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

PRESENT: BERNARD J. FRIED PART 60
Justice

FBEM

IMAGING INTERNATIONAL,

Plaintiff,

- v -

HELL GRAPHIC SYSTEMS, INC., and LINOTYPE-HELL COMPANY,

Defendants.

INDEX NO. 5062-92

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This motion is decided in accordance with the attached memorandum decision.

FILED
COUNTY CLERK'S OFFICE
NEW YORK

FILED
SEP 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/7/06

J.S.C. BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM -PART: 60

----------X

IMAGING INTERNATIONAL,

Plaintiff,

-against- Index No.: 5062/92

HELL GRAPHIC SYSTEMS, INC.,
and LINOTYPE-HELL COMPANY,

Defendants.

----------X

APPEARANCES:

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FRIED, J.

Defendants filed this motion on May 9, 2006, seeking both leave to reargue and *in limine* relief. In their motion for leave to reargue, Defendants ask that I delete several sentences from a footnote in my March 31, 2006 memorandum decision denying Defendants' post-trial motions, following a bifurcated liability trial in which a jury found Defendant Hell Graphic Systems, Inc. liable for fraud. In their *in limine* motion, Defendants seek a ruling as to the admissibility of certain evidence of damages at the forthcoming trial as to their damages for fraud. Plaintiff has opposed the motion in both respects. Oral argument on this motion took place on July 26, 2006.

For the reasons that follow, I deny the motion *in limine*, grant Defendants' motion for leave to reargue, and strike the sentences from the footnote in the March 31, 2006 memorandum decision. An amended memorandum decision and Order will follow.

Because my resolution of the motion for leave to reargue depends on the same analysis as is required to decide the *in limine* motion, I will address the motion *in limine* first.

Motion in Limine

In anticipation of the damages phase of trial in this case, Defendants ask for an Order *in limine* limiting Plaintiff's introduction of evidence to those alleged damages recoverable under the terms of the 1989 contract between the parties, which contains a limitation of damages provision. The provision states as follows:

> THE WARRANTY CONTAINED IN THIS SECTION 7 IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, AND ALL OTHER WARRANTIES, INCLUDING BUT NOT LIMITED TO ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY DISCLAIMED. HGS [Defendant Hell Graphic Systems, Inc.] DISCLAIMS ALL WARRANTIES, INCLUDING BUT NOT LIMITED TO ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO ANY ITEMS OF EQUIPMENT MANUFACTURED BY ANYONE OTHER THAN HGS OR ITS AFFILIATES. IN NO EVENT SHALL HGS BE LIABLE FOR ANY LOSS OF USE, REVENUE, ANTICIPATED PROFITS OR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE USE OF PERFORMANCE OF THE EQUIPMENT.

(Notice of Mot., Ex. 7 ¶ 7©.)

As noted in my March 31, 2006 decision denying Defendants' post-trial motions, at the liability trial in this case, Defendants first raised the subject of this contractual

provision in its post-trial motions following the jury's verdict at the liability phase of trial. Defendant neither mentioned this limitation of damages provision nor objected to the omission of this information from the jury instructions or verdict sheet during trial.[1] Defendants themselves insisted that Plaintiff defer the introduction of the bulk of its damages evidence until the damages phase of trial. I find, therefore, that Defendants have waived any objection to the submission of damages evidence to the jury based on the limitation of damages provision at the damages phase of trial.

As an alternative and independent ground for my decision, I find that Defendants may not rely on this contractual damages limitation to exculpate themselves from the consequential damages of the fraudulent inducement of that contract, because such reliance is barred on the facts of this case.

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[1] Footnote 5 of the March 31, 2006 memorandum opinion states in relevant part:

> Defendants are estopped from invoking a provision of the 1989 agreement to eliminate their liability for fraud, because they participated in the trial of this action without ever calling my attention to that provision and waived any objection to my jury charge as to the elements of fraud. *See* C.P.L.R. § 4110-b; *cf. Import Alley of Mid-Island, Inc. v. Mid-Island Shopping Plaza, Inc.*, 103 A.D.2d 797, 798 [2d Dept. 1984] ["when an adversary does not apply to strike a jury demand until the eve of trial [a jury] waiver clause can no longer be asserted [and the adversary] must be deemed to have waived the clause"]. Defendants' counsel admitted as much at oral argument. (Trans. Oral Arg. I at 9 ["I can't think of any specific point it was raised during the trial"]. Defendants cannot, in a post-trial motion, overturn the jury's verdict based on a contract provision that they never raised during trial, when they never objected to the omission of this information from the jury instructions or verdict sheet.

