breaching party could cause.

Q. . . . Now, was the choice to raise it to \$1 million based on one particular year of what happened at the firm?

A. No, no. It was based on what was happening at the time and what we foresaw that would be the probable future that would make it fair to put that number. There was no mathematics in it. It was just what made common sense to it.

Q. I just want to make sure I understand. When you say what you foresaw, what are you talking about?

A. The -- particularly the Brazil operations was growing permanently. It had -- if we took the average sales [and] profits over five years periods, it was growing all the time. It was really -- so we could be optimistic and say we foresee that things are going to carry on growing. There was [] no reason to think otherwise at that time.

(A. 289-90). Mr. Levin also testified that these rationales were discussed with Salvini.

Q. Were the firm's overall revenues ever mentioned in conversations with Mr. Salvini?

A. Yes, they were.

Q. What about the firm's overall profits, were they mentioned?

A. Also. Those were the two reasons why we thought it made sense to put that new number instead of [the] previous.

(A. 294). And Mr. Levin expressly connected the firm's overall performance and prospects at the time the partners signed the 2015 Contributors Agreement on February 2, 2015, to the foreseeable damages a potential breach might cause.

Q. Was this new contract with Energisa in 2014, was that a factor in the contributors -- in the contributors' reasoning for raising that damages clause to \$1 million?

A. It was.

Q. Why was it a factor? Can you explain it?

A. Yes.

Q. Yes, why?

A. Well, for the same reason I explained before. We had our revenues and our profits made sense and it made every sense for us to think that

any breach of the noncompete should be measured in [millions of] dollars, the damage of any breach.

(A. 299-300).

Accordingly, the amended Contributors Agreement, dated February 2, 2015 (the “2015 Contributors Agreement”), raised the estimated-damages payment “to 1,000,000 US dollars” while the non-compete provision remained the same as in the 2011 Contributors Agreement. (A. 977, 989).

E. Defendants’ Work At Organizacao Levin Do Brasil Ltda. And The Energisa Project

Defendants’ time at Levin Global focused primarily on Levin Global’s activities in Brazil through Levin Global’s operating company in Brazil called Organizacao Levin do Brasil Ltda. (“Levin Brazil”). Salvini managed the Levin Brazil office and its commercial operations. (*See* A. 264). Gugliano was a director of the company with responsibility for the operations and billable projects of the office in Sao Paulo, Brazil. (A. 267).

The year 2014 was a particularly optimistic one for Levin Brazil because it had secured the biggest job in its history providing services for a group of Brazilian electric utility companies called Grupo Energisa (“Energisa”). (A. 296-298). The job for Energisa was valued at about \$11 million (hereafter, the “Energisa Project”). (A. 298). The terms of the Energisa Project were executed in two contracts, both

dated October 1, 2014, which were signed and initialed on every page by Gugliano. (A. 1033-67; A. 1068-1102).

F. Gugliano Secretly Establishes A Competing Company In Brazil Called Real Valor

In early 2015, despite having just signed the 2015 Contributors Agreement, Gugliano began a competing company in Brazil. That company was Real Valor.

In March 2015, Gugliano asked his cousin who worked as an attorney, Alessandra Carteiro, to form Real Valor in Brazil on his behalf. (A. 723). Gugliano paid all fees associated with starting Real Valor. Real Valor's Articles of Organization, dated March 23, 2015, list Ms. Carteiro and her employee, Bruna Pereira Moura, as the owners of Real Valor. (A. 1103-1113).

G. Gugliano Is Caught In The Act Using Levin Global's Computer Networks To Create Real Valor

Gugliano performed many of the activities for establishing Real Valor from a computer connected to Levin Global's network. Unbeknownst to Gugliano at the time, in order to investigate certain improper uses of its computer network, Levin Global had implemented a monitoring program that took periodic pictures of the screens of any computer connected to its network. (A. 307). This monitoring program caught Gugliano red-handed by taking screen shots of him drafting Real Valor's foundational documents, obtaining Real Valor's tax address, and renting office space for Real Valor. (*Id.*; A. 1118-19; A. 1121-25; A. 1126-30).

The Contributors considered firing Gugliano but ultimately decided to let him remain. (A. 316-17). They attempted to negotiate a new agreement with Gugliano that would specifically forbid him from continuing with Real Valor. Salvini requested that Levin Global’s Brazilian legal counsel, Manoel J. Pereira dos Santos, draft a “non competition and confidentiality agreement” that Gugliano would sign. (See A. 646-47).

H. Gugliano Pushes Ahead With Real Valor Before Abruptly Quitting His Employment With Levin Global

Despite all this, Gugliano continued with Real Valor. Gugliano directed his cousin to seek accreditation for Real Valor from Brazil’s national electric energy agency, ANEEL, allowing Real Valor to service public utility companies, which she did in a letter dated June 1, 2015. (A. 726). ANEEL acknowledged the application and entered it into its protocol on July 2, 2015. (See A. 737). The next day, on July 3, 2015, Gugliano resigned from his employment with Levin Global. (A. 1603-14). He nevertheless remained a Contributor in Levin Global.

