IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

MICHAEL CONROY, ET AL	)	
	)	CASE NO. LACV072840
PLAINTIFFS,	)	
	)	PLAINTIFFS'
VS.	)	MOTION FOR PARTIAL
	)	SUMMARY &
	)	DECLARATORY
APTS. DOWNTOWN, INC., ET AL	)	JUDGMENT
	)	
	)	Judge Dillard
DEFENDANTS.	)	

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Plaintiffs, as individuals and as Class Representatives, by and through their attorneys, Christine Boyer and Christopher Warnock, hereby file this Motion for Partial Summary & Declaratory Judgment to conform with their Second Amended & Substituted Petition and move for partial summary & declaratory judgment on the issue of the legality of Defendant Apts. Downtown Inc's leases and lease rules on the grounds that there is no genuine issue as to any material fact with regard to the legality of these provisions and that Plaintiffs individually and/or as Class Representatives are entitled to judgment as a matter of law.

1. STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Defendant Apts. Downtown, Inc., (hereinafter referred to as "Landlord"), under the fictitious names, Apartments Downtown and Apartments Near Campus, is a property manager with over 1,000 tenants in Iowa City, Johnson County, Iowa., See Exhibit 2[1], Defendant's Answers to Plaintiff's Interrogatories, Interrogatory 2.

[1] The numbering of Plaintiffs' exhibits for this motion correspond to the exhibits in Plaintiffs' Common Evidentiary Appendix, filed May 12, 2011.

manager with over 1,000 tenants in Iowa City, Johnson County, Iowa., See Exhibit 2[1], Defendant's Answers to Plaintiff's Interrogatories, Interrogatory 2.

Landlord uses standard leases. See Answer of Defendant, filed on or about January 27, 2011, Division I, paragraph 3, page 1; See also Exhibit 3, Apartments Downtown Standard Lease 2011-12; Exhibit 4, Apartments Downtown Standard Lease 2010-11; ; Exhibit 5, Apartments Downtown Standard Lease 2009-10; Exhibit 7, Apartments Downtown Standard Lease and Addendum 2007-8.

Plaintiff Molly Burke was a tenant of Landlord with a standard 2010-11 lease. See Exhibit 8, Molly Burke Lease; §3 of Exhibit 9, Defendant's Responses to Plaintiff's Request for Admissions.

Dara Eifler was a tenant of Landlord with a standard 2007-8 lease. See §5 of Exhibit 9, Defendant's Responses to Plaintiff's Request for Admissions.[2]

Kristen Jacobsen was a tenant of Landlord with a standard 2009-10 lease. See Exhibit 12, Kirsten Jacobsen Lease; §7 of Exhibit 9, Defendant's Responses to Plaintiff's Request for Admissions.

Jessica Jones is a current tenant of Landlord with a standard 2011-12 lease. See Exhibit 23.

Dan Ambrisco is a current tenant of Landlord with a standard 2011-12 lease. See Exhibit 24.

[1] The numbering of Plaintiffs' exhibits for this motion correspond to the exhibits in Plaintiffs' Common Evidentiary Appendix, filed May 12, 2011.

[2] Questions were raised by the Court at the July 26, 2011 hearing regarding compulsory counterclaims with regard to Ms. Eifler's tenancy. Plaintiff would note that the counterclaims arose out of her second tenancy at 317 S. Johnson Street in Iowa City from July 2008 to July 2009. Ms. Eifler had an earlier tenancy at 308 S. Gilbert Street in Iowa City on or about August 2007 to July 2008.

2. SUMMARY & DECLARATORY JUDGMENT IS APPROPRIATE

Following the suggestion of this Court at the July 26, 2011 hearing that proceeding by declaratory judgment is appropriate, Plaintiffs have moved to amend their petition to add a declaratory judgment count. In addition, Plaintiffs have moved to amend their petition to add as plaintiffs Jessica Jones and Dan Ambrisco, current tenants for the 2011-2012 lease term.[3]

Summary judgment is appropriate with regard to the legality of Landlord's leases. First, there are no material facts in dispute. Plaintiffs Molly Burke, Dara Eifler, Kirsten Jacobsen, Dan Ambrisco and Jessica Jones are or were all tenants of Landlord with standard leases.[4] Landlord admits in its Answer that it has standard leases and it has provided them to Plaintiffs in discovery. All that remains is to determine the legality of Landlord's standard leases.

Second, it is appropriate to deal with the issue of the legality of Landlord's leases on summary judgment in the context of a declaratory judgment action. In *City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006) the Iowa Supreme Court noted that the district court had, "…considered the petition for declaratory judgment based on motions for summary judgment filed by the parties." *City of Johnston*, 718 N.W.2d 290 at ¶30.