Imaging Int'l v. Hell Graphic Sys., Inc., Index No. 005062/1992, Slip Op. at 15 n. 5 (Sup. Ct. N.Y. County Mar. 31, 2006).

Under New York law, a defendant cannot limit or avoid liability for fraudulent inducement to a contract by an exculpatory provision, such as a provision limiting damages, in that very contract. *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384-85 (1983). The Court of Appeals has held broadly that:

> [A]n exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, ***as when it is fraudulent*** , malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.

Kalisch-Jarcho, 58 N.Y.2d at 384-85 (citations omitted) (emphasis added). *Accord Net2Globe Intl., Inc. v. Time Warner Telecom* , 273 F. Supp. 2d 436, 450-51 (S.D.N.Y. 2003) (allegations of negligence did not "rise to the level of malice or intentional wrongdoing necessary to invalidate the contracts' limitation on liability provision"). *Cf. World-Link, Inc. v. Citizens Telecom. Co.*, 2000 WL 1877065, **2-5 (S.D.N.Y. Dec 26, 2000) (limitation of liability clause excluded recovery of consequential damages for "*any* type of breach" of contract); *Ninacci Diamond & Jewelry Co. v. R.A.V. Investigative Servs., Inc.*, 1998 WL 299926, **5-6 (S.D.N.Y. June 9, 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999) (dismissing fraud claim as meritless for failure to prove an express misrepresentation or material omission, while affirming principle that allegations of negligence "do not rise to the level of 'gross negligence' required to void a contractual waiver of liability").

Thus, consequential damages may not be limited or excluded if "the limitation is unconscionable" – *i.e.*, in cases involving bad faith or willful wrongful conduct. *Cayuga*

Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 15 (4th Dept. 1983). A "defendant may be estopped from asserting a contractual limitation of consequential damages if the defendant has acted in bad faith." *See also American Tel. & Tel. Co. v. N.Y.C. Human Resources Admin.*, 833 F. Supp. 962, 989 (S.D.N.Y. 1993), *as corrected and ordered unsealed*, (1993) (contractual limitation of consequential damages was enforceable, where complaint was "utterly devoid of any allegations of fraud, willful misconduct, or bad faith"). "Bad faith... connotes a dishonest purpose." *Kalisch-Jarcho*, 58 N.Y.2d at 385. This principle extends also to claims of fraudulent inducement to contract, which contain an element of bad faith. *See Cirillo v. Slomin's Inc*, 196 Misc. 2d 922, 935 (Sup. Ct. Nassau County 2003) (denying motion to dismiss fraud cause of action based on exculpatory clause in contracts between parties). "Whereas an exculpatory clause is enforceable against claims of ordinary negligence, such clauses are unenforceable with respect to claims of reckless or intentional conduct, as a matter of public policy." *Id.*

This public policy applies both to "contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum." *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992) (exculpatory and limitation of liability clauses were enforceable against ordinary negligence claims, but not against allegations of gross negligence, which evinced a reckless disregard for the rights of defendant's customers).

For example, in *Cayuga*, the plaintiff was permitted recover consequential damages as to its cause of action for fraud, although the Court had upheld the consequential damages exclusion in the contract between the parties as enforceable as to the plaintiff's breach of warranty claims. *Cayuga*, 95 A.D.2d at 22-25; *cf. id.* at 13-18

(partially dismissing causes of action for breach of warranties based on consequential damages exclusion in contract, where defendant had not engaged in "bad faith or willfully dilatory conduct" as to repair and replacement of defective machinery and equipment).