I. Salvini Also Suddenly Leaves His Employment With Levin Global On July 31, 2015

At the end of June 2015, Salvini declared his intention to leave Levin Global by the end of July. (A. 319-20). His last official day as an employee was July 31, 2015, although he also remained a Contributor. (A. 320).

J. Evidence Emerges That Salvini And Gugliano Sabotaged The Energisa Project To Hobble Levin Brazil As They Exited To Run Real Valor

Before leaving Levin Global, Salvini and Gugliano received repeated notifications that the Energisa Project had gone off the rails and that Energisa was defaulting Levin Global. (A. 1131-41; A. 1142-50). Astonishingly, neither the disastrous state of the Energisa Project nor Energisa's repeated complaints were ever communicated to Mr. Levin or the other Contributors until around July 5, 2015—weeks after Energisa had declared a default and two days after Gugliano's resignation. (A. 326-27). All Contributors had weekly meetings to discuss the status of projects, which Salvini and Gugliano would regularly attend. (A. 327). Yet, neither Gugliano nor Salvini ever brought the difficulties with the Energisa Project to the attention of the other Contributors. (A. 327-28). Those difficulties included the allegedly illegal hiring of over 100 contractors and significant delay of project progress (11% vs. 33%) showing that the project had been practically abandoned. (A. 326). Defendants covered up the situation.

Perhaps the most damning documentary evidence of intentional sabotage comes from an August 6, 2015 e-mail from Gugliano to Alexandre Ferreira, an officer of Energisa. (A. 1171-1219). Gugliano sent this e-mail from his personal e-mail address less than a month after he left employment with Levin Brazil—but while he remained a Contributor subject to the non-compete—and Gugliano copied

Salvini's personal yahoo.com e-mail address. (A. 1171). Attached to Gugliano's e-mail were copies of several privileged conversations within Mr. Levin, which included the company's attorneys, concerning how the company should respond to Energisa's default letters. (A. 1172-1219). Those confidential conversations essentially admitted the company's breaches of the contract with Energisa. (*Id.*). Gugliano intentionally leaked this damaging confidential information to Energisa at a time when Levin Global was frantically trying to rescue its relationship with the energy company.

On August 6, 2015, less than a week after his departure from employment with Levin Global, Salvini also e-mailed two Energisa officers, making untrue, defamatory statements and maligning Levin Global (A. 1220-27).

K. Levin Global Suffers Extensive Damages As A Result Of Defendants' Sabotage And Competition

The fallout from the Energisa Project's collapse resulted in extensive damages to Levin Global. Energisa initially rescinded the entire project with Levin Brazil. (A. 328). After intense negotiations, Energisa allowed Levin Brazil to complete a small portion of the project but Levin Brazil had to pay fines and penalties for its breach, and it suffered other consequential damages as well. (A. 337).

In the months that followed, Brazil's energy-sector regulator, ANEEL, relied upon the debacle with Energisa to revoke the accreditation that allowed Levin Brazil to participate in bidding for and providing services to its primary customer base in

the country. (A. 338). To this day, the disastrous Energisa Project and continued bad-mouthing from Defendants has prevented Levin Brazil from recruiting enough qualified technicians and engineers to reapply for its accreditation from ANEEL.

THE TRIAL AND JUDGMENT

Shortly before trial, Defendants raised an objection to Plaintiffs' proposed Exhibit P-47. (A. 92). Exhibit P-47 was a summary of voluminous material pursuant to Rule 10.11 of the New York Guide to Evidence showing in line-item format the costs and losses suffered by Levin Brazil as a result of Defendants' breaches of the Contributors Agreement. (A. 1446-1489). Just four days before the trial, the Trial Court erroneously granted Defendants' motion to preclude the exhibit and went further and held that the amounts in P-47 "are not recoverable, period" and that Plaintiffs could not take into account costs and losses initially felt by the Fund's operating companies in calculating the Fund's damages. (A. 175-76). During the trial, the Trial Court similarly precluded Mr. Levin from testifying about lost profits of the Fund, and directed the jury not to consider such lost profits. (A. 470-71).

The Trial Court held a jury trial on Plaintiffs' claims and Defendants' counterclaims from August 19, 2024, through August 26, 2024. Five witnesses (Mr. Levin, Aldo Di Paolantonio, Carlos Salvador, Salvini, and Gugliano) testified.

At the conclusion of the trial, the jury issued a unanimous verdict that: (a) Salvini breached Section 8 of the Contributors Agreement; (b) Gugliano

breached Section 8 of the Contributors Agreement; (c) the Fund breached section 6 of the Contributors Agreement in failing to pay Salvini dividends and awarding him \$18,000; (d) the Fund breached section 6 of the Contributors Agreement in failing to pay Gugliano dividends and awarding him \$3,600; (d) Plaintiffs did not breach Section 3.1.2 by failing to purchase the shares of Salvini; (e) Plaintiffs did breach Section 3.1.2 by failing to purchase the shares of Gugliano, as of August 1, 2015, and awarding him \$1. (A. 919-26).

The jury did not rule on the damages for Defendants' breach of the Contributors Agreement because the Trial Court's August 15, 2024 ruling precluded planned testimony on actual damages and the question of whether the liquidated damages provision was an unenforceable penalty was a question of law for the Trial Court.

