

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Courtney

Clyburn Pope, Circuit Court Judge

Lexington County

Case No. 2020-CP-32-04007

Appellate Case No. 2024-001585

1221 Bower, LLC Appellant

v.

Insurance Office of America, Inc., ...Respondent

RECORD ON APPEAL

Volume 1 of 4

Ms. Jenna Kay Depoy, Esquire
222 W COLEMAN BLVD., BUILDING 2
MT PLEASANT SC 29464

Mr. William Sylvester Hammett, III, Esquire
222 W. COLEMAN BLVD., BUILDING 2
MT. PLEASANT SC 29464

ATTORNEYS FOR APPELLANT

Mr. Benjamin Houston Joyce, Esquire
701 EAST BAY STREET, SUITE 411
CHARLESTON SC 29403

Mr. Ellis Reed-Hill Lesemann, Esquire
418 KING STREET
SUITE 301
CHARLESTON SC 29403

Mrs. Michelle Alyce Stewart, Esquire
418 KING STREET, SUITE 301
CHARLESTON SC 29403

ATTORNEYS FOR RESPONDENT

RECEIVED
May 16 2025
SC Court of Appeals

Index

Order

- Court's Ruling on Pre-Trial Motions, January 22, 2024.....	0001
- Court's Clarification on Ruling on Pre-Trial Motions, January 23, 2024.....	0005
- Jury Verdict Form	0010
- Form 4- Jury Verdict.....	0012
- Post-Trial Order, September 11, 2024.....	0015

Pleadings

- Summons and Complaint, December 2, 2020.....	0028
- Answer and Counterclaim	0036
- Plaintiff's Motion for Summary Judgement.....	0053
- Memorandum in Support of Defendant's Motion for Summary Judgement.....	0056
- Plaintiff's Motion to Compel, July 24, 2023.....	0067
- Plaintiff's Motion to Compel, October 3, 2023.....	0070
- Plaintiff's Motion to Compel, December 21, 2023.....	0073
- Defendant's Pre-Trial Brief, January 17, 2024.....	0076
- Defendant's Motion <i>in Limine</i> , January 17, 2024.....	0089
- Plaintiff's Motion <i>in Limine</i> , January 19, 2024.....	0104
- Plaintiff's Motion to Exclude.....	0113
- Plaintiff's Motion <i>in Limine</i> , January 21, 2024.....	0116
- Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees, March 1, 2024.....	0125
- Defendant's Motion for Attorneys' Fees, February 1, 2024.....	0137
- Defendant's Memorandum in Support of Motion for Attorneys' Fees and Costs, February 29, 2024.....	0142
- Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgement Notwithstanding the Verdict.....	0149

Transcript

- Trial Transcript, January 22-26, 2024.....	0158
- Post-Trial Hearing Transcript.....	1213

Exhibits

- Plaintiff's Trial Exhibit 1.....	1266
- Plaintiff's Trial Exhibit 6.....	1303
- Plaintiff's Trial Exhibit 7.....	1309
- Plaintiff's Trial Exhibit 8.....	1314
- Plaintiff's Trial Exhibit 10.....	1318
- Plaintiff's Trial Exhibit 11.....	1322

- Plaintiff's Trial Exhibit 13.....	1345
- Plaintiff's Trial Exhibit 14.....	1347
- Plaintiff's Trial Exhibit 16.....	1349
- Plaintiff's Trial Exhibit 22.....	1363
- Plaintiff's Trial Exhibit 23.....	1407
- Plaintiff's Trial Exhibit 24.....	1409
- Plaintiff's Trial Exhibit 44.....	1411
- Plaintiff's Trial Exhibit 46.....	1413
- Plaintiff's Trial Exhibit 52.....	1414
- Plaintiff's Trial Exhibit 55.....	1416
- Plaintiff's Trial Exhibit 56.....	1421
- Plaintiff's Trial Exhibit 57.....	1423
- Plaintiff's Trial Exhibit 64.....	1425
- Plaintiff's Trial Exhibit 65.....	1428
- Plaintiff's Trial Exhibit 66.....	1430
- Plaintiff's Trial Exhibit 67.....	1433
- Plaintiff's Trial Exhibit 69.....	1437
- Plaintiff's Trial Exhibit 72.....	1438
- Plaintiff's Trial Exhibit 73.....	1442
- Plaintiff's Trial Exhibit 74.....	1448

Other

- Defendant's Affidavit in Support of Motion for Attorneys' Fees with Invoices, February 1, 2024.....	1449

Certificate of Counsel.....	1594

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: "Pope, Courtney Clyburn Law Clerk (Paige Brown)" <[REDACTED]>
Date: Tuesday, January 23, 2024 at 10:23 AM
To: "Hal E. Cobb" <hcobb@chsalaw.com>, "erl@lalawsc.com" <erl@lalawsc.com>, "bhj@lalawsc.com" <bhj@lalawsc.com>, Caroline Lista <clista@chsalaw.com>
Cc: "Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison)" <[REDACTED]>

Subject: RE: Rulings

[THIS MESSAGE IS FROM AN EXTERNAL SOURCE]

All,

1. Plaintiff **will not** be allowed to discuss reletting and marketing efforts after Plaintiff left the leased premises.
2. Plaintiff is **not allowed** to discuss any evidence of any water intrusions that occurred after the Plaintiff left the leased premises.

Best,

Paige Christopher

Law Clerk
The Honorable Courtney Clyburn Pope
South Carolina 2nd Judicial Circuit
109 Park Avenue SE
Aiken, SC 29802

CONFIDENTIALITY NOTICE

This message is intended only for the addressee and may contain information that is confidential. If you are NOT the intended recipient, do not read, copy, retain, or disseminate this message or any attachments. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

From: Hal E. Cobb <hcobb@chsalaw.com>

Sent: Monday, January 22, 2024 9:14 PM

To: Pope, Courtney Clyburn Law Clerk (Paige Brown) <[REDACTED]erl@lalawsc.com; bhj@lalawsc.com; Caroline Lista <clista@chsalaw.com>

Cc: Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison) <[REDACTED]>

Subject: Re: Rulings

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Thank you Paige.

Couple of quick clarification comments below as the ruling is unclear to me as it relates to Defendants Motion in Limine ("MIL").

1. Under SCROE 401 and 403, we requested all reletting and marketing efforts and testimony to that affect after Plaintiff left the leased Premises on 12-15-2020 not be allowed. This MIL item (items #1 and 2 under 401 and 403 respectively) included excluding the testimony of **both** Gerry Schauer (we noted that we planned to challenge him being accepted as an expert if he was allowed to be called) as well as Jessica Colby. We understand that Jessica Cob's is excluded in this ruling and the proffer of Gerry Schauer, but we just would like clarity that the interpretation of the ruling below includes that any reletting / marketing efforts taken by my client 1221 Bower, LLC are **NOT** allowed to be spoken of in front of the jury. Noting that Mr. Schauer's testimony (as an expert or not) would be strictly taken under proffer status and outside the purview of the jury.
2. There is no ruling below as to the third item in the MIL as to whether Plaintiff is allowed to bring into court

any evidence of any water intrusions that occurred after the Plaintiff left the Leased Premises on 12-15-2020.

Thanks so much and see you in the morning.

Thanks,

Hal E. Cobb

Senior Partner

[\(843\) 327-5777](tel:(843)327-5777)

hcobb@cdhlawfirm.com

222 W Coleman Blvd. Mt. Pleasant, SC 29464

www.chsalaw.com

DISCLAIMER: The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or legally privileged material. Any review, retransmission, dissemination or other use of this information, directly or indirectly, by persons or entities other than the intended recipient is prohibited. If you are not the intended recipient please contact the sender and delete the material from all computers in which it resides. Internet communications cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late, incomplete, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are present in this message, or any attachments, that have arisen as a result of e-mail transmission. If verification is required, please request a hard-copy version or contact us by phone. Any views or opinions presented are solely those of the author and do not necessarily represent those of the firm.

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any entity, investment, plan, transaction, arrangement, or other tax related matter.

From: "Pope, Courtney Clyburn Law Clerk (Paige Brown)" <[REDACTED]>
Date: Monday, January 22, 2024 at 8:30 PM
To: "erl@lalawsc.com" <erl@lalawsc.com>, "bhj@lalawsc.com" <bhj@lalawsc.com>, "Hal E. Cobb" <hcobb@chsalaw.com>, Caroline Lista <clista@chsalaw.com>
Cc: "Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison)" <[REDACTED]>
Subject: Re: Rulings

[THIS MESSAGE IS FROM AN EXTERNAL SOURCE]

All,

Be advised that Judge Clyburn Pope has made the following rulings with respect to your motions:

1. Plaintiff's motion to exclude any reference to 101 W Main St, LLC's purchase of and IOA's leasing of the current office space at 101 W. Main Street in Lexington, South Carolina, which transpired almost two (2) years following IOA's termination of the Lease Agreement is **GRANTED on relevance**

grounds;

2. Plaintiff's motion to exclude any reference to alleged financial or other "ulterior motives" for IOA's termination of the Lease Agreement as speculated by Defendant, including but not limited to: (i) the cost savings of IOA working remotely during COVID-19 after vacating the premises and before securing a replacement office space; (ii) the reduction of on-premises staff and/or allegedly not needing as much space as the premises provided; and (iii) IOA's search for replacement office space following its termination of the Lease Agreement is **GRANTED on relevance grounds;**
3. Plaintiff's motion to exclude any reference to IOA's knowledge of the occurrence of water leaks at the premises prior to Defendant's purchase of the premises, and any alleged failure to disclose the same during the purchase and sale process with nonparties, I.O.A. Properties, III, LLC and A.J. Leone—**Parties stipulated during the hearing that this type of testimony would not come in;**
4. Plaintiff's motion to exclude any reference that the premises was not left in "broom-clean" condition by IOA based on Defendant's false statements and misrepresentations through photographs that were taken before IOA vacated and cleaned the premises or on the basis that a sub-tenant remained in Unit 105 after IOA vacated terminated the Lease Agreement and vacated the premises—**Parties stipulated prior to the hearing that the photo taken before IOA moved out would not come in;**
5. Plaintiff's motion to exclude any reference or false insinuation that IOA "kept all rental proceeds" from a sub-tenant located in Unit 105—**Parties stipulated that this reference or inference would not be made;** and
6. Plaintiff's motion to exclude any reference or attempt to introduce damages alleged by Defendant that are based on conjecture, guesswork, speculation, and unreasonable assumptions that cannot be proven with any degree of reasonable certainty—**Court ruled during the hearing that Defendant should submit a statement of damages to Plaintiff's Counsel before 1/23/24. Defendant was further instructed that Mr. Leone should not testify about attorney's fees.**

With respect to the testimony of witnesses, the court finds as follows:

1. Defendant's motion to exclude Jessica Corby as a witness is **GRANTED on prejudice grounds;**
2. Defendant's motion to exclude Gerry Schauer as a witness will be **held in abeyance—the court will allow Plaintiff to proffer Gerry Schauer's testimony and determine if he meets the appropriate qualifications to be deemed an expert in his field;**
3. Rob Lapin's testimony will be contingent upon whether or not Gerry Schauer is allowed to testify as an expert.

Best,

Paige Christopher

Law Clerk
The Honorable Courtney Clyburn Pope
South Carolina 2nd Judicial Circuit
109 Park Avenue SE
Aiken, SC 29802

CONFIDENTIALITY NOTICE

This message is intended only for the addressee and may contain information that is confidential. If you are NOT the intended recipient, do not read, copy, retain, or disseminate this message or any attachments. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**From:** "Pope, Courtney Clyburn Law Clerk (Paige Brown)" <[REDACTED]>

**Date:** Tuesday, January 23, 2024 at 3:08 PM

**To:** "Hal E. Cobb" <hcobb@chsalaw.com>, "erl@lalawsc.com" <erl@lalawsc.com>, "bhj@lalawsc.com" <bhj@lalawsc.com>, Caroline Lista <clista@chsalaw.com>

**Cc:** "Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison)" <[REDACTED]>



**Subject:** RE: Rulings

[THIS MESSAGE IS FROM AN EXTERNAL SOURCE]

All,

Judge Clyburn Pope has clarified her rulings as follows:

1. Plaintiff will be allowed to bring up reletting and marketing efforts for rebuttal purposes only (either on cross examination or through a rebuttal witness).
2. Plaintiff will not be allowed to discuss water damages after Plaintiff left the leased premises. However, Defendant is precluded from the inclusion of damages related to the termination of Jessica Corby's lease.

Best,

**Paige Christopher**

Law Clerk  
The Honorable Courtney Clyburn Pope  
South Carolina 2nd Judicial Circuit  
109 Park Avenue SE  
Aiken, SC 29802

CONFIDENTIALITY NOTICE

This message is intended only for the addressee and may contain information that is confidential. If you are NOT the intended recipient, do not read, copy, retain, or disseminate this message or any attachments. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

---

**From:** Hal E. Cobb <hcobb@chsalaw.com>

**Sent:** Monday, January 22, 2024 9:14 PM

**To:** Pope, Courtney Clyburn Law Clerk (Paige Brown) <[REDACTED]erl@lalawsc.com; bhj@lalawsc.com; Caroline Lista <clista@chsalaw.com>

**Cc:** Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison) <[REDACTED]>

**Subject:** Re: Rulings

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Thank you Paige.

Couple of quick clarification comments below as the ruling is unclear to me as it relates to Defendants Motion in Limine ("MIL").

1. Under SCROE 401 and 403, we requested all reletting and marketing efforts and testimony to that affect after Plaintiff left the leased Premises on 12-15-2020 not be allowed. This MIL item (items #1 and 2 under 401 and 403 respectively) included excluding the testimony of **both** Gerry Schauer (we noted that we planned to challenge him being accepted as an expert if he was allowed to be called) as well as Jessica Colby. We understand that Jessica Cob's is excluded in this ruling and the proffer of Gerry Schauer, but we just would like clarity that the interpretation of the ruling below includes that any reletting / marketing efforts taken by my client 1221 Bower, LLC are **NOT** allowed to be spoken of in front of the jury. Noting that Mr. Schauer's testimony (as an expert or not) would be strictly taken under proffer status and outside the purview of the jury.

2. There is no ruling below as to the third item in the MIL as to whether Plaintiff is allowed to bring into court any evidence of any water intrusions that occurred after the Plaintiff left the Leased Premises on 12-15-2020.

Thanks so much and see you in the morning.

Thanks,

**Hal E. Cobb**

*Senior Partner*

[\(843\) 327-5777](tel:(843)327-5777)

[hcobb@cdhlawfirm.com](mailto:hcobb@cdhlawfirm.com)

222 W Coleman Blvd. Mt. Pleasant, SC 29464

[www.chsalaw.com](http://www.chsalaw.com)

DISCLAIMER: The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or legally privileged material. Any review, retransmission, dissemination or other use of this information, directly or indirectly, by persons or entities other than the intended recipient is prohibited. If you are not the intended recipient please contact the sender and delete the material from all computers in which it resides. Internet communications cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late, incomplete, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are present in this message, or any attachments, that have arisen as a result of e-mail transmission. If verification is required, please request a hard-copy version or contact us by phone. Any views or opinions presented are solely those of the author and do not necessarily represent those of the firm.

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any entity, investment, plan, transaction, arrangement, or other tax related matter.

---

**From:** "Pope, Courtney Clyburn Law Clerk (Paige Brown)" [REDACTED]  
**Date:** Monday, January 22, 2024 at 8:30 PM  
**To:** "[erl@lalawsc.com](mailto:erl@lalawsc.com)" <[erl@lalawsc.com](mailto:erl@lalawsc.com)>, "[bhj@lalawsc.com](mailto:bhj@lalawsc.com)" <[bhj@lalawsc.com](mailto:bhj@lalawsc.com)>, "Hal E. Cobb" <[hcobb@chsalaw.com](mailto:hcobb@chsalaw.com)>, Caroline Lista <[clista@chsalaw.com](mailto:clista@chsalaw.com)>  
**Cc:** "Pope, Courtney Clyburn Secretary (Nicole Gaines-Harrison)" [REDACTED]  
**Subject:** Re: Rulings

[THIS MESSAGE IS FROM AN EXTERNAL SOURCE]

All,

Be advised that Judge Clyburn Pope has made the following rulings with respect to your motions:

1. Plaintiff's motion to exclude any reference to 101 W Main St, LLC's purchase of and IOA's leasing of the current office space at 101 W. Main Street in Lexington, South Carolina, which transpired almost

two (2) years following IOA's termination of the Lease Agreement is **GRANTED on relevance grounds**;

2. Plaintiff's motion to exclude any reference to alleged financial or other "ulterior motives" for IOA's termination of the Lease Agreement as speculated by Defendant, including but not limited to: (i) the cost savings of IOA working remotely during COVID-19 after vacating the premises and before securing a replacement office space; (ii) the reduction of on-premises staff and/or allegedly not needing as much space as the premises provided; and (iii) IOA's search for replacement office space following its termination of the Lease Agreement is **GRANTED on relevance grounds**;
3. Plaintiff's motion to exclude any reference to IOA's knowledge of the occurrence of water leaks at the premises prior to Defendant's purchase of the premises, and any alleged failure to disclose the same during the purchase and sale process with nonparties, I.O.A. Properties, III, LLC and A.J. Leone—**Parties stipulated during the hearing that this type of testimony would not come in**;
4. Plaintiff's motion to exclude any reference that the premises was not left in "broom-clean" condition by IOA based on Defendant's false statements and misrepresentations through photographs that were taken before IOA vacated and cleaned the premises or on the basis that a sub-tenant remained in Unit 105 after IOA vacated terminated the Lease Agreement and vacated the premises—**Parties stipulated prior to the hearing that the photo taken before IOA moved out would not come in**;
5. Plaintiff's motion to exclude any reference or false insinuation that IOA "kept all rental proceeds" from a sub-tenant located in Unit 105—**Parties stipulated that this reference or inference would not be made**; and
6. Plaintiff's motion to exclude any reference or attempt to introduce damages alleged by Defendant that are based on conjecture, guesswork, speculation, and unreasonable assumptions that cannot be proven with any degree of reasonable certainty—**Court ruled during the hearing that Defendant should submit a statement of damages to Plaintiff's Counsel before 1/23/24. Defendant was further instructed that Mr. Leone should not testify about attorney's fees.**

With respect to the testimony of witnesses, the court finds as follows:

1. Defendant's motion to exclude Jessica Corby as a witness is **GRANTED on prejudice grounds**;
2. Defendant's motion to exclude Gerry Schauer as a witness will be **held in abeyance—the court will allow Plaintiff to proffer Gerry Schauer's testimony and determine if he meets the appropriate qualifications to be deemed an expert in his field**;
3. Rob Lapin's testimony will be contingent upon whether or not Gerry Schauer is allowed to testify as an expert.

Best,

**Paige Christopher**

Law Clerk

The Honorable Courtney Clyburn Pope

South Carolina 2nd Judicial Circuit

109 Park Avenue SE

Aiken, SC 29802

#### CONFIDENTIALITY NOTICE

This message is intended only for the addressee and may contain information that is confidential. If you are NOT the intended recipient, do not read, copy, retain, or disseminate this message or any attachments. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately



and delete all copies of the message and any attachments.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF LEXINGTON)

FOR THE ELEVENTH JUDICIAL CIRCUIT)

INSURANCE OFFICE OF AMERICA,
INC.,)

Case No.: 2020-CP-32-04007)

Plaintiff,)

vs.)

VERDICT FORM)

1221 Bower, LLC,)

Defendant.)
_____)

We the jury unanimously find as follows:

As to the claims asserted by Plaintiff Insurance Office of America, Inc. ("IOA"):

1. On Plaintiff IOA's claim for declaratory judgment relating to the termination of the Lease, we find in favor of:
 - a. Plaintiff _____
 - b. Defendant ✓
2. On Plaintiff IOA's claim for a partial refund of rent under Section 11.1 of the Lease, we find in favor of:
 - a. Plaintiff ✓, and award a refund of rent in the amount of: \$ 25,000.00
 - b. Defendant _____

As to the claims asserted by Defendant 1221 Bower, LLC:

3. On Defendant 1221 Bower, LLC's counterclaim for declaratory judgment relating to the termination of the Lease, we find in favor of:
 - a. Plaintiff _____
 - b. Defendant ✓

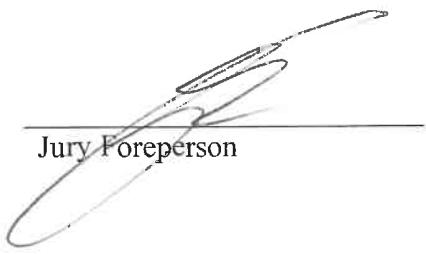
4. On Defendant 1221 Bower, LLC's counterclaim for breach of the Lease against Plaintiff IOA, we find in favor of:

a. Plaintiff _____

OR

b. Defendant in the amount of \$ 150,000.00

Date: January 25, 2024



Jury Foreperson

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP3204007

Insurance Office Of America Inc
PLAINTIFF(S)

1221 Bower Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter was resolved by jury trial on January 26, 2024. The jury found in favor of defendant, 1221 Bower, LLC. in relation to the termination of the lease with IOA., Inc. The jury awarded the plaintiff a partial refund of the rent under Section 11.1 in the amount of \$25,000. As to the counterclaims asserted by Defendant 1221 Bower, LLC. The jury found in favor of the defendant for the amount of \$150,000. Attorneys have ten days to file any post trial motions.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/29/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Lexington Common Pleas

Case Caption: Insurance Office Of America Inc VS 1221 Bower Llc
Case Number: 2020CP3204007
Type: Order/Electronic Form 4

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2024-01-29 11:56:50 page 3 of 3

ELECTRONICALLY FILED - 2024 Jan 29 12:52 PM - LEXINGTON - COMMON PLEAS - CASE#2020CP3204007

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

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 \$664,302.35¹ 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.

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).

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

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.").

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).

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

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 Att’y 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).

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

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. IOA’s Motions Are Respectfully Denied.

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



Lexington Common Pleas

Case Caption: Insurance Office Of America Inc VS 1221 Bower Llc
Case Number: 2020CP3204007
Type: Order/Other

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2024-09-11 13:05:46 page 13 of 13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	Case No.: 2020-CP-32-_____
	)	
Plaintiff,	)	
	)	SUMMONS
vs.	)	
	)	<i>(Expedited Hearing Requested,</i>
1221 BOWER, LLC,	)	<i>Rule 57, SCRCP)</i>
	)	
Defendant.	)	
_____	)	

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to appear and defend this action by answering the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

By: s/Ellis R. Lesemann
 Ellis R. Lesemann (S.C. Bar No. 15315)
erl@lalawsc.com
 Michelle A. Matthews (S.C. Bar No. 100685)
mam@lalawsc.com
 LESEMANN & ASSOCIATES LLC
 418 King Street, Suite 301
 Charleston, SC 29403
 (843) 724-5155

Attorneys for Plaintiff

December 2, 2020
 Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	Case No.: 2020-CP-32-_____
	)	
Plaintiff,	)	
	)	COMPLAINT
vs.	)	
	)	(Expedited Hearing Requested,
1221 BOWER, LLC,	)	Rule 57, SCRPC)
	)	
Defendant.	)	
_____	)	

COMES NOW Plaintiff Insurance Office of America, Inc., and states its complaint against Defendant 1221 Bower, LLC as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Insurance Office of America, Inc. ("Plaintiff" or "Tenant") is a Florida corporation with authority to transact business within the State of South Carolina with offices located at 1221 Bower Parkway, Units 101 through 105, Columbia, South Carolina 29212.
2. Defendant 1221 Bower, LLC ("Defendant" or "Landlord") is a South Carolina limited liability company and the owner of real property located in Lexington County, South Carolina.
3. For these reasons, both jurisdiction and venue are proper in this forum.

FACTUAL BACKGROUND

4. This action arises under the Storefront Lease dated January 1, 2012 ("Lease"), as amended, between 1221 Bower, LLC, as successor to 1116 Berkeley, LLC, and 1465 Remount, LLC ("Landlord"), and Insurance Office of America ("Tenant") relating to the property located at 1221 Bower Parkway, Units 101 through 105, Columbia, South Carolina 29212 (the "Leased

Premises”)¹. A copy of the Lease is attached hereto as Exhibit A.

5. The Lease Term has been extended to December 31, 2027 by the Fifth Amendment to Lease dated September 12, 2019, subject to Tenant’s right of early termination. A copy of the Fifth Amendment to Lease is attached hereto as Exhibit B.

6. Through this action, Tenant seeks an order confirming Tenant’s recent termination of the Lease under Section 11.1 as a proper exercise of contractual rights due to Landlord’s failure to repair damage to the Leased Premises within ninety (90) days as required under the Lease.

7. Specifically, Landlord has failed to promptly restore and repair the Leased Premises within ninety (90) days of the date of the multiple instances of damage to the Leased Premises due to leaks, water intrusion, mold infestation, and related problems, which have interfered with Tenant’s business operations.