Notwithstanding this line of authority, Defendants maintain that the principle expounded in *Kalisch-Jarcho* and the other cases does not apply to tort cases, such as the present case. In support of its position, Defendant relies heavily on *Mom's Bagels of New York, Inc. v. Sig Greenebaum Inc.* ,164 A.D.2d 820 (1st Dept. 1990), *appeal dism'd*, 77 N.Y.2d 902 (1991).

In *Mom's Bagels* , the plaintiff sued for breach of contract and fraud in the inducement, relating to the defendant's alleged failure to install a commercial oven purchased by the plaintiff in satisfaction of the required specifications. On appeal from a partial dismissal of the defendant's summary judgment motion, the First Department quoted from the parties' sales agreement or invoice, which contained a provision stating:

> SELLER SHALL NOT BE RESPONSIBLE FOR ANY GENERAL, SPECIAL OR CONSEQUENTIAL DAMAGE TO PROPERTY..., AND ITS SOLE LIABILITY FROM BREACH OF WARRANTY *OR OTHERWISE* SHALL BE STRICTLY LIMITED TO EITHER THE RETURN OF THE GOODS SOLD HEREUNDER AND THE REPAYMENT OF THE PURCHASE PRICE; OR THAT SELLER SHALL REPAIR AND REPLACE THE NON-CONFORMING GOODS OF PARTS.

Id. at 822 (emphasis in original).

Mom's Bagels is inapposite, however, for two reasons. First, the defendant in *Mom's Bagels* raised the contractual exclusion of consequential damages in a timely manner as an affirmative defense in its Answer, (*see* Notice of Mot., Ex. 2 at 27-28),

whereas Defendants here first raised the issue in their post-trial motions, after failing to object to the omission of this information from the jury instructions or verdict sheet during trial. Second, I am not convinced that *Mom's Bagels* stands for the legal proposition for which it is cited by Defendants.

The decision noted the principle, often cited in breach of contract cases, that "parties to a commercial contract, absent any question of unconscionability, may agree to limit the seller's liability for damages." *Id.* at 822. In support of this principle, the Court cited *Belden-Stark Brick Corp. v. Morris Rosen & Sons, Inc.* , 39 A.D.2d 534 (1st Dept. 1972), *aff'd*, 31 N.Y.2d 884 (1972), in which the Court held that a contract provision limiting consequential damages was "applicable and binding to prevent a recovery of the damages claimed by the counterclaim" alleging ordinary negligence. *Belden-Stark*, 39 A.D.2d at 535.

Although the plaintiff had alleged both breach of contract and fraud, the *Mom's Bagels* Court did not distinguish between these two causes of action or indicate that the limitation of damages exclusion would apply to the fraud cause of action. Rather, the Court concluded without explanation that "the plaintiff herein is not entitled to consequential damages," based on "the terms and conditions of the invoice, discussed *supra*," since "the plaintiff has not offered any persuasive evidence that such exclusion was unconscionable." *Mom's Bagels*, 164 A.D.2d at 822.

The Court then touched on whether punitive damages were permitted (they were not). Only then did the Court address the cause of action for fraud. The Court stated:

> Moreover, we find that plaintiff has not set forth a cause of action for fraud, since plaintiff has failed to allege the essential element of injury of damage. As discussed *supra*, in accordance with the terms and conditions of the parties' agreement invoice, limiting defendant's liability for damages, plaintiff admits it has received a refund of the purchase price of the oven.

Mom's Bagels, 164 A.D.2d at 823 (citations omitted).

The meaning of this short paragraph is unclear. One possible reading, which I am exhorted by Defendants to adopt, is that the *Mom's Bagels* Court hereby extended the *Belden-Stark* principle to fraud claims and held that consequential damages for fraud were barred by the contractual limitation of damages provision in that case. This interpretation would explain the reference to "the terms and conditions of the parties' agreement invoice, limiting defendant's liability for damages."