Following the jury's verdict, the Trial Court issued a Decision after Trial, dated August 28, 2024, (as noted, the "Decision") in which the Trial Court found that the liquidated damages provision of the Contributors' Agreement, Section 13.1, was an unenforceable penalty. (A. 8-9).

ARGUMENT

I. STANDARDS OF REVIEW

This Court should review the Trial Court's Decision invalidating liquidated damages as akin to a determination after a non-jury trial since the issues were within the purview of the Trial Court and not presented to the jury. "It is well settled that

as to the review of a judgment following a nonjury trial, this Court’s ‘authority is as broad as that of the trial court’ and that ‘as to a bench trial [and the Appellate Division] may render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses.’” *State v. Jesus H.*, 176 A.D.3d 646, 647 (1st Dep’t 2019) (citations omitted) (alteration in original); *see Kalt v. Ritman*, 50 A.D.3d 469, 469 (1st Dep’t 2008) (“[O]ur reach in reviewing the evidence in a nonjury trial is as broad as that of the trial court.”).

As to the Trial Court’s decision to exclude evidence and testimony, evidentiary rulings are reviewed for an abuse of discretion. *Pastreich v. Pastreich*, 176 A.D.3d 449, 451 (1st Dept 2019) (reviewing evidentiary decision for abuse of discretion); *Tate-Mitros v. MTA New York City Transit*, 144 A.D.3d 454, 456 (1st Dep’t 2016) (noting court’s evidentiary decision “should not ordinarily be disturbed on appeal absent a clear abuse of discretion.”).

II. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD IN HOLDING THAT THE LIQUIDATED DAMAGES PROVISION WAS UNENFORCEABLE AND DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROOF ON THE ISSUE

The Trial Court’s Decision disregarded well established case law by applying an incorrect legal standard and therefore should be reversed. Moreover, under the correct legal standard, Defendants had the burden of establishing that Section 13.1 was an unenforceable penalty, and they failed to present any evidence at trial that

would have allowed them to meet their burden. This Court should therefore also direct entry of judgment for Plaintiffs.

A. The “Well Established” Legal Standard

The Court of Appeals described the “well established” rule for determining whether a liquidated damages clause amounts to an unenforceable penalty nearly 50 years ago:

A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. . . . If, however, 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-Ctr., Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 425 (1977).

Since then, New York courts have consistently applied this analysis. *See, e.g., Seymour v. Hovnanian*, 211 A.D.3d 549, 553 (1st Dep’t 2022) (“If the amount is ‘grossly disproportionate’ to the probable loss, the provision is a penalty, and courts will not enforce it.” (citations omitted)); *Tenber Assocs. v. Bloomberg L.P.*, 51 A.D.3d 573, 574 (1st Dep’t 2008) (“Bloomberg failed to establish that . . . the amount fixed was ‘plainly or grossly disproportionate to the probably loss.’” (citing *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425)); *Zeer v. Azulay*, 50 A.D.3d 781, 785 (2d Dep’t 2008) (“A party requesting that a court strike down a liquidated damages provision as an unenforceable penalty must demonstrate that the damages are not a reasonable measure of the actual loss resulting from the breach, and the actual loss is readily

ascertainable.” (collecting cases)); *Fed. Realty Ltd. P’ship v. Choices Women’s Med. Ctr., Inc.*, 289 A.D.2d 439, 442 (2d Dep’t 2001) (“[T]he record is devoid of evidence that the amount of liquidated damages to which the parties agreed is grossly disproportionate to the plaintiff’s actual loss.”); *see also United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 740 (2d Cir. 1989) (“A liquidated damages clause generally will be upheld by a court, unless the liquidated amount is a penalty because it is plainly or grossly disproportionate to the probable loss anticipated when the contract was executed.” (citing *Truck Rent-A-Ctr.* and other cases)). When considering whether a remedy is disproportionate to foreseeable losses, “the agreement should be interpreted as of the date of its making and not as of the date of its breach.” *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425.

“The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty.” *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (2005); *see Trustees of Columbia Univ. in City of New York v. D’Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 75 (2020) (“Defendant, as the party seeking to avoid payment of liquidated damages, has the burden of establishing that the damages for breach of the surrender agreement were disproportionate to the foreseeable losses and in fact, a penalty.” (internal quotation marks and citation omitted)). The Court of Appeals has stated that a defendant “must demonstrate either that damages . . . were readily ascertainable at the time [the

parties] entered into their . . . agreement, or that . . . [the remedy] is conspicuously disproportionate to these foreseeable losses.” *JMD Holding*, 4 N.Y.3d at 380. Defendants must present evidence affirmatively proving foreseeability and gross disproportionality; Plaintiffs need not present any evidence on the issue to prevail. *See Fed. Realty*, 289 A.D.2d at 442 (“[S]ince the record is devoid of evidence that the amount of liquidated damages to which the parties agreed is grossly disproportionate to the plaintiff’s actual loss . . . the Supreme Court should have dismissed the defendant’s third affirmative defense challenging the plaintiff’s right to recover such damages.”). Moreover, as the Court of Appeals in *JMD Holding* noted, there is an increasing trend favoring freedom of contract and against invalidating liquidated damages provisions freely agreed to. *See* 4 N.Y.3d at 381.