8. As of the date of this filing, it has been one hundred ten (110) days since Tenant provided written notice to Landlord relating to the damage, such that the ninety (90) day deadline has already been significantly breached.

9. Section 11.1 of the Lease, entitled “Damage or Destruction by Fire or other Casualty,” provides in pertinent part as follows:

[...] If the Leased Premises are damaged or destroyed by fire, flood, tornado or by the elements, or through any casualty, or otherwise, after the commencement of the Lease Term, this Lease shall continue in full force and effect, and Landlord at its expense shall promptly restore, repair or rebuild the Leased Premises including but not limited to the store front, to the same condition as it existed when the possession of the Leased Premises were turned over to the Tenant at the commencement of the Lease Term, within ninety (90) days after such damage or destruction. **In the event Landlord fails to restore the Leased Premises as aforesaid, Tenant’s sole remedy against Landlord shall be to terminate this Lease as of the date of such casualty.**

See Lease at § 11.1 (emphasis added).

¹ For purposes of this Complaint, the term “Leased Premises” refers to Units 101 through 104 and does not include Unit 105, which is under a sublease agreement.

10. Tenant provided prompt written notice to Landlord of damage on August 14, 2020 and again on August 17, 2020, which related to plumbing failures and water intrusion that also resulted in mold infestation.

11. Although the most recent of the ongoing plumbing issues was presented to Landlord on August 14, 2020, Landlord is aware that the Leased Premises has been plagued with persistent water intrusion issues for over a year.

12. Tenant's employees have had to place trash cans in their offices to collect intruding water from the unresolved leaks.

13. Furthermore, due to an ongoing issue with rainwater entering the Leased Premises from the lower area of the Building under the exterior walls, Tenant must keep a blower fan in the Units to migrate the flow of rainwater.

14. In another instance, Tenant reported a leak from the ceiling that was dripping directly onto Tenant's employee's head and desk. The leak was caused by a toilet leak in the upstairs unit. It took eighty-nine (89) days, and numerous visits by contractors, to resolve this particular leak.

15. These persistent issues and resulting damage has significantly disrupted Tenant's ability to use the Leased Premises.

16. As noted above, one hundred ten (110) days have passed since Tenant provided written notice to Landlord relating to the damages. However, Landlord either cannot repair or refuses to repair these ongoing issues.

17. As stipulated in Section 15.16 of the Lease, "[t]ime is of the essence with respect to all provisions of this Lease." Landlord, through its lack of diligence and failure to repair the Lease Premises, has breached this provision of the Lease.

18. On December 1, 2020, Tenant provided a Notice of Termination of Storefront Lease to Landlord to confirm that Tenant is exercising its right to terminate the Lease and shall surrender the premises back to Landlord on December 15, 2020, which would be the effective date of the termination. A copy of the Notice of Termination is attached hereto as Exhibit C.

19. Also, during the period of damage, Tenant is entitled to reimbursement of rent in accordance with Section 11.1 of the Lease, which provides in part as follows:

Fixed Rent shall abate from the date of such damage or destruction until ten (10) days after Landlord has repaired or restored the Building in the manner and in the condition provided in this Section and notified Tenant of that fact. In the event that a part only of the Leased Premises is untenable or incapable of use for the normal conduct of Tenant's business therein, a just and proportionate part of the Fixed Rent shall be abated from the date of such damage until ten (10) days after Landlord has completely repaired same and notified Tenant of such fact.

See Lease at § 11.1.

20. As a result of Landlord's refusal to undertake its obligations under the Lease, Tenant is entitled to a declaration that the Lease was lawfully terminated and that Tenant is entitled to a reimbursement for a just and proportionate part of the Fixed Rent paid during the period of unresolved damage.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Confirming Termination of Lease)

21. Plaintiff restates and re-alleges each and every allegation above as if fully set forth herein.

22. The South Carolina Declaratory Judgment Act provides that this Court has the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. *See S.C. Code § 15-53-20.*

23. All necessary parties have been joined to this action. An actual, justiciable controversy exists between the parties relating to their rights and obligations under the Lease.

24. Landlord, after receiving notice of damage, failed to repair the damage within the required 90-day period.

25. Tenant is entitled to exercise its right to terminate the Lease due to Landlord's failure to remedy the damage "within ninety (90) days after such damage or destruction" on August 14, 2020. *See Lease* at §11.1.

26. Landlord's lack of diligence and failure to promptly repair the Leased Premises is also a breach of Section 15.16 of the Lease. *See Lease* at §15.16 ("Time is of the essence with respect to all provisions of this Lease").

27. As of the date of this filing, one hundred ten (110) days have passed since Tenant provided written notice to Landlord relating to the damage, but Landlord has failed to complete the repair and restoration required under the Lease.

28. Accordingly, Tenant is entitled to an order confirming that the Lease is terminated as of December 15, 2020 due to Landlord's failure to undertake its obligations under the Lease to Tenant's detriment.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment/Breach of Contract – Reimbursement of Rent)

29. Plaintiff restates and re-alleges each and every allegation above as if fully set forth herein.

30. Under the terms of the Lease, Tenant is entitled to a deduction from the Fixed Rent during the time that the Leased Premises were damaged.

31. Specifically, Section 11.1 of the Lease provides as follows:

Fixed Rent shall abate from the date of such damage or destruction until ten (10) days after Landlord has repaired or restored the Building in the manner and in the condition provided in this Section and notified Tenant of that fact. In the event that a part only of the Leased Premises is untenable or incapable of use for the normal conduct of Tenant's business therein, a just and proportionate part of the

Fixed Rent shall be abated from the date of such damage until ten (10) days after Landlord has completely repaired same and notified Tenant of such fact.

See Lease at § 11.1.

32. Under the circumstances, Tenant believes that a just and proportionate rate of reimbursement is two-thirds (66.6%). Therefore, pursuant to Section 11.1 of the Lease, Tenant is entitled to just and proportionate reimbursement for two-thirds (2/3) of the Fixed Rent that was paid to Landlord for the time period from August 14, 2020 through the date of termination on December 15, 2020 in the amount of \$41,336.97.

33. As a result of Landlord's breaches of the Lease, Tenant is entitled to an award of a reimbursement of Fixed Rent in the amount of \$41,336.97, plus prejudgment interest and reasonable attorney's fees and costs, as to be confirmed by this Court in its order.

WHEREFORE, on the basis of these claims against Defendant 1221 Bower, LLC, Plaintiff Insurance Office of America, Inc., respectfully requests that the Court enter a declaratory judgment declaring that the Lease terminated as of December 15, 2020 and awarding Plaintiff the reimbursement of Fixed Rent in the amount of \$41,336.97, in accordance with Section 11.1 of the Lease, along with such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: s/Ellis R. Lesemann
Ellis R. Lesemann (S.C. Bar No. 15315)
erl@lalawsc.com
Michelle A. Matthews (S.C. Bar No. 100685)
mam@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
(843) 724-5155

Attorneys for Plaintiff

December 2, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
INSURANCE OFFICE OF AMERICA, INC.,	)	Case No.: 2020-CP-32-04007
	)	
Plaintiff,	)	
	)	ANSWER AND COUNTERCLAIMS
vs.	)	(Jury Trial Demanded)
	)	
1221 Bower, LLC,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT 1221 BOWER, LLC'S ANSWER, AFFIRMATIVE DEFENSES AND
COUNTERCLAIM TO PLAINTIFF INSURANCE OFFICE OF AMERICA, INC.'S
COMPLAINT**

NOW COMES the Defendant, 1221 Bower, LLC ("Defendant"), by and through its attorneys, COBB, DILL & HAMMETT, LLC, and for its Answer to Plaintiff's Complaint, states as follows:

FIRST DEFENSE

Defendant denies each and every allegation of the Complaint not specifically admitted hereafter and specific proof thereof is demanded.

PARTIES, JURISDICTION, AND VENUE

1. Defendant admits the allegations set forth in Paragraph 1 of the Complaint.
2. Defendant admits the allegations set forth in Paragraph 2 of the Complaint.
3. Defendant admits the allegations set forth in Paragraph 3 of the Complaint.

FACTUAL ALLEGATIONS

4. Defendant denies the allegations set forth in Paragraph 4 of the Complaint and notes that the footnote provided in the Complaint is inaccurate as the sub-lease and its benefits and

obligations noted belong solely to the Plaintiff, not the Defendant and therefore should be considered part of the “Leased Premises” as defined in the Lease.

5. Defendant admits the allegations set forth in Paragraph 5 of the Complaint.
6. Defendant admits that Plaintiff has sought equitable relief in this action and denies the remaining allegations of Paragraph 6, and specifically denies that Plaintiff is entitled to the relief requested.
7. Defendant denies the allegations set forth in Paragraph 7 of the Complaint and demands strict proof thereof.
8. Defendant denies the allegations set forth in Paragraph 8 of the Complaint and demands strict proof thereof.
9. Defendant admits Section 11.1 of the Lease contains the quoted language set forth in Paragraph 9 but denies that Paragraph 9 accurately sets forth all language, terms and conditions of Section 11.1 of the Lease.
10. Defendant denies the allegations set forth in Paragraph 10 of the Complaint and demands strict proof thereof.
11. Defendant denies the allegations set forth in Paragraph 11 of the Complaint and demands strict proof thereof.
12. Defendant denies the allegations set forth in Paragraph 12 of the Complaint and demands strict proof thereof.
13. Defendant denies the allegations set forth in Paragraph 13 of the Complaint and demands strict proof thereof.
14. Defendant denies the allegations set forth in Paragraph 14 of the Complaint and demands strict proof thereof.

15. Defendant denies the allegations set forth in Paragraph 15 of the Complaint and demands strict proof thereof.
16. Defendant denies the allegations set forth in Paragraph 16 of the Complaint and demands strict proof thereof.
17. Defendant admits Section 15.6 of the Lease contains the quoted language set forth in Paragraph 17 but denies that Paragraph 17 accurately sets forth all language, terms and conditions of Section 15.6 of the Lease. Defendant denies the remaining allegations set forth in Paragraph 17 of the Complaint and demands strict proof thereof.
18. Defendant admits it received the Notice of Termination of Storefront lease from Plaintiff. Defendant denies the remaining allegations set forth in Paragraph 18 of the Complaint and demands strict proof thereof.
19. Defendant admits Section 11.1 of the Lease contains the quoted language set forth in Paragraph 19 but denies that Paragraph 19 accurately sets forth all language, terms and conditions of Section 11.1 of the Lease. Defendant denies the remaining allegations set forth in Paragraph 19 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.
20. Defendant denies the allegations set forth in Paragraph 20 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.

ANSWERING THE FIRST CAUSE OF ACTION
(Declaratory Judgment)

21. Answering Paragraph 21 of the Complaint, Defendant incorporates by reference its responses set forth in the preceding Paragraphs of this Answer as fully as if repeated verbatim herein.

22. Defendant admits the allegations set forth in Paragraph 22 of the Complaint.
23. Defendant denies the allegations set forth in Paragraph 23 of the Complaint and demands strict proof thereof.¹
24. Defendant denies the allegations set forth in Paragraph 24 of the Complaint and demands strict proof thereof.
25. Defendant denies the allegations set forth in Paragraph 25 of the Complaint and demands strict proof thereof.
26. Defendant denies the allegations set forth in Paragraph 26 of the Complaint and demands strict proof thereof.
27. Defendant denies the allegations set forth in Paragraph 27 of the Complaint and demands strict proof thereof.
28. Defendant denies the allegations set forth in Paragraph 28 of the Complaint and demands strict proof thereof.

ANSWERING THE SECOND CAUSE OF ACTION
(Declaratory Judgment/Breach of Contract)

29. Answering Paragraph 29 of the Complaint, Defendant incorporates by reference its responses set forth in the preceding Paragraphs of this Answer as fully as if repeated verbatim herein.
30. Defendant denies the allegations set forth in Paragraph 30 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.

¹ For example, Plaintiff has ignored its sub-lease tenant as a necessary party to its Complaint whose rights are directly and adversely affected by Plaintiff's bad faith attempt to terminate its obligations under the lease.

31. Defendant admits Section 11.1 of the Lease contains the quoted language set forth in Paragraph 31 but denies that Paragraph 31 accurately sets forth all language, terms and conditions of Section 11.1 of the Lease. Defendant denies the remaining allegations set forth in Paragraph 31 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.
32. Defendant denies the allegations set forth in Paragraph 32 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.
33. Defendant denies the remaining allegations set forth in Paragraph 33 of the Complaint, demands strict proof thereof, and specifically denies that Plaintiff is entitled to the relief requested.
34. Defendant denies the propriety of each and every request or prayer for relief contained in the **WHEREFORE** Paragraph. Defendant denies that Plaintiff is entitled to any relief. Defendant specifically requests that the Court deny the requested relief.

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Complaint fails to state facts sufficient to constitute a cause of action and is generally conclusory against Plaintiff. The Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND AFFIRMATIVE DEFENSE
(Ratification)

Each and every cause of action or claim for relief in the Complaint are barred by Plaintiff's ratification or the representations, acts, and/or omissions alleged in the Complaint to have caused Plaintiff's alleged damages.

FOR A THIRD AFFIRMATIVE DEFENSE
(Estoppel)

Defendant is informed and believes, and based on such information and belief alleges, that Plaintiff's claims are barred for the reason that, by its actions, Plaintiff is estopped from bringing any causes of action.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Waiver)

Defendant is informed and believes, and based on such information and belief alleges, that by its conduct, Plaintiff has waived some or all of the causes of action asserted in the Complaint.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Intervening/Superseding Act)

Any claimed damages that are alleged to have been sustained by Plaintiff in this action were the result of, or due solely to, the intervening and/or superseding acts of the other parties or persons, over whom Defendant exercised no control, so as to bar Plaintiff's recovery against Defendant.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Justification)

The actions of Defendant and its agents were justified at all times material herein, based on all relevant facts and circumstances known by Defendant and its agents at the time they so acted. Accordingly, Plaintiff is barred from any recovery in this action.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

The damages claimed by Plaintiff, if any, must be reduced by any amount of such claimed damages caused by Plaintiff's failure to mitigate such claimed damages in whole or in part.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Set-Off)

Plaintiff's recovery, if any, should be subject to a set-off or recoupment to the extent that Plaintiff is found to be responsible for all or part of the damages alleged in the Answer to Complaint and Counterclaims and/or recovers from one or more third-parties for all or part of the damages alleged in the Answer to Complaint and Counterclaims.

FOR AN NINTH AFFIRMATIVE DEFENSE
(Unclean Hands)

Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

FOR A TENTH AFFIRMATIVE DEFENSE
(No Damage/No Injury)

Plaintiff's claims are barred, in whole or in part, because Plaintiff did not suffer any damages as a result of any alleged actions by Defendant, and any damages Plaintiff did suffer were the result of its own actions or inactions or inactions of other parties or non-parties.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE
(Reservation of Right to Amend Answer and Assert Additional Defenses)

Defendant reserves and does not waive any additional and further defenses to Plaintiff's Complaint as may be revealed throughout the duration of its investigation and/or discovery in the case and consistent with the South Carolina Rules of Civil Procedure.

DEFENDANT'S FURTHER ANSWER TO THE COMPLAINT AND AS
COUNTERCLAIMS

Now comes Defendant, 1221 Bower, LLC ("Defendant"), in further answer to the Complaint, for its Counterclaims against Plaintiff, Insurance Office of America, Inc. ("Plaintiff"), as follows:

PARTIES, JURISDICTION, AND VENUE

1. Defendant 1221 Bower, LLC is a South Carolina limited liability company and the owner of real property located in Lexington County, South Carolina.

2. Upon information and belief, Plaintiff is a Florida corporation with authority to transact business within the State of South Carolina with offices located at 1221 Bower Parkway, Units 101 through 105, Columbia, South Carolina 29212.

3. For these reasons, both jurisdiction and venue are proper in this forum.

FACTUAL ALLEGATIONS

4. This action arises under the Storefront Lease dated January 1, 2012 (“Lease”), as amended between 1221 Bower, LLC, as successor to 1116 Berkeley, LLC, and 1465 Remount, LLC (“Landlord”), and Insurance Office of America, Inc. (“Tenant”) relating to the property located at 1221 Bower Parkway, Units 101 through 105, Columbia, South Carolina 29212 (the “Leased Premises”). A copy of the Lease is attached hereto as Exhibit A.

5. The Lease Term has been extended to December 31, 2027 by the Fifth Amendment to Lease dated September 12, 2019. A copy of the Fifth Amendment to Lease is attached hereto as Exhibit B.

6. The Leased Premises is subject to a property owners’ association known as Bower Commons Co-Owners Association, Inc, a South Carolina non-profit limited liability company (the “Association”). The Association is managed by and through a third-party management company named S&S Services Group, LLC d/b/a CAMS – Community Association Management Services (“CAMS”).

7. Plaintiff’s affiliate, IOA Properties, previously owned the Leased Premises.

8. Defendant was induced and financially motivated to purchase the Leased Premises from the Plaintiff and its affiliate due to the value of the Lease with Plaintiff.

9. Plaintiff was aware of the conditions of the Leased Premises and after the purchase by the Defendant, continued to operate as if it was the owner of the Leased Premises, not following the terms of the Lease for Landlord notice.

10. Under the Lease, Tenant [Plaintiff] is required to give Landlord [Defendant] prompt written notice of any damage to or destruction of any portion of the Leased Premises resulting from fire or other casualty.

11. From time to time, as Plaintiff being a long-term tenant and affiliated prior owner of the Leased Premises well knows, the Leased Premises requires maintenance and repairs due to the age of the Leased Premises and natural elements. Upon written request, Defendant causes maintenance and repairs to be made as timely and reasonably as the circumstances allow.

12. Plaintiff has routinely failed to provide prompt and accurate written notice to Defendant of damage to the Leased Premises per the Lease's notice provisions where Plaintiff had Defendant's updated contact information yet failed to adequately provide direct notice to the Tenant.

13. Sections 1.1 O, 15.4 and 15.7 of the Lease address Notice to the Landlord [Defendant] by Tenant [Plaintiff] and are cited below:

"Section 15.4 Notices - Whenever notice shall or may be given to either of the parties by the other each such notice shall be by registered or certified mail with return receipt requested.

Notice to Landlord shall be address as specified in Section 1.1 O, and notice to Tenant shall be addressed as specified in Section 1.1 DD, or, in each case, to such other address as either may from time to time designate in writing to the other. Any notice under this Lease shall be deemed to have been given the time it is placed in the mails with sufficient postage prepaid."

(Emphasis added.)

“Section 15.7 Tenant's notice to Landlord or Default - Should Landlord be in default under any of the terms of this Lease, Tenant shall give Landlord prompt written notice thereof in the manner specified in Section 15.4 and Tenant shall allow Landlord a reasonable length of time (in any event, not less than thirty (30) days from the date of such notice) in which to cure such default.”

(Emphasis added.)

“Section 1.1 O . "Landlord's Address": IOA Properties III LLC
1855 West State Road 434
Suite 230
Longwood, Florida 32750
Attn: Ray Gross”

Plaintiff was made aware of Defendant’s correct address as it was Plaintiff’s own affiliate who sold the leased Premises to Defendant, therefore Section 1.1 O of the Lease was modified in writing to the Plaintiff on where to send proper notice to the Defendant as required under Section 15.4 of the Lease. (see Exhibit C)

14. Plaintiff cites in its Complaint, and Defendant has demanded strict proof thereof, that repairs were not timely made after notice; however notice was never given properly per the Lease for the Plaintiff’s alleged notice provided date **but** repair work was done or was being reasonably worked on with Plaintiff’s knowledge of any delays or setbacks in work by and through communications provided to Plaintiff by Defendant.

15. Plaintiff has also alleged that Defendant’s repairs were untimely thus creating a Defendant breach of the Lease, and while Plaintiff is and will be proven wrong, cited in Section 15.7 of the Lease and cited below, Defendant has a “reasonable length of time” to cure any alleged defaults that is not capped.

16. Plaintiff clearly realized that post COVID-19 its need for commercial office space to house its employees was no longer a priority, and upon information and belief, have shifted to a non-traditional work from home arrangement in the case of the majority of its agents who once

physically worked in the Leased Premises and have intentionally tried to terminate the Lease in a series of bad faith acts solely to remove themselves of its financial obligations due the Defendant.

17. Plaintiff has interfered with Defendant's remediation of damages to the Leased Premises during their attempts to make repairs to the Leased Premises as well as re-let the Leased Premises.

18. Plaintiff abandoned the Leased Premises on or about December 11, 2020, prior the Lease expiration, including shutting off electricity to the leased Premises and security card access, and has left behind significant amounts of trash and debris within the Leased Premises and Defendant discovered Plaintiff attempted to make a series of unapproved and unknown material renovations on the Leased premises. (Exhibit D).

19. Sections 9.4 of the Lease notes the condition the Leased Premises should be left in, where Section 9.2 addressed the requirement of Landlord [Defendant] approval of any material alterations to be made to the Leased Premises by the Tenant [Plaintiff]. Sections 9.2 and 9.2 of the Lease are cited below:

"Section 9.2 By Tenant - Tenant may from time to time, with the prior written consent of the Landlord (which consent shall not be unreasonably withheld) at its own expense, alter, renovate or improve the interior of the Leased Premises provided the same be performed in a good and workmanlike manner, in accordance with accepted building practices and so as not to weaken or impair the strength or substantially lessen the value of the Building. Any work done by Tenant under the provisions of this Section shall not interfere with the use by the other tenants of their premises in the Shopping Center."

(Emphasis added.)

"Section 9.4 Trade Fixtures - All trade fixtures and equipment installed by Tenant in the Leased Premises shall be new or completely reconditioned and shall remain the property of Tenant. Tenant shall obtain the written consent of Landlord before installing any fixtures or equipment. Provided Tenant is not in default hereunder, Tenant shall have the right, at the termination of this Lease, to remove any and all trade fixtures, equipment and other items of personal property not constituting a part of the freehold which it may have stored or installed in the Leased Premises,

including but not limited to counters, shelving, show cases, chairs and moveable machinery purchased provided by Tenant and which are susceptible to being moved without damage to the Building, provide this right is exercised before the Lease is terminated or during the ten (10) day period immediately following such termination and provided that Tenant shall repair any damage to the Leased Premises caused thereby. The right granted Tenant in this Section shall not include the right to remove any plumbing or electrical fixtures or equipment, heating or air conditioning equipment, floor coverings (including wall-to-wall carpeting) glued or fastened to the floors or any paneling, tile or other materials fastened or attached to the walls or ceilings, all of which shall be deemed to constitute a part of the freehold, and, as a matter of course, shall not include the right to remove any fixtures or machinery that were furnished or paid for by Landlord. **The Leased Premises and area adjacent to the Lease Premises in the Building shall be left in a broom-clean condition.** If Tenant shall fail to remove its trade fixtures or other property at the termination of this Lease or within ten (10) days thereafter, such fixtures and other property not removed by Tenant shall be deemed abandoned by Tenant, and, at the option of Landlord, shall become the property of Landlord.”

(Emphasis added.)

20. Plaintiff has failed to make timely rent and additional rent payments for the month of January 2021. Plaintiff expressed its intent to withhold the remainder of the rent due under the Lease and amendments thereto and has since demanded a reimbursement of rent which it is not entitled to, attempting to absolve themselves of any and all obligations it owes Defendant under the Lease.

21. Section 12.1 of the Lease addressed the Events of Default and Landlord Remedies in the event of a Tenant breach and its sub-paragraphs (a) and (f) are cited below:

“Section 12.1 Events of Default by Tenant and Remedies - Each of the following events shall be deemed to be and "Event of Default" or a "Default" by Tenant under this Lease, if such event continues for a period of five (5) days after written notice thereof is delivered to Tenant (or such longer cure period as may be specifically permitted by the applicable subparagraph); provided, however, that no notice need be provided to Tenant if Tenant has received a notice of Default or noncompliance more than twice in the immediately proceeding twelve (12) month period:

- a) **If Tenant shall fail (i) to pay any installment of Rent or any other amount payable to Landlord hereunder as and when herein provided,** (ii) to obtain the insurance coverage required hereunder, or (iii) to comply with the provisions of Section 7.5 regarding

Hazardous Materials.

- b) *If Tenant shall vacate the Leased Premises and permit the same to remain unoccupied and unattended.”*

(Emphasis added.)

22. Defendant informed Plaintiff that it would be in default if Plaintiff refused to pay rent and abandon the Leased Premise in response to Plaintiff's communications through Defendant's counsel, giving notice of Plaintiff's default and with the Plaintiff's actions and this litigation an incurable Event of Default due to Plaintiff's breach of the Lease.

23. Defendant by and through its counterclaims herein, is seeking all remedies allowed for under the Lease.

24. Unknown to Defendant at this time are the circumstances of the Plaintiff's sub-lease within the Leased Premises and any potential risk and cost to Defendant which could be made a claim by Plaintiff's sub-lease tenant against Defendant. The sub-lease tenant was not made a party to this litigation and further continues to actively occupy the portion of the Leased Premises sub-leased to it by Plaintiff.