It would not, however, explain how an extension of the *Belden-Stark* principle to the fraud claim would be consistent with the principle enunciated in *Kalisch-Jarcho* that "an exculpatory clause is unenforceable when... the misconduct for which it would grant immunity smacks of intentional wrongdoing..., as when it is fraudulent." *Kalisch-Jarcho*, 58 N.Y.2d at 384-85. The decision does not cite *Kalisch-Jarcho* or any of the related cases cited *supra*, much less distinguish them. The *Mom's Bagels* decision does not expressly state that the *Belden-Stark* principle should be extended to fraud claims, or explain how such an extension would be consistent with *Kalisch-Jarcho* and its progeny. The fact that the *Mom's Bagels* Court discussed consequential damages – including *Belden-Stark*'s holding concerning ordinary negligence – separately from the fraud claim suggests that the Court did not intend to extend this holding to cases of fraud.

Because of this contradiction, I am not convinced that *Mom's Bagels*'s decision to dismiss the fraud cause of action rested on an extension of the *Belden-Stark* principle to fraud claims, rather than on some other ground as to which the Court remained silent. Perhaps the Court decided that the record evidence did not substantiate the plaintiff's claim of injury, or that the plaintiff had not alleged injury with the specificity required to support a fraud cause of action; the decision does not even mention the Court's view of most of the record submitted on appeal. Perhaps the Court deemed the plaintiff to have waived any objection to the consequential damages exclusion based on *Kalisch-Jarcho*, by failing to raise the issue clearly in its briefs. *See infra* n. 2.

In support of their preferred reading of the decision, Defendants have asked me to consider the record and briefs submitted by the parties on appeal to the First Department in the case. The briefs are not law, and Defendants do not provide any authority authorizing me to consult such documents to supplement a brief First Department decision. Even assuming that it were proper to consult the record and briefs on appeal in *Mom's Bagels*, however, it would not shed much light on the relevant portion of that decision.[2]

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Neither the parties' briefs nor the lower court opinion in *Mom's Bagels* addressed the legal question at issue in this motion.

The defendant-appellant's opening brief on appeal was organized according to the following three point-headings: (I) "Plaintiff's complaint for breach of contract requires dismissal insofar as it seeks consequential damages"; (II) "Punitive damages should be stricken where they arise out of a single transaction in a private contract action"; and (III) "Summary judgment should be granted dismissing the second cause of action for fraud."

So far, these headings indicate the appellant's assumption that the consequential damages exclusion related only to the breach of contract claim. The appellant did not in its opening brief actually contend that the consequential damages exclusion was enforceable as

against the fraud claim, although it seemed to assume as much in point III, in which it argued: "since plaintiff had refunded to it the entire cost of its oven... except for the excluded consequential damages, plaintiff has failed to allege any damage or injury and, accordingly, the fraud claim should be dismissed." (Notice of Mot. Ex. 3 ("App't's Br.") at 11.)

The plaintiff-respondent contributed to the confusion in its opposition brief, in which it also discussed the consequential damages exclusion and the fraud claim in separate sections. In point II, the respondent contended that the consequential damages exclusion was unconscionable and therefore unenforceable because the appellant's conduct had been "intentional," reasoning that "it is unconscionable for the Defendant to misrepresent material factual elements so as to induce Plaintiff to enter into a contract...." (Notice of Mot. Ex. 4 ("Resp't's Br.") at 3-4.) The "intentional... misrepresent[ation]" language suggests that the respondent was arguing that the consequential damages exclusion was unenforceable only against the fraud claim. The respondent itself did not distinguish between the two causes of action in this section, however; indeed, it waited until point III to argue that its fraud cause of action should be permitted.

In its reply brief, the appellant converted its argument to dismiss the fraud claim into the point-heading: "Plaintiff is not entitled to recover lost profits." Its argument was that the fraud damages "specifie[d] for the first time" on appeal: (1) had not appeared in its complaint and (2) were based on "lost profits in part, running afoul of the traditional rule that fraud or fraudulent inducement involves out-of-pocket loss only." (Notice of Mot. Ex. 5 ("App't's Reply Br.") at 1-2.) The appellant did not suggest that the damages sought in connection with the fraud claim were excluded by contract, although it specifically noted that "the first cause of action [for breach of contract] seeks damages contractually excluded." (App't's Reply Br. at 1.) The appellant's failure to characterize the fraud cause of action in the same way suggests that the appellant had abandoned this argument or never intended to make it.