Finally, as this Court opined at the July 26, 2011 hearing, declaratory judgment is clearly appropriate in the instant case. Civil Rule §1.1102 states,

[3] See Plaintiffs' Second Motion to Amend Petition and Second Amended and Substituted Petition filed with the instant motion.

[4] Issues regarding lead plaintiff Michael Conroy are not appropriate for summary judgment and Plaintiffs reserve issues regarding Mr. Conroy for later resolution, most likely by trial.

> Any person interested in an oral or written contract, or a will, or whose rights, status or other legal relations are affected by any statute, municipal ordinance, rule, regulation, contract or franchise, may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status or legal relations thereunder.

Civil Rule § 1.1103, states, "A contract may be construed either before or after a breach." In the instant case the Plaintiffs are tenants of Landlord and seek to have the legality of their leases declared. As the Iowa Supreme Court has held,

> The basic and fundamental requirement under [the declaratory judgment rule] is that the facts alleged in the petition seeking such relief must show there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment. There must be a justiciable controversy as distinguished from a mere abstract question. *Melsha v. Tribune Publishing Co*., 243 Iowa 350, 51 N.W.2d 425; *Wesselink v. State Department of Health*, 248 Iowa 639, 80 N.W.2d 484; *Wright v. Thompson*, 254 Iowa 342, 117 N.W.2d 520.

McCarl v. Fernberg, 126 N.W.2d 427 (Iowa 1964).

As this Court noted at the July 26, 2011 hearing, if sections of Landlord's leases are found to be illegal, Landlord would have to remove the offending provisions or face the penalty for knowing and willful inclusion imposed by Iowa Code §562A.11(2). If these clauses are found to be illegal any previous, current or future enforcement would render Landlord liable for damages. Finally, if the lease clauses are illegal, injunctive and other relief would be appropriate. Thus, summary and declaratory judgment is appropriate on the issue of the legality of Landlord's leases and lease rules.

3. THE INCLUSION OF ILLEGAL CLAUSES IN A RESIDENTIAL LEASE IS ILLEGAL REGARDLESS OF ENFORCEMENT

Plaintiffs' assert that under Chapter 562A, Iowa's version of the Uniform Residential Landlord Tenant Act, that tenants have a right to a legal lease, free of illegal

provisions and that a lease may not contain illegal provisions even if these provisions are not enforced.

Iowa Code §562A.11, "Prohibited provisions in rental agreements" states that,

> 1. A rental agreement shall not provide that the tenant or landlord:
> a. Agrees to waive or to forego rights or remedies under this chapter
> d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith.
> 2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney fees.
>
> Iowa Code §562A.11.

The language of section (1) is straightforward and clearly focuses on the contents of the lease agreement itself, not on the enforcement of the provision. "*A rental agreement shall not provide*…" emphasis supplied. Iowa Code §562A.11. Iowa Code §562.11(1) makes it clear that illegal provisions cannot be written into leases. The first sentence of Section (2) specifically references enforceability and it would be redundant to interpret Section (1) as having the same effect. The second sentence of Section (2) returns to focus on the rental agreement itself and again clearly makes the inclusion of prohibited provisions in a rental agreement actionable even without enforcement, if the inclusion was knowing and willful.[5] Iowa Code §562A.11.

Similarly Iowa Code §562A.9 provides, "The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of

[5] At the July 26, 2011 hearing defense counsel agreed, upon questioning by this Court, that knowing and willful inclusion of a prohibited lease provisions gave rise to damage to the tenant even if the provision was not enforced.

law…" Code §562A.9(1). Conversely, prohibited terms and condition may not be included in a lease.

Some states, in adopting the Uniform Residential Landlord Tenant Act, have chosen to make landlords liable only for enforcement of illegal provisions. Delaware, for example, in adopting this section changed it from the original Uniform Act language to say, "If a landlord *attempts to enforce* provisions of a rental agreement known by the landlord to be prohibited…" emphasis added, Delaware Code, §5301(3)(b).

The Iowa legislature, however, chose to remain closer to the original Uniform Act language and make the inclusion of illegal lease provisions punishable by up to three months rent in addition to actual damages so long as the inclusion was willful and knowing. The comments to the Uniform Act explain,

> Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section… Such provisions, even though unenforceable at law may nevertheless prejudice and injure the rights and interests of the uninformed tenant who may, for example, surrender or waive rights in settlement of an enforceable claim against the landlord for damages arising from the landlord's negligence.