25. Section 12.5 of the Lease outlines the monetary damages categories Plaintiff is liable to the Defendant as a result of the defaulting on the Lease that are accruing and ongoing at this time:

“Section 12.5 Additional Costs and Expenses of Default - Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above; (i) costs and expensed incurred by Landlord to obtain possession of the Leased Premises; (ii) broker's fees incurred by Landlord in connection with reletting the whole or any part of the Leased Premises; (iii) the costs of removing, storing and/or disposing of Tenant's or other occupant's property; (iv) the amount of all damages suffered by Landlord as a result of Tenant's Default prior to termination or recovery of the Leased Premises, as the case may be; (v) the cost of making repairs and replacements required to be made by Tenant hereunder, and

of performing all covenants of Tenant relating to the condition of the Lease Premises; (vi) the cost of repairing, altering, remodeling or otherwise putting the Leased Premises into condition acceptable to a new tenant or tenants; (vii) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law equity or hereunder, including reasonable attorneys' fees (which shall be not less than fifteen percent (15%) of all sums then owing by Tenant to Landlord), litigation expenses and court costs.”

26. Defendant has taken action to clean the Leased Premises, re-key the Leased Premises, turn back on the electricity for the Leased Premises, has not addressed the sub-lease within the Leased premises which Plaintiff is in direct privity of, and is working with a commercial realtor to attempt to re-let the Leased Premises, (excluding the sub-lease portion of the Leased Premises which is not abandoned at the time of this counterclaim nor or any rents under the sub-lease being paid to Defendant) to mitigate its unknown and ongoing damages caused by Plaintiff's willful, flagrant and improper breach of the Lease.

**FOR A FIRST COUNTERCLAIM
(Declaratory Judgment – Confirming Existence of Lease)**

27. Defendant restates and re-alleges each and every allegation above as if fully set forth herein.

28. The South Carolina Declaratory Judgment Act provides this Court has the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. See S.C. Code §15-53-20.

29. All necessary parties for Defendant's counterclaim have been joined to this action. An actual, justiciable controversy exists between the parties relating to their rights and obligations under the Lease.

30. Defendant, after eventually receiving notice of damage, remedied damages or was in process of repairs which Defendant communicated timely and often with Plaintiff.

31. Plaintiff is not entitled to exercise its right to terminate the Lease under Section 11.1 of the Lease given Defendant's improper / late notice; continued attempts to remedy the damages complained of reasonably as allowed for under Section 15.7 of the Lease to cure any alleged Landlord default ("*Tenant shall allow Landlord a reasonable length of time (in any event, not less than thirty (30) days from the date of such notice) in which to cure such default.*") and within the appropriate time frames allowed within the Lease. The 90 day term to resolve the repairs under Section 11.1 are offset by the cure provision allowed for Landlord to remedy the repairs under Section 15.7 of the lease.

32. Plaintiff failed to provide notice correctly per the terms of the Lease, specifically under its Section 15.4 and 15.7.

33. Plaintiff has interfered with Defendant's actions to remedy damages to the Leased Premises by and through failing to provide accurate and correct notice thereof and preventing access to the Leased Premises.

34. Plaintiff's knowledge of the Leased Premises given its affiliation to the prior owner and the length of time Plaintiff has occupied the Leased Premises contradict statements made in the Plaintiff's own declaratory judgment request.

35. Defendant has a documented history of communicating with Plaintiff regarding repairs and causing repairs to be made within a reasonable time frame. (Exhibit E.)

36. Accordingly, Defendant is entitled to an order declaring that the Lease and all obligations of the parties thereunder, remain in effect and that the Lease is not terminated as desired by the Plaintiff.

**FOR A SECOND COUNTERCLAIM
(Breach of Contract)**

37. Defendant restates and re-alleges each and every allegation above as if fully set forth herein.

38. To recover for a breach of contract the plaintiff [Defendant as plaintiff in its counterclaim herein] must allege and prove: (1) a binding contract entered into by the parties, (2) breach or unjustifiable failure to perform the contract, and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

39. Plaintiff and Defendant entered into a binding contract, the Lease and amendments thereto.

40. Plaintiff failed to promptly provide Defendant written notice of damage to or destruction of portions of the Leased Premises.

41. Plaintiff has failed to make timely rent payments to the Defendant for the month of January 2021 in violation of Section 12.1(a) of the Lease.

42. Plaintiff abandoned the Leased Premises on or about December 11, 2020, prior the Lease expiration in violation of Section 12.1(f) of the Lease,

43. Plaintiff has left behind significant amounts of trash and debris within the Leased Premises in violation of Section 9.4 of the Lease.

44. Plaintiff attempted to make a series of unapproved and unknown material renovations on the Leased premises in violation of Section 9.2 of the Lease.

45. Defendant anticipates its damages will continue to accrue as Plaintiff continues to withhold rent payments.

46. Defendant has suffered and will continue to suffer unknown damages as a result of Plaintiff's multiple breaches of the Lease.

47. Defendant has and will continue to attempt to mitigate the damages caused by the Plaintiff's multiple breaches of the Lease and seeks any and all relief allowed under the Lease, including, but not limited to, the monetary categories outlined in Section 12.5, but damages continue to accrue.

48. Defendant is entitled to judgment against the Plaintiff for Breach of Contract, including, but not limited to, actual compensatory, exemplary damages, and any damages set forth herein in an amount that is fair, just, and reasonable under the circumstances, including attorney's costs and fees, and whatever the court deems just and proper.

WHEREFORE, Defendant prays for an order granting the following:

- A declaratory judgment declaring that the Lease has not been terminated;
- Damages in the amount to be determined by the trier of fact including but not limited to actual, compensatory, and punitive damages;
- Costs of reletting the Leased Premises;
- Attorneys' fees and costs; and
- All other relief as this court deems just and fair.

RESPECTFULLY SUBMITTED,

/s/ Hal E. Cobb

Cobb Dill & Hammett, LLC

Hal E. Cobb, Esq. (S.C. Bar No. 100575)

Logan S. Davis, Esq. (S.C. Bar No. 104429)

222 W Coleman Blvd., Bldg. 2

Mt. Pleasant, SC 29464

Phone: (843) 936-2523

Facsimile: (843) 353-2583

hcobb@cdhlawfirm.com

ldavis@cdhlawfirm.com

Attorneys for Defendant

Dated: January 7, 2021
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	
	)	Case No.: 2020-CP-32-4007
Plaintiff,	)	
	)	PLAINTIFF'S NOTICE OF MOTION
vs.	)	AND MOTION FOR
	)	SUMMARY JUDGMENT
1221 BOWER, LLC,	)	
	)	
Defendant.	)	
	)	

COMES NOW Plaintiff Insurance Office of America, Inc. ("Plaintiff" or "IOA"), by and through its undersigned counsel, and hereby moves this Court for an Order granting summary judgment in favor of Plaintiff as to all causes of action contained in the Complaint and in favor of Plaintiff as to all counterclaims filed by 1221 Bower, LLC ("Defendant" or "1221 Bower").

This Motion is brought pursuant to Rule 56 of the South Carolina Rules of Civil Procedure ("SCRCP") on the grounds that there exists no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law as to all causes of action contained in the Complaint and those alleged by Defendant in its counterclaims.

1. Plaintiff asserted a cause of action against Defendant for declaratory judgment confirming valid termination of the Lease Agreement and a cause of action for breach of contract based on Defendant's failure to reimburse certain Fixed Rent, plus prejudgment interest and reasonable attorney's fees and costs. Defendant filed a counterclaim for declaratory judgment seeking to confirm the existence of the Lease Agreement and for breach of contract. Summary judgment in favor of the Plaintiff on its causes of action and Defendant's counterclaims is appropriate for the following reasons:

- a. There is no genuine issue of material fact that a binding contract in the form a Lease Agreement existed between Plaintiff and Defendant.
- b. Plaintiff has established there is no genuine issue of material fact that it validly terminated the Lease Agreement under Section 11.1 as a result of Defendant's failure undertake its obligation of promptly restoring and repairing the Leased Premises within ninety (90) days of being notified by Plaintiff of damage to the Leased Premises due to leaks, water intrusion, mold infestation, and related problems.
- c. Plaintiff has established there is no genuine issue of material fact that it has suffered damages and is entitled to reimbursement of rent.
- d. Plaintiff has established there is no genuine issue of material fact that Defendant breached the Lease by failing to promptly restore and repair the Leased Premises within ninety (90) days of being notified by Plaintiff and that Plaintiff has suffered damages as a result.
- e. Plaintiff has established there is no genuine issue of material fact that Plaintiff is entitled to a deduction from the fixed rent during the time that the Leased Premises was damaged pursuant to Section 11.1 of the Lease Agreement, along with prejudgment interest and reasonable attorney's fees and costs pursuant to the terms of the Lease Agreement.

WHEREFORE, as will be shown based upon applicable law, legal memoranda and other pleadings, relevant exhibits, discovery, affidavits, deposition testimony, and any other admissible evidence presented to this this Court, summary judgment in favor of Plaintiff on all causes of

action contained in Plaintiff's Complaint and in favor of Plaintiff as to all counterclaims filed by Defendant is proper and should be granted.

Respectfully submitted,

By: s/Ellis R. Lesemann

Ellis R. Lesemann

erl@lalawsc.com

Benjamin H. Joyce

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

Attorneys for Plaintiff

December 22, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
Insurance Office of America, Inc.,	)	Case No.: 2020-CP-32-04007
	)	
Plaintiff,	)	
	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT’S MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	
1221 Bower, LLC,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, 1221 Bower, LLC, hereby moves this Court for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of Defendant as to all causes of action contained in the Complaint and in favor of Defendant as to all counterclaims in Defendant’s Answer and Counterclaims.

STATEMENT OF FACTS

On January 1, 2012, IOA Properties III, LLC and its affiliate Plaintiff Insurance Office of America, Inc. (“IOA”) entered into a lease agreement (the “Lease”) for office space located at 1221 Bower Parkway Units 101, 102, 103, 104 and 105, Columbia, SC 29212 (“Premises”). The Premises are situated on the first floor of a multi-story building where residential tenants occupy the upstairs units. IOA Properties III, LLC owned the Premises from January 1, 2012 until Defendant 1221 Bower, LLC (“Bower”), through its affiliate, entered into a Contract for Sale and Purchase of the Premises, which ratified July 10, 2019 . On July 19, 2019, Bower purchased the Premises from IOA Properties III, LLC and the Lease was assigned to Bower, who assumed the role as landlord to the Plaintiff. The Lease, as amended, is set to run until December 31, 2027.

While IOA Properties III, LLC owned the Premises, multiple independent, intermittent, and isolated water intrusion events occurred. Specifically, leaks occurred in Unit 101 (See Exhibit A - Scott Berry Deposition pg. 18 ¶12-25; pg. 19 ¶1-5), water intruded from the units above into the space between Unit 102 and 103 due to a “toilet-related leak issue” (See Exhibit B - Berry Deposition, pg. 19 ¶1-19) and water pooled at another exterior doorway due to rain runoff bringing water back to the exterior door such that a blower to dry the carpet tiles was necessary (See Exhibit C - Berry Deposition pg. 56 ¶15-25; pg. 57 ¶1-10).

Post-purchase, the same independent, intermittent, and isolated water intrusion events (leak caused by residential unit above that Defendant does not own, rainwater backing up and entering through exterior door) *re-occurred* in late 2019 and 2020, which form the basis for Plaintiff’s Complaint.

In late March 2020, IOA corporate officials directed employees to work from home due to the COVID-19 pandemic. (See Exhibit D - Crissy Warner Deposition pg. 18 ¶3-19). On June 1, 2020, IOA employees returned at twenty-five percent capacity, amounting to about four people (See Exhibit E - Warner Deposition pg. 28 ¶15-16; pg. 88 ¶10-13). In July, 2020, fifty percent of employees returned, amounting to roughly seven people. (See Exhibit F - Warner Deposition pg. 28 ¶22-24; pg. 88 ¶14-17). For two weeks in June, 2020, the offices closed entirely due to concerns of covid exposure (See Exhibit G - Warner Deposition pg. 28 ¶18-21). In August, 2020, IOA’s badge scanner for the front office door malfunctioned and employees were directed to work from home until the security system was repaired. (See Exhibit H - Warner Deposition Pg. 29 ¶17-24). The badge scanner remained unfixed upon IOA’s decision to vacate the Premises. (See Exhibit I - Warner Deposition Pg. 30 ¶14-25).

On August 14, 2020, Scott Berry twice texted Angela Adleman, an agent of CAMS, the property manager for the Premises, to notify her of a recurring toilet leak affecting the wall

between Unit 102 and 103. That same day, Ms. Adleman called a plumber, and the plumber was on site to inspect and repair on August 19, 2020, a mere four business days after notification. On August 31st, IOA notified Ms. Adleman of a leak in Unit 105, who again responded promptly. IOA did not directly contact 1221 Bower in its capacity as landlord until September 22, 2020.

The leak caused by the upstairs residential unit allowed mold to develop in a portion of the wall between Units 102 and 103. IOA then hired Kleen Sites Geoservices, Inc. (“Kleen Sites”) to test and inspect the wall. On September 25, 2020, Kleen Sites agent Dave Dunnagan conducted testing of Units 101, 102 and 103. Dave Dunnagan testified that when Kleen Sites conducted its initial assessment, the *potential* of an unsafe work environment resulting from the mold concentrated in the wall between Unit 102 and 103 existed, but was eliminated by Kleen Site’s successful remediation of that wall. (See Exhibit J - Dave Dunnagan Deposition pg. 71 ¶13-25, pg. 72 ¶1-25, pg. 73 ¶1-7). Dave Dunnagan further testified that he never told employees to keep out of the office due to health concerns. (See Exhibit K - Dave Dunnagan Deposition pg. 40 ¶8-25, pg. 41 ¶1).

Unit 104 remained separated from the other units, usable, free of any water intrusions, free of any claims of mold, and easily accessible, yet was used by Plaintiff for some small storage. While Unit 104 could have been used by Plaintiff, Plaintiff chose the alternative path to “terminate” the Lease instead with what is a reasonable motive of saving the rent due to Bower under the Lease.

The majority of the Premises was unaffected by the events Plaintiff alleges in its Complaint, yet Plaintiff did not attempt to utilize the unaffected space prior to wrongfully terminating the Lease. The Premises consists of a total of approximately 5,653 square feet of rented space. Unit 101 consists of 3,385 square feet and did not suffer from mold and did not require remediation work. Throughout 2020, Unit 104 was used as minimal storage, and employees of

IOA did not use either Unit 101 or 104 while the remediation work was being performed. Plaintiff sub-leases Unit 105. They instead refused to work inside the entire building whatsoever.

On December 1, 2020 IOA sent a “Notice of Termination of Storefront Lease” alleging that it was exercising its right to terminate the Lease pursuant to Section 11.1 because landlord failed to repair the damage within ninety (90) days of notification. IOA abandoned the Lease Premises on or about December 11, 2020, seven years prior to its expiration.

IOA’s Complaint alleges that a leak “was dripping directly onto Tenant’s employee’s head and desk....[and] was caused by a toilet leak in the upstairs unit.” Complaint ¶14. The Complaint further alleges that “due to an ongoing issue with rainwater entering the Leased [Premises] from the lower area of the Building under the exterior walls, Tenant must keep a blower fan in the Units to migrate the flow of rainwater.” Complaint ¶12. It is unclear the time frame the Complaint refers to, as Scott Berry’s deposition testimony shows these same instances occurred as early as 2015, *before* the sale to Bower.

To this day, IOA has not relocated to another office building and the employees continue to work from their homes (*See* Exhibit L - Warner Deposition pg. 60 ¶6-19). IOA has provided no funds to its employees to supplement them working from home. IOA has continued to onboard new employees since it vacated the Premises. (*See* Exhibit M - Warner Deposition pg. 95 ¶8-25, pg. 96 ¶1-7).

PROCEDURAL HISTORY

On December 2, 2020, IOA filed a two-count complaint against Bower. Count I alleges Declaratory Judgment – Confirming Termination of Lease. Count II alleges Declaratory Judgment/Breach of Contract – Reimbursement of Rent.

On January 7, 2021 Bower answered the Complaint and asserted the following affirmative defenses: failure to state a claim, ratification, estoppel, waiver, intervening/superseding act, justification, failure to mitigate damages, set-off, unclean hands, no damage/no injury. Bower also

asserted a two-count counterclaim against IOA. Count I alleges Declaratory Judgment – Confirming Existence of Lease. Count II alleges Breach of Contract.

The matter is pending in the Court of Common Pleas for the eleventh Judicial Circuit. The parties have engaged in written discovery and have taken depositions.

On October 7, 2021, Defendant took the deposition of Dave Dunnagan, the President and Principal Engineer of Kleen Sites. Defendant also conducted depositions of Crissy Warner and Scott Berry, the Branch Operations Manager and Vice President of IOA, respectively, on October 14, 2021. Additionally, Defendant conducted the depositions of Robert Motley, the Regional President of IOA Columbia on March 10, 2022 and Melissa Rudolph, the Property Coordinator at IOA on April 6, 2022.

Plaintiff conducted the deposition of AJ Leone, agent of Defendant, on October 12, 2021. Plaintiff conducted the deposition of Angela Adleman, the Property Manager of CAMS, on November 5, 2021.

STANDARD OF REVIEW

Pursuant to Rule 56(a) of the South Carolina Rules of Civil Procedure, Bower moves the Court for an Order granting summary judgment on all its counterclaims in this action.

Summary Judgment is proper when there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCPP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-S Mgmt. Co.*, 381 S.C. 326,329-30 (2009). Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify

that application of the law. *Evening Post Pub. Co. v. Berkeley County School District*, 392 S.C. 76, 82 (2011).

ANALYSIS

I. There is no genuine issue of material fact that Plaintiff was not entitled to terminate the Lease Agreement pursuant to Section 11.1.

No further fact inquiry is necessary to determine that declaratory judgment confirming existence of the Lease is appropriate. Plaintiff was not entitled to terminate the Lease pursuant to Section 11.1 entitled “Damage or Destruction by Fire or other Casualty”. A declaratory judgment action is neither legal nor equitable but is determined by the nature of the underlying issue. *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). A lease agreement is a contract, and an action to construe a contract is an action at law. *Duncan v. Little*, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct.App.1992). When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense. *C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

The terms used in the Lease indicate that independent, intermittent, and isolated leaks which resulted in mold in a small, concentrated area of a building was not intended to be the basis for tenant’s termination rights under Section 11.1, which provides:

[...] If the Premises are damaged or destroyed by fire, flood, tornado, or the elements, or by casualty, or otherwise, after the commencement of the Lease Term, this Lease shall continue in full force and effect, and Landlord at its expense shall promptly restore, repair or rebuild the Premises including but not limited to the

store front, to the same condition as it existed when the possession of the Premises were turned over to the Tenant at the commencement of the Lease Term, within ninety (90) days after such damage or destruction. In the event Landlord fails to restore Premises as aforesaid, Tenant's sole remedy against Landlord shall be to terminate this Lease as of the date of such casualty.

Plaintiff argues that this clause entitled IOA to terminate the lease, cease paying rent, and even seek reimbursement of rent. Plaintiff assumedly argues that independent, intermittent, and isolated leaks, water intrusion, and mild pooling of water constitutes either damage "by the elements" or that these occurrences fall under the general language "or otherwise".

Where words of particular and specific meaning are followed by general words, general words are construed to embrace only things of the same general kinds or class as those enumerated. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Here, Section 11.1 applies when damage or destruction results "by fire, flood, tornado, or the elements, or by casualty, or otherwise..." Thus, the general terms "or otherwise" and "or the elements" must be construed to only embrace things of the same general kind or class as a fire, flood, tornado, or a casualty. See Black's Law Dictionary (casualty defined as an "[i]nevitable accident; an event not to be foreseen or guarded against. A loss from such an event or cause; as by fire, shipwreck, lightning, etc."); *Blue Water Realty, LLC v. Salon Mgmt. of Great Neck, Corp.*, 189 A.D.3d 496, 2020 WL 7250444, at *1 (1st Dep't Dec. 10, 2020) (holding that casualty [as used in commercial lease]...did not include repeated leaks and flooding which were a "common occurrence" in the leased premises);

Here, the Plaintiff knew the building suffered sporadically from leaks from the residential units above and from slight water intrusion issues at the door as early as 2015 as its affiliate *owned* the Premises and Plaintiff *occupied* the Premises *before* Bower purchased the Premises. Leaks

from the residential unit above Unit 102 and 103 and rainwater pooling at the exterior door occurred as early as 2015, as testified to by two IOA employees who worked at the Premises during the time IOA was the owner. It is not unexpected that these leaks may *re-occur* at a later date after the sale to Bower. The enumerated classes of “fire” “flood” “casualty” “tornado” are unexpected, catastrophic events of fire, flood, tornado and do not extend to this case merely because a general term was used in the Lease following the enumerated terms.

The language used later in Section 11.1 sheds further light on the parties’ intent. Section 11.1 specifically requires landlord to repair the *store front*, alluding to the parties’ intent that this provision govern when an event damages or destroys the property at such a magnitude that the store front needs repair. Here, Plaintiff’s witnesses testified the events alleged in the Complaint were known to occur and only affected a small percentage of the building. In fact, the slight pooling at the door after a rainstorm was so predictable that employees kept a blower fan in the closet.

Even if Section 11.1 is interpreted to include the events complained of, Section 11.1 termination rights were never triggered. IOA alleges that it provided notice to 1221 Bower on August 14, 2020 that there was water damage and mold which interfered with their business operations. According to IOA employees Scott Berry and Crissy Warner, plumbers were on premises on the following dates: August 19, August 31, October 14, October 26, November 11; and according to those Ms. Warner, Mr. Berry, and Dave Dunnagan, mold remediation was successfully performed on November 2 – 5th, within 90 days of August 14, 2020. If the leak *re-occurred after* the successful remediation (as it had in the past prior to Bower’s ownership), that is not grounds to terminate the Lease.

Bower is aware that Plaintiff has filed its Motion for Summary Judgment on its claims for Declaratory Judgment and Breach of Contract against Bower. Plaintiff’s motion must fail because

there exists no genuine issue of material fact that Section 11.1 does not contemplate the facts of this case. No further fact inquiry is needed to determine that the leaks, concentrated mold, and independent, isolated and intermittent water intrusion did not rise to the level of destruction or damage provided for under the Lease. Accordingly, Bower is entitled to an order declaring that the Lease and all obligations of the parties thereunder remain in effect and that the Lease is not terminated as desired by Plaintiff.

I. There is no genuine issue of material fact as to whether Plaintiff breached the Lease Agreement.

To establish breach of contract, Defendant must establish three elements by a preponderance of the evidence: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct result of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 (1962).

The evidence, and all inferences therefrom, when viewed in the light most favorable to Plaintiff, establish that IOA entered into a binding contract with Bower and subsequently breached that contract by: (1) failing to timely pay rent; (2) vacating the Premises and permitting it to remain unoccupied and unattended; (3) failing to leave the Premises in a broom clean condition; and (4) making unapproved alterations.

A. Plaintiff's failure to pay rent under the Lease amounts to a breach of the Lease.

It is undisputed that IOA failed to make timely rent payments and additional rent payments for common area maintenance expenses since January 2021 in direct breach of Section 12.1(a) ("If Tenant shall fail...to pay any installment of Rent or any other amount payable to Landlord hereunder...[it shall constitute an event of default]").

B. Plaintiff's abandonment of the Premises amounts to a breach of the Lease.

On December 11, 2020, seven years prior to the termination date, IOA prematurely vacated the Premises and permitted the premises to remain unoccupied and unattended. This constitutes a clear breach of contract. See Lease Section 12.1(f) (“If Tenant shall vacate the Premises and permit the same to remain unoccupied and unattended...[it shall constitute an event of default]”).

C. Plaintiff’s failure to leave premises in a broom clean condition constitutes a breach of the Lease.

IOA failed to leave the Premises in a broom clean condition, thus breaching Section 9.4 of the Lease.

D. Plaintiff’s unapproved alterations to the Premises constitutes a breach of the Lease.

IOA made material alterations to the premises without landlord approval in direct violation of Section 9.2, which requires written consent of the Landlord prior to altering, renovating, or improving the interior of the Premises. Correspondence amongst IOA employees and contractor invoices clearly show that IOA was “building out” a cubicle to become an office, and never obtained landlord approval for said project. (See Exhibit N - Berry Deposition pg. 67 ¶20-25, pg. 68 ¶1-8; Warner Deposition pg. 54 ¶20-25, pg. 55 ¶1-25, and pg. 56 ¶1).

II. There is no genuine issue of material fact that Bower is entitled to damages.

There is no genuine issue of material fact as to whether Bower has suffered damages as a result of Plaintiff’s breach of Lease. Section 12.5 of the Lease provides that in the event of Tenant default, Tenant is liable for: (1) costs and expenses incurred by landlord to obtain possession; (2) broker’s fees in connection with reletting the premises; (3) costs of removing, storing and/or disposing of tenant’s property; (4) costs of making repairs and replacements required to be made by Tenant under the Lease; (5) costs of repairing, altering, etc. to put the Premises in a condition acceptable to new tenants; and (6) attorneys’ fees, litigation expenses, and court costs. See Lease §12.5.

Bower has made diligent efforts to mitigate damages and re-let the Premises. As of the date of this filing, Bower has been successful in leasing Suite 105 and part of Suite 104 to a new tenant with a term ending on December 31, 2024. Bower has also leased Suite 101 and 102 to a cosmetology school with a term ending September 30, 2025.

CONCLUSION

The Defendant, 1221 Bower, LLC, hereby moves this Court for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of Defendant as to all causes of action contained in the Complaint and in favor of Defendant as to all counterclaims as there exists no genuine issue of material fact as to whether Plaintiff breached the Lease Agreement and there exists no genuine issue of material fact as to whether Plaintiff was entitled to terminate the Lease Agreement.

Respectfully Submitted,

Cobb Dill & Hammett, LLC

s/Hal E. Cobb, Esq.
Hal E. Cobb, Esq. (SC Bar # 100575)
M. Paige Kregor, Esq. (SC Bar # 105226)
Cobb Dill & Hammett, LLC
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
Telephone: (843) 936-6680
Facsimile: (843) 353-2583
hcobb@cdhlawfirm.com
pkregor@cdhlawfirm.com
Attorneys for Defendant

Mt. Pleasant, SC
June 10, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	
	)	Case No.: 2020-CP-32-4007
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MOTION TO COMPEL
	)	DISCOVERY
1221 BOWER, LLC,	)	
	)	
Defendant.	)	
	)	

**TO: HAL E. COBB, ESQUIRE AND PAIGE KREGOR, ESQUIRE,
ATTORNEYS FOR DEFENDANT 1221 BOWER, LLC:**

YOU WILL PLEASE TAKE NOTICE that Plaintiff Insurance Office of America, Inc. ("Plaintiff"), by and through its undersigned counsel, and pursuant to Rule 37 of the South Carolina Rules of Civil Procedure (SCRPC), will move before this Honorable Court for an Order compelling Defendant, 1221 Bower, LLC ("Defendant") to serve supplemental responses to Plaintiff's Second Set of Interrogatories and Requests for Production. In support hereof, Plaintiff shows unto the Court the following:

1. On September 10, 2021, Plaintiff served its Second Set of Interrogatories and Requests for Production to Defendant, a copy of which is attached as Exhibit A. On October 1, 2021, Defendant served its answers and responses to Plaintiff's Second Set of Interrogatories and Requests for Production on Plaintiff.
2. Plaintiff's Second Set of Interrogatories and Requests for Production seek information concerning Defendant's alleged damages sought under Defendant's counterclaims against Plaintiff.

3. This case is scheduled for a date certain trial on October 9, 2023. In an effort to begin preparing for trial, Plaintiff requested that Defendant supplement its responses to Plaintiff's Second Set of Interrogatories and Requests for Production pursuant to Rule 26(e), SCRCF. A copy of Plaintiff's May 31, 2023 correspondence is attached as Exhibit B.

4. Defendant did not provide Plaintiff with any supplemental answers or responses to Plaintiff's Second Set of Interrogatories and Requests for Production in response to this May 31, 2023 request.

5. On June 30, 2023, Plaintiff served Defendant with a second request pursuant to Rule 26(e), SCRCF, asking Defendant to supplement its answers and responses to Plaintiff's Second Set of Interrogatories and Requests for Production. A copy of Plaintiff's June 30, 2023 correspondence is attached hereto as Exhibit C.

6. To date, Defendant has failed to supplement its answers and responses to Plaintiff's Second Set of Interrogatories and Requests for Production in this matter, hampering Plaintiff's ability to adequately prepare for the upcoming trial.

WHEREFORE, Plaintiff respectfully requests that this Court order Defendant to fully and immediately supplement its answers and responses to Plaintiff's Second Set of Interrogatories and Requests for Production and order Defendant to pay the reasonable attorney's costs and fees incurred by Plaintiff in pursuing this motion.

Respectfully submitted,

By: s/Benjamin H. Joyce

Ellis R. Lesemann (SC Bar No. 15315)

erl@lalawsc.com

Benjamin H. Joyce (SC Bar No. 100949)

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

Attorneys for Plaintiff

July 24, 2023
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	
	)	Case No.: 2020-CP-32-4007
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MOTION TO COMPEL
	)	SUBPOENA RESPONSE FROM MAIN
1221 BOWER, LLC,	)	GATE MANAGEMENT, LLC
	)	
Defendant.	)	
	)	

TO: HAL E. COBB, ESQUIRE, REGISTERED AGENT FOR MAIN GATE MANAGEMENT, LLC AND ATTORNEY FOR DEFENDANT 1221 BOWER, LLC:

YOU WILL PLEASE TAKE NOTICE that Plaintiff Insurance Office of America, Inc. ("Plaintiff"), by and through its undersigned counsel, and pursuant to Rule 45 of the South Carolina Rules of Civil Procedure (SCRPC), will move before this Honorable Court for an Order compelling Main Gate Management, LLC to respond to Plaintiff's subpoena issued August 16, 2023. In support hereof, Plaintiff shows unto the Court the following:

1. On August 16, 2023, Plaintiff served by certified mail return receipt requested a subpoena to Main Gate Management, LLC on its Registered Agent, Hal Cobb, Esquire. A copy of the subpoena and signed certified mail domestic return receipt is attached as Exhibit A.

2. Plaintiff's subpoena to Main Gate Management, LLC seeks copies of all materials in Main Gate Management, LLC's possession relating to Units 101 through 105 at Bower Commons, 1221 Bower Parkway, Columbia, SC 29212 ("Leased Premises"), including, but not limited to statements, invoices, documentation of rent collected, agreements, contracts, invoices, payments, receipts, documents, spreadsheets, reports, notes, photographs, electronically stored

information, emails, text messages, voicemails, and communications from December 1, 2020 to present day. *See Exhibit A.*

3. This information is relevant to the causes of action raised by Defendant as Defendant has filed a Counterclaim asserting that Plaintiff breached the lease agreement between the parties and that Plaintiff is liable for ongoing rent and additional expenses.

4. Main Gate Management, LLC is the entity that maintains the rent roll for the Leased Premises as evidenced by the statement of February 2, 2021 prepared by Main Gate Management, LLC and produced by Defendant as “1221 Bower – RFP – 000162 – 000163,” which is attached as Exhibit B.

5. Additionally, Defendant is claiming fees from Main Gate Management, LLC as part of its damages in this case as evidenced by the spreadsheet produced by Defendant as “1221 Bower Supp RFP000141 – RFP000152,” which is attached as Exhibit C.

6. This case is scheduled for a date certain trial on October 9, 2023. In an effort to fully and adequately prepare for trial, Plaintiff requested that Main Gate Management, LLC respond to the Plaintiff’s subpoena by email dated September 28, 2023 to Main Gate Management, LLC’s registered agent, Hal Cobb. This email and the Registered Agent’s response is attached as Exhibit D.

7. To date, Plaintiff has not received a response to its subpoena from Main Gate Management, LLC, hampering Plaintiff’s ability to adequately prepare for the upcoming trial.

WHEREFORE, Plaintiff respectfully requests that this Court order Main Gate Management, LLC to fully and immediately respond to the subpoena issued August 16, 2023 and to pay the reasonable attorney’s costs and fees incurred by Plaintiff in pursuing this motion.

Respectfully submitted,

By: s/Benjamin H. Joyce

Ellis R. Lesemann (SC Bar No. 15315)

erl@lalawsc.com

Benjamin H. Joyce (SC Bar No. 100949)

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

Attorneys for Plaintiff

October 3, 2023
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
INSURANCE OFFICE OF AMERICA, INC.,	)	
	)	Case No.: 2020-CP-32-4007
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MOTION TO COMPEL
	)	DEFENDANT'S DISCOVERY
1221 BOWER, LLC,	)	RESPONSES
	)	
Defendant.	)	
	)	

TO: HAL E. COBB, ESQUIRE, ATTORNEY FOR DEFENDANT 1221 BOWER, LLC:

YOU WILL PLEASE TAKE NOTICE that Plaintiff Insurance Office of America, Inc. ("Plaintiff"), by and through its undersigned counsel, and pursuant to Rule 37 of the South Carolina Rules of Civil Procedure (SCRCP), will move before this Honorable Court for an Order on **January 4, 2024 at 10:00 a.m.** compelling Defendant, 1221 Bower, LLC ("Defendant") to provide full and complete responses to Plaintiff's discovery requests. In support hereof, Plaintiff shows unto the Court the following:

1. Plaintiff has served discovery requests on Defendant that request the following categories of records from Defendant:

- i. Detail of all efforts by Defendant to relet Units 101 – 105 at 1221 Bower Parkway, Columbia, South Carolina 29212 ("Leased Premises"),¹ which necessarily includes communication with Defendant's real estate broker regarding reletting of the

¹ See Plaintiff's Second Set of Interrogatories and Second Set of Requests for Production to Defendant dated September 10, 2021 attached as Exhibit A.

Leased Premises, documentation of all marketing efforts, and correspondence with current and prospective tenants regarding the Leased Premises;

- ii. Documents relating to the cost incurred by Defendant to relet the Leased Premises, which necessarily includes documents supporting the itemization of expenses that Defendant is claiming in connection with its counterclaim against Plaintiff; and
- iii. Defendant's federal and state tax returns filed from 2019 to present.²

2. Defendant has failed to supplement its discovery responses and/or provide full and complete information regarding the following:

- i. Defendant's communications with real estate brokers regarding the Leased Premises;
- ii. Defendant's communications with current and prospective tenants of the Leased Premises;
- iii. Documentation supporting Defendant's marketing of the Leased Premises on Craigslist;
- iv. Documentation supporting Defendant's claim of expenses for work performed by Cost Segregation Study, LLC and Daniel Island CPA;
- v. Invoices from Cobb Dill & Hammett for legal fees and costs that are itemized as Defendant's expenses sought in connection with Defendant's counterclaim;
- vi. Defendant's state and federal tax returns; and
- vii. An updated spreadsheet of Defendant's claimed expenses and damages.

² See Plaintiff's Fourth Requests for Production to Defendant dated December 12, 2023 attached as Exhibit B. A request for Defendant's tax returns was also made during the December 14, 2023 deposition of Andrew Leone, managing member of Defendant.

3. Defendant relies upon the attorney-client privilege in refusing to produce legal invoices that are itemized as part of Defendant's alleged expenses which Defendant is seeking in connection with its counterclaim. Because Defendant is seeking the payment of its legal invoices as part of its counterclaim, these invoices are discoverable, and Plaintiff is entitled to know if they are relevant to Defendant's claims. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (holding that typically, the attorney-client privilege does not extend to billing records and expense reports, providing that "the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure.") (quoting *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir.1992); see also *Berchtold v. Faegre Baker Daniels, LLP*, 2014 WL 12609704, at *2 (D.S.C. December 3, 2014) (holding where a party is seeking legal fees, the opposing party is entitled to invoices itemizing the fees and expenses incurred.)

WHEREFORE, Plaintiff respectfully requests that this Court order Defendant to fully and immediately supplement its answers and responses to Plaintiff's discovery requests and order Defendant to pay the reasonable attorney's costs and fees incurred by Plaintiff in pursuing this motion.

Respectfully submitted,

By: s/Benjamin H. Joyce
 Ellis R. Lesemann (SC Bar No. 15315)
erl@lalawsc.com
 Benjamin H. Joyce (SC Bar No. 100949)
bhj@lalawsc.com
 LESEMANN & ASSOCIATES LLC
 418 King Street, Suite 301
 Charleston, SC 29403
 (843) 724-5155

December 21, 2023
 Charleston, SC

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
Insurance Office of America, Inc.,	)	
	)	Case No.: 2020-CP-32-04007
	)	
Plaintiff,	)	
	)	DEFENDANT’S PRE-TRIAL BRIEF
	)	
v.	)	
	)	
1221 Bower, LLC,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, 1221 Bower, LLC, pursuant to Rule 16(c) of the *South Carolina Rules of Civil Procedure*, respectfully submits the following as its pre-trial brief in the above-captioned matter:

INTRODUCTION

This case arises from a landlord-tenant dispute on commercial property located at 1221 Bower Parkway, Units 101 – 105, Columbia, SC (the “Leased Premises”). The Leased Premises sits close to Harbison Boulevard, on a downslope grade, and is located on the first floor of a building that has two additional floors above it. The two additional floors above the first floor are made up of residential townhouse style condominiums. The units within 1221 Bower Parkway, including the Leased Premises and condominiums therein are parties to the Bower Commons Co-Owners Association (“OA”). The OA is the owner of the common elements, including, but not limited to, the space between the ceiling of the first floor and the floor of the second floor. The OA is managed by Community Association Management Services (“CAMS”).

On or about January 1, 2012, Insurance of America, Inc. (“Plaintiff” or “Tenant”) entered

into a lease and subsequently five additional amendments with its affiliate, I.O.A. Properties III, Inc. (“IOA Properties”) (see **Exhibit A** for the Lease and its 5th Amendment, collectively, excluding other amendments, the “Lease”) On or around July 19th, 2019, IOA Properties sold to 1221 Bowers, LLC (“Defendant” or “Landlord”)¹ the Leased Premises which included an assignment of the Lease.

Plaintiff failed to disclose that while its affiliate owned the Leased Premises, the residential units upstairs caused leaks to occur in the 2015 and 2016 range.² Upon Defendant’s purchase of the Leased Premises, Defendant was diligent and responsive throughout the entire period of time Plaintiff was using the Leased Premises. On August 14, 2020, Plaintiff notified CAMS of a new leak affecting two offices that shared a common wall between Units 102 and 103. Plaintiff wants this Court to rule that the Lease was properly terminated based off language in the Lease §11.1 that requires the Landlord to repair the damage from any casualty within ninety (90) days. Plaintiff wants the notification of the leak to CAMS on August 14, 2020 to constitute notice to Landlord and additionally claims Landlord did not repair within that ninety (90) days.

What the Plaintiff wants this Court to ignore is i) the rest of the Lease which requires Plaintiff to provide prompt written notice to the landlord (which was not done until September 22, 2020); ii) the fact that the leak was fixed several times between August 14, 2020 and December 1, 2020 and there were re-occurrences in the same area (albeit a different fix each time was done); iii) that the leak came from the same area in which Plaintiff suffered leaks as when their affiliate IOA Properties owned the Leased Premises; iv) that the concern of mold in the affected area was

¹ The actual buyer was two entities that shortly after closing had their name changed to 1221 Bower, LLC. This is not disputed, nor does it affect the facts of this case.

² This is not a case about seller disclosure. This fact is important only because i) the tenant knew the Leased Premises had issues with upstairs units creating water intrusions that the POA had to get involved and ii) the tenant is attempting to ask this court to use its Declaratory Judgment power to claim Landlord failed to repair an issue that the tenant themselves clearly never could repair when they owned the Leased Premises. There is no “repair” from having running water above you create the risk of future water intrusions.

addressed and remediated with Plaintiff's preferred vendor; v) that Plaintiff delayed work being done in the Leased Premises; vi) the Plaintiff was in breach of the Leased Premises prior to and after their wrongful attempt to terminate the Lease³; vii) the fact that §12.7 requires in the event of a landlord default, landlord is to be given prompt written notice and allows for at least 30 days (and more if reasonably needed) to cure any landlord default; viii) the fact that §13.2 and 15.16 required the Plaintiff to notify the Defendant's mortgagor; ix) the fact that any Landlord time obligations in the Lease are excused under the Force Majeure clause in §15.16; and x) that Plaintiff failed to ever give prompt written notice directly to the landlord as required by the Lease, and so on.

The Plaintiff wishes to confuse the fact that §12.8 does not give the tenant a remedy to terminate the lease, so that additional remedy is added in §11.1, but only after the rest of the Lease is adhered to. Plaintiff wants this Court to only look to §11.1 of the Lease and ignore the other Sections that provide for grounds for default and remedies, like: §12.7, §12.8, §15.7 and §15.16.

Defendant's position is simple: It did not fail to meet any of its obligations under the Lease. The Lease that was drafted by the Plaintiff and its affiliate, and in the event of any concern over its interpretation, should be read in the light most favorable of the non-drafter which would be the Defendant. *Southern Atlantic Financial Services v. Middleton*, 356 S.C. 444, 590 S.E.2d 27 (S.C. 2003) and *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Bazzle v. Green Tree*

³ Plaintiff breached §9.2 by doing interior construction which they left unfinished and which they did not gain landlord approval as required; they breached §9.4 by failing to leave the Leased Premises broom swept (not only did they leave items in Unit 104, they left a sub-lease tenant in Unit 105 in which landlord had no privity of contract with); they breached §12.1(a) by failing to pay rent starting in January, 2021, and the breached §12.1(f) by vacating the Leased Premises.

Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), 123 S.Ct. 2403 (2003). The facts are undisputed, and the Plaintiff's ulterior motive for attempting to terminate the Lease will become apparent through evidence presented and witness testimony.

Under the Lease, the Plaintiff has breached multiple sections of the Lease leading to Defendants counterclaims as follows: i) Plaintiff failed to pay its Rent and Additional Rent (includes CAM and expenses) per §§3.2 and 3.4; ii) Plaintiff made unapproved alterations to the Leased Premises and left them incomplete in breach of §9.2; iii) Plaintiff left unit 105 with a sub-tenant (that was not in privity of contract with Defendant) violating the requirement to leave the Leased Premises "broom swept" per §9.4, and so on.

Plaintiff's multiple breaches of the Lease triggered Events of Default under §12.1(a) – failure to pay Rent; §12.1(f) vacate the Leased Premises; and (m) other requirements under the Lease as mentioned herein. Because of these Events of Default, Defendant has been damaged. Per the Lease, Defendant is entitled to damages, including, but not limited to, under §12.4 - the unpaid Rent (minus the net sums from any re-letting done by the Defendant on the Leased Premises); §12.5 – additional costs and expenses (includes attorney fees for collections); and §15.23 – which further re-iterates only the Landlord is entitled to any attorney fees in any dispute under the Lease.

Plaintiff has spent significant time in discovery attempting to deconstruct Defendant's re-letting and marketing efforts to re-let the Leased Premises in order to deflate the damages caused to the Defendant by the Plaintiff. Defendant believes this effort taken by the Plaintiff is due to Plaintiff's realization that they did indeed breach the Lease. Nevertheless, Plaintiff's efforts are wasted as the Lease specifically covers in its §12.6 that the Landlord's re-letting and marketing efforts to re-let are above Plaintiff's reproach and Plaintiff is not entitled to judge or condemn whatever reletting or marketing efforts to re-let the Leased Premises. The Lease only notes that

any re-letting net sums shall be deducted from total damages claimed in its §12.4.

Defendant is seeking damages, attorney fees and costs against the Plaintiff for its breach of the Lease, according to its pleadings and testimony to be offered in trial.

PROCEDURAL HISTORY

On December 2, 2020, Plaintiff filed a two-count complaint against Defendant. Count I asks for a Declaratory Judgment – Confirming Termination of Lease. Count II asks for a Declaratory Judgment/Breach of Contract – Reimbursement of Rent.

On January 7, 2021 Defendant answered the Complaint and asserted the following affirmative defenses: (1) failure to state a claim, (2) ratification, (3) estoppel, (4) waiver, (5) intervening/superseding act, (6) justification, (7) failure to mitigate damages, (8) set-off, (9) unclean hands and (10) no damage/no injury.

At this same time, Defendant asserted a two-count counterclaim against IOA. Counterclaim Count I asks for a Declaratory Judgment – Confirming Existence of Lease. Counterclaim Count II alleges Breach of Contract by Plaintiff.

STATEMENT OF UNDISPUTED FACTS

After conclusion of discovery in this case, it is clear that the Parties do not dispute that:

1. The Parties are parties to the Lease, which constitutes a binding contract between Plaintiff and Defendant.
2. The Leased Premises covered under the Lease include five units: Unit 101, 102, 103, 104 and 105.
3. The wall connecting two offices (one in 102 and one in 103) had a history of water intrusion as a result of a second-floor bathroom which unit belonged to a third party not related to either of the parties.

4. That Unit 105 was sub-leased to a third party not named in this case and was in privity of contract with only the Plaintiff.
5. When Plaintiff vacated the Leased Premises, Plaintiff left behind the sub-lease tenant in Unit 105 for Defendant to deal directly with despite no being in privity of contract with the sub-lease tenant.
6. Prior to vacating the Leased Premises, Plaintiff kept all rental proceeds from their sub-tenant located in Unit 105.

STATEMENT OF FACTS IN CONTROVERSY

The material facts which are in controversy in the case are:

1. Whether Defendant repaired the Leased Premises timely after becoming aware of any damage.
2. Whether the water issues and resulting damage significantly disrupted the Plaintiff's ability to use the entire Leased Premises.
3. Whether the water leaks in the Leased Premises were intermittent or persistent.
4. Whether Defendant lacked diligence in making repairs to the Leased Premises.
5. Whether Defendant failed to repair each occurrence of damage in the Leased Premises.
6. Whether Plaintiff delayed Defendant in making repairs to the Leased Premises.
7. Whether §11.1 of the Lease should be read exclusively of, or in conjunction with, the Lease, specifically §12.7, §12.8, §15.7 and §15.16.
8. Whether Plaintiff failed to provide proper notice to the Defendant per the Lease under its §15.4.
9. Whether Plaintiff failed to provide proper notice to the Defendant's mortgagor (i.e. Lender) per the Lease under its §13.2 and §15.16.

10. Whether Plaintiff breached the Lease, specifically §3.2 (failure to pay Rent); §3.4 (failure to pay Additional Rent plus expenses); §9.2 (tenant alterations unapproved by Landlord); §9.4 (trade fixtures – failure to leave the Leased Premises “broom swept”).
11. Whether Plaintiff’s breaches of the Lease led to Events of Default of the Lease under §12.1 (a) – failure to pay rent; §12.1 (f) vacating the Leased Premises; and §12.1(m) other requirements under the Lease.
12. Whether Defendants re-letting and marketing efforts of re-letting of the Leased premises are allowed to be criticized by the Plaintiff in contravention of the Lease §12.6 which does not allow Plaintiff this right.
13. The amount of damages due to the Defendant for its breach of the Lease as allowed for under §12.4, §12.5, and §15.23.

STATEMENT OF LEGAL ISSUES

The following is a list of the legal issues involved in the case:

- A. Whether §11.1 of the Lease, specifically the language “any casualty, or otherwise”, contemplates intermittent water leaks and resulting water damage. The entire relevant provision reads “[i]f the Leased Premises are damaged or destroyed by fire, flood, tornado or by the elements, or through any casualty, or otherwise... Landlord at its expense shall promptly restore, repair, or rebuild the Leased Premises...” South Carolina states that where words of particular and specific meaning are followed by general words, general words are construed to embrace only things of the same general kinds or class as those enumerated. *Ellis v. Taylor*, 316 S.C. 245, 248 (1994).
- B. Whether §15.7 of the Lease applies to §11.1 defaults by Defendant landlord. If its

language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499 (Ct. App. 2007).

C. Whether §11.1 provides for ninety (90) days for Landlord to repair any casualty to the property, and should landlord not repair within ninety days be given an additional thirty (30) days to cure such default in repairing the Leased Premises pursuant to §12.7.

D. Whether §12.7 Default by Landlord governs defaults of the Landlord, or in the alternative, should be read in conjunction with §11.1, where §12.7 states in its entirety:

“Unless otherwise provided herein, if Landlord defaults in the performance of any term, covenant or condition required to be performed by Landlord under this Lease, Landlord shall have thirty (30) days following the receipt of written notice from Tenant specifying such default to cure such default; provide[d], however, that if the nature of Landlord’s obligation is such that more than thirty (30) days are reasonably required for its performance, then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same completion. Said thirty (30) day period shall be extended by the period of time during which Landlord is actually prevented from performing such obligation as a result of Tenant delays or Force Majeure delays, provided that Landlord is at all times diligently prosecuting such performance to completion.”

E. Whether §12.8 Tenant Remedies governs remedies available to Tenant, or in the alternative, should be read in conjunction with §11.1, where §12.8 states in its entirety:

“If Landlord shall default in the performance of its obligations hereunder and such default shall continue following [t]he expiration of applicable cure periods, expressly provided for in Section 12.7 above. Tenant may perform Landlord’s obligations hereunder, and offset the reasonable costs and expenses incurred by Tenant in doing so against Rent thereafter coming due under this Lease. Notwithstanding any other provisions in this Lease, if Landlord’s default(s) shall

render all or any portions of the Leased premises untenable for Tenant's permitted use for more than sixty (60) days, Tenant shall be entitled to a fair and reasonable Rent abatement during the time that all of the portion of the Leased Premises are so rendered unsuitable. Tenant's remedies against Landlord shall be further limited by the provisions set forth in Section 15.2 of this Lease."

F. Whether COVID-19 (as well as the fact the water intrusion was caused by upstairs condo units not under the control of the Defendant) constituted Force Majeure for purposes of this Lease, as under §12.7 of the Lease it states, "Said thirty (30) day period shall be extended by the period of time during which Landlord is actually prevented from performing such obligation as a result of Tenant delays or Force Majeure delays, provided that Landlord is at all times diligently prosecuting such performance to completion." Also see Lease §15.16, which states "Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restriction or any other causes of any kind whatsoever which are beyond the reasonable control of Landlord."

G. Defendant's counterclaim of breach of contract. To establish a breach of contract, Plaintiff must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (Ct. App. 2012).

H. Whether Plaintiff's failure to pay Rent and Additional Rent as required in the Lease

§§3.2 and 3.4 combined with Plaintiff's failure to complete alterations to the Leased Premises while leaving a sub-lease tenant in Unit 105 (i.e. not broom swept) as required in the Lease §§9.2 and 9.4 caused Events of Default per the lease's §12.1(a), (f) and (m).

- I. Whether Plaintiff is allowed to challenge the reletting and marketing efforts of Defendant despite the Lease's §12.6 which specifically waives any such challenge and allows the Defendant to do as it sees best for the Leased Premises when it comes to reletting and marketing efforts to relet.
- J. The amount of damages Defendant shall be entitled to from Plaintiff as allowed for under the Lease per its §§12.4, 12.5 and 15.23. Damages being requested consist of unpaid Rent, Additional Rent, Expenses, and Attorney Fees minus the net sum from any reletting. Damages being sought are listed below, noting attorney fees shall be increased at the time of trial:

\$ 617,190.27	Total unpaid base rent on IOA lease
\$ 247,362.91	Total unpaid of IOA CAM CAM
\$ 95,479.13	Running total of expenses Invoices and proof of payment form checking account have been provided
\$ 116,972.86	Attorney fees as of 12-29-23 *Lease §15.23 allows 1221 Bower to collect its attorney fees from IOA
	\$ 1,077,005.17 Total Expenses to Date
\$ 292,376.42	re-let lease offset - Units 101-102
\$ 112,415.68	re-let lease offset - Unit 105 & Part of 104
\$ 6,050.00	re-let lease offset - Part of Unit 104
\$ 1,860.72	re-let lease offset - Part of Unit 103
	\$ 412,702.82 Total Rent offset by re-letting (plus guaranteed beyond trial date)
	<i>*Lease §12.6 waives Landlord's duty to re-let and any required efforts however any monies collected in re-letting shall offset what IOA owes</i>
	\$ 664,302.35 Damages owed by IOA to 1221 Bower

APPLICABLE LAW

This matter will involve application of common law rules and principles of contract law and interpretation, as well as other legal issues, which include, but are not limited to the

following:

- “If the contract’s language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.” *Beaufort County Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011).
- A court “must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct.App.1997).
- “The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used.” *Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc.* 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000).
- “It is fundamental that, in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.” *Bluffton Towne Ctr., LLC v. Gilleland-Price*, 412 S.C. 554, 772 S.E.2d 882, 890 (Ct. App. 2015);
- To recover for a breach of contract, the plaintiff must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *See Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 123 S.E.2d 602 (1962).
- “The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Fuller*, 240 S.C. at 89 (1962).
- To recover damages, “the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.” *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981).
- “Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971); *see also Yadkin Brick Co. v. Materials*

Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000); *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996).

SETTLEMENT NEGOTIATIONS

The parties have engaged in discussions regarding a settlement of this matter and attended mediation. No resolution has been reached.

ATTORNEY'S FEES

Defendant respectfully requests attorney's fees in its prayer for relief, pursuant to §12.5 "... (vii) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law equity or hereunder, including reasonable attorneys' fees (which shall be not less than fifteen percent (15%) of all sums then owing by Tenant to Landlord), litigation expenses and court costs" and §15.23 Attorneys' Fees of the Lease, which states in its entirety:

"In the event of a breach by Tenant of any of the covenants or provisions hereof, and irrespective of whether Landlord declares a Default or exercises its remedies under Article XII in connection therewith, Landlord shall have the right to bring a legal action against Tenant in connection therewith, to obtain an injunction of such breach therein, and the right to invoke any other remedies allowed at law or at equity as if re-entry, summary proceedings, or other remedies were not herein provided for; and in the event of such breach by Tenant, Landlord shall be entitled to recover from Tenant, payable as Additional Rent hereunder, *any and all expenses as Landlord may incur in connection with its efforts to secure such injunction relief or other remedy at law or in equity, including, but not limited to, court costs and attorneys' fees.*" (**emphasis added**)

VOIR DIRE QUESTIONS

Defendant's proposed *Voir Dire* questions are attached hereto.

TRIAL EXHIBITS

Defendant's anticipated Trial Exhibits are attached hereto.

WITNESSES

Defendant's anticipated witnesses are attached hereto.

JURY CHARGES

Defendant's proposed jury charges are attached hereto.

VERDICT FORM

Defendant's proposed jury charges are attached hereto.

EXPECTED DURATION OF TRIAL

Plaintiff expects the trial of this matter to take three to four days.

Respectfully submitted,

s/ Hal E. Cobb, Esq.
Hal E. Cobb, Esq. SC Bar #100575
Cobb Dill & Hammett, LLC
222 West Coleman Boulevard
Mt. Pleasant, SC 29464
Phone: (843) 936-6673
Facsimile: (843) 353-2583
hcobb@cdhlawfirm.com

Attorney for Defendant

This 17th day of January, 2024
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
INSURANCE OFFICE OF AMERICA,	)	
INC.,	)	Case No.: 2020-CP-32-04007
	)	
Plaintiff,	)	
	)	DEFENDANT'S MOTION <i>IN LIMINE</i>
v.	)	
	)	
	)	
1221 BOWER, LLC,	)	
	)	
Defendant.	)	
_____	)	

TO: BENJAMIN H. JOYCE, ESQ. AS COUNSEL FOR PLAINTIFF INSURANCE OFFICE OF AMERICA, INC.,

1221 Bower, LLC ("Defendant"), by and through undersigned counsel, hereby submits this Motion *in Limine*, pursuant to the South Carolina Rules of Evidence 401 and 403, and South Carolina case law, to exclude the following matter from the trial of this case:

1. Any testimony, evidence, statements, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020, as they are irrelevant to the dispute between Plaintiff and Defendant under 401 SCROE.
2. Any testimony, evidence, statements, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020, as they are irrelevant to the dispute between Plaintiff and Defendant as they are unduly prejudicial against Defendant and have a high probability of misleading and confusing the jury under 403 SCROE.

3. Any testimony, evidence, statements, demonstrative exhibits, hearsay or inference relating to any water leaks or water events that occurred at 1221 Bower Parkway, Columbia, SC after December 15, 2020 under 401 and 403 SCROE.

BACKGROUND

Discovery disputes have been resolved and by trial should be complete. This case is ready for trial. Defendant submits this Motion *in Limine* to exclude information that is inadmissible under Rule 401 and Rule 403 of the South Carolina Rules of Evidence (“SCROE”).

This case arises out of a commercial landlord-tenant dispute related to commercial property located at 1221 Bower Parkway, Units 101-105 Columbia, SC (the “Leased Premises”). The Leased Premises is located close to Harbison Boulevard, on a downslope grade, and is located on the first floor of a building that has two additional floors above it. The two additional floors above the first floor are made up of residential townhouse style condominium. The units within 1221 Bower Parkway, including the Leased Premises and condominiums therein are parties to the Bower Commons Co-Owners Association (“BCCA”). The BCCA is the owner of the common elements, including, but not limited to, the space and pipes between the ceiling of the first floor and the floor of the second floor. The BCCA is managed by Community Association Management Services (“CAMS”).

On or about January 1, 2012, Insurance of America, Inc. (“Plaintiff” or “Tenant”) entered into a Storefront Lease and subsequently five additional amendments with its affiliate, I.O.A. Properties III, Inc. (“IOA Properties”) (See **Exhibit A** for the Storefront Lease and its 5th Amendment, collectively, the “Lease”). On or about July 19, 2019, IOA Properties sold to 1221 Bower, LLC (“Defendant” or “Landlord”) the Leased Premises which included an assignment of the Lease. There is no argument about the Lease being valid and enforceable; the dispute arises

from the interpretation of the Lease itself as to if Plaintiff's actions were allowed for, and if not, what Defendant is entitled to as a result. The Lease was drafted by and between IOA Properties and IOA and Defendant was assigned the Lease upon the purchase of the leased Premises.

Plaintiff's Complaint alleges Landlord failed to promptly restore and repair the Leased Premises within ninety (90) days and that as a result Landlord is in breach of the Lease. See Complaint ¶7.

Plaintiff attempted to terminate the Lease with Defendant, citing §11.1 of the Lease, which provides in part as follows:

Fixed Rent shall abate from the date of such damage or destruction until ten (10) after Landlord has repaired or restored the Building in the manner and in the condition provided in this Section and notified Tenant of that fact. In the event that a part only of the Leased Premises is untenable or incapable of use for the normal conduct of Tenant's business therein, a just and proportionate part of the Fixed Rent shall be abated from the date of such damage until ten (10) days after Landlord has completely repaired same and notified Tenant of such fact.

See Lease at §11.1.

Defendant's Answer and Counterclaim alleges that Defendant was not derelict or negligent in its duties; that Defendant actively and consistently repaired any and all damages to the Leased Premises caused by separate and distinct water events; and that Plaintiff was in default of the Lease and Defendant has sought compensatory damages as a result in its counterclaims. Specifically, Defendant alleges it was diligent in curing any deficiencies timely under the circumstances and in compliance with the Lease.

Plaintiff's allegations would ask this Court to ignore the significant and material acts taken by the Defendant as well as the totality of the Lease. Plaintiff in its pleadings has requested the Court adjudicate this dispute by relying solely on §11.1 of the Lease, completely ignoring the other enforceable sections of the Lease. The Lease contains several additional efforts to be taken by the

Plaintiff **prior** to any attempt at termination of the Lease under §11.1, which Plaintiff failed to do as its pleadings per its own pleadings.

The required additional efforts to be taken by Plaintiff under the Lease, include, but are not limited to: i) notice to the Landlord's creditor of any claims of Landlord default which was not done (§§13.2 and 15.16 of the Lease); ii) a defined cure period for any claimed Landlord default (§12.7 of the Lease); iii) and additional time in the event of a Force Majeure (§§12.7 and 15.16 of the Lease). (see below §§ 12.7; 13.2; and 15.16 for reference).

12.7 Default by Landlord - Unless otherwise provided herein, if Landlord defaults in the performance of any term, covenant or condition required to be performed by Landlord under this Lease, Landlord shall have thirty (30) days following the receipt of written notice from Tenant specifying such default to cure such default; provide, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are reasonably required for its performance, then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion. Said thirty (30) day period shall be extended by the period of time during which Landlord is actually prevented from performing such obligation as a result of Tenant delays or Force Majeure delays, provided that Landlord is at all times diligently prosecuting such performance to completion.

Section 13.2 Notice to Mortgagees of Landlords Default - Tenant shall give prompt written notice to each mortgagee of record of any default of Landlord hereunder, and Tenant shall allow such mortgagee a reasonable length of time (in any event, not less than sixty (60) days from the date of such notice) in which to cure any such default. Any such notice shall be sent to Mortgage Loan Department of any such mortgagee at its home office address.

Section 15.16 Time of the Essence; Force Majeure; Notice to Lender - Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restriction or any other causes of any kind whatsoever which are beyond the reasonable control of Landlord. At any time when there is outstanding a mortgage, deed of trust or similar security instrument covering Landlord's interest in the Leased Premises, Tenant may not exercise any remedies for Default by Landlord hereunder unless and until the holder of the indebtedness secured by such mortgage, deed of trust or similar security instrument shall have received written

notice of such Default and a reasonable time for curing such Default shall thereafter have elapsed.

Defendant's rely on the entire Lease, including, but not limited to the above sections, in addition to the facts of Defendant's work to repair water intrusions and mold caused by third party residential condominiums that are above the Leased Premises to support Defendant's counterclaims alleging Plaintiff breached the Lease and request for damages. There is no dispute as to the validity and enforceability of the Lease, only the interpretation of its sections.

Plaintiff requests in its Complaint a reimbursement of Rent that it paid for the Leased Premises that exceeded its alleged termination date as well as providing abatement for the Leased Premises, as allowed for *if* Plaintiff properly terminated the Lease. Defendant in its counterclaim has requested damages for unpaid rent, including expenses and attorney fees, allowed for under the Lease *if* Plaintiff did **not** properly terminate the Lease. Defendant in its damages calculation has reduced the amount of damages sought to be offset by rents collected from new tenants in portions of the Leased Premises Plaintiff left vacant on December 15, 2020. The Lease specifically deals with the issue of re-letting in its §12.6, which waives the obligation of the duty to mitigate and further allows the Defendant to re-let as it sees fit without the judgment of the Plaintiff in the event of a termination or breach of the Lease by the Plaintiff.

12.6 Reletting the Leased Premises - In the event of termination of this Lease or repossession of the Leased Premises after an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Leased Premises or any portion thereof, or to collect rent after reletting; Landlord may relet the whole or any portion of the Lease Premises for any period, to any tenant, and for any use and purpose, upon such terms as it deems appropriate, and may grant any rent or other lease concessions as it deems advisable, including reduced or abated rent.

The recital of the above facts is to provide this Court a foundation to the justification of excluding evidence at trial. Plaintiff intends to attempt to introduce evidence of events that occurred after Plaintiff vacated the Leased Premises that are irrelevant, and meant to create

confusion and prejudice in the jury and the Court. More specifically, Plaintiff intends to produce evidence and witnesses pertaining to subsequent leases, reletting efforts between Defendant and third parties, and a subsequent water event that occurred in December of 2022. This trial would be turned into an unfair persecution of Defendant if Plaintiff were allowed to present this evidence and witnesses.

ARGUMENT

- I. **Any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 should be excluded under SCROE 401, because this evidence is not relevant to the issues of termination of lease, whether improper or not, or rent abatement, which are the issues at dispute between Plaintiff and Defendant.**

The South Carolina Rules of Evidence permits only relevant evidence in a trial. Rule 401, SCROE, states “relevant evidence means evidence having any tendency to make the existence of any fact that **is of consequence to the determination of the action** more probable or less probable than it would be without the evidence.” (*emphasis added*). Any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020, is not relevant, because they (1) have nothing to do with Plaintiff’s Complaint nor Defendant’s counterclaims, and (2) as per the Lease Agreement between Plaintiff and Defendant, Defendant is under no obligation or duty whatsoever to even relet the Leased Premises.

Therefore, any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of

1221 Bower Parkway, Units 101-105 Columbia, SC, following Plaintiff vacating the premises December 15, 2020, must be excluded from this trial.

- A. Any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, or marketing efforts of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 should be excluded under SCROE 401 because this evidence is not relevant to the issues at dispute between Plaintiff and Defendant.**

Section §12.6 of the Lease, in its entirety, states,

In the event of termination of this Lease or repossession of the Leased Premises after an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Leased Premises or any portion thereof, or to collect rent after reletting; Landlord may relet the whole or any portion of the Leased Premises for any period, to any tenant, and for any use and purpose, upon such terms as it deems appropriate, and may grant any rent or other lease concessions as it deems advisable, including reduced or abated rent.

See Lease at §12.6.

As clearly stipulated, Defendant does not have any contractual duty to relet the premises. However, Defendant did so in attempt to mitigate its damages due to Plaintiff's attempt to terminate the Lease.

Plaintiff's counsel wrongfully and incorrectly asked, "Are you aware that pleadings that had been previously filed in this case acknowledge a duty to mitigate on behalf of 1221 Bower?" when deposing Mr. Leone. See **Exhibit B**. However, none of Defendant's pleadings indicate any such responsibility has been accepted or taken on. Defendant relies on the Lease, which states Defendant is under absolutely no duty or obligation to relet the premises.

Plaintiff's argument on why marketing and reletting efforts are relevant is that §12.6 is only applicable in the event of a default or a breach of the lease agreement. Plaintiff is correct that

§12.6 is only applicable in the event of default or a breach of the lease. If Defendant is found by the jury to have defaulted under the lease (*i.e.* Plaintiff wins its argument), then Defendant's marketing and reletting efforts are irrelevant. If Plaintiff is found to have breached the lease, then §12.6 is applicable and Defendant's marketing and reletting efforts are still irrelevant.

For purposes of the underlying dispute for the jury, Defendant's marketing and reletting efforts are wholly irrelevant. As such, any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 are entirely irrelevant to this case and the Lease at dispute.

On December 4, 2023, Plaintiff sent a supplemental interrogatory naming Gerry Schauer ("Mr. Schauer") as an expert witness for trial, stating:

He is anticipated to testify regarding his review and opinions as to the efforts by Defendant to market and relet Suites 101-105 at 1221 Bower Parkway after Plaintiff providing notice it was terminating the lease and vacating the premises. Mr. Schauer is further anticipated to testify regarding his opinions as to Defendant's efforts and conduct in relation to mitigating the damages sought [...]

See **Exhibit C.**

The validity of the Lease and the terms therein have never been disputed by the Parties. However, Plaintiff fails to acknowledge that under the Lease, "***Landlord shall not have any obligation to relet or to attempt to relet the Leased Premises or any portion thereof or to collect rent after reletting.***" (*emphasis added*). As such, any testimony discussing subleasing, and any circumstances or incidents within that sublease, are entirely irrelevant to this case and the Lease at dispute.

Furthermore, Mr. Schauer is a commercial real estate broker in the Charleston area market, with little to no experience in commercial real estate in the Columbia, Lexington or Irmo area. Not

only this, but Charleston and the greater Columbia area have different marketing platforms for commercial spaces (*i.e.* Charleston has a commercial property MLS and Columbia area does not). Ultimately, Mr. Schauer's testimony is not relevant to the dispute before the court and will only cause undue delay in the proceeding.

Therefore, any and all testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, or marketing efforts of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 must be excluded as all are prohibited by Rule 401 SCROE

B. Any testimony, evidence, statement, demonstrative exhibits, hearsay, or references to the lease payment amounts or lessors of 1221 Bower Parkway, Columbia, SC following Plaintiff vacating the premises December 15, 2020 should be excluded under SCROE 401 because this evidence is not relevant to the issues at dispute between Plaintiff and Defendant.

This case was #1 on the jury trial roster for the week of October 9, 2023 and on October 5, 2023, Plaintiff sent Defendant a supplemental interrogatory naming Jessica Colby ("Ms. Colby") as a witness for trial. Ms. Colby is the owner and operator of Strand and Shades, LLC, which entered into a lease agreement with Defendant almost **two years after** Plaintiff vacated the premises. The interrogatories stated:

She is expected to testify regarding her lease agreement with Defendant for a portion of Suite 104 at 1221 Bower Parkway, Columbia, SC, 29212, as well as the capital she invested in the premises to operate her business and service customers. She is also expected to testify regarding the events and circumstances surrounding the termination of the lease agreement, including but not limited to her communications with Andrew "A.J" Leone" ["Defendant"].

See **Exhibit D**.

However, Ms. Colby's lease with Defendant and termination thereof, are irrelevant to the facts of this case, as Plaintiff had no privity of contract with Ms. Colby, Ms. Colby did not enter

into a lease agreement with Defendant, until long after Plaintiff had vacated the premises and **Ms. Colby was not present for any of the facts at dispute in this case.** Ms. Colby entered into a lease agreement with Defendant to begin October 1, 2022 and terminated her lease agreement in February of 2023. Plaintiff vacated the Leased Premises in December of 2020, almost two full years prior to Ms. Colby entering into a lease at the premises.

Defendant has provided a plethora of documentation detailing its damages following Plaintiff's breach of its lease agreement. Including, but not limited to, its tax returns, leases, invoices of all costs, lease payments, checking account statements, attorneys' fees invoices, a numerous detailed spreadsheets outlining its damages with corresponding invoices and lease agreements.

The facts that are in issue in the current case are (1) whether Defendant properly performed its duties under the Lease and (2) whether Plaintiff was eligible to terminate, and if so, if it properly terminated the Lease. No testimony, evidence, statement, demonstrative exhibits, hearsay, nor inference to the lease payment amounts or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 will have the tendency to make the existence of **any material fact** in this case to be more or less probable and must be excluded as all are prohibited by Rule 401 SCROE.

II. Any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020 should be excluded under SCROE 403, as it is likely to confuse or mislead the jury.

Rule 403, SCROE, states that: "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence.” “Probative” means “[t]ending to prove or disprove.” *Probative*, Black’s Law Dictionary (11th ed. 2019). The more essential a piece of evidence is to a case, the greater its probative value. *State v. Gray*, 408 S.C. 601, 610 (Ct. App. 2014). Balancing evidence’s probative value against the unfair prejudice such evidence may cause is based on the entire record and will turn on the facts of each case. *State v. Lyles*, 379 S.C. 328, 338 (citing *State v. Gillian*, 373 S.C. 601, 609 (2007)). “[T]he more essential the evidence, the greater its probative value.” *Id.* (alteration in original) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). “Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.” *Id.* Under Rule 403, “prejudice that is ‘unfair’ is distinguished from the legitimate impact all evidence has on the outcome of a case.” *Gray*, 408 S.C. at 616. Thus, evidence is unfair when it suggests a decision may be rendered on an improper basis. *Id.* (citing *State v. Gilchrist*, 329 S.C. 621, 630 (Ct. App. 1998)).

Should the Court come to a determination that any testimony, evidence, statement, demonstrative exhibits, hearsay, or inference to the reletting, reletting efforts, marketing efforts, lease payment amounts, or lessors of 1221 Bower Parkway, Units 101-105 Columbia, SC following Plaintiff vacating the premises December 15, 2020, has any probative value, that value is substantially outweighed by the danger of unfair prejudice to Defendant and the risk of misleading and confusing the jury and therefore must be excluded from this trial.

Evidence may be excluded where it is likely to confuse or mislead the jury, such as by distracting them with immaterial or side issues. (See, *United States v. Zayyad*, 741 F.3d 452, 462 (4th Cir. 2014)). Any evidence pertaining at all to Defendant reletting the premises is unfair to admit into evidence, as it may lead to a jury determination on an improper basis. Defendant’s

reletting and efforts thereof may be used to confuse or mislead the jury, without any material purpose to the issues at dispute.

This dispute evolves from the Lease between Plaintiff and Defendant. Any evidence introduced pertaining to other lease agreements, other tenants of the premises or reletting poses a substantial risk of confusing the jury as to the lease agreement at the center of the actual dispute.

Any evidence presented regarding the reletting of the premises is unfairly prejudicial and outweighs any probative value that such evidence might have in proving or disproving Plaintiff's claims and Defendant's counterclaims. As discussed above, Plaintiff intends to introduce evidence in the form of witness testimony to discuss subsequent events and reletting efforts. Namely, Plaintiff intends to use Ms. Colby as a witness to testify about her experience with the Landlord. Allowing Ms. Colby's testimony may lead the jury to draw inaccurate and incorrect conclusions regarding the material facts at issue, which renders this evidence unfair.

In Ms. Colby's deposition, taken on December 14, 2023, she made numerous statements regarding Mr. Leone's character. Some examples of this include:

When Defendant's counsel asked Ms. Colby, "Did you call AJ a slumlord who was destroying your business?"

Ms. Colby replied, "Yes, I did."

See **Exhibit E**.

Ms. Colby also suggested that Mr. Leone is a bad person because he is from New York.

She stated, "[...] we're from the same area. I know how this works. We're both from the North."

Defendant's counsel asked, "You think people from the North are bad?"

Ms. Colby replied, “You’ve got to watch your back when you live in the North. You’ve got to look over your shoulder [...] Nobody is nice and friendly up North and everybody’s got an agenda.”

See **Exhibit F**.

Whether or not Ms. Colby and Defendant have a contentious relationship has no bearing on tending to prove or disprove whether or not Defendant complied with the Lease, or whether Plaintiff properly terminated its Lease.

With regard to the testimony of Mr. Schauer, Mr. Schauer’s opinions on Defendant’s reletting efforts also have no bearing whatsoever on this case. Introducing witness testimony regarding marketing efforts has a high probability of confusing the jury and misleading them with respect to what the actual dispute between the parties is.

Any of Defendant’s marketing efforts to relet the premises are irrelevant to the claims in dispute. Defendant is under no contractual obligation or duty to relet the premises. At no time has Defendant ever waived or terminated its protection in its reletting efforts per §12.6 of the Lease. Even though Defendant has undertaken such efforts to mitigate Defendant’s own damages, how Defendant sought to minimize its damages is irrelevant and must be excluded from introduction into evidence.

III. Any evidence relating to any water leaks, or water events, at the Leased Premises after December 15, 2020, must be excluded as the evidence is prohibited under Rules 401 and 403 of South Carolina Rules of Evidence.

The South Carolina Rules of Evidence permits only relevant evidence in a trial. Rule 401 of SCROE, states “relevant evidence means evidence having any tendency to make the existence of any fact that **is of consequence to the determination of the action** more probable or less probable than it would be without the evidence.” (*emphasis added*).

Rule 403 of SCROE, states that: “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Any evidence relating to any water leaks, or water events, after Plaintiff vacated the Leased Premises, has very little, if any, probative value, it will confuse the issues, mislead the jury and is prejudicial.

On or about December 15, 2020, Plaintiff allegedly terminated its Lease with Defendant. There was a subsequent leak and water damage that occurred on the property, **over two years later**, in December of 2022 that was related to a sprinkler system issue. The water damage that resulted from the leak occurred over two years after Plaintiff wrongfully terminated its Lease with Defendant. This evidence has no probative value in determining whether Defendant defaulted in its Lease Agreement with Plaintiff in 2020, nor whether Plaintiff validly terminated its Lease Agreement with Defendant. This evidence will mislead the jury to drawing erroneous conclusions. The jury likely will be unable to differentiate the water events that occurred in 2020 and the sprinkler system issue that occurred in 2022, and differentiate that the causes of the water events in 2020 and 2022 were not only unrelated, but that the sprinkler system water incident did not even occur when Plaintiff was in possession of the Leased Premises. Introducing this subsequent leak will confuse the jury on the issues in this case and will move the jury further away from the actual dispute. This evidence is also prejudicial to Defendant, as jurors may improperly conclude key issues in this case based on the introduction of such evidence. Wherefore, any evidence relating to any water events that occurred after Plaintiff vacated the premises in December of 2020 should be excluded at this trial because such evidence has no probative value, is prejudicial, and will mislead and confuse the jury.

CONCLUSION

For the reasons set forth herein, this Honorable Court should exclude the above matters from the trial of this case.

[Signature on the Following Page.]

Respectfully submitted,

COBB HAMMETT SCAPELLATO
ANDREWS, LLC

/s/ Hal E. Cobb

Hal E. Cobb, Esq.

S.C. Bar No.: 100575

222 West Coleman Blvd.

Mount Pleasant, SC 29464

Telephone: (843) 936-6673

hcobb@chsalaw.com

Attorney for Defendant

January __, 2024

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT
) Case No.: 2020-CP-32-4007

INSURANCE OFFICE OF AMERICA,)
INC.,)

Plaintiff,)

vs.)

1221 BOWER, LLC,)

Defendant.)

**PLAINTIFF'S
MOTION IN LIMINE**

COMES NOW Plaintiff Insurance Office of America, Inc. ("Plaintiff," "IOA," or "Tenant") and requests that the Court enter an Order barring Defendant 1221 Bower, LLC ("Defendant," "1221 Bower," or "Landlord"), its counsel, and witnesses from introducing any evidence, testimony, argument, innuendo, or demonstrative exhibits regarding the following:

- Any reference to 101 W Main St, LLC's purchase of and IOA's leasing of the current office space at 101 W. Main Street in Lexington, South Carolina, which transpired almost two (2) years following IOA's termination of the Lease Agreement;
- Any reference to alleged financial or other "ulterior motives" for IOA's termination of the Lease Agreement as speculated by Defendant, including but not limited to: (i) the cost savings of IOA working remotely during COVID-19 after vacating the premises and before securing a replacement office space; (ii) the reduction of on-premises staff and/or allegedly not needing as much space as the premises provided; and (iii) IOA's search for replacement office space following its termination of the Lease Agreement;
- Any reference to IOA's knowledge of the occurrence of water leaks at the premises prior to Defendant's purchase of the premises, and any alleged failure to disclose the same during the purchase and sale process with nonparties, I.O.A. Properties, III, LLC and A.J. Leone;
- Any reference that the premises was not left in "broom-clean" condition by IOA based on Defendant's false statements and misrepresentations through photographs that were taken before IOA vacated and cleaned the premises or on the basis that a sub-

tenant remained in Unit 105 after IOA vacated terminated the Lease Agreement and vacated the premises;

- Any reference or false insinuation that IOA “kept all rental proceeds” from a sub-tenant located in Unit 105; and
- Any reference or attempt to introduce damages alleged by Defendant that are based on conjecture, guesswork, speculation, and unreasonable assumptions that cannot be proven with any degree of reasonable certainty.

All of these topics and information to which Defendant intends to bring forward in the trial of this case should be excluded and found inadmissible under Rules 401, 402, and 403 of the South Carolina Rules of Evidence (“SCRE”).

STANDARD

“The purpose of a motion in limine is to prevent disclosure of potentially prejudicial matter to the jury.” *State v. Floyd*, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). Pursuant to Rule 401 of the South Carolina Rules of Evidence (“SCRE”), “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Rule 401 is subject to the balancing requirement of Rule 403, SCRE. *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). Rule 403, SCRE states: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *See also Jamison v. Ford Motor Co*, 373 S.C. 248, 644 S.E.2d 755 (S.C. App. 2007). Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); *see also State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (S.C. App. 2008) (holding photographs calculated to arouse the

sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.) It is within the sound discretion of the trial court to determine the admissibility of evidence. *Watson*, 343 S.C. at 478, 540 S.E.2d at 487.

ARGUMENT

I. ANY ALLEGED “ULTERIOR MOTIVES” FOR IOA’S TERMINATION OF THE LEASE AGREEMENT AS SPECULATED BY DEFENDANT ARE NOT RELEVANT AND SHOULD BE EXCLUDED.

Defendant is expected to attempt to introduce false and unsubstantiated theories at the trial of this case to confuse, mislead, and inflame the jury against IOA and distract from the determination of the claims at issue. These theories postulated by Defendant and outlined below are irrelevant and should be excluded.

The issue in this commercial lease dispute is narrow. IOA has asserted claims against Defendant for declaratory judgment and breach of contract based on Defendant’s failure to repair damage resulting from water and sewage intrusion and mold infestation within ninety (90) days and restore the premises as required by the Lease Agreement. Through its declaratory judgment claim, IOA is asking the trier of fact to confirm that its termination of the Lease Agreement was valid based on Defendant’s failure to repair and restore the premises within ninety (90) days. Defendant has asserted counterclaims against IOA for declaratory judgment and breach of contract. Specifically, Defendant is asking the Court to confirm the existence of the Lease Agreement and that IOA’s termination of the same was invalid. In its breach of contract claim, Defendant also asserts that IOA failed to make timely rent payments, abandoned the premises, and failed to leave the premises in broom-clean condition. Importantly, the theories outlined below that Defendant will attempt to inject into and taint this proceeding have no bearing on the claims asserted in this case.

a. 101 W Main St, LLC's Purchase of and IOA's Leasing of its Current Office Space Almost (2) Years After the Termination of the Lease Should Be Excluded.

Defendant is expected to attempt to inject a theory into this case that the President of IOA wanted to terminate the Lease Agreement with Defendant for the alleged financial ulterior motive of purchasing a replacement office space and then leasing it back to IOA. This theory is completely unfounded, but it is also irrelevant, and if allowed into evidence, would mislead the jury and be unfairly prejudicial to IOA.

The evidence in this case confirms that following the termination of the Lease Agreement by IOA, IOA searched for and considered several potential commercial office spaces for lease. *See Exhibit 1, Correspondence Regarding Replacement Office Space.* Ultimately, almost two (2) years later, 101 W Main St, LLC, an entity to which the President of IOA is a member, purchased 101 West Main Street in Lexington and leased a portion of the building to IOA to use as office space.

Since discovering this information, counsel for Defendant has now pivoted to making this commercial landlord tenant dispute about an alleged conspiracy theory that is baseless. Specifically, counsel for Defendant is postulating a theory that the President of IOA wanted to terminate the lease so that he could financially benefit at a later date by purchasing a building and then leasing it back to IOA. The evidence confirms that this alleged ulterior motive is baseless and is just a theory being conceived by counsel for Defendant.

Regardless, this theory is irrelevant and has no bearing on the declaratory judgment and breach of contract claims asserted by the parties in this case, and specifically whether IOA validly terminated the Lease Agreement as a result of Defendant's failure to repair damage from water and sewage intrusion and mold infestation within ninety (90) days. In general, *the motive* for the breach is immaterial in an action for breach of contract. *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547, 23 S. Ct. 754, 757 (1903); *see also Orion Drilling Co., LLC v. EQT Prod. Co.*,

No. CV 16-1516, 2019 WL 4273861, at *25 (W.D. Pa. Sept. 10, 2019), *aff'd*, 826 F. App'x 204 (3d Cir. 2020) (holding that under Pennsylvania law the subjective intent, or motive, of the contracting party is irrelevant in a breach of contract action); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (upholding trial court's exclusion of defendant's dispute with another contractor offered by plaintiff to prove defendant's motive in withholding payment on the basis that the probative value of the evidence was not great because defendant's motive was not at issue in a breach of contract case.) Furthermore, the language of the Lease Agreement does not predicate an award of damages on alleged willful or fraudulent acts or omissions by either party, which would be the only reason to allow evidence of a party's motive to breach a contract. *See Penncro Assocs., Inc. v. Sprint Corp.*, No. CIV.A.04-2549 JWL-DJ, 2005 WL 950626, at *2 (D. Kan. Apr. 25, 2005) (holding defendant's motive was relevant to the defendant's alleged breach due to language in the contract providing that "Neither party will be liable to the other for consequential, indirect or punitive damages for any cause of action, whether in contract, tort or otherwise, except for: b) Any grossly negligent, willful or fraudulent act or omission ...")

For this reason, IOA requests that the Court enter an Order barring Defendant from referencing, attempting to illicit testimony, or attempting to introduce any evidence related to 101 W Main St, LLC's purchase of or IOA's leasing of its current office space, as such matters should be excluded under Rules 401, 402, and 403, SCRE.

b. Any Cost Savings and Financial Incentive for IOA to Work Remotely or Pursue Replacement Office Space Should Be Excluded.

Defendant is also expected to attempt to introduce another alleged "ulterior motive" for IOA's termination of the Lease. Specifically, Defendant is expected to introduce evidence and testimony that Plaintiff wanted to terminate the Lease Agreement to transition to full remote work operations in order to save money from paying rent to Defendant. For the reasons stated above,

this alleged “motive” is also being postulated by counsel for Defendant in an attempt to mislead and inflame a jury against IOA. The evidence confirms that shortly after terminating the Lease Agreement and vacating the premises, IOA was searching for and considering replacement office space. Despite this theory being baseless and unfounded, it is also irrelevant and has no bearing on the declaratory judgment and breach of contract claims asserted in this case. Therefore, IOA is requesting that this matter be excluded from consideration and evidence pursuant to Rules 401, 402, and 403, SCRE.

II. EVIDENCE OF AND QUESTIONS REGARDING PLAINTIFF’S KNOWLEDGE OF WATER LEAKS PRIOR TO DEFENDANT’S PURCHASE OF THE LEASED PREMISE AND ANY ALLEGED NON-DISCLOSURE OF SAME DURING THE PURCHASE AND SALE PROCESS BETWEEN NONPARTIES SHOULD BE EXCLUDED.

Defendant is attempting to make this a case about a non-party seller disclosure during the purchase and sale of the premises to another non-party, Andrew “A.J.” Leone. Specifically, Defendant is attempting to argue that an affiliate entity, I.O.A. Properties, III, LLC, failed to disclose prior water leaks in the premises during the purchase and sale process to Andrew “A.J.” Leone, who is a non-party to this case and a member of 1221 Bower, LLC.

Any alleged failure to disclose has nothing to do with the claims asserted by the parties in this case. Furthermore, the parties to the purchase and sale agreement are not parties to the instant case. *See Exhibit 2, Contract for Sale and Purchase.* Lastly, even though the claim is baseless and inappropriate for this proceeding, the purchase and sale of the property was on an “as-is” basis. Allowing counsel for Defendant to inject this information into this commercial landlord-tenant dispute would run afoul with Rules 401, 402, and 403, SCRE, and should be disallowed.

III. **ANY INFERENCE OR REFERENCE THAT THE PREMISES WAS NOT LEFT IN BROOM-CLEAN CONDITION BASED ON FALSE STATEMENTS AND MISLEADING PHOTOGRAPHS SHOULD BE DISALLOWED AND EXCLUDED.**

In its pleadings filed in this case, Defendant has misrepresented to the Court that the premises was not left in broom-clean condition. *See Exhibit 3, Excerpt of Defendant's Counterclaim with Photos*. The photographs submitted in support of such contention were taken before Tenant vacated and cleaned the property. After IOA terminated the Lease Agreement, IOA cleaned the premises and left it broom clean condition. IOA has produced photographic evidence confirming the same to Defendant in this litigation (*See Exhibit 4, Plaintiff's Supplemental Answers with Photos*), but Defendant appears to be continuing to push this unfounded accusation and will attempt to introduce misleading photographs that depict a storage closet and other areas that were taken before Tenant vacated and cleaned the premises. This should be disallowed, as such photographs are not an accurate depiction of what the premises looked like at the time of IOA vacating and are only being offered to prejudice and inflame a jury against IOA.

IV. **ANY INFERENCE OR REFERENCE THAT IOA KEPT ALL THE RENTAL PROCEEDS FROM A SUB-TENANT IN UNIT 105 IS FALSE AND SHOULD BE EXCLUDED.**

Defendant has claimed in this case that after IOA terminated the Lease Agreement, it continued to keep rental proceeds from a sub-tenant that was in Unit 105. This is false, and Defendant has produced no evidence in this case confirming such allegation. On the contrary, Defendant's own rent calculations produced in this case from other tenants show that the charges from this sub-tenant were reconciled and that Landlord has received the full rent amount from this sub-tenant commencing after IOA terminated the Lease Agreement and vacated the premises.

This allegation is not only untrue but would be extremely prejudicial to IOA if referenced during the trial of this case or admitted into evidence. Therefore, Defendant is requesting that any reference to this allegation be disallowed under Rule 401, 402, and 403, SCRE.

V. **A SIGNIFICANT PORTION OF DEFENDANT'S ALLEGED DAMAGES ARE BASED ON SPECULATION AND SHOULD BE EXCLUDED.**

Defendant is claiming damages in this case based on speculation, as admitted by Defendant's own representative during his second deposition last month. Specifically, Defendant is claiming damages based on the possibility of replacement tenants not exercising an option to renew their lease agreement or deciding to enter into a lease extension in the future. Defendant's representative has conceded that these alleged damages it is attempting to attribute to IOA are based on an assumption that may or may not happen.

Evidence of this sort should be excluded as highly speculative. *See Gravelle v. Roberts*, No. 2008-UP-283, 2008 WL 9841726, at *4 (S.C. Ct. App. June 2, 2008) (South Carolina does not permit recovery for speculative damages.); *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 391–92, 162 S.E.2d 705, 708 (1968) (The amount of damages cannot be left to conjecture, guesswork, or speculation.) Andrew "AJ" Leone, the Defendant's representative, testified in his second deposition that Defendant's damages calculation assumed current tenants would not renew their leases even though at least one has the right of doing so. *See Exhibit 5, Leone Dep. 79:18 - 78:5*. Specifically, the Kenneth Shuler School of Cosmetology's ("Shuler") lease of units 101 and 102 expires on August 31, 2024, but Shuler has the right to exercise two (2) one (1) year lease renewals which are subject to a 3% annual increase over the preceding year's rent. Similarly, Mr. Leone acknowledged that Defendant's damages calculations did not take into account the possibility that Kim Chapman, the lessee of unit 105 and part of unit 104, would renew and extend her lease with Defendant upon its expiration in August 2024.

CONCLUSION

For the foregoing reasons, Plaintiff Insurance of America, Inc. respectfully requests that the Court grant Plaintiff's Motion in Limine as set forth above. This Motion will be further supported through argument of counsel in advance of trial.

Respectfully submitted,

By: s/Ellis R. Lesemann

Ellis R. Lesemann

erl@lalawsc.com

Benjamin H. Joyce

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

January 19, 2024

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2020-CP-32-4007
INSURANCE OFFICE OF AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF'S MOTION TO EXCLUDE
vs.	)	TESTIMONY OF ROB LAPIN
	)	
1221 BOWER, LLC,	)	
	)	
Defendant.	)	

COMES NOW Plaintiff Insurance Office of America, Inc. ("Plaintiff" or "IOA") and respectfully moves the Court for an Order excluding the testimony of Rob Lapin, a witness first identified by Defendant 1221 Bower, LLC ("Defendant") four (4) days ago on January 15, 2024. *See Exhibit 1.*

Over the course of three (3) years of discovery in this case, Defendant never identified Mr. Lapin as a potential witness in this matter until the week before trial. Rule 33(b), SCRCF, places a continuing duty on a party to supplement its discovery responses, which Defendant has failed to observe. It is expected that Defendant is calling Mr. Lapin to discuss Defendant's duty and efforts to mitigate damages and its reletting of the leased premises. It is further expected that Defendant intends to attempt to qualify Mr. Lapin as an expert witness at trial. Defendant has taken a position in this case that is contrary to established law in South Carolina, namely that Defendant, the landlord, is under no duty to mitigate damages. Now, as of four (4) days ago, Defendant appears to be calling Mr. Lapin to discuss Defendant's duty and efforts to mitigate damages and its reletting efforts. It is also anticipated that Defendant is calling Mr. Lapin to discuss, qualify, and testify about the recent deposition testimony of Andrew "A.J." Leone, the owner representative of 1221

Bower, LLC, and Mr. Leone's claim that he is more qualified as the owner of the premises at issue than a commercial real estate broker to market and lease up the commercial office space.

Plaintiff served its First Set of Interrogatories to Defendant on January 5, 2021, approximately (3) years ago and requested that Defendant identify any and all potential witnesses. *See Exhibit 2*. Defendant has had approximately three (3) years to identify Mr. Lapin as a potential witness but has failed to identify him until four (4) days ago and seven (7) days prior to the start of trial in this matter. Permitting Defendant to present an untimely and inadequately disclosed (potentially expert) witness at trial would create unfair surprise and prejudice to IOA. IOA does not have the time to depose Mr. Lapin, order and receive his transcript, and respond accordingly to Mr. Lapin's testimony and opinions through its own expert or fact witnesses.

Consequently, and as a result of the above, IOA respectfully requests an Order excluding Defendant's utilization of Mr. Lapin in this case, accordingly. *See Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338–39, 628 S.E.2d 894, 901 (Ct. App. 2006) (setting forth the factors, including surprise and prejudice, which a court should consider when deciding to exclude the testimony of an expert witness). The purpose of the rules of civil procedure, including expert discovery, is to prevent "trial by ambush." *See, e.g., Haney v. Kavoukjian*, No. 2:19-cv-2098-RMG, 2022 WL 1439041, at *1 (D.S.C. May 5, 2020); *Egan v. U.S.*, No. 3:15-cv-03533-DCC, 2018 WL 1305718, at *6 (D.S.C. March 13, 2018). For these reasons, Plaintiff respectfully requests that this Court grant this Motion to Exclude Testimony by Rob Lapin.

[Signature Page Follows]

Respectfully submitted,

By: s/Ellis R. Lesemann

Ellis R. Lesemann (SC Bar No. 15315)

erl@lalawsc.com

Benjamin H. Joyce (SC Bar No. 100949)

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

Attorneys for Plaintiff Insurance of America, Inc.

January 19, 2024
Charleston, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT
) Case No.: 2020-CP-32-4007

INSURANCE OFFICE OF AMERICA,)
INC.,)

Plaintiff,)

vs.)

1221 BOWER, LLC,)

Defendant.)

**PLAINTIFF'S
MOTION IN LIMINE**

COMES NOW Plaintiff Insurance Office of America, Inc. ("Plaintiff," "IOA," or "Tenant") and requests that the Court enter an Order barring Defendant 1221 Bower, LLC ("Defendant," "1221 Bower," or "Landlord"), its counsel, and witnesses from introducing any evidence, testimony, argument, innuendo, or demonstrative exhibits regarding the following:

- Any reference to 101 W Main St, LLC's purchase of and IOA's leasing of the current office space at 101 W. Main Street in Lexington, South Carolina, which transpired almost two (2) years following IOA's termination of the Lease Agreement;
- Any reference to alleged financial or other "ulterior motives" for IOA's termination of the Lease Agreement as speculated by Defendant, including but not limited to: (i) the cost savings of IOA working remotely during COVID-19 after vacating the premises and before securing a replacement office space; (ii) the reduction of on-premises staff and/or allegedly not needing as much space as the premises provided; and (iii) IOA's search for replacement office space following its termination of the Lease Agreement;
- Any reference to IOA's knowledge of the occurrence of water leaks at the premises prior to Defendant's purchase of the premises, and any alleged failure to disclose the same during the purchase and sale process with nonparties, I.O.A. Properties, III, LLC and A.J. Leone;
- Any reference that the premises was not left in "broom-clean" condition by IOA based on Defendant's false statements and misrepresentations through photographs that were taken before IOA vacated and cleaned the premises or on the basis that a sub-

tenant remained in Unit 105 after IOA vacated terminated the Lease Agreement and vacated the premises;

- Any reference or false insinuation that IOA “kept all rental proceeds” from a sub-tenant located in Unit 105; and
- Any reference or attempt to introduce damages alleged by Defendant that are based on conjecture, guesswork, speculation, and unreasonable assumptions that cannot be proven with any degree of reasonable certainty.

All of these topics and information to which Defendant intends to bring forward in the trial of this case should be excluded and found inadmissible under Rules 401, 402, and 403 of the South Carolina Rules of Evidence (“SCRE”).

STANDARD

“The purpose of a motion in limine is to prevent disclosure of potentially prejudicial matter to the jury.” *State v. Floyd*, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). Pursuant to Rule 401 of the South Carolina Rules of Evidence (“SCRE”), “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Rule 401 is subject to the balancing requirement of Rule 403, SCRE. *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). Rule 403, SCRE states: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *See also Jamison v. Ford Motor Co*, 373 S.C. 248, 644 S.E.2d 755 (S.C. App. 2007). Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); *see also State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (S.C. App. 2008) (holding photographs calculated to arouse the

sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.) It is within the sound discretion of the trial court to determine the admissibility of evidence. *Watson*, 343 S.C. at 478, 540 S.E.2d at 487.

ARGUMENT

I. ANY ALLEGED “ULTERIOR MOTIVES” FOR IOA’S TERMINATION OF THE LEASE AGREEMENT AS SPECULATED BY DEFENDANT ARE NOT RELEVANT AND SHOULD BE EXCLUDED.

Defendant is expected to attempt to introduce false and unsubstantiated theories at the trial of this case to confuse, mislead, and inflame the jury against IOA and distract from the determination of the claims at issue. These theories postulated by Defendant and outlined below are irrelevant and should be excluded.

The issue in this commercial lease dispute is narrow. IOA has asserted claims against Defendant for declaratory judgment and breach of contract based on Defendant’s failure to repair damage resulting from water and sewage intrusion and mold infestation within ninety (90) days and restore the premises as required by the Lease Agreement. Through its declaratory judgment claim, IOA is asking the trier of fact to confirm that its termination of the Lease Agreement was valid based on Defendant’s failure to repair and restore the premises within ninety (90) days. Defendant has asserted counterclaims against IOA for declaratory judgment and breach of contract. Specifically, Defendant is asking the Court to confirm the existence of the Lease Agreement and that IOA’s termination of the same was invalid. In its breach of contract claim, Defendant also asserts that IOA failed to make timely rent payments, abandoned the premises, and failed to leave the premises in broom-clean condition. Importantly, the theories outlined below that Defendant will attempt to inject into and taint this proceeding have no bearing on the claims asserted in this case.

a. 101 W Main St, LLC's Purchase of and IOA's Leasing of its Current Office Space Almost (2) Years After the Termination of the Lease Should Be Excluded.

Defendant is expected to attempt to inject a theory into this case that the President of IOA wanted to terminate the Lease Agreement with Defendant for the alleged financial ulterior motive of purchasing a replacement office space and then leasing it back to IOA. This theory is completely unfounded, but it is also irrelevant, and if allowed into evidence, would mislead the jury and be unfairly prejudicial to IOA.

The evidence in this case confirms that following the termination of the Lease Agreement by IOA, IOA searched for and considered several potential commercial office spaces for lease. *See Exhibit 1, Correspondence Regarding Replacement Office Space.* Ultimately, almost two (2) years later, 101 W Main St, LLC, an entity to which the President of IOA is a member, purchased 101 West Main Street in Lexington and leased a portion of the building to IOA to use as office space.

Since discovering this information, counsel for Defendant has now pivoted to making this commercial landlord tenant dispute about an alleged conspiracy theory that is baseless. Specifically, counsel for Defendant is postulating a theory that the President of IOA wanted to terminate the lease so that he could financially benefit at a later date by purchasing a building and then leasing it back to IOA. The evidence confirms that this alleged ulterior motive is baseless and is just a theory being conceived by counsel for Defendant.

Regardless, this theory is irrelevant and has no bearing on the declaratory judgment and breach of contract claims asserted by the parties in this case, and specifically whether IOA validly terminated the Lease Agreement as a result of Defendant's failure to repair damage from water and sewage intrusion and mold infestation within ninety (90) days. In general, *the motive* for the breach is immaterial in an action for breach of contract. *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547, 23 S. Ct. 754, 757 (1903); *see also Orion Drilling Co., LLC v. EQT Prod. Co.*,

No. CV 16-1516, 2019 WL 4273861, at *25 (W.D. Pa. Sept. 10, 2019), *aff'd*, 826 F. App'x 204 (3d Cir. 2020) (holding that under Pennsylvania law the subjective intent, or motive, of the contracting party is irrelevant in a breach of contract action); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (upholding trial court's exclusion of defendant's dispute with another contractor offered by plaintiff to prove defendant's motive in withholding payment on the basis that the probative value of the evidence was not great because defendant's motive was not at issue in a breach of contract case.) Furthermore, the language of the Lease Agreement does not predicate an award of damages on alleged willful or fraudulent acts or omissions by either party, which would be the only reason to allow evidence of a party's motive to breach a contract. *See Penncro Assocs., Inc. v. Sprint Corp.*, No. CIV.A.04-2549 JWL-DJ, 2005 WL 950626, at *2 (D. Kan. Apr. 25, 2005) (holding defendant's motive was relevant to the defendant's alleged breach due to language in the contract providing that "Neither party will be liable to the other for consequential, indirect or punitive damages for any cause of action, whether in contract, tort or otherwise, except for: b) Any grossly negligent, willful or fraudulent act or omission ...")

For this reason, IOA requests that the Court enter an Order barring Defendant from referencing, attempting to illicit testimony, or attempting to introduce any evidence related to 101 W Main St, LLC's purchase of or IOA's leasing of its current office space, as such matters should be excluded under Rules 401, 402, and 403, SCRE.

b. Any Cost Savings and Financial Incentive for IOA to Work Remotely or Pursue Replacement Office Space Should Be Excluded.

Defendant is also expected to attempt to introduce another alleged "ulterior motive" for IOA's termination of the Lease. Specifically, Defendant is expected to introduce evidence and testimony that Plaintiff wanted to terminate the Lease Agreement to transition to full remote work operations in order to save money from paying rent to Defendant. For the reasons stated above,

this alleged “motive” is also being postulated by counsel for Defendant in an attempt to mislead and inflame a jury against IOA. The evidence confirms that shortly after terminating the Lease Agreement and vacating the premises, IOA was searching for and considering replacement office space. Despite this theory being baseless and unfounded, it is also irrelevant and has no bearing on the declaratory judgment and breach of contract claims asserted in this case. Therefore, IOA is requesting that this matter be excluded from consideration and evidence pursuant to Rules 401, 402, and 403, SCRE.

II. EVIDENCE OF AND QUESTIONS REGARDING PLAINTIFF’S KNOWLEDGE OF WATER LEAKS PRIOR TO DEFENDANT’S PURCHASE OF THE LEASED PREMISE AND ANY ALLEGED NON-DISCLOSURE OF SAME DURING THE PURCHASE AND SALE PROCESS BETWEEN NONPARTIES SHOULD BE EXCLUDED.

Defendant is attempting to make this a case about a non-party seller disclosure during the purchase and sale of the premises to another non-party, Andrew “A.J.” Leone. Specifically, Defendant is attempting to argue that an affiliate entity, I.O.A. Properties, III, LLC, failed to disclose prior water leaks in the premises during the purchase and sale process to Andrew “A.J.” Leone, who is a non-party to this case and a member of 1221 Bower, LLC.

Any alleged failure to disclose has nothing to do with the claims asserted by the parties in this case. Furthermore, the parties to the purchase and sale agreement are not parties to the instant case. *See Exhibit 2, Contract for Sale and Purchase.* Lastly, even though the claim is baseless and inappropriate for this proceeding, the purchase and sale of the property was on an “as-is” basis. Allowing counsel for Defendant to inject this information into this commercial landlord-tenant dispute would run afoul with Rules 401, 402, and 403, SCRE, and should be disallowed.

III. **ANY INFERENCE OR REFERENCE THAT THE PREMISES WAS NOT LEFT IN BROOM-CLEAN CONDITION BASED ON FALSE STATEMENTS AND MISLEADING PHOTOGRAPHS SHOULD BE DISALLOWED AND EXCLUDED.**

In its pleadings filed in this case, Defendant has misrepresented to the Court that the premises was not left in broom-clean condition. *See Exhibit 3, Excerpt of Defendant's Counterclaim with Photos*. The photographs submitted in support of such contention were taken before Tenant vacated and cleaned the property. After IOA terminated the Lease Agreement, IOA cleaned the premises and left it broom clean condition. IOA has produced photographic evidence confirming the same to Defendant in this litigation (*See Exhibit 4, Plaintiff's Supplemental Answers with Photos*), but Defendant appears to be continuing to push this unfounded accusation and will attempt to introduce misleading photographs that depict a storage closet and other areas that were taken before Tenant vacated and cleaned the premises. This should be disallowed, as such photographs are not an accurate depiction of what the premises looked like at the time of IOA vacating and are only being offered to prejudice and inflame a jury against IOA.

IV. **ANY INFERENCE OR REFERENCE THAT IOA KEPT ALL THE RENTAL PROCEEDS FROM A SUB-TENANT IN UNIT 105 IS FALSE AND SHOULD BE EXCLUDED.**

Defendant has claimed in this case that after IOA terminated the Lease Agreement, it continued to keep rental proceeds from a sub-tenant that was in Unit 105. This is false, and Defendant has produced no evidence in this case confirming such allegation. On the contrary, Defendant's own rent calculations produced in this case from other tenants show that the charges from this sub-tenant were reconciled and that Landlord has received the full rent amount from this sub-tenant commencing after IOA terminated the Lease Agreement and vacated the premises.

This allegation is not only untrue but would be extremely prejudicial to IOA if referenced during the trial of this case or admitted into evidence. Therefore, Defendant is requesting that any reference to this allegation be disallowed under Rule 401, 402, and 403, SCRE.

V. **A SIGNIFICANT PORTION OF DEFENDANT'S ALLEGED DAMAGES ARE BASED ON SPECULATION AND SHOULD BE EXCLUDED.**

Defendant is claiming damages in this case based on speculation, as admitted by Defendant's own representative during his second deposition last month. Specifically, Defendant is claiming damages based on the possibility of replacement tenants not exercising an option to renew their lease agreement or deciding to enter into a lease extension in the future. Defendant's representative has conceded that these alleged damages it is attempting to attribute to IOA are based on an assumption that may or may not happen.

Evidence of this sort should be excluded as highly speculative. *See Gravelle v. Roberts*, No. 2008-UP-283, 2008 WL 9841726, at *4 (S.C. Ct. App. June 2, 2008) (South Carolina does not permit recovery for speculative damages.); *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 391–92, 162 S.E.2d 705, 708 (1968) (The amount of damages cannot be left to conjecture, guesswork, or speculation.) Andrew "AJ" Leone, the Defendant's representative, testified in his second deposition that Defendant's damages calculation assumed current tenants would not renew their leases even though at least one has the right of doing so. *See Exhibit 5, Leone Dep. 79:18 - 78:5*. Specifically, the Kenneth Shuler School of Cosmetology's ("Shuler") lease of units 101 and 102 expires on August 31, 2024, but Shuler has the right to exercise two (2) one (1) year lease renewals which are subject to a 3% annual increase over the preceding year's rent. Similarly, Mr. Leone acknowledged that Defendant's damages calculations did not take into account the possibility that Kim Chapman, the lessee of unit 105 and part of unit 104, would renew and extend her lease with Defendant upon its expiration in August 2024.

CONCLUSION

For the foregoing reasons, Plaintiff Insurance of America, Inc. respectfully requests that the Court grant Plaintiff's Motion in Limine as set forth above. This Motion will be further supported through argument of counsel in advance of trial.

Respectfully submitted,

By: s/Ellis R. Lesemann

Ellis R. Lesemann

erl@lalawsc.com

Benjamin H. Joyce

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

January 19, 2024

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2020-CP-32-4007
	)	
INSURANCE OFFICE OF AMERICA,	)	
INC.,	)	
	)	
Plaintiff,	)	
	)	OPPOSITION TO DEFENDANT'S
vs.	)	MOTION FOR ATTORNEY FEES
	)	
1221 BOWER, LLC,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

Defendant 1221 Bower, LLC has presented a request for attorney's fees that is improper and excessive under any standard of measurement. This commercial lease dispute was tried before the Honorable Courtney Clyburn Pope during the week of January 22 – 26, 2024 at the Lexington County Courthouse. Following lengthy deliberations, the jury returned a "split verdict" in favor of both parties. Plaintiff Insurance Office of America, Inc. ("IOA") was awarded 60% of the damages it sought under its claims. Conversely, Defendant 1221 Bower, LLC ("Defendant" or "Landlord") was only awarded 30% of the damages it requested at closing, and only 25% of the damages it identified in its Pre-Trial Brief filed with the Court.

Considering the relative success of the parties, IOA recovered a significantly larger percentage of the damages being claimed and also convinced the jury that Landlord's damages were excessive, unwarranted, and self-inflicted. Despite its relative lack of success at trial, and the clear message sent by the jury, Landlord is now seeking an excessive amount of attorney's fees that are actually greater than the amount of the judgment. Landlord's request is unreasonable and unwarranted based on the significant degree of success obtained by IOA, the very limited degree

of success obtained by Landlord, and other factors outlines below. As a result, the Court should either deny Defendant's Motion for Attorney Fees or, in the alternative, reduce the amount by 60% – 70%.

FACTUAL BACKGROUND

In this action, IOA asserted two (2) causes of action against Landlord, and Landlord asserted two (2) counterclaims. Each of the claims and counterclaims asserted relate to rights and obligations arising under the Lease Agreement, including IOA's termination of the Lease Agreement. Immediately prior to and during trial, Landlord's alleged damages figure fluctuated. Immediately prior to trial, Landlord's alleged damages totaled \$547,329.49, as indicated in Landlord's Pre-Trial Brief. During trial, Landlord's damages number was reduced due to success obtained by IOA in excluding certain damages. By closing arguments, Landlord's alleged damages were reduced to \$497,541.31, which is the amount that was requested from the jury.

However, the jury clearly considered Landlord's claim to be excessive and unwarranted. Furthermore, the jury believed that IOA was entitled to a reimbursement of rent due to the damaged condition of the leased premises. The jury issued a split verdict as follows: (i) a verdict in favor of Landlord on IOA's first cause of action for declaratory judgment relating to the termination of the lease; (ii) a verdict and judgment for \$25,000.00 to IOA on its second cause of action for declaratory judgment and breach of contract relating to the equitable reimbursement of rent; (iii) a verdict in favor of Landlord on Landlord's cause of action for declaratory judgment relating to the termination of the Lease; and (iv) a verdict and judgment for \$150,000.00 to Landlord on Landlord's counterclaim for breach of contract.

As to Landlord's counterclaims, the jury found in favor of Landlord but awarded Landlord a judgment that was \$397,329.49 less than (or 27% of) the damages Landlord had claimed in its

Pre-Trial Brief. Conversely, the amount that the jury thought was proper was \$347,541.31 less than (or only 30% of) the damages requested from the jury at closing. The table below reflects the percentages and amounts by which Landlord's claims for damages were excessive and unwarranted:

Damages Sought by Defendant	Amount Claimed	Amount Awarded by Jury	Percentage Reduction by Jury	Amount of Reduction by Jury
Pre-Trial Brief	\$547,329.49	\$150,000.00	(72.6%)	(\$397,329.49)
Closing	\$497,541.31	\$150,000.00	(69.9%)	(\$347,541.31)

Furthermore, when the judgment awarded to IOA is considered, Defendant's net recovery of \$125,000.00 is a 75% reduction from the amount that Landlord requested during closing. Notwithstanding IOA's success at trial, Defendant now wants \$172,206.03 in fees, expenses, and meals. For the reasons discussed herein, Defendant's request should be denied, or in the alternative, reduced by at least 60 – 70% to account for IOA's success on the merits and Defendant's limited success.

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). On appeal an award of attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Blumberg*, 310 S.C. at 494, 427 S.E.2d at 660.

ARGUMENT

I. DEFENDANT SHOULD NOT BE ENTITLED TO ATTORNEY FEES AND COSTS BECAUSE IT DID NOT PREVAIL AT TRIAL UNDER THE CIRCUMSTANCES

IOA is the prevailing party as to its claim against Defendant for reimbursement of rent due to damages. The South Carolina Supreme Court has defined a "prevailing party" 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). IOA sought, and was awarded, a judgment for reimbursement of rent paid to Defendant from August 14, 2020 through December 15, 2020. The jury awarded IOA more than what Defendant told the jury they should award to IOA. Also, IOA was successful in

receiving a reduction of approximately 70% of what Landlord had claimed as damages. As a result, any fees awarded should be adjusted accordingly.

It is axiomatic that Defendant cannot be paid for fees relating to issues that it lost, but that is what Defendant is attempting to accomplish with its request. *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 who prevailed on those issues).

“The extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees[.]” *Hensley*, 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”). The trial court determines the prevailing party “by evaluating the degree of success obtained.” *Heath*, 302 S.C. at 183, 394 S.E.2d at 711. If a party “prevails only partially, the factor of beneficial results accomplished will weigh in favor of reducing the fee.” *See Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct. App. 1990). When a movant has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole may be an excessive amount. *See Firehouse Rest. Grp., Inc. v. Scurmont LLC*, 2011 WL 4943889, at *13 (D.S.C. Oct. 17, 2011) (reducing overall number of hours performed by counsel and awarding 50% of the fees sought by the defendant); *see also S.C. Citizens for Life, Inc. v. Krawcheck*, 2011 WL 13324484, at *4 (D.S.C. Sept. 30, 2011) (finding that a 35% reduction in attorney’s fees and costs was appropriate where the movant achieved **substantial** but incomplete success) (emphasis added).

Here, Defendant did not achieve substantial success. In fact, the result obtained by Defendant confirms a relative lack of success. Defendant seems to simply point to the partial verdict it received, claim victory, and assert that it is entitled to fees. Instead, the jury entered what can be construed as a compromise verdict that, after offsetting the judgment to IOA, amounted to a 75% reduction from the amount of damages requested by Landlord at trial. The partial verdict obtained by Defendant is not a victory that warrants a massive award of fees. If the jury wished for Defendant to prevail on its claims, it would have awarded \$497,541.31 on the verdict form to Landlord and \$0 to IOA, neither of which the jury did.

In deciding the amount of the fee, a court should take into consideration the facts and equities of the particular case. *Prevatte*, 302 S.C. at 416, 396 S.E.2d at 644. The jury found that IOA was entitled to a partial refund of rent paid by IOA to Landlord during the period of unresolved damage, which Landlord refused to provide. Landlord, as the non-prevailing party, should not be rewarded for refusing to comply with the Lease Agreement. Nothing in the Lease Agreement, or under applicable law, allows a non-prevailing party to recover attorney's fees from the prevailing party.

Landlord's request for an award of attorney's fees and costs should be denied or, in the alternative, reduced significantly to an amount that would be proportional to its limited degree of success. *See, e.g., Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (affirming trial court's reduction of attorney's fees request by 50% where party prevailed only in part).

II. THE AMOUNT OF ATTORNEY FEES AND COSTS REQUESTED BY LANDLORD IS UNREASONABLE

Having achieved only a limited degree of success, Landlord is not the prevailing party. Nevertheless, Landlord seeks the total amount of attorney's fees and costs it incurred to date and makes no effort to distinguish the fees relating to claims and issues to which it did not prevail. For

instance, during discovery and leading up to day one of trial, Landlord focused on and devoted a significant amount of time and expense to unsuccessful theories that were deemed irrelevant and inadmissible at trial.

The fees and costs requested by Landlord are excessive and unreasonable. Landlord should not be rewarded for incurring fees in pursuit of unsuccessful legal theories that were excluded prior to trial and never reached the jury.

A. Landlord Seeks Fees for Time Devoted to Issues that were Inadmissible and Excluded at Trial and Preparing for a Trial that was Continued due to Landlord's Own Conduct.

Landlord's fee request is unreasonable as it seeks an award of all attorney's fees and costs incurred to date, including amounts for the time and labor devoted to issues on which Landlord did not prevail.

Landlord attempted to show that IOA possessed financial or other ulterior motives for terminating the Lease Agreement. Landlord spent an overwhelming amount of time in pursuit of this theory that was clearly irrelevant to the claims asserted by the parties. In pursuit of this unsuccessful theory, Landlord served several third-party subpoenas, served discovery requests to IOA, noticed a deposition of Rob Motley of IOA in Lexington, and filed discovery and pre-trial motions with the Court. Additionally, Landlord spent considerable time theorizing and strategizing, reviewing discovery and subpoena productions with irrelevant information, and preparing for and conducting discovery and depositions on irrelevant topics. The hours spent on these unsuccessful issues should have been excluded from Landlord's fee request; however, Landlord did not do so and now asks this Court to award fees and costs devoted to unsuccessful theories. Landlord's request is improper under applicable law and should be denied, or in the alternative, significantly reduced by at least 60 – 70%.

Furthermore, Landlord requests fees and costs for time spent on two rounds of trial preparation, which is inappropriate and should be disallowed. The trial of this case was initially set for a date certain on October 9, 2023. However, the trial was continued due to Landlord's own conduct, including outstanding discovery issues and motions filed relating to Landlord's unsuccessful theories ultimately deemed irrelevant and inadmissible and Landlord's failure to update and finalize its alleged damages figure and provide certain support for its alleged damages until the week before trial. Landlord's request however seeks an award of fees for hours devoted to trial preparation prior to the original trial date in October of 2023, as well as the fees and costs incurred in connection with the trial of this case during the week of January 22, 2024. IOA should not be required to pay for two rounds of duplicative trial preparation that was caused by Landlord's own conduct.

B. The Fees are Excessive and Unreasonable.

In attempting to quantify success, the courts "must compare the amount of damages sought to the amount awarded." *See Randolph v. PowerComm Constr., Inc.*, 780 F. App'x 16, 23 (4th Cir. 2019) (reducing attorney's fee award by 25% to account for limited degree of success). After reducing its damages figure twice during trial, Landlord ultimately sought damages against IOA in the amount of \$497,541.31. The jury, however, only awarded \$150,000.00 to Landlord, which amounts to a 70% reduction from the damages requested by Landlord (and a 75% reduction after offsetting the amount that the jury awarded to IOA). The Landlord's limited degrees of success in obtaining a judgment weighs heavily in favor of a significant reduction on any attorney fee award to Landlord. Any fee award to Landlord should be proportional to the degree of limited success Landlord achieved.

C. The Fees Requested Grossly Exceed the Amount Contemplated in the Fee Provision.

As a basis for its fee request, Landlord cites to Section 12.5 of the Lease Agreement, entitled “Additional Costs and Expenses of Default,” which provides, in part, as follows:

Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above [...] (vii) all reasonable expenses incurred by Landlord in enforcing or defending Landlord’s rights and/or remedies at law, equity or hereunder, including reasonable attorneys’ fees (**which shall be not less than fifteen percent (15%) of all sums then owing by Tenant to Landlord**), litigation expenses and court costs.

See Lease at § 12.5 (emphasis added).

Landlord’s request greatly exceeds any amount considered to be “reasonable” under the Lease Agreement. As discussed above, the jury awarded \$150,000.00 to Landlord and awarded \$25,000.00 to IOA. After offsetting the amount of the judgment in favor of IOA, the jury’s award to Landlord amounts to \$125,000.00.

Based on the language of the Lease Agreement, a reasonable award of attorney’s fees and expenses would “be not less than fifteen percent (15%) of all sums then owing by Tenant to Landlord,” i.e., 15% of \$125,000.00. Fifteen percent (15%) of the sums owing by IOA to Landlord would be \$18,750.00. Landlord’s request for a fee award in the amount \$172,206.03 is approximately 137% of the sum owed by IOA, which is unreasonable in light of the terms of the Lease Agreement indicating that a 15% fee should be the minimum amount. Landlord’s fee request also exceeds the amount that would be payable to counsel pursuant to a typical contingency fee arrangement, which is often one-third (1/3) of the recovery. A standard contingency fee of one-third the amount of net recovery to Landlord, i.e. \$125,000.00, would be \$41,250.00, which itself is less than 25% of what Landlord has requested. Landlord’s Motion for Attorney Fees is

unreasonable and should be denied or, in the alternative, the fee award should be significantly reduced by 60 – 70% to account for these issues.

III. LANDLORD FAILS TO MAKE THE NECESSARY SHOWING FOR AN AWARD OF ATTORNEY’S FEES AND COSTS

To the extent the Court finds that Landlord is the prevailing party, Landlord’s fee submission is improperly documented and impermissibly vague.

Landlord’s Motion for Attorney Fees, Affidavit, and supporting documentation are insufficient to support a finding as to each of the following six 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. *Blumberg*, 310 S.C. at 494, 427 S.E.2d at 660. “Trial courts should make specific findings of fact on the record for each of the factors set out above.” *See Rowell v. Whisnant*, 360 S.C. 181, 186, 600 S.E.2d 96, 99 (Ct. App. 2004).

The Affidavit of Attorney’s Fees and Costs merely provides a general description of general tasks performed by counsel. The supporting documentation consists of block billing with vague task entries labeled as “emails with OC,” “review,” “read responses,” “trial prep,” and “discuss case strategy.” The generic labels impede the Court’s reasonableness review.

The reasonableness of the hourly rates is not addressed in the Affidavit of Attorney’s Fees. The Motion for Attorney’s Fees and Supporting Memorandum state that Landlord’s lead counsel “capped” his hourly rate to \$167.50 per hour beginning in August of 2023. The documents submitted in support of Landlord’s Motion show that, during the 32-month period prior to August 16, 2023, Landlord’s lead counsel billed an hourly rate between \$300.00 and \$350.00. Nor does it provide evidence that such rates are equal to those prevailing in the community.

The fee provision contained in Section 12.5 of the Lease Agreement provides for reasonable “attorneys’ fees.” Landlord appears to seek a fee award for work performed by non-attorney employees, as the initials of several timekeepers do not match those of the associates and partners listed at the top of each invoice. The Affidavit, however, does not address the work performed by non-attorneys or the reasonableness of the rate(s) and hours devoted to the tasks. Similarly, the fee provision provides for reasonable attorneys’ fees, litigation expenses and court costs. However, the documentation supplied by Landlord includes cost entries labeled “Groucho’s Deli,” “BJ’s Restaurant Brewhouse,” “Applebee’s,” and “Root Celler.” There is no basis for Landlord’s request for amounts that are not “reasonable attorneys’ fees, litigation expenses, or court costs.” The Lease Agreement does not require IOA to feed Landlord and its counsel.

The deficiencies in Landlord’s fee submission deprives the Court of the ability to evaluate the fee request and to make any determination as to the reasonableness of a fee award. *See Griffith v. Griffith*, 332 S.C. 630, 646–47, 506 S.E.2d 526, 534–35 (Ct. App. 1998) (remanding issue of attorneys’ fees due to the family court’s failure to set forth specific findings of fact on each of the six factors); *see also Hensley* 461 U.S. at 433 (“Where the documentation of hours is inadequate, the district court may reduce the award accordingly.”). Landlord’s deficient fee submission does not support the excessive and unreasonable fee award.

Accordingly, Landlord’s Motion for Attorney Fees should be denied, or, in the alternative, the hours claimed and fees sought should be significantly reduced and proportional to the limited degree of success it achieved.

CONCLUSION

Based on the foregoing, Defendant 1221 Bower, LLC's Motion for Attorney Fees should be denied or reduced as follows:

A 60% reduction, which is warranted based on IOA's significant success, Landlord's limited success, and the other reasons outlined above would result in a fee award of \$68,882.41.

A 70% fee reduction, which is proportionate to the reduction applied by the jury, would result in an award of \$51,661.81.

Respectfully submitted,

By: s/Ellis R. Lesemann

Ellis R. Lesemann (S.C. Bar No. 15315)

erl@lalawsc.com

Benjamin H. Joyce (SC Bar No. 100949)

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

***Attorneys for Plaintiff Insurance Office of
America, Inc.***

March 1, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
INSURANCE OFFICE OF AMERICA,	)	
INC.,	)	Case No.: 2020-CP-32-04007
	)	
Plaintiff,	)	
	)	DEFENDANT'S MOTION FOR
v.	)	ATTORNEY FEES
	)	
	)	
1221 BOWER, LLC,	)	
	)	
Defendant.	)	

TO: COUNSEL FOR PLAINTIFF INSURANCE OFFICE OF AMERICA, INC.,

1221 Bower, LLC ("Defendant"), by and through undersigned counsel, hereby submits this Motion for Attorney Fees post-verdict, as procedurally agreed to during the trial, for Attorney Fees, pursuant to the valid and enforceable Lease that existed between the parties.

BACKGROUND

This case was tried by Jury in the Lexington County Courthouse beginning on Monday, January 22, 2024 and ending on Friday, January 27, 2024 with a beneficial verdict in favor of Defendant and Defendant's counterclaims. (See **Exhibit A** - Jury Executed Verdict Form, the "Verdict Form").

The lease in question authorizes attorney fees. See **Exhibit B** for the Lease and its 5th Amendment, collectively, the "Lease").

ARGUMENT

- I. **§12.5 of the Lease allows for the collection of reasonable attorney fees, litigation expenses and court costs.**

The Lease has two sections that address attorney fees, litigation expenses and court costs, stating in pertinent part:

12.5 Additional Costs and Expenses of Default - *Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above;* (i) costs and expensed incurred by Landlord to obtain possession of the Leased Premises; (ii) broker's fees incurred by Landlord in connection with reletting the whole or any part of the Leased Premises; (iii) the costs of removing, storing and/or disposing of Tenant's or other occupant's property; (iv) the amount of all damages suffered by Landlord as a result of Tenant's Default prior to termination or recovery of the Leased Premises, as the case may be; (v) the cost of making repairs and replacements required to be made by Tenant hereunder, and of performing all covenants of Tenant relating to the condition of the Lease Premises; (vi) the cost of repairing, altering, remodeling or otherwise putting the Leased Premises into condition acceptable to a new tenant or tenants; (vii) ***all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law equity or hereunder, including reasonable attorneys' fees (which shall be not less than fifteen percent (15%) of all sums then owing by Tenant to Landlord), litigation expenses and court costs.*** (emphasis added)

Defendant counsel's attorney fee affidavit speaks to the reasonableness of Defendant's expenses incurred to enforce its rights and defend against the tenant's complaint as well as accounting for all such fees and costs. This is incorporated by reference and attached hereto as **Exhibit C.**

II. §15.23 of the Lease allows for the collection of reasonable attorney fees, litigation expenses, and court costs.

As previously mentioned, the Lease contains a second section that addresses attorney fees when the Plaintiff is in default of the Lease, which the Jury per the Verdict Form agrees that the Lease was i) existing (i.e. not terminated by Plaintiff), and ii) Plaintiff was in breach of the Lease. Defendant is additionally entitled to damages as outlined in §15.23 of the Lease, which specifically states in pertinent part:

Section 15.23 Attorneys' Fees - In the event of a breach by Tenant of any of the covenants or provisions hereof, and irrespective of whether Landlord declares a Default or exercises its remedies under Article XII in connection therewith, Landlord shall have the right to bring a legal action against Tenant in connection therewith, to obtain an injunction of such breach therein, and the right to invoke any other remedies allowed at law or at equity as if re-entry, summary proceedings, or other remedies were not herein provided for; and **in the event of such breach by Tenant, Landlord shall be entitled to recover from Tenant, payable as Additional Rent hereunder, any and all expenses as Landlord may incur in connection with its efforts to secure such injunctive relief or other remedy at law or in equity, including, but not limited to, court costs and attorneys' fees.** (emphasis added)

Again, **Exhibit C** itemizes the Defendant's attorney fees and costs. To summarize:

	Attorney Fees	Costs	Total
Total	\$ 160,365.58	\$ 11,840.45	\$ 172,206.03

Defendant requested and counsel acquiesced to decrease it's hourly billing rate to \$167.50, despite lead counsel hourly billing rate set at \$450.00. This matter was long, arduous, and required significant contract and legal knowledge and preparation throughout each stage including the trial.

LAW ON POINT

"In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001).

South Carolina has not adopted the merger doctrine from the Restatement. Thus, we find post-judgment attorney's fees can be awarded if a statute or contract provides for such fees. Because no statutory authority exists to grant attorney's fees in this case, we must look to the language of the note itself to determine whether the parties intended for post-judgment attorney's fees to be recoverable. See *132 *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)

(“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.”).

“When determining the reasonableness of a fee award, the court should consider the following factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services.” *Alukonis v. Smith*, 431 S.C. 41, 64, 846 S.E.2d 600, 613 (2020).

CONCLUSION

For the reasons set forth herein, this Honorable Court should award attorneys' fee, litigation expenses and court costs in the amount of **\$172,206.03** to the Defendant.

[Signature on the Following Page.]

Respectfully submitted,

COBB HAMMETT SCAPELLATO
ANDREWS, LLC



Hal E. Cobb, Esq.

S.C. Bar No.: 100575

222 West Coleman Blvd.

Mount Pleasant, SC 29464

Telephone: (843) 936-6673

hcobb@chsalaw.com

Attorney for Defendant

February 1, 2024

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	Case No.: 2020-CP-32-4007
Insurance Office of America, Inc.,	)	
	)	
Plaintiff,	)	DEFENDANT’S MEMORANDUM IN
	)	SUPPORT OF DEFENDANT’S
vs.	)	MOTION FOR ATTORNEYS’ FEES
	)	AND COSTS
1221 Bower, LLC,	)	
	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that 1221 Bower, LLC hereby presents its Memorandum in Support of Defendant’s Motion for Attorneys’ Fees and Costs.

MEMORANDUM IN SUPPORT

INTRODUCTION

In September of 2019, 1221 Bower, LLC (“Defendant” or “1221 Bower”) purchased the Leased Premises from I.O.A. Properties III, LLC and assumed the Lease Agreement with I.O.A. Properties III, LLC’s affiliate and tenant, Insurance Office of America, Inc. (“Plaintiff” or “IOA”). On December 1, 2020, IOA invalidly attempted to terminate the Lease Agreement and on December 2, 2020, filed a lawsuit against 1221 Bower for a declaratory judgment asking the court to rule that they validly terminated the Lease Agreement and seeking rent abatement. 1221 Bower counterclaimed seeking a declaratory judgment confirming the existence of the Lease and for breach of contract. For over three (3) years, 1221 Bower defended the lawsuit and pursued its counterclaims.

Trial was held for the matter of Insurance Office of America vs. 1221 Bower, LLC from January 22, 2024 through January 26, 2024 at the Lexington County Courthouse before the Honorable Courtney Clyburn Pope. The jury rendered the following verdicts:

- (i) a verdict in favor of 1221 Bower on IOA's first cause of action for declaratory judgment relating to the termination of the lease;
- (ii) a verdict and judgment for \$25,000.00 to IOA on IOA's second cause of action relating to reimbursement of rent;
- (iii) a verdict in favor of 1221 Bower on 1221 Bower's cause of action for declaratory judgment confirming the existence of the Lease; and
- (iv) a verdict and judgment for \$150,000.00 to 1221 Bower on 1221 Bower's counterclaim for breach of contract.

Defendant 1221 Bower is entitled to an award of attorneys' fees and court costs, as authorized by statute and dictated by contract.

STANDARD

"Attorney's fees are not recoverable unless authorized by contract or statute." *Jackson v. Speed*, 326 S.C. 289, 307 (1997). Where the contract provides for "reasonable" attorneys fees without specifying a rate or amount, the issue of attorneys fees is left to the discretion of the trial judge. Factors to be considered by the trial court in making a determination as to attorneys fees are: (1) The nature, extent and difficulty of the legal services rendered; (2) The time and labor necessarily devoted to the case; (3) The professional standing of counsel; (4) The contingency of compensation; (5) The fee customarily charged in the locality for similar legal services; and (6) The beneficial results obtained. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) and *Glasscock v. Glasscock*, 304 S.C. 158, 161 403 S.E.2d 313, 315 (S.C. 1991).

ARGUMENT

- I. **ATTORNEY FEES ARE RECOVERABLE BY BOTH CONTRACT AND STATUTE AND UNDER EITHER THEORY, THE COURT MUST DETERMINE THE REASONABLENESS OF THE FEES.**

1. IOA breached the Lease Agreement, which clearly provides 1221 Bower the contractual right to collect any costs and attorneys' fees following a breach.
2. The Lease Agreement provides Defendant 1221 Bower with attorneys' fees, litigation expenses and court costs in Section 12.5, which states:

Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above: [the above being Tenant's rent payment obligations] [...] (vii) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law and equity or hereunder, **including reasonable attorneys' fees (which shall not be less than fifteen (15%) of all sums then owing by Tenant to Landlord), litigation expenses and court costs.**

See Defendant's Trial Exhibit No. 1, which is attached hereto.

3. The Lease Agreement provides Defendant 1221 Bower with attorneys' fees and court costs in Section 15.23, which states:

In the event of a breach by Tenant of any of the covenants or provisions hereof, and irrespective of whether Landlord declares a Default or exercises its remedies under Article XII in connection therewith, to obtain an injunction of such breach therein, and the right to invoke any other remedies allowed at law or at equity as if re-entry, summary proceedings, or other remedies were not herein provided for, and in the event of such breach by Tenant, **Landlord shall be entitled to recovery from Tenant, payable as Additional Rent hereunder, any and all expenses as Landlord may incur in connection with its efforts to secure such injunctive relief or other remedy at law or in equity, including but not limited to, court costs and attorneys' fees.**

See Defendant's Trial Exhibit No. 1, which is attached hereto.

4. As provided by the Lease Agreement, Defendant 1221 Bower is entitled to recover from Plaintiff IOA "any and all expenses [...] including but not limited to, court costs and attorneys' fees."

5. S.C. Code Ann. § 15-53-100 of the Uniform Declaratory Judgments Act allows this Court to make such an award of costs as it deems equitable and just.

II. DEFENDANT'S FEES WERE REASONABLE

A. THE NATURE, EXTENT AND DIFFICULTY OF THE CASE, AS WELL AS THE TIME NECESSARILY DEVOTED TO THE CASE

1. Throughout the course of this three (3) year litigation, the parties engaged in extensive written discovery, eleven (11) depositions, mediation and six (6) motions to compel and motions for summary judgment. This matter was decided by a jury from a trial beginning on January 22, 2024 and concluding on January 26, 2024.
2. Attached hereto as **Exhibit B**, is an Affidavit of Attorneys' Fees setting forth the time devoted to defending Plaintiff's claims and pursuing Defendant's counterclaims. The amount of time was reasonable considering the amount of discovery the parties engaged in, the number of depositions taken, and also being that Defendant 1221 Bower's managing member, Andrew "AJ" Leone, is an active duty military. Defendant also draws the Court's attention to the fact that much of the discovery Defendant incurred fees related to responding to concerned data the Plaintiff never used at trial. In this context, upon information and belief, Plaintiff made the case more complex than was necessary. Plaintiff filed numerous motions that required Defendant to defend which was unavoidable from Defendant's perspective.

B. THE PROFESSIONAL STANDING OF COUNSEL

1. Hal E. Cobb has been an attorney since 2012 and has been in private practice, as

senior partner of Cobb Hammett Scapellato Andrews, LLC (f/k/a Cobb Dill & Hammett, LLC) for over ten (10) years. Hal E. Cobb's resume is attached hereto as **Exhibit C**, which highlights counsel's professional standing, in further depth. Hal E. Cobb has substantial experience in both litigation and contract disputes. Furthermore, Hal E. Cobb enjoys a strong professional reputation.

C. CONTINGENCY OF COMPENSATION

1. Counsel for Defendant did not represent Defendant on a contingency fee basis and therefore this is not a factor for consideration.

D. CUSTOMARY LEGAL FEES FOR SIMILAR SERVICES

1. Considering the duration of the case, the market rate for similar services in this area, and fees in similar cases, the fees sought by Defendant are more than reasonable. At the beginning of the case, Hal E. Cobb, as senior partner, was billing Three Hundred Dollars (\$300) per hour with an associate attorney assisting at Two Hundred Twenty Five Dollars (\$225) per hour. In October of 2021, another associate took over assisting Hal E. Cobb, billing at an hourly rate of Two Hundred Thirty Five Dollars (\$235) per hour. Due to the duration of the case, and enormous expense 1221 Bower, LLC was expending to defend the claims brought by Plaintiff IOA and to pursue its counterclaims for declaratory judgment and breach of contract, on or about August 2, 2023, there was an hourly "cap" placed on all billing of One Hundred Sixty Seven and 50/100 Dollars (\$167.50) per hour. From then on, all attorneys' hourly rate for this matter were reduced to the "capped" amount. Not only were all of the hourly rates below the average hourly rates of attorneys in both the Charleston and Lexington markets, but Defendant's counsel would argue these

hourly rates are less than Plaintiff's counsels', if not *considerably* less, with particular note to an hourly rate of One Hundred Sixty Seven Dollars and 50/100 (\$167.50) per hour for the final six (6) months of litigation. (*Invoices evidencing the above are attached hereto with Exhibit B*).

E. BENEFICIAL RESULTS OBTAINED

1. Defendant prevailed against Plaintiff as to both of Defendant's counterclaims and as to Plaintiff's declaratory judgment that Plaintiff validly terminated the Lease Agreement. As a result, Defendant was awarded One Hundred Fifty Thousand Dollars (\$150,000) relating to its damages from IOA vacating the Leased Premises. Plaintiff sought rent reimbursement in the amount of Forty-One Thousand Three Hundred Thirty Six and 97/100 Dollars (\$41,336.97) and was awarded rent reimbursement in the amount of Twenty Five Thousand Dollars (\$25,000). The results obtained by Counsel were more beneficial to the Defendant than the Plaintiff, or stated differently, Defendant received a net benefit of \$125,000. Since Plaintiff filed this case, Defendant's only options were to surrender, or defend the action. Defendant has prevailed on both defending Plaintiff's causes of action and prosecuting its own counterclaims.

Considering all of the foregoing factors, Defendant's attorneys' fees are both reasonable and should be awarded in full.

CONCLUSION

It is for these above reasons, by way of contract and statute, that we respectfully ask the Court to grant Defendant's Motion for Attorneys' Fees and Court Costs and to order that Defendant

1221 Bower be reimbursed in full for such costs.

RESPECTFULLY SUBMITTED,

COBB HAMMETT SCAPELLATO
ANDREWS, LLC

s/ Hal E. Cobb, Esq. _____

Hal E. Cobb, Esq.

S.C. Bar No.: 100575

222 W. Coleman Blvd.,

Mt. Pleasant, SC 29464

(843) 936-6680

hcobb@chsalaw.com

February 29, 2024

Mt. Pleasant, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	Case No.: 2020-CP-32-4007
Insurance Office of America, Inc.,	)	
	)	
Plaintiff,	)	DEFENDANT'S MEMORANDUM IN
	)	OPPOSITION TO PLAINTIFF'S
vs.	)	MOTION FOR JUDGMENT
	)	NOTWITHSTANDING THE VERDICT
1221 Bower, LLC,	)	
	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that 1221 Bower, LLC hereby presents its Memorandum in Opposition to Plaintiffs' Motion for Judgment Notwithstanding the Verdict.

MEMORANDUM IN OPPOSITION

INTRODUCTION

Trial was held for the matter of Insurance Office of America ("Plaintiff" or "IOA") vs. 1221 Bower, LLC ("Defendant" or "1221 Bower") from January 22, 2024 through January 26, 2024 at the Lexington County Courthouse before the Honorable Courtney Clyburn Pope. The jury rendered the following verdicts:

- (i) a verdict in favor of 1221 Bower on IOA's first cause of action for declaratory judgment relating to the termination of the lease;
- (ii) a verdict and judgment for \$25,000.00 to IOA on IOA's second cause of action relating to reimbursement of rent;
- (iii) a verdict in favor of 1221 Bower on 1221 Bower's cause of action for declaratory judgment relating to the termination of the Lease; and
- (iv) a verdict and judgment for \$150,000.00 to 1221 Bower on 1221 Bower's counterclaim for breach of contract.

Following these verdicts, Plaintiff IOA has filed a motion for judgment notwithstanding the verdict.

STANDARD

On Plaintiff IOA's motion for a directed verdict or a judgment notwithstanding the verdict, this court should view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See RFT Mgmt. Co. v. Tinsley Adams L.L.P.*, 339 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference, or its inference is in doubt." *Road, LLC v. Beaufort County*, 433 S.C. 164, 174 (2021). "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.* at 174-175. "In considering a JNOV, the trial court is concerned with the existence of evidence, not its weight." *Id.* "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Id.*

ARGUMENT

- I. **BASED ON THE PRESENTATION OF EVIDENCE AT TRIAL, THE JURY PROPERLY AND VALIDLY RULED AGAINST IOA IN DETERMINING IOA FAILED TO VALIDLY TERMINATE THE LEASE AGREEMENT**
 - A. **PLAINTIFF IOA FAILED TO VALIDLY TERMINATE THE LEASE AGREEMENT PURSUANT TO SECTION 15.16, BECAUSE THE JURY FOUND THERE WERE DELAYS BEYOND THE REASONABLE CONTROL OF DEFENDANT**

With respect to Section 15.16, some of the material facts for the jury to find, included delays which were "beyond the reasonable control of Landlord" 1221 Bower, which suspended the computation of time requirements of the 1221 Bower under the Lease Agreement.

After five days of hearing witness testimony and presentation of evidence, the jury correctly concluded that there were delays beyond the reasonable control of 1221 Bower. As such, IOA failed to validly terminate the Lease Agreement under its claim that 1221 Bower failed to meet its requirement that is called for in Section 11.1, but this requirement was suspended per Section 15.16. When considering a JNOV, the trial court is concerned with the existence of evidence, not its weight and the jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. See *Road, LLC v. Beaufort County*, 433 S.C. 174-175 (2021).

In Plaintiff's Complaint, Plaintiff cites to Section 15.16 and names it the "time is of the essence" clause. Section 15.16 of the Lease Agreement states:

Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, **whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays** due to strikes, riots, acts of God, shortages of labor or materials, wars, governmental laws, regulations or restriction or **any other causes of any kind whatsoever which are beyond the reasonable control of Landlord.** (Emphasis added).

See *Defendant's Trial Exhibit No. 1*, which is attached hereto.

However, in Plaintiff's motion *now* refers to Section 15.16 of the Lease Agreement as merely a "force majeure" clause. IOA continues to seek to manipulate and use this contract for only its benefit, ignoring any part that does not fit its narrative.

B. PLAINTIFF IOA FAILED TO PROPERLY TERMINATE THE LEASE AGREEMENT PURSUANT TO SECTION 12.7, BECAUSE THE JURY FOUND THAT PLAINTIFF (i) FAILED TO NOTIFY DEFENDANT OF ANY DEFAULT, (ii) CREATED DELAYS AND (iii) THERE WERE FORCE MAJEURE DELAYS

Not only did IOA fail to provide 1221 Bower with any such written notice of any default,

until IOA's invalid attempt to terminate the Lease Agreement, but also, as provided through evidence and witness testimony, Tenant IOA delayed the repairs to the premises on **numerous** occasions, which were of no fault of 1221 Bower.

Section 12.7 of the Lease Agreement provides:

Unless otherwise provided herein, if Landlord defaults in the performance of any term, covenant or condition required to be performed by Landlord under this Lease, **Landlord shall have thirty (30) days following receipt of written notice from Tenant specifying such default to cure such default;** provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are reasonably required for its performance, then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same completion. **Said thirty (30) day period shall be extended by the period of time during which the Landlord is actually prevented from performing such obligation as a result of Tenant delays or Force Majeure delays, provided that Landlord is at all times diligently prosecuting such performance to completion.** (Emphasis added).

See Defendant's Trial Exhibit No. 1, which is attached hereto.

With respect to Section 12.7, material facts for the jury to determine included, but were not limited to, (i) if this section of the Lease was applicable, (ii) if Landlord 1221 Bower defaulted, (iii) if and when written notice from Tenant IOA was ever given and received, (iv) if more than thirty (30) days was reasonably required for 1221 Bower's performance, (v) if 1221 Bower was diligent in its efforts to repair the premises, (vi) if 1221 Bower was at all prevented from performing repairs, and (vii) if various factors related to COVID-19 in any way delayed repairs. After five (5) days of the jury hearing witness testimony and the presentation of evidence, the jury reached its determination on these issues and ruled against IOA.

The jury found that IOA failed to properly terminate the Lease Agreement and that as a result, 1221 Bower was entitled to damages from IOA's breach of the Lease Agreement. As a result, the jury determined 1221 Bower did not default in its obligations under the Lease

Agreement; that more than thirty (30) days were reasonably required to repair the premises; that IOA delayed 1221 Bower's efforts to repair any damage; and that numerous factors, including, but not limited to COVID-19 related delays and inaccessibility to the upstairs residential units delayed 1221 Bower's ability to repair the premises.

As a result, Plaintiff IOA failed to properly terminate the Lease Agreement pursuant to Section 12.7.

C. PLAINTIFF IOA FAILED TO VALIDLY TERMINATE THE LEASE AGREEMENT, REGARDLESS OF ITS RELIANCE ON A PORTION OF SECTION 11.1, BECAUSE THE JURY DETERMINED SECTION 11.1 DID NOT EXCLUDE THE APPLICATION OF THE REST OF THE LEASE AGREEMENT

IOA sought to have the jury ignore any Lease provision, with exception of *parts* of Section 11.1. IOA relied, specifically on the language:

If the Leased Premises are damaged or destroyed by fire, flood, tornado or by the elements, or through any casualty, or otherwise, after the commencement of the Lease Term, this Lease shall continue in full force and effect, and Landlord at its expense shall promptly restore, repair or rebuild the Leased Premises including but not limited to the store front, to the same condition as it existed when the possession of the Leased Premises were turned over to the Tenant at the commencement of the Lease Term, within ninety (90) days after such damage or destruction. In the event Landlord fails to restore the Leased Premises as aforesaid, Tenant's sole remedy against Landlord shall be to terminate this Lease as of the date of such casualty.

See Defendant's Trial Exhibit No. 1, which is attached hereto.

Material facts for the jury to determine to reach a conclusion as to *just this* specific Lease provision (Section 11.1), included, but were not limited to, (i) whether the damage to the premises occurred on August 14, 2020 and was never corrected or fixed until IOA vacated the premises, (ii) was the Leased Premises damaged or destroyed by fire, flood, tornado or by the elements, or

through casualty, (iii) when the ninety (90) day “clock” began due to the strict written notice to Landlord provisions in the Lease Agreement, and (iv) if this clause excluded the application of any other Lease provisions. After five (5) days of the jury hearing witness testimony and the presentation of evidence, the jury reached its determination on these issues and ruled against IOA.

The jury found that IOA failed to properly terminate the Lease Agreement and that as a result, 1221 Bower was entitled to damages from IOA’s breach of the Lease Agreement. As a result, the jury determined that Section 11.1 does not exclude the application of the rest of the Lease Agreement.

D. THE JURY’S VERDICTS ARE CONSISTENT WITH THE CLEAR PREPONDERANCE OF THE EVIDENCE ADMITTED DURING THE TRIAL OF THIS CASE

Based on the plain and unambiguous wording of the Lease, as well as the applicable rules of construction of a contract, the verdicts and judgment reached by the jury in favor of 1221 Bower are consistent with the clear preponderance of the evidence admitted during the trial of the case, such that the jury validly reached its decisions. After five days of trial, the jury validly and rightfully reached its decisions in this case. IOA failed to validly terminate the Lease Agreement.

The overarching issue that was left to the jury to determine at trial was whether IOA validly terminated the Lease Agreement. The jury was presented with a slew of evidence, including the Lease Agreement and testimony from five witnesses. At no time, was the jury directed to ignore the Lease Agreement and only apply some parts of Section 11.1 of the Lease Agreement as IOA would like to assert. Plaintiff seeks to have this court overrule a jury verdict that was not in its favor and have this court ignore five (5) days of trial, the presentation of evidence and witness testimony, the entirety of the Lease Agreement and the determination of the jury.

Just one example of Plaintiff’s attempts to disregard the Lease Agreement is shown through

its disregard of Sections 15.4, 15.7 and 15.16. The first two, directing notice to the Landlord and the latter stating that “time is of the essence.” Plaintiff also attempts to ignore the part of Section 11.1, this section being the ones it relies entirely on, which states, “Tenant shall give the Landlord prompt written notice of any damage to or destruction of any portion of the Leased Premises resulting from fire or other casualty.” However, IOA failed to give any notice whatsoever to Landlord 1221 Bower, until September 22, 2020. These being only a few examples of IOA’s attempts to ignore any and all parts of the Lease that are not the small part of Section 11.1 of which it relies entirely on.

Furthermore, IOA fails to acknowledge Section 15.16 and the determination of the jury as to its applicability to this dispute. Again, at no time was the jury instructed to disregard the entirety of the Lease, or any provisions therein. Section 15.16 states:

Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, **whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays** due to strikes, riots, acts of God, shortages of labor or materials, wars, governmental laws, regulations or restriction or **any other causes of any kind whatsoever which are beyond the reasonable control of Landlord.** (Emphasis added).

See Defendant’s Trial Exhibit No. 1, which is attached hereto.

The jury heard evidence and testimony related to what was and was not within the “reasonable control” of Landlord 1221 Bower and reached its determination. The jury also heard evidence presented (i) relating to COVID-19 delays, (ii) plumber availability delays, (iii) inability