The appellant's reply brief briefly returned to the unconscionability argument in point II, but it did not distinguish between fraud and breach of contract. (App't's Reply Br. at 1-2 ("Call it breach of contract, representation, or warranty, or whatever plaintiff will... the essence of [the plaintiff's] claim... concerns a... breach of an express warranty.").) In this section, the appellant maintained that the respondent's unconscionability argument was "without relevance" because the appellant had removed the oven and refunded the respondent's purchase price. (App't's Reply Br. at 3.) The reply brief never addressed the distinction drawn between simple negligence and bad faith in the *Kalisch-Jarcho* line of cases.

The lower court found that the limitation of damages provision did not apply on the facts of the case to either cause of action. (Notice of Mot. Ex. 2 at 9.)

The decision by the First Department in *Mom's Bagels* tracks the points of the appellant's opening brief, without resolving, or even addressing, the legal question at issue in this motion. Although the *Mom's Bagels* decision states in conclusory fashion that "the plaintiff has not offered any persuasive evidence that [a consequential damages] exclusion was unconscionable," *id.* at 822, it does not address the respondent's *legal* argument in its opposition brief on appeal that the consequential damage exclusion was unenforceable, "as it is unconscionable for the Defendant to [intentionally] misrepresent material factual elements so as to induce Plaintiff to enter into a contract," (App't's Br. at 3-4).

In conclusion, the two-sentence paragraph in *Mom's Bagels*, which is at the heart of Defendants' argument in this motion, is too ambiguous for me to disregard the clear authority of *Kalisch-Jarcho*.

My interpretation is reinforced by the absence of any other New York decisions supporting Defendants' position that a limitation of damages clause in a contract for the sale of goods controls the recovery available to a plaintiff claiming fraud in the inducement.

Some of the cases cited by Defendants are inapposite, because they are based on the proposition – correct but irrelevant – that a fraudulently induced contract becomes void only if rescinded, and it does not become void if a damages remedy is pursued. *E.g. Keywell Corp. v. Weinstein*, 33 F.3d 159 (2d Cir. 1994) (plaintiff's "rights to avoid contractual limitations on damages for breach of representations and warranties" were impacted by election of damages remedy for fraud); *Soviero Bros. Contracting Corp. v.*

City of N.Y., 286 A.D. 435, 441-42 (1st Dept. 1955), *aff'd*, 2 N.Y.2d 924 (1957) (upholding contractual provision providing for reasonable contractual limitation of period to bring lawsuit);[3] *Leav v. Weitzner*, 268 A.D. 466, 468 (1st Dept. 1944) (provision of lease waiving parties' right to a jury trial was enforceable in action by tenants seeking damages for fraud).

Here the damages limitation provision is unenforceable not because it was fraudulently induced, but because it violates public policy. It violates public policy because the elimination of consequential damages would virtually eliminate Defendants' liability for fraud. Thus, cases finding that contractual provisions were enforceable when a contract had not been rescinded are inapposite.

Defendants also maintain that *Glenn Partition v. Trustees of Columbia University*, 169 A.D.2d 488 (1st Dept. 1991) and *Clark-Fitzpatrick, Inc. v. Long Island Railroad Company*, 198 A.D.2d 254 (2d Dept. 1993) establish that *Kalisch-Jarcho* cannot be cited "for the proposition that a fraud cause of action may be utilized to evade a no-damages-for-delay clause in the parties' contract." *Glenn Partition*, 169 A.D.2d at 489. (*See* Defs.' Reply Br. at 2.) The quote from *Glenn Partition*, however, is taken out of context. In fact, the quoted passage goes on to explain the unrelated teaching in *Kalisch-Jarcho* "that a contractor's remedy for delay resulting from willful or grossly

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[3] In the context of a contractual limitation of the period in which a lawsuit could be brought, *Soviero* also stated that "[a] total immunity clause is bad; a limitation provision, if reasonable, is not." *Soviero*, 286 A.D. at 441. *Soviero* at no point negated the principle, enunciated in *Kalisch-Jarcho* and *Sommer*, that an exculpatory clause is unenforceable if it would grant immunity from intentional wrongdoing.

negligent acts of the contractee remains exclusively in contract rather than in tort." *Glenn Partition*, 169 A.D.2d at 489. *Accord Clark-Fitzpatrick*, 198 A.D.2d at 255 (fraud claim properly dismissed, where "remedy for delays resulting from willful or grossly negligent acts" was "exclusively in contract rather than tort"). In other words, both decisions stand for the familiar principle that a fraud cause of action does not arise when the only fraud alleged relates to a breach of contract. Contrary to Defendants' claim, *Clark-Fitzpatrick* affirms that "[d]amages arising from delays caused by the bad faith or willful, malicious or grossly negligent conduct of a party to a contract are recoverable, irrespective of a clause generally exculpating that party from liability for delays." *Clark-Fitzpatrick*, 198 A.D.2d at 255.

Consequently, the limitation of damages provision in the 1989 agreement does not control the admissibility of damages evidence at the damages phase of trial in this case, and the motion *in limine* is therefore denied.

Motion for Leave to Reargue

In their motion for leave to reargue, Defendant ask that I reissue my March 31, 2006 memorandum decision denying Defendants' post-trial motions, after deleting from footnote 5 of the decision several sentences concerning *Mom's Bagels of New York, Inc. v. Sig Greenebaum, Inc.*, 164 A.D.2d 820 (1st Dept. 1990).

> The objectionable paragraph reads:
>
> In support of their argument that a contractual damage limitation can defeat a jury verdict of fraud in the inducement, Defendants cite *Mom's Bagels of New York, Inc. v. Sig Greenebaum, Inc.*, 164 A.D.2d 820 [1st Dept. 1990], in which a restaurant sued a seller of an oven for fraud and breach of contract. *Mom's Bagel's*, however, decided different issues, and its reasoning does not govern this case. In *Mom's Bagels*, the court

> dismissed the fraud count in the complaint on summary judgment. In doing so, the court relied not on the contractual damage limitation provision, but on the fact that the plaintiff had admitted that it had received a full refund of the price of the oven and had not alleged any other injury. (*Id.* at 823.) Moreover, the court dismissed the plaintiff's punitive damages demand not because of the contractual damage provision, but because the complaint alleged only a "private wrong." (*Id.* at 822-23.) Consequently, the reasoning of *Mom's Bagel's* does not apply here. Imaging has alleged a variety of damages in its Complaint and throughout this litigation, and Defendants themselves insisted that Plaintiff defer the bulk of its damages evidence until the damages phase of trial.

Imaging Int'l v. Hell Graphic Sys., Inc., Index No. 005062/1992, Slip Op. at 15 n. 5 (Sup. Ct. N.Y. County Mar. 31, 2006) ("March 31, 2006 decision").

Defendants contend that the paragraph evinces a misapprehension of the facts and holding of *Mom's Bagels* and insist that, if the offending paragraph is not stricken from the March 31, 2006 decision, Defendants would be prevented from relying on the holding in *Mom's Bagels* to limit the evidence and recovery in the upcoming damages trial.

Under C.P.L.R. § 2221, a party may make a motion for leave to reargue "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and ...[it] shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

As explained *supra*, I am not convinced that Defendants' interpretation of *Mom's Bagels*'s holding is correct. In light of my analysis of *Mom's Bagels supra*, however, I also conclude that the characterization of the case in footnote 5 of the March 31, 2006 memorandum decision lacks nuance and is unnecessary to the result reached in that

decision. Therefore, I will reissue the memorandum decision with the paragraph in footnote 5 discussing *Mom's Bagels* removed.

Accordingly, it is

ORDERED that Defendants' motion *in limine* is DENIED; and it is further

ORDERED that the motion to reargue is GRANTED; and it is further

ORDERED that the last six sentences of the third paragraph of footnote 5 on page 15 of the March 31, 2006 decision, beginning with the words, "In support of their argument that a contractual damage limitation can defeat," and concluding with the words, "evidence until the damages phase of trial," shall be deleted; and it is further

ORDERED that an amended memorandum decision and Order, amending the March 31, 2006 decision, will be issued forthwith.

DATED:

9/7/06

J.S.C. BERNARD J. FRIED
J.S.C.

FILED
SEP 11 2006
COUNTY CLERK'S OFFICE
NEW YORK