Comment to §1.403 Prohibited Provisions in Rental Agreements,
http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/urlta72.htm

Finally, in *Baierl v. McTaggart*, 629 N.W.2d 277 (Wis. 2001) the Wisconsin Supreme Court, examining their version of the Uniform Residential Landlord Tenant Act, administratively adopted, specifically examined the section entitled, "Prohibited rental agreement provisions" and explained that the words, "no rental agreement may require" meant that that the prohibited act is the *inclusion* of an illegal clause in the lease. *Baierl at* ¶41. The Court went on to hold that,

> "…many lease provisions have been found to be void because they are either unconscionable or unconstitutional; but their existence in a lease continues to have an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests of the landlords or fail to pursue their own lawful rights.
>
> …some landlords explained that these objectionable provisions were not enforced, and therefore caused the tenant no serious problems… this fact, if true, merely aggravated the unfairness of these objectionable provisions: If these provisions are not actually enforced, however, there can be no explanation for the inclusion of the provisions in the rental agreement, unless they are intended solely for the purpose of intimidation. This purpose, far from legitimizing the provisions, merely compounds the alleged unfairness.

Baierl v. McTaggart, 629 N.W.2d 277, ¶50-52 (Wis. 2001).

The Uniform Act's provisions were clearly aimed at the evils caused by both the inclusion and enforcement of illegal provisions. Iowa's statute reflects the wisdom of this approach in protecting the interests of tenants from the mere inclusion, and not just enforcement, of illegal lease provisions.

4. LANDLORD'S LEASES & LEASE RULES VIOLATE THE IOWA UNIFORM RESIDENTIAL LANDLORD TENANT ACT

A. Landlord's Leases Violate Iowa Code §562A.11 by Including Indemnification and Exculpation Clauses

Iowa Code §562A.11 provides that, "A rental agreement shall not provide that the tenant or landlord… d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith." Iowa Code §562A.11(1)(a).

Landlord's standard leases contain a number of provisions that specifically state that they are indemnification clauses. These clauses are identically numbered in all leases, though §48 does not appear in all leases.

Section 32, which deals with parking, states,

> Tenants shall *hold harmless and indemnify* the Landlord for all loss of property, damages to vehicle, or personal injury sustained through theft, vandalism, or otherwise.

Section 39(c) states, "Tenants shall *hold harmless/indemnify* Landlord for all losses sustained due to such laundry equipment."

Section 48, which deals with use of common area, states, "Tenants shall *hold harmless and indemnify* the Landlord/Partners for all loss of property or injuries the Tenant sustains through improper use."

Section 70 states, "Tenants shall *hold harmless and indemnify* the Landlord/Partners for all loss of property or injuries the Tenant sustains through theft, fire, rain, snow, wind or otherwise."

Emphasis supplied. §§32(e), 39(c), 48 & 70 in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §§32(e), 39(c), 48 & 70 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §§32(e), 39(c), & 70 in Exhibit 5, Apartments Downtown Standard Lease 2009-10; and §§32(e), 39(c), & 70 in Exhibit 7, 2007-8 Standard Lease & Addendum.

Illegal indemnification and exculpatory provisions also appear in Landlord's standard leases with regard to laundry equipment,

> LAUNDRY EQUIPMENT (if present) is for the use of the Tenants and provided as a convenience. Use machines at your own risk. Laundry facilities are not part of the lease agreement. *Landlord is not responsible for the articles that may be damaged or stolen*…c. Inside apartments washers/dryers are not supplied by Landlord but may remain in the unit from previous tenants. *Tenants shall hold harmless/indemnify Landlord for all losses sustained due to such laundry equipment*.

Emphasis supplied, §39 in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §39 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §39 in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

An almost identical laundry equipment indemnification and exculpatory provision appears in the 2007-8 standard lease,

> LAUNDRY EQUIPMENT (if applicable) of the building are for the use of the Tenants and provided as a convenience. Use machines at your own risk. It is not part of the lease agreement. 36b. *Landlord is not responsible for the articles that may be damaged or stolen*…c. Where applicable washers/dryers are not supplied by Landlord but may exist in the unit from previous tenants. *Tenants shall hold harmless/indemnify Landlord for all losses sustained due to an un-maintained laundry machine.*

Emphasis supplied, §36 in Exhibit 7, 2007-8 Standard Lease & Addendum.

Further illegal exculpatory clauses with regard to security appear in Landlord's standard leases,

> Landlord does not provide any form of security. *Landlord does not guarantee and is not liable to Tenants or guest of Tenants for damage or loss* to person or property caused by other persons, including but not limited to theft, burglary, assault, vandalism or other crimes. Each Tenant or guest is responsible for protecting his or her own person and property.

Emphasis supplied, §15 in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §15 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §15 in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

An almost identical exculpatory provision for security appears in the 2007-8 standard lease, entitled, "Security is Not Provided."