It does not matter whether the parties label the contractual remedy a “fine,” “punishment,” or “penalty.” The Court of Appeals has made clear that, “[i]n interpreting a provision fixing damages, it is not material whether the parties themselves have chosen to call the provision one for ‘liquidated damages,’ . . . or have styled it as a penalty. . . . Such an approach would put too much faith in form and too little in substance.” *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425.

Absent a showing of gross disproportionality, “there is no countervailing public policy concern [and] ‘freedom of contract prevails’ in this ‘arm’s length transaction between sophisticated parties.’” *Seymour*, 211 A.D.3d at 554 (quoting

Trustees of Columbia, 36 N.Y.3d at 75 n.4). This is because “[p]rovisions for liquidated damage have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage. . . . [And] [i]n such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury.” *Truck Rent-A-Ctr.*, 41 N.Y.2d at 424.

B. This Court Has Enforced Liquidated Damages Clauses Providing For Two To Three Times The Foreseeable Damages

In the recent case of *Seymour v. Hovnanian*, 211 A.D.3d 549 (1st Dep’t 2022), this Court acknowledged that “[t]he term ‘grossly disproportionate’ in the liquidated damages context does not lend itself to a precise definition.” *Id.* at 554. It noted that the Court of Appeals had previously found liquidated damages of “7½ times” what a plaintiff would have received had a contract been fully performed were “grossly disproportionate.” *See id.* (citing *Trustees of Columbia Univ.*, 36 N.Y.3d at 75). By contrast, it cited four Appellate Department cases that had enforced liquidated damages clauses allowing plaintiffs to recover “between two or three times” the amount of probable loss. *See id.* (citing *Tenber*, 51 A.D.3d at 574; *Fed. Realty*, 289 A.D.2d at 442; *Carlyle, LLC v. Quik Park Beekman II, LLC*, 59 Misc. 3d 35, 37, 74 N.Y.S.3d 434 (1st Dep’t 2018); *Withers Bergman LP v. Solus Alternative Asset Mgmt. LP*, 35 Misc. 3d 138(A), 951 N.Y.S.2d 84 (1st Dep’t App. Term 2012)).

C. The Trial Court’s Decision Disregarded The Correct Legal Standard, Relied Upon An Irrelevant Inquiry, And Improperly Shifted the Burden Of Proof

The Trial Court’s Decision did not engage in any of the analysis required by the case law discussed above. It made no determination of whether damages were readily ascertainable at the time of contracting. Nor did it discuss whether the liquidated amount was plainly or grossly disproportionate. (A. 8-9). The Decision solely discussed the language from Section 13.1 and whether any credible evidence supported the conclusion that the parties had “actually discussed the difficulty of establishing damages, what the actual monetary damages to the Fund looked like after a breach of the non-compete or any actual Fund financial metrics.” (A. 8).

Whether the contracting parties “discussed” these topics at the time of contracting is not an element of the correct legal standard. Case law required the Trial Court—not the parties—to make its own determination concerning the ability to estimate damages and their proportionality. *See* Part II.A and II.B, *supra*; *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425-26 (discussing what “the parties could reasonably conclude” as of “the date of the lease” without analyzing whether any evidence was presented at trial to show that the parties actually discussed those issues). The Trial Court abdicated this duty.

The correct legal standard required Defendants to affirmatively present evidence establishing that the probable loss was “readily ascertainable” at the time

of contracting or that it was plainly or grossly disproportionate to the liquidated amount. *See Truck Rent-A-Ctr.*, 41 N.Y.2d at 425; *JMD Holding*, 4 N.Y.3d at 380 (requiring the party seeking to avoid liquidated damages to “demonstrate either that damages flowing from a prospective early termination were readily ascertainable at the time [the parties] entered into their revolving loan agreement, or that the early termination fee is conspicuously disproportionate to these foreseeable losses”); *United Title Agency, LLC v. Surfside-3 Marina, Inc.*, 65 A.D.3d 1134, 1135 (2d Dep’t 2009) (“The party challenging a liquidated damages clause must establish either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses.” (citing *Truck Rent-A-Ctr.*, *JMD Holding*, and other cases)). The Trial Court’s Decision did not analyze whether the record included any evidence establishing these two elements.

The Trial Court’s Decision did find that “[n]o specifics were provided of any substantive discussions of potential damages that were tethered to any contemplated financial harm that the Fund would suffer.” (A. 8). If anything, this absence of evidence means that Defendants failed to prove that the probable loss was readily ascertainable or grossly disproportionate. *See Fed. Realty*, 289 A.D.2d at 442 (dismissing defendant’s affirmative defense because “the record is devoid of evidence that the amount of liquidated damages to which the parties agreed is grossly

disproportionate to the plaintiff's actual loss"); *United Title Agency*, 65 A.D.3d at 1135 (reversing a lower court's decision that a liquidated damages provision was a penalty because "[t]he record is devoid of any evidentiary proof as to either of those factors"). The Trial Court's conclusion that Defendants met their burden is therefore directly contradicted by the Trial Court's own interpretation of the factual record. By ruling that a lack of evidence invalidated the liquidated damages provision, the Trial Court improperly shifted the burden to Plaintiffs to affirmatively uphold the contractual provision rather than correctly requiring Defendants to affirmatively prove the provision was a penalty.

Similarly, the Trial Court's reliance on the specific language from the Contributors Agreement disregarded clear Court of Appeals precedent. (A. 8). The Court of Appeals has held that "it is not material whether the parties themselves have chosen to call the provision one for 'liquidated damages,' . . . or have styled it as a penalty." *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425. It is not clear from the Decision why exactly the Trial Court felt the contract's language supported its ruling. But to the extent it relied on the language the parties used in Section 13.1 (which was translated from Spanish in any event), the Trial Court erred by improperly considering the language the parties used as material in direct contradiction to *Truck Rent-A-Center*.

Moreover, the Trial Court’s citation to testimony from Mr. Di Paolantonio as well as reliance on Defendants’ Exhibit EE does not demonstrate that the \$1 million was “a measure intended to sufficiently disincentivize disloyalty and make it worthwhile for the Fund to punish it.” (A. 8). While the Trial Court cited to Di Paolantonio’s testimony at Tr. 276 (A. 491), nowhere does he say that the \$1 million was meant to be a penalty. Rather, in explaining why he agreed to the \$1 million, he testified that “the exit of a contributing partner by breaching this clause of no-compete causes [sic] causes an economic damage to us. A partner is in charge or a part of the sale and the profits of company. If a partner takes advantage of that situation for his or her own benefit, it’s damaging the rest of us.” (*Id.*) The Trial Court’s reliance on DX-EE, an email chain regarding, *inter alia*, the liquidated damages provision, also does not support its conclusion. Mr. Levin’s January 30, 2015 email notes that the \$20,000 amount in the 2011 Contributors Agreement was “ridiculously low,” and did not cover even the cost of a lawsuit, so it had to be increased to the \$1 million, which was not grossly disproportionate for all the reasons set forth herein, including Levin Global’s revenues. (A. 1632); *see also* Parts II.D and II.E, *infra*.

In any event, the Trial Court was wrong to rely on this as a basis to invalidate Section 13.1. Both the Court of Appeals and this Court have held that the fact that liquidated damages incentivize a party not to breach does not transform such

provision “into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses.” *Addressing Sys. & Prod., Inc. v. Friedman*, 59 A.D.3d 359, 360 (1st Dep’t 2009) (citing *Bates Adv. USA, Inc. v. 498 Seventh, LLC*, 7 N.Y.3d 115, 120 (2006)). For example, in *Bates Advertising*, the plaintiff’s attorney testified that the clause was intended to “incentivize” the landlord and to provide “a club over his head to make sure he gets the work done.” 7 N.Y.3d at 120. The Court nonetheless concluded that the provision was not a penalty because:

the prospect of damages in the event of breach may always be said to encourage parties to comply with their contractual obligations. Liquidated damages are not transformed into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses.

Id. Indeed, the *Bates* Court upheld a liquidated damages provision that resulted in a \$4,339,528.61 rent abatement (based on the per day abatement set forth in the lease multiplied by the 412 days of noncompliance) due to the landlord’s failure to provide the required class E fire alarm and communication systems required by the lease at issue. *Id.* at 119.

Accordingly, because the Trial Court disregarded controlling case law, failed to apply the correct legal standard, and improperly shifted the burden of proof, the Decision should be reversed.

D. The Trial Record Is Devoid Of Evidence Showing The Foreseeable Damages Were “Readily Ascertainable” At The Time Of Contracting

Nothing in the trial record supports the idea that damages from a party’s breach of the 2015 Contributors Agreement were “readily ascertainable” at the time of contracting in February 2015. Neither Defendants’ witnesses nor Plaintiffs’ gave any testimony suggesting that the parties had the ability to measure, with any precision, the foreseeable damages from a breach of the 2015 Contributors Agreement—testimony Defendants would have needed to present in order to meet their burden.

In fact, the Trial Court’s Decision essentially found that Defendants failed to present this evidence when it stated that “there was no believable evidence that, in fact, that parties actually discussed the difficulty of estimating damages, what the actual monetary damages to the Fund looked like after a breach of the non-compete or any actual Fund financial metrics” and “[n]o specifics were provided of any substantive discussions of potential damages that were tethered to any contemplated financial harm that the Fund would suffer.” (A. 8). The absence of such evidence was a failure of proof by Defendants, not Plaintiffs.

Moreover, evidence from the record affirmatively established that the parties could not readily ascertain the amount of damages and that this uncertainty was the reason for the liquidated damages. Mr. Levin gave testimony supporting his broad

consideration of Levin Global's revenues and profits before raising the remedy in Section 13.1 to \$1 million but could not give a precise estimate of damages. (A. 291) ("Q. . . . Was there any limitation on your ability to come up with this number? I mean, did you face any sort of uncertainty when you tried and sat down and tried to come up with a good number? A. We threw around some number There were different opinions, but finally, we all agreed unanimously that that was a right -- the right number to use at the time.")). Mr. Di Paolantonio also testified to his broad considerations but never suggested a precise estimate was possible. (A. 491) ("Q. Why did you agree to the amount of a million dollars? A. Because the exit of a contributing partner by breaching this clause of no-compete causes an economic damage to us. A partner is in charge of a part of the sales and the profits of a company. If a partner takes advantage of that situation for his or her own benefit, it's damaging the rest of us.").

Given the lack of evidence supporting the ability of the parties to readily ascertain or otherwise precisely estimate the probable losses at the time of contracting, Defendants failed to meet their burden.

E. The Trial Record Is Devoid Of Evidence Showing Gross Disproportionality

Even if Defendants had proven that probable losses were readily ascertainable at the time of contracting (and they did not), Defendants did not meet their burden of proving gross disproportionality to the probable damages—much less

disproportionately in excess of two-to-three times as discussed in *Seymour*. Nothing in the record establishes a precise figure of the probable damages at the time of contracting. And nothing in the record suggests that such a figure, even if it had been proven, is grossly disproportionate to the \$1 million liquidated remedy in Section 13.1.

In fact, Mr. Levin expressly connected the firm's overall performance and prospects at the time the partners signed the 2015 Contributors Agreement on February 2, 2015, to the foreseeable damages a potential breach might cause:

Q. Was this new contract with Energisa in 2014, was that a factor in the contributors -- in the contributors' reasoning for raising that damages clause to \$1 million?

A. It was.

Q. Why was it a factor? Can you explain it?

A. Yes.

Q. Yes, why?

A. Well, for the same reason I explained before. We had our revenues and our profits made sense and it made every sense for us to think that any breach of the noncompete should be measured in [millions of] dollars, the damage of any breach.

(A. 299-300.) Similarly, Mr. Di Paolantonio testified that the amount of liquidated damages was reasonable. (A. 492) ("The [main] reason is that the person who breaches that clause retributes the rest of us for an amount that's an estimate of the damage that his actions caused. Q Did you think a million dollars was a reasonable estimate of those damages? A. Yes, and I continue to do so, yes."). Accordingly, the Trial Court should have ruled in Plaintiff's favor.

Again, it was Defendants' burden to establish a figure for the foreseeable damages and then show that the remedy in Section 13.1 is "plainly or grossly disproportionate" to that figure. *See Truck Rent-A-Ctr.*, 41 N.Y.2d at 425. They did not. The best Defendants did is accuse (unconvincingly) Mr. Levin of selecting an arbitrary number of \$1 million for Section 13.1 (putting aside that Defendants agreed with this number). But that is not the relevant test. Whether or not the number was arbitrary does not bear on the correct inquiry of whether it is grossly disproportionate. *See Truck Rent-A-Ctr.*, 41 N.Y.2d at 425; *Seymour v.*, 211 A.D.3d at 554.

Accordingly, because Defendants failed to elicit any facts in the record allowing the Trial Court to invalidate the liquidated damages in Section 13.1 as an unenforceable penalty, the Trial Court should have granted Plaintiffs' motion for directed judgment on this issue and denied Defendants' motion. *See Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997) ("A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party."); *Noboa-Jaquez v. Town Sports Int'l, LLC*, 138 A.D.3d 493 (1st Dep't 2016) (affirming motion for directed verdict because "[t]here was no rational process by which a factfinder could base a finding in favor

of [the nonmovant]”). This Court should correct this error by reversing that decision and directing entry of judgment in Plaintiffs’ favor.

F. Section 13.1 Is Not Rendered Unenforceable By Section 13.2’s Allowance Of “Other Applicable Damages In Accordance With General Rules Of Law”

Finally, the Trial Court’s Decision did not discuss the significance, if any, of Section 13.2’s statement that Section 13.1 “does not prevent” parties from requesting “other applicable damages in accordance with the general rules of law.” (*See* A. 989). However, Plaintiffs note that Section 13.2 does not affirmatively permit recovery of actual damages beyond or in lieu of the amount for liquidated damages because it only “does not prevent” the recovery of “other damages” that are available “in accordance with general rules of law.” *See Jefferies LLC v Gegenheimer*, 2020 WL 3268536, at *5 (S.D.N.Y. June 17, 2020), *aff’d*, 849 Fed App’x 16 (2d Cir. 2021) (clause that provides for both liquidated and actual damages is not per se unenforceable). Section 13.2 is therefore a “general remedies clause” that reserves the right to seek other remedies but only if those remedies are otherwise allowed by the law. This Court has upheld liquidated damages notwithstanding the inclusion of these types of general remedies clauses. *See Grynberg v. Advance Nanotech, Inc.*, 79 A.D.3d 480, 480 (1st Dep’t 2010) (holding that liquidated damages were not rendered nugatory by the general remedies clause in an agreement).

The language used in Section 13.2 is similar to language from the analogous and well-reasoned case of *GFI Brokers, LLC v. Santana*, No. 06-cv-3988 (GEL), 2008 WL 3166972, at *11–12 (S.D.N.Y. Aug. 6, 2008). In that case, the liquidated damages provision stated that liquidated damages are payable “in addition to all other obligations of [Santana] to GFI and to other remedies available to GFI,” and that such damages “shall not be deemed to be exclusive of any other remedies available to GFI, by judicial or arbitral proceedings or otherwise, including to enforce the performance or observation of the covenants and agreements contained in this Agreement.” The court held that:

[w]hile the provision reserves certain rights with respect to other remedies, it does not run afoul of the “exclusive remedy” requirement. The key phrase is “other remedies available.” The provision does not provide for actual damages in addition to liquidated damages, because it only reserves rights to additional remedies that are “available.” To the extent that New York law precludes the availability of actual damages in a contract providing for liquidated damages, they are not “other remedies available.”

Likewise, here, to the extent that New York law precludes the availability of actual damages in a contract providing for liquidated damages, Section 13.2 does not provide for actual damages because such damages would not be “other applicable damages in accordance with general rules of law” in New York.

Finally, even if Sections 13.1 and 13.2 did run afoul of the exclusive remedy rule (they do not), Plaintiffs may nevertheless elect to pursue only liquidated damages. *See In re Richmond Garden Views, LLC*, Case No. 23-cv-22381 (SHL),

2024 WL 4455437, at *5 (Bankr. S.D.N.Y. Oct. 9, 2024) (upholding a party’s election to pursue liquidated damages despite a contract provision also allowing for actual damages).

III. THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE RELATING TO COSTS AND LOSSES AS WELL AS EXHIBIT P-47

The Trial Court precluded, just four days before trial, Plaintiffs’ proposed Exhibit P-47, which was a summary of voluminous material demonstrating the over \$14 million in costs and losses suffered by Levin Global and Mr. Levin as a result of Defendants’ breaches of the Contributors Agreement. (A. 174-76, A. 471, A. 1446-89). Its ruling also stated that the financial information presented in P-47—losses and costs incurred by the Fund’s Brazilian operating company as a result of Defendants’ breaching competition—“are not recoverable, period” and that Plaintiffs could not present evidence of those costs and losses when calculating the Fund’s damages. (A. 175-76). During the trial, the Court similarly precluded Mr. Levin from testifying about the lost profits of the Fund and directed the jury not to consider such lost profits. (A. 471). These rulings were incorrect.

A. The Trial Court Erroneously Excluded Evidence Substantiating The Levin Global Fund’s Costs and Losses

Damages that were initially felt by the Fund’s operating companies were relevant and admissible for the purpose of ultimately calculating the Fund’s actual damages. The Trial Court erred in concluding that the damages reflected in

Exhibit P-47 were “not recoverable, period” simply because they concerned the Fund’s operating companies and not the Fund directly.

The Fund is not an operating entity. The Fund is a mechanism that allows for the distribution of profits made at the operating company level to the Contributors. The Fund is the 99% owner (through an intermediate entity) of Levin Brazil, the entity that Defendants sabotaged and created their own company to compete with. (See A. 1027 (Levin Global organizational chart)). There is no other place for profits from Levin Brazil to go except up to the Fund, where they are ultimately distributed to the Contributors.

Plaintiffs therefore could have shown that the costs and losses incurred by Levin Brazil due to Defendants’ breaching competition flowed up to, and negatively impacted, the Fund and its owners. Such testimony is relevant to prove damages and admissible. However, the Trial Court improperly prohibited all such testimony and prevented Plaintiffs from establishing their damages.¹

To the extent Defendants disagreed with Plaintiffs’ reliance on the costs and losses incurred by the Brazilian operating company to indirectly calculate the Fund’s

¹ If the liquidated damages provision is unenforceable, which it is not, case law explicitly allows Plaintiffs to seek actual damages. *See JMD Holding*, 4 N.Y.3d at 380 (“If the [liquidated damages] clause is rejected as being a penalty, the recovery is limited to actual damages proven.”). The Trial Court therefore should have allowed evidence concerning actual damages because it invalidated the liquidated damages clause.

damages, they could have cross-examined Plaintiffs on their methodology. But this disagreement was not a valid basis for the wholesale exclusion of all evidence.

B. Mr. Levin Was Competent To Testify About The Fund's Lost Profits As A Fact Witness And His Trial Testimony Should Have Been Permitted

Mr. Levin is the owner and CEO of Levin Global. (*See* A. 69, 469). The Trial Court acknowledged that Mr. Levin had firsthand knowledge of the costs and losses suffered by Levin Global as a result of Defendants' competition. (*See* A. 470 ("The Witness: As the CEO of the organization I saw it out of my own income, my own lawsuits. The Court: Okay, I'll allow you to testify on that basis. Go ahead.")). His testimony was therefore admissible to establish those costs and lost profits as a fact witness. *See Wathne Imports, Ltd. v. PLR USA, Inc.*, 125 A.D.3d 434, 434 (1st Dep't 2015) ("Plaintiff's CEO has the requisite personal knowledge of the relevant business areas and information to render her competent to testify as to plaintiff's lost profits, including offering estimates or projections of lost sales and profits." (citing *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 406 (1993) and *Greasy Spoon, Inc. v. Jefferson Towers, Inc.*, 75 N.Y.2d 792, 795-96 (1990)); *cf. Tulin v. Bostic*, 152 A.D.2d 887, 888 (3d Dep't 1989) ("[I]t has been recognized that the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value." (citations omitted))).

Despite controlling case law from this Court allowing owners and CEOs to testify as fact witnesses concerning lost profits, *see Wathne Imports*, 125 A.D.3d at 434, the Trial Court momentarily allowed Mr. Levin to testify but then sustained an objection on the basis that Mr. Levin could not testify about “lost profits” unless he was an expert (*See* A. 470-71). The Trial Court then instructed the jury to disregard “anything in terms of the lost profits.” (A. 471). This was an error, and by excluding this evidence, the Trial Court unduly prevented Plaintiffs from proving their damages at trial.

C. Exhibit P-47 Is Also Admissible As A Summary Of Voluminous Material

Exhibit P-47 itself is an Excel spreadsheet created by Mr. Levin, and it summarized in line-item format the costs and losses that Levin Brazil suffered as a result of Defendants’ breaching competition. (*See* A. 1446-89). It is what the New York Rules of Evidence call a summary of voluminous material. New York Court Rule 10.11 (the “Voluminous Record Rule”) provides:

10.11. Exception for Summary of Voluminous Material

The content of voluminous writings, recordings, or photographs may be proved by the use of a summary, chart, or calculation of the contents, provided the writings, recordings, or photographs are accurate, otherwise admissible, and cannot be conveniently examined in court. The party offering such evidence must make the originals available for examination, copying, or both, by other parties at a reasonable time and place. The party against whom the item is being offered must be given an opportunity to challenge its admission. And, the court may order the offering party to produce the underlying originals in court.

By its own terms, the rule provides that the original records must be made available for examination but does not require that the underlying original records be admitted. Plaintiffs produced all the underlying records on June 30, 2021, together with the document that is P-47. Thus, Defendants had more than three years before trial began on August 19, 2024, to test the accuracy of these underlying documents, which they failed to do, raising the issue just days before trial.

The Voluminous Record Rule “permits the admission of summaries of voluminous records or entries where, if requested, the party against whom it is offered can have access to the original data.” *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 446 (1974). In *Ed Guth*, the petitioner offered computer printouts showing the data collected and how it bore the selection of an equalization rate. The respondent tried to avoid the statistical evidence by arguing the computer printouts were not the best evidence, and the Court of Appeals rejected the argument. The Court of Appeals noted that there was no claim that the respondent was denied access to the underlying material and let the evidence in. *Id.* There was no requirement or discussion that the underlying material must also have been admitted into evidence. *See also Matter of Thomma*, 232 A.D.2d 422, 422 (2d Dep’t 1996) (accepting printouts showing benefits were received over 10-year period even though underlying data was not in evidence); *Nat. Grid Corporate Services, LLC v. Lechack & Grodensky, PC*, 2014 WL 5468309, at *4 (Sup. Ct. Nassau Co. Mar. 27, 2014)

(noting under the voluminous writings exception to the best evidence rule, summaries of voluminous writings are admissible, where the party against whom the summary is offered has access to the original material, and suggesting that such a summary of 20,000 final bill files would be admissible rather than the 20,000 bill files themselves).

Further, P-47 was not hearsay, as it was a summary chart created by Norberto Levin, who testified at the trial.

CONCLUSION

Accordingly, Appellants request that this Court: (1) reverse the Decision's holding that the liquidated damages provision in Section 13.1 of the Contributors Agreement was unenforceable and direct entry of judgment in favor of Plaintiffs in the amount of \$1,000,000 each against Defendants Salvini and Gugliano, for a total of \$2,000,000 million, in accordance with said provision, plus pre- and post-judgment interest; and (2) reverse the Trial Court's ruling that precluded Plaintiffs from presenting admissible evidence relevant to damages incurred by the Levin Global Fund, including Exhibit P-47 and related testimony, and remand this case for additional proceedings concerning Plaintiffs' damages.

Dated: New York, New York
October 28, 2025



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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

NORBERTO JORGE LEVIN, FONDO DE
INVERSION PRIVADO LEVIN GLOBAL,

Plaintiffs-Appellants,

against

CARLOS LUIS SALVINI, MAURICIO VALENTIM GUGLIANO,

Defendants-Respondents.

1. The index number of the case in the Court below is 650477/2017.
2. The full name of the original parties were Norberto Jorge Levin v. Carlos Luis Salvini and Mauricio Valentim Gugliano. Fondo de Inversion Privado Levin Global was added as a party and to the caption by the filing of the Verified Amended Complaint on or about January 25, 2019.
3. The action was commenced in the Supreme Court, New York County.
4. This action was commenced on or about January 27, 2017, by the filing of a Summons and Complaint. Issue was joined by service of an Answer on or about October 4, 2019.
5. The nature and object of the action: Plaintiffs sued two Contributors for violating non-compete obligations of the operative Contributors' Agreement among the parties.
6. The appeal is from the Judgment of the Supreme Court of the State of New York, County of New York, entered January 22, 2025.
7. This appeal is being perfected on the Appendix method.