STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON INSURANCE OFFICE OF AMERICA, INC., Plaintiff, vs. 1221 BOWER, LLC, Defendant.	))))))))))))))))	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT Case No.: 2020-CP-32-4007 **ORDER ON POST-TRIAL MOTIONS**

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SC Court of Appeals

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A jury trial in this commercial lease dispute was held from January 22-26, 2024 at the Lexington County Courthouse. After the closing arguments and deliberations, the jury returned a "split verdict" as follows: (i) a verdict in favor of Defendant 1221 Bower, LLC ("Landlord" or "1221 Bower") on the first cause of action asserted by Plaintiff Insurance Office of America, Inc. ("Tenant" or "IOA") for declaratory judgment relating to the termination of the Lease Agreement; (ii) a verdict and judgment in favor of IOA against Landlord for $25,000.00 on the second cause of action for breach of contract relating to the reimbursement of rent; (iii) a verdict in favor of Landlord against IOA on Landlord's cause of action for declaratory judgment relating to the termination of the Lease Agreement; and (iv) a verdict and judgment in favor of Landlord against IOA for $150,000.00 on Landlord's counterclaim for breach of contract.

Following the entry of the jury's verdict, IOA and 1221 Bower filed timely post-trial motions. IOA filed: (i) a Motion for Costs under S.C. Code § 15-53-100; and (ii) a Motion for Judgment Notwithstanding the Verdict (JNOV). Conversely, Landlord filed a Motion for Attorney Fees and Costs seeking an award of $172,206.03 in attorney fees and costs. After careful review of the record, the Court **DENIES** IOA's Motion for Costs, **DENIES** IOA's Motion for Judgment

Notwithstanding the Verdict, and **GRANTS IN PART AND DENIES IN PART** Landlord's Motion for Attorney Fees and Costs and awards Landlord $94,500.00 in attorney fees and costs.

BACKGROUND

As indicated above, IOA asserted two (2) causes of action against Landlord and Landlord asserted two (2) counterclaims against IOA. Both sides had their own degree of success on the merits. All of the claims and counterclaims relate to a long-term Lease Agreement that was initially entered by IOA and the prior owner of the leased premises, IOA Properties III LLC. The amount of damages sought by IOA was $41,336.97. The jury returned a verdict in IOA favor for $25,000.00, which is approximately 60% of the amount that IOA sought. Landlord, based on its Pre-Trial Brief, claimed $664,302.35[1] in damages against IOA.[2] By comparison, the jury's verdict of $150,000.00 in favor of Landlord indicates that Landlord recovered only about 23% of the amount claimed.

In other words, the jury believed that Landlord's claim for damages was excessive and awarded a judgment that was $397,329.49 (or 73%) less than what Landlord had claimed. IOA was successful in obtaining a significant reduction of Landlord's claim when measured in terms of damages. If the $25,000.00 judgment awarded to IOA is applied as an offset, the net amount awarded to Landlord (which would be $125,000.00) is 77% less than what Landlord claimed in its Pre-Trial Brief. In the Motion for Attorney Fees and Costs, Landlord requested $172,206.03, an

[1] The Court acknowledges that this figure included some amount of attorney's fees and expenses. However, Defendant's Pre-Trial Brief did not allocate between actual damages and attorney's fees, so it is not possible to glean the specific amounts of each category that were being claimed at that time.

[2] During trial, Landlord's damages number was reduced due to successful results obtained by IOA in excluding certain damages as speculative or otherwise improper. During closing arguments, Landlord asked the jury to award $497,541.31 in damages. The jury's verdict amounts to only 30% of what Landlord requested at the close of trial.

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amount that exceeds the verdict that Landlord obtained, regardless of whether the judgment entered in favor of IOA is applied as an offset.

The Lease Agreement includes two attorney fees provisions, one in Section 12.5 ("Additional Costs and Expenses of Default") and the other in Section 15.23 ("Attorney's Fees"). The provision in Section 12.5 indicates that Landlord can recover "reasonable attorneys' fees (which shall not be less than fifteen percent (15%) of all sums then owing by Tenant to Landlord), litigation expenses and court costs."

LEGAL STANDARD

Under South Carolina law, attorney's fees may be awarded based either upon rule of court or express or statutory or contractual authority. *See, e.g., Baron Data Systems, Inc. v. Loder*, 297 S.C. 382, 377 S.E.2d 296 (1989). "As a general rule, the amount of attorney's fees to be awarded in a particular case is within the discretion of the trial judge." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004).

Once a basis for an award is established, to evaluate a request for attorney's fees and expenses, the Court must consider the following factors when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *See Blumberg v. Nealco, Inc.,* 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). The "beneficial results obtained" factor aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

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DISCUSSION

I. As Both Parties Had Success on the Merits, a Reduction in the Award of Fees and Expenses is Warranted.

In view of the jury's verdict, each side "prevailed" on various issues and claims, so there is not a singular prevailing party in this case. A "prevailing party" has been defined as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one whose favor the decision or verdict is rendered and judgment entered." *See Heath v. County of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990). By this standard, both parties prevailed as both received a verdict in their favor. Although the judgment awarded to Landlord was larger than the judgment awarded to IOA, the circumstances whereby both parties have prevailed in this case warrants an adjustment in the amount of fees requested.

Under Section 10 of the Lease Agreement, IOA claimed a reimbursement of rent that was paid to Landlord from August 14, 2020 through December 15, 2020, a period during which IOA was not able to have full and quiet enjoyment of the leased premises. Although the amount of the verdict was less than what IOA requested, IOA did receive approximately 60% of the amount of rent reimbursement it requested. An award of any amount in IOA's favor indicates a determination by the jury that *Landlord* breached the Lease Agreement by refusing to provide IOA with a reimbursement of rent. The jury's determination that Landlord breached the Lease Agreement should be taken into account when determining the appropriate amount of fees and expenses, if any, that should be awarded to Landlord. Also, although the jury did enter a verdict against IOA on Landlord's counterclaim for breach of the Lease Agreement, as noted above, the amount of the verdict was only 23% of the damages that had been claimed by Landlord in its Pre-Trial Brief. *See* Landlord's Pre-Trial Brief January 17, 2024, at Section J. The jury reduced Landlord's damages

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claim by $514,302.35. The significant disparity between what was claimed and what was awarded warrants a reduction in the amount of fees and expenses that Landlord should recover.

It is recognized that a party is not entitled to fees for issues that it lost. *See, e.g., Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct. App. 1990) (finding that the time and labor devoted to issues on which party does not prevail should not be charged against the opposing party). Fees and expenses incurred by Landlord in seeking to defeat IOA's successful claim for reimbursement of rent should not be charged to IOA. Also, as noted above, Landlord's recovery was equal to only 23% of the damages it sought. When a party seeking fees has prevailed only partially, "the factor of beneficial results accomplished will weigh in favor of reducing the fee, since the time and labor devoted to the issues he lost should not, in equity, be charged against the opposing party who prevailed on those issues." *Prevatte*, 302 S.C. at 417, 396 S.E.2d at 644. Furthermore, "[i]n cases of this type, **only in rare instances should the fee approach or exceed the verdict amount**." *Id.* (emphasis added). Here, Landlord has requested a fee award that actually exceeds the verdict amount, which is not appropriate or reasonable under the circumstances.

The relative degree of success on the merits is of particular importance when evaluating a request for attorney's fees and expenses. The United States Supreme Court, when resolving a request for fees in a civil rights case, has stated that "the extent of a plaintiff's success is ***a crucial factor*** in determining the proper amount of an award of attorney's fees[.]" *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (vacating fee award in civil rights action under 42 U.S.C. 1988 and holding that "[w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained") (emphasis added).

Such considerations apply here based on the jury's verdict, both the verdict in favor of IOA and the verdict in favor of Landlord for an amount significantly less than what Landlord had claimed.

The Court recognizes that it is not possible to achieve a precise separation of the fees and expenses incurred on the claims where Landlord was unsuccessful as opposed to those where Landlord had some degree of success. In such instances, a percentage reduction is appropriate to arrive at a reasonable overall fee, in addition to subtracting out any fees or expenses that are allocable to the unsuccessful claims. "Once the court has subtracted the fees incurred for unsuccessful, unrelated claims, it then awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." *Johnson v. City of Aiken*, 278 F.3d 333, 337 (4th Cir. 2002). When a party achieved only partial success, an amount of hours that might otherwise have been "reasonably expended" on the case as a whole can be excessive in light of the ultimate outcome.

Numerous courts have applied percentage reductions to arrive at a reasonable fee. *See, e.g., Firehouse Rest. Grp., Inc. v. Scurmont LLC*, 2011 WL 4943889, at *13 (D.S.C. Oct. 17, 2011) (reducing number of hours incurred and awarding 50% of the fees sought due to limited success on the merits); *S.C. Citizens for Life, Inc. v. Krawcheck*, 2011 WL 13324484, at *4 (D.S.C. Sept. 30, 2011) (imposing a 35% reduction in the amount requested as an adjustment for limited success); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (affirming trial court's reduction of fee request by 50% where party seeking fees had prevailed only in part in the underlying action). It is recognized that there is "no precise formula for reducing a fee petition for partial success." *See Krawcheck,* 2011 WL 13324484, at n.2 (stating that that court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to for the limited success. The court necessarily has discretion in making this equitable judgment.").

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For all of the reasons stated above, and those set forth below, the Court finds an award of fees and expenses in the amount of $94,500.00, which represents a reduction of approximately 45% from the amount requested, is reasonable and equitable. Although this is less than what was requested, it is significantly higher than the 15% "minimum" included in the Lease Agreement. By comparison, an award of fees and expenses that would equal to 15% minimum of the verdict in favor of Landlord would be only $22,500.00. The Court's award of $94,500 is approximately **63%** of the judgment amount.[3] As the parties agreed that the 15% calculation would be the minimum amount that would be considered reasonable, an award equal to 63% of the judgment is certainly reasonable based on Landlord's partial success on the merits.

II. Other Circumstances and the Equities of this Case Also Support the Court's Reduction of the Amount of Fees and Expenses Awarded.

The Court's analysis and decision to reduce the Landlord's fee request by 45% is not limited to Landlord's limited degree of success. Other equitable considerations arising from the evidence presented at trial also support the reduction, as certain actions and inactions on the part of Landlord contributed to and complicated this dispute.

For example, when Mr. Leone was asked by the property manager (Angela Adelman) to authorize an air quality and mold assessment of the leased premises, he responded that "[t]his is one of those things where if the tests come back positive then we have to do more and more." *See, e.g.,* Pl. Tr. Ex. 44 (Email from AJ Leone to Angela Adelman dated September 3, 2020). It was not until several weeks later that an assessment and remediation was performed. The repairs themselves were not completed until January 2021, after IOA provided notice that it was

[3] If the $25,000.00 judgment in favor of IOA is taken into account, the fee award to Landlord is equal to 76% of the net amount due to Landlord ($125,000.00).

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terminating the Lease Agreement. An inference can be drawn from the evidence that Mr. Leone's actions were not consistent with good faith dealing, which is a relevant consideration when determining an appropriate and reasonable award of fees and expenses.

Although conflicting testimony was presented regarding the severity of the damage, it is undisputed that a mold infestation in IOA's offices occurred following ongoing leaks from a second-floor toilet, which resulted in dispersal of untreated wastewater for an extended period of time. *See, generally,* Tr. Testimony of Crissy Warner; *see also* Pl. Tr. Ex. 16 (internal email correspondence within IOA). After Mr. Leone testified at trial that Landlord always acted in "good faith," IOA was permitted to introduce evidence indicating that other tenants were adversely affected by unresolved leaks and believed, as did IOA, that Landlord failed to act in good faith. *See, e.g,* Pl. Tr. Ex. 73 (Email exchange between Landlord and Jessica Colby). Additionally, Landlord did not offer any reimbursement of rent to IOA despite the provision in the Lease Agreement stating that a "just and proportionate part of the Fixed Rent shall be abated from the date of the damage until ten (10) days after Landlord has completely repaired same and notified Tenant of such fact." *See* Pl. Tr. Ex. 1, at Section 11.1 (Lease Agreement). This evidence in the record, albeit disputed, is relevant to the Court's determination of a reasonable and equitable award of attorney's fees and expenses and provides additional support for the 45% reduction.

III. The Reduction of the Amount of Fees and Expenses Awarded is Also Appropriate Due to Unsuccessful Motions, Excluded Evidence, and Duplicative Trial Preparation.

Upon review of the materials presented by Landlord in support of the request for fees and expenses, the Court also finds that Landlord has included fees and expenses relating to unsuccessful motions and excluded evidence. One example is Landlord's unsuccessful Motion for Summary Judgment. The invoices provided by Landlord in support of the fee request include

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thousands of dollars of fees and expenses incurred relating to a summary judgment motion that was denied. *See Pl. Mot. for Att'y Fees,* at Exhibit C (Invoices # 27707, 27587, 28324, 28766, 28923, 29709, 30034, 30313, and 30728).[4] Upon review of the record provided in support of Landlord's Motion, Landlord did not make any adjustment for its limited degree of success or time spent on unsuccessful motions or on developing inadmissible evidence. The Court believes that adjustment is proper, as Landlord also incurred thousands of dollars in fees developing a theory that IOA had fraudulent intent for vacating the leased premises, including conducting significant discovery relating to IOA's subsequent occupancy of 101 West Main Street in Lexington, South Carolina. *See, e.g.,* Invoices # 37550, 38341, 38688, 29978. The Court granted IOA's motion in limine to exclude this evidence, resulting in another issue upon which Landlord was not successful.

Landlord served numerous third-party subpoenas, discovery requests, conducted a deposition of an IOA representative in Lexington, and filed discovery and pre-trial motions with the Court relating to this unsuccessful, excluded theory. *See Pl. Mot. for Atty. Fees*, at Exhibit C (Invoices # 27537, 27707, 29501, 36348, 37550, 37823, 38028, 38150, 38341, and 38688). Landlord also requests all fees and costs for what appears to be three or more rounds of trial preparation,[5] which appears to be duplicative. It would not be equitable to require IOA to pay for fees relating to Landlord's unsuccessful motions, inadmissible evidence, or duplicative trial

[4] Based on the time entries included in Invoices # 27707, 27587, 28324, 28766, 28923, 29709, 30034, 30313, and 30728, the fees and costs attributable to Landlord's unsuccessful summary judgment motion exceed $8,000.00. Although some of this amount might have been incurred in response to IOA's motion, it is not possible to allocate between the two based on the information provided.

[5] The invoices provided by Landlord indicate that trial discussions and preparations were billed over a nineteen (19) month period. This includes June 2022 (Invoice # 30313 and Invoice # 30728), July 2022 (Invoice # 30728 and Invoice # 31004), August 2022 (Invoice # 31130), November 2022 (Invoice #32477), July 2023 (Invoice # 36113), September 2023 (Invoice # 36506 and Invoice # 36892), October 2023 (Invoice # 36986), and January 2024 (Invoice # 38688).

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preparation. However, rather than making additional deductions from the fee award, the Court considers these circumstances to provide separate and additional support for the 45% adjustment.

IV. The *Blumberg* Factors Also Support a Reduction.

There are six (6) factors that the Court must consider when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *See, e.g., Blumberg*, 310 S.C. at 494, 427 S.E.2d at 660.

In view and consideration of the applicable factors, the Court believes that the 45% reduction is warranted. As described above, Landlord again achieved limited success after having complicated the dispute with motions and theories that were unsuccessful. Although the case was well-litigated, it was a commercial lease dispute that was not exceptional or novel. The Court finds that Landlord's counsel has good professional standing. Also, based on the invoices provided, it appears that the compensation of counsel was not contingent.

From the record presented, it is uncertain how the fees requested would compare to the fees customarily charged in the locality for similar services. However, there are certain items that would suggest that the number of timekeepers involved in the case likely resulted in some amount of inefficiency or duplication. The invoices indicate that (18) different timekeepers worked on the case on Landlord's behalf, as identified by the following initials: (1) "H.E.C.;" (2) "L.S.D.;" (3) "S.T.L.;" (4) "P.K.;" (5) "K.A.;" (6) "T.K.;" (7) "H.B.;" (8) "C.T.;" (9) "B.A.R.;" (10) "K.T.;" (11) "R.J.;" (12) "C.L.;" (13) "A.W.;" (14) "I.B.;" (15) "M.K.;" (16) "W.H.;" (17) "J.D.;" and (18) "T.P." Although a level of turnover is expected, the Court believes that the involvement of 18 timekeepers on a single file appears excessive and inefficient. Although the hourly rates charged

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do not appear to be excessive, the involvement of some many timekeepers would result in an increase of the total hours. Each new timekeeper would likely incur time learning or doing what prior timekeepers had already learned or done. Although there is nothing wrong with using numerous timekeepers, it is not equitable to require IOA to pay for increased fees resulting from it. Additionally, no information has been provided about the skills, experience, or professional standing of each of the timekeepers. There are also a number of instances of "block billing" that does not include detail about the tasks being performed. The Court does not question that the work was performed, but the record does not justify awarding the total hours or fees requested based on the *Blumberg* factors. *See also Hensley*, 461 U.S. at 433 ("[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly"). For these reasons, the Court believes that consideration and application of the *Blumberg* factors also provides separate and additional support for the 45% reduction of Landlord's fee request.

V. <u>IOA's Motions Are Respectfully Denied</u>.

The Court has also carefully reviewed the Motion for Costs and the Motion for Judgment Notwithstanding the Verdict filed by IOA. Regarding IOA's Motion for Costs under S.C. Code § 15-53-100, the Court exercises its discretion to deny IOA's motion as the split verdict indicates that IOA also had limited success on the merits and did not entirely prevail. Also, the Court believes that the reduction in Landlord's requested fee award provides an appropriate and equitable adjustment to the relative fees and expenses borne by each party.

IOA also filed a Motion for Judgment Notwithstanding the Verdict. Upon review, the Court also denies this Motion and declines to disturb the jury's unanimous verdict. A "motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Crossley v. State Farm Mutual Auto. Ins. Co.*, 307 S.C. 354, 357, 415 S.E.2d 393, 395 (1992);

Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party; if more than one inference can be drawn, the case must be submitted to the jury. *Id.*

The Court finds that based on the testimony and evidence the jury was presented at trial and viewing the evidence in the light most favorable to Landlord, the jury could reasonably conclude that IOA failed to adhere to and breached certain provisions of the Lease Agreement and that Landlord should be awarded some damages. The amount awarded is within the range that was requested by Landlord and could be based on any number of scenarios or calculations that the jury considered. It is also possible for IOA to have been entitled to a reimbursement of rent while also not being entitled to have terminated the Lease. For these reasons, the Court denies IOA's Motion for Judgment Notwithstanding the Verdict.

CONCLUSION

Based on the foregoing, the Court grants in part and denies in part Defendant 1221 Bower LLC's Motion for Attorney Fees and Costs in part and awards $94,500.00 in attorney fees and costs. As stated above, the Court also denies IOA's Motion for Costs and Motion for Judgment Notwithstanding the Verdict.

____
The Honorable Courtney Clyburn-Pope
Presiding Judge

________________, South Carolina

August ____, 2024

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Lexington Common Pleas

Case Caption: Insurance Office Of America Inc VS 1221 Bower Llc

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So Ordered

The Honorable Courtney Clyburn Pope

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