> Tenants agree that the Landlord is not required by this lease to provide any form of security. *Landlord is not liable to Tenants or guest of Tenants for damage or loss* to person or property caused by other persons, including but not limited to theft, burglary, assault, vandalism or other crimes. Each Tenant or guest is responsible for protecting his or her own person and property.

Emphasis supplied, §30 in Exhibit 7, 2007-8 Standard Lease & Addendum.

An additional illegal exculpatory lease clause references refrigerators,

> REFRIGERATOR: If the refrigerator should break down, first call maintenance. Then, please make arrangements with friends or neighbors to store your food. *Landlord will not be responsible for any loss*, as the result of the refrigerator not working properly.

Emphasis supplied, §38 in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §38 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §38 in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

An almost identical exculpatory provision appears in the 2007-8 standard lease, "*Landlord will not be responsible for any loss*, as the result of the refrigerator not working properly." §12 in Exhibit 7, 2007-8 Standard Lease & Addendum.

Thus there are seven separate indemnification and exculpation clauses in Landlord's standard 2011-12, 2010-11, 2009-10 leases and six such clauses in its 2007-8 lease. All of these indemnification and exculpatory provisions are illegal under Iowa Code §562A.11, which makes it clear that neither liability nor costs may be shifted from landlord to tenant in a lease.

B. Landlord's Leases Violate Iowa Code §562A.12 by Including Automatic Cleaning Provisions

Landlord standard leases contain provisions requiring that automatic cleaning fees be paid by tenants at the termination of their tenancies.

> Tenants agree to a charge starting at $95 (efficiency) not to exceed $225 (6+ bedrooms) being deducted from the deposit for professional cleaning at the expiration of the Lease. Hardwoods and decorative concrete floors are polished or cleaned upon turn over of occupancy each year. Tenants agree to a charge not to exceed $195 being deducted from the deposit for polishing or cleaning the floors.

§37(e) in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §37(e) in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §37(e) in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

The lease language and amount are slightly different in the 2007-8 lease, but the automatic nature of the cleaning charge is the same,

> 3d. Tenants agrees to allow the Landlord to deduct between $100 - $190 out of the deposit for professional carpet cleaning at the expiration of the lease.

§3d in Exhibit 7, 2007-8 Standard Lease & Addendum.

The inclusion in Landlord's leases of an automatic cleaning fee provision violates Iowa Code §562A.12 which states that the landlord shall provide,

> the tenant a written statement showing the *specific reason* for withholding of the rental deposit or any portion thereof. If the rental deposit or any portion of the rental deposit is withheld for the restoration of the dwelling unit, the statement shall *specify the nature of the damages*.

emphasis supplied, Iowa Code §562A.12(3). Instead of giving the required specific reason or itemization Landlord's leases provide that this cleaning fee is automatically imposed on tenants and deducted from their security deposit upon termination of their tenancy. As the lease language reads, tenants are automatically charged for carpet cleaning even if their carpet is clean.

In *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) the Ohio Court of Appeals, in construing Ohio's security deposit statute[6], substantially similar to Iowa's, held that landlords could not automatically deduct carpet cleaning fees from a security deposit, either using a lease or checkout provisions,

> It is well settled that a provision in a lease agreement as to payment for carpet cleaning that is inconsistent with R.C. 5321.16(B) is unenforceable. *Albreqt v. Chen* (1983), 17 Ohio App.3d 79, 80, 17 OBR 140, 140-141, 477 N.E.2d 1150, 1152-1153. Accordingly, a landlord may not unilaterally deduct the cost of carpet cleaning from a tenant's security deposit without an itemization

[6] Ohio Revised Code §5321.16 (B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession.

> setting forth the specific need for the deduction. Id. at 81, 17 OBR at 142, 477 N.E.2d at 1153-1155.

Chaney v. Breton Builder Co., Ltd., 130 Ohio App.3d 602 at ¶18.

In fact, the statutory requirements in Iowa are even higher as the Iowa Code requires that, "In an action concerning the rental deposit, the burden of proving, by a preponderance of the evidence, the reason for withholding all or any portion of the rental deposit shall be on the landlord." Iowa Code §§562A.12(3).

In addition, by requiring automatic cleaning fees Landlord's standard leases violate Iowa Code §562A.12(3)(b) which states,

> The landlord may withhold from the rental deposit only such amounts as are reasonably necessary for the following reasons…b. To restore the dwelling unit to its condition at the commencement of the tenancy, *ordinary wear and tear excepted*.

Emphasis added, Iowa Code §562A.12(3)(b).

By including these automatic cleaning fee provisions in its leases Landlord evades the statutory requirement that it determine specifically: (1) if cleaning is even necessary, because if no cleaning is necessary charging a cleaning fee is clearly unwarranted or (2) whether there is cleaning that is required due to ordinary wear and tear, which is the landlord's statutory responsibility or (3) the cleaning that is required is due to the extraordinary acts of the tenant, for which the tenant may be charged.

In *Uhlenhake v. Professional Property Management Inc.*, No. CL-82571 (D. Iowa 5th District, entered April 19, 2000) (Exhibit 14) District Judge Michael Huppert invalidated a Polk County Iowa landlord's attempt to charge automatic carpet cleaning fees in its lease. Judge Huppert held that carpet cleaning charges could not be made for dirt or soiling due to ordinary wear and tear, citing *Southmark Management Corp v. Vick*,

692 S.W.2nd 157, 160 (Tex App. 1985) "[The tenant] could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security." *Uhlenhake* at 5. Judge Huppert further held that Iowa landlords could not charge automatic cleaning fees, "Otherwise, the lease would be used to circumvent [Iowa Code §562A.12(3)] in cases such as this one where there has been no showing of extraordinary wear and tear." *Uhlenhake* at 6.

The plain meaning of the lease language is made crystal clear by Defendants' own evidence and information forms. Filed as a supplement to Joseph Clark's Main Affidavit [7] are the official Apartments Downtown and Apartments Near Campus Checkout and Inspection Checklists which both state, "Carpet Cleaning: As agreed upon in your lease, Landlord will *automatically* subtract $85-$195 out of the deposit for professional carpet cleaning." emphasis supplied, Supplemment [sic] to Affidavit of Joseph Clark, Exhibit L, Apartments Downtown "Clean! Clean! Clean! Checkout and Inspection" at 1; Exhibit M, Apartments Near Campus Checkout and Inspection Information at 1.; see also Exhibit 15, Apartments Downtown "Clean! Clean! Clean! Checkout and Inspection" at 1.

Similarly, the Pet Addendum, also attached to the Clark Main Affidavit states, "Tenant(s) agree $150 will *automatically* be subtracted for professional carpet cleaning at the expiration of the lease." emphasis supplied, Supplemment [sic] to Affidavit of Joseph Clark, Exhibit F Pet Addendum.

Finally, plaintiff Kirsten Jacobsen received a specific checkout information form for her apartment. This form gives the date that her apartment would be inspected and states,

[7] Filed with Defendants' Resistance to Plaintiffs' second motion for summary judgment

> Tenants only need to vacuum clean. Tenants DO NOT have to set up carpet cleaning. According to your lease's addendum, a charge in the amount of $85.00-$194.00 will *automatically* be deducted from the tenant's deposit to pay for professional cleaning at the expiration of the lease.

emphasis supplied, Exhibit 19, Kirsten Jacobsen Checkout Information Form.

Thus it is clear the automatic cleaning fee provisions contained in Landlord's standard leases are illegal under Iowa Code §562A.12.

C. Landlord's Leases Violate Iowa Code §§562A.15 & 562A.17 by Including Provisions that Require Tenants to Pay for Common Area Damage by Unknown Vandals

Landlord's standard leases require tenants to pay for common area damages. These are not damages caused by the tenants themselves or damages for which tenants are responsible due to their own action or negligence or the actions of their guests, but vandalism by unknown parties and damages of unknown origin,

> What is common area damage (CAD)? -If damages occur in common areas (stairs/hallways/entryways…) and Landlord and Tenants are not able to determine who caused the damage within 7 days, then each apartment will pay a pro-rata share of costs to repair damages.

Page 3 of Exhibit 13, Apartment Downtown Lease Signing information.

Charges for common area damage are imposed through a variety of different lease clauses. Landlord's 2011-12 standard lease states,

> Tenants agree to pay for all damages to the apartment windows, screens, and doors, including exterior unit doors (including random acts of vandalism). Tenants further agree to be responsible for a 15 foot area around the apartment entry door.

§30 in Exhibit 3, Apartments Downtown Standard Lease 2011-12.

Landlord's 2010-11 & 2009-10 standard leases states,

> Tenants agree to pay for all damages to the apartment windows, screens, and doors, including exterior unit doors (including random acts of vandalism). Tenants further agree to be responsible for a 15 foot area around the apartment entry door, and for the cost to repair damage in the common areas of the building as follows:
> a. Tenants agree to be responsible for damage in the common areas, as the tenants are the only lawful occupants of the building. The lease includes reasonable use of the common areas and Tenants share responsibility for its care. If Landlord and tenants are unable to determine who caused damage in common areas within 7 days after the damage comes to the attention of Landlord, then each apartment in the building shall pay an equal pro-rata share of costs to repair the damage. Damages can include but are not limited to doors, windows, drywall, carpet, lights, smoke detectors, etc. Such charges are due immediately.

§30 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §30 in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

Landlord's 2007-8 standard lease states,

> TENANTS AGREE TO PAY FOR ALL DAMAGES TO THE APARTMENTS WINDOWS, SCREENS, AND DOORS (EVEN IN THE ACTS OF VANDALISM). Tenants further agree to be responsible for a 15 foot area around the entry door, and for all cost incurred on unclaimed damages throughout the common areas (CAD).

§29 in Exhibit 7, 2007-8 Standard Lease & Addendum.

Despite some differences, Landlord's common area damage policy is substantially similar for all leases, requiring tenants to pay for vandalism or damage by unknown parties. Landlord's common area damage lease provisions and rules directly contravene Iowa law which states, "The *landlord* shall…Keep all common areas of the premises in a clean and safe condition." Iowa Code §562A.15(1)(c). *emphasis supplied*.

It is instructive to compare the provision that sets forth the responsibilities of tenants. Iowa Code §562A.17, entitled, "Tenant to maintain dwelling unit" states,

The tenant shall:

1. Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety.
2. Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit.
3. Dispose from the tenant's dwelling unit all ashes, rubbish, garbage, and other waste in a clean and safe manner.
4. Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.
5. Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances including elevators in the premises.
6. Not deliberately or negligently destroy, deface, damage, impair or remove a part of the premises or knowingly permit a person to do so.
7. Act in a manner that will not disturb a neighbor's peaceful enjoyment of the premises.

Iowa Code §562A.17

Tenants' responsibilities under the law are limited to responsible use of the rental premises and cleaning just the interior of the unit that they actually occupy. While tenants certainly have an obligation not to cause damage in common areas, the responsibility for maintaining common areas lies with the landlord and cannot be forced upon tenants. Absent some showing that tenants caused or were, in some way, personally responsible for common area damage, such damage must be repaired and paid for by Landlord.

D. Landlord's Leases Violate Iowa Code §562A.15 by Including Provisions that Require Tenants Responsible for Unit Repairs

Iowa Code §562A.15, entitled, "Landlord to maintain fit premises" states,

1. The landlord shall:
a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

Iowa Code §562A.15(1).

However, Landlord's standard leases state,

> Unless Landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, doors, carpet, and walls regardless of whether such damage is cause by residents, guests or others.

§33(a) in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §33(a) in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §33(a) in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

Landlord's 2007-8 standard lease states, "Tenants are responsible for all damages caused to windows, screens and doors, including the apartment entrance door, front door and patio door, if applicable." §37(b) in Exhibit 7, Apartments Downtown Standard Lease 2007-8.

First of all, if any damage to or repairs of interior windows, doors, carpet, and walls were due to ordinary wear and tear, as noted above in §4(B), such repairs cannot be charged to tenants. Secondly, as noted above in §4(B), landlords may not make tenants responsible for damage to common external areas by unknown vandals. Here Landlord seeks to make tenants responsible once again for certain common area damages and also for damages to the interior of the leased premises. Of course, if tenants are irresponsible in their use of the premises, common or interior, they can be charged.

However, the language of Landlord's leases goes far beyond the negligent or willful damage by tenants or their guests and makes them responsible for all damages to windows, doors, carpet, and walls both inside and outside of their units. This is clearly a violation of Iowa Code §562A.15(1)(b) requiring landlords to keep premises repaired. Similarly, Iowa Code §562A.17 makes it clear that tenants are responsible only for

cleaning the interior of the unit they occupy and for reasonable use of the premises, they cannot be legally required to make the repairs specified in Landlord's standard leases.

These lease provisions are clearly illegal, except insofar as they make tenants liable for their own negligent or willful damage beyond normal wear and tear.

E. Landlord's Leases Violate Iowa Code §§562A.14 & 562A. 22 by Including Provisions that Waive Tenants' Right to Have Rent Abated If Landlord Fails to Deliver Possession at the Commencement of the Lease Term

Iowa Code §562A.14, entitled, "Landlord to supply possession of dwelling unit" states,

> At the commencement of the term, the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 562A.15.

Iowa Code §562A.22, entitled, "Failure to deliver possession" states,

> If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 562A.14, rent abates until possession is delivered…

Iowa Code §562A.22 (1).

However, Landlord's standard leases for 2011-12, 2010-11 and 2009-10 state,

> Delay in Possession. If Landlord is unable to give possession, Landlord will make reasonable efforts to correct any problems in a timely manner. *Rent will not abate unless the unit is declared uninhabitable by the City*.

Emphasis supplied, §12 in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §12 in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §12 in Exhibit 5, Apartments Downtown Standard Lease 2009-10.

This lease provision forces tenants to pay rent when Landlord has not complied with the most basic requirement of a landlord, to provide possession of the leased

premises to the tenant. This represents a significant change from Landlord's 2007-9 standard lease which stated, "Possession. If the Landlord is unable to give possession at the beginning of the term hereof, the *rent shall be abated until possession is delivered as provided by law*." emphasis supplied, §14 of Exhibit 7, Apartments Downtown Lease 2007-8.

Landlord, as it acknowledges in its 2007-8 lease, is required by law to deliver possession of leased premises to its tenants at the commencement of the rental term. Under these lease terms, for example, Landlord could lose the keys to a unit, leaving tenants locked out and yet still collect rent from them. Landlord's lease provisions waiving the rent abatement when possession is not delivered are illegal under Iowa Code §§562A.14 & 562A.22.

F. Landlord's Leases Violate Iowa Code §§562A.14 & 562A. 15 by Including Provisions that Waive Landlord's Responsibilities to Supply Possession and Maintain Fit Premises

Iowa Code §562A.14, entitled, "Landlord to supply possession of dwelling unit" states,

> At the commencement of the term, the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 562A.15.

Iowa Code §562A.14.

Iowa Code §562A.15, entitled, "Landlord to maintain fit premises" states,

> 1. The landlord shall:
> a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
> b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

> c. Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.
> d. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.
> e. Provide and maintain appropriate receptacles and conveniences, accessible to all tenants, for the central collection and removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.
> f. Supply running water and reasonable amounts of hot water at all times and reasonable heat, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

Iowa Code §562A.15.

Landlord's standard leases state, "A Tenant Altered Lease Dates (TALD) form must be signed by both the new and current tenants at the management office for either party to move in/move out early/late." §13a in Exhibit 3, Apartments Downtown Standard Lease 2011-12; §13a in Exhibit 4, Apartments Downtown Standard Lease 2010-11; §13a in Exhibit 5, Apartments Downtown Standard Lease 2009-10; §15 in Exhibit 7, Apartments Downtown Standard Lease 2007-8.

The TALD form[8] states,

> Altered lease dates before July 26th or after August 6th PLACES CLEANING ARRANGEMENTS UPON TENANTS as stipulated in Condition/Cleaning Agreement on reverse side of this page. (Please note: New tenants allowing old tenants to remain in a unit after August 1st *relinquish the Landlord from any obligation* to prepare the unit!)

Emphasis in Original, Exhibit 25, TALD form at 1.

The Condition/Cleaning Agreement on page 2 of the TALD form states,

[8] The TALD form can be found at the Apartments Downtown website at http://www.aptsdowntown.com/pdf/TALD_Cleaning-Condition_2011.pdf

> *The cleaning and condition of any unit* in which the tenants, original and new, have agreed to alter the lease dates leaving LESS than 120 hours between lease dates and/or does not fall between July 26th – August 6th *is strictly between the original tenants and the new tenants.* {The only point in which the Landlord will clean a unit is during regular turnover (July 26th through August 6th) and only with 100% occupancy change.} Therefore, tenants completing a T.A.L.D. agree to the following cleaning/condition terms if LESS THAN 120 HOURS between move-in/move-out and/or all 120 hours do not fall between July 26th – August 6th…2. *Original tenants are to clean and prepare the unit for the new tenants*. Please obtain the Clean, Clean, Clean document from the office which outlines the Landlord's cleaning expectations.
> 3. *New tenants understand that any objections to the cleanliness of the unit are between them and the original tenants*. New tenants may accept the unit in whatever condition they choose; however, the unit MUST meet the Landlord's standards of cleaning upon move-out. *Carpeting must be professionally cleaned at the Tenants cost.

Emphasis supplied, Exhibit 25, TALD form at 2.

By using the TALD and its Condition/Cleaning Agreement Landlord is explicitly evading its statutory responsibility to clean and repair rental units as detailed in previous sections of this motion. Plaintiffs would note that Iowa Code §562A.15 states,

> 3. The landlord and tenant of a dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only…b. If the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

Iowa Code §562A.15(3).

What Iowa Code §562A.15(3)(b) makes clear is that it is possible for a landlord and tenant to agree that the tenant will provide their own repairs. Landlord is legally obligated to provide incoming tenants with clean, sanitary and well maintained premises. Landlord may not delegate this responsibility to the outgoing tenants. The TALD lease provisions and cleaning agreement are illegal as they waive landlord's statutory

responsibilities to repair and maintain and make one set of tenants responsible for the cleaning and upkeep that the landlord owes to other tenants.

5. LANDLORD'S LEASES & LEASE RULES VIOLATE THE IMPLIED WARRANTY OF HABITABILITY & IOWA CITY HOUSING CODE

In addition to its own provisions, Chapter 562A incorporates housing code requirements. Iowa Code §562A.15(1) (a) requires that landlords, "Comply with the requirements of applicable building and housing codes materially affecting health and safety." Landlord's common area damage lease provisions, discussed above in §4(C), windows, doors, carpet, and wall repair provisions, discussed above in §4(D), and TALD provisions, discussed above in §4(F) all violate the Iowa City Housing Code by requiring tenants, rather than the landlord, to be responsible for a wide variety of maintenance and repair.

The Iowa City Housing Code ("Housing Code") §17-5-19, entitled "Responsibilities of Owners Relating to the Maintenance and Occupancy of Premises, states,

> A. Maintenance Of Structure:
> 1. Structure:
> a. Every foundation, roof, floor, wall, ceiling, stair, step, elevator, handrail, guardrail, porch, sidewalk and appurtenance thereto shall be maintained in a safe and sound condition and shall be capable of supporting the loads that normal use may cause to be placed thereon.
> 2. Exterior: Every foundation, floor, exterior wall, exterior door, window and roof shall be maintained in a weathertight, watertight, rodentproof and insectproof condition.

> 3. Doors: Every door, door hinge, door latch, door lock or any associated door hardware shall be maintained in good and functional condition, and every door, when closed, shall fit well within its frame.
> 4. Windows: Every window, existing storm window, window latch, window lock, aperture covering and any associated hardware shall be maintained in good and functional condition and shall fit well with its frame.
> 5. Interior: Every interior partition, wall, floor, ceiling and other interior surface shall be maintained so as to permit it to be kept in a clean and sanitary condition. All building interior public and service areas shall be maintained in a sanitary condition.

Iowa City Housing Code §17-5-19.

The Housing Code thus comprehensively describes the responsibility that landlords have to repair and maintain both the exterior and interior of rental units. It is instructive to compare the responsibilities of occupants/tenants under the Housing Code. Section 17-5-20, entitled, "Responsibilities of Occupants Relating to the Maintenance and Occupancy of Premises" states,

> A. Controlled Area:
> 1. Every occupant of a dwelling unit or rooming unit shall keep in a clean, safe and sanitary condition that part of the dwelling unit, rooming unit or premises thereof which the occupant occupies and controls.
> 2. Every floor and floor covering shall be kept reasonably clean and sanitary.
> 3. Every wall and ceiling shall be kept reasonably clean and free of dirt or greasy film.
> 4. No dwelling or the premises thereof shall be used for the storage or handling of solid waste.
> 5. No dwelling or the premises thereof shall be used for the storage or handling of dangerous or hazardous materials. …
> B. Plumbing Fixtures: The occupants of a dwelling unit shall keep all supplied plumbing fixtures therein in a clean and sanitary condition and shall be responsible for the exercise of reasonable care, proper use and proper operation thereof.

Housing Code §17-5-20. The occupant/tenant are basically required only to clean and make reasonable use of the premises, while repair and other maintenance is the responsibility of the landlord. Landlord's leases repeatedly violate the Housing Code by

making tenants responsible for maintenance and repair, both inside and outside of their rental units.

The requirement of maintenance and repair by landlords, particularly with regard to compliance with housing codes, is also imposed by the implied warranty of habitability. As the Iowa Supreme Court stated in its landmark holding in *Mease v. Fox*,

> [W]e hold the landlord impliedly warrants at the outset of the lease that there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty we perceive in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein. *Brown v. Southall Realty Co*., 237 A.2d 834 (D.C.App. 1968); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

Mease v. Fox, 200 N.W.2d 791 at ¶37 (Iowa 1972).

The *Mease* Court explained its rationale for requiring landlords to repair and maintain rental premises,

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent `tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

Mease v. Fox, 200 N.W.2d 791 at ¶30 citing *Pines v. Perssion*, 111 N.W.2d 409, 412-413.

Whatever Landlord's actual practices may be, all that is currently at issue is the legality of its leases. These leases contain not one or two problematic clauses, but a myriad of illegal provisions. Landlord's standard leases make tenants responsible for repairs and maintenance, evade its responsibility to provide fit premises, even to refuse a

rent abatement while keeping a tenant out of possession. Whether we consider Chapter 562A, Iowa's version of the Uniform Residential Landlord Tenant Act, the Iowa City Housing Code or the common law implied warranty of habitability these lease provisions are clearly illegal.

WHEREFORE, Plaintiffs request that the Court enter Summary & Declaratory Judgment that the aforementioned provisions in Defendants' standard leases are illegal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document was served on August ___, 2011, via first class mail, postage pre-paid, upon all attorneys of record who have not waived their right to service and/or pro se parties at their respective addresses as shown herein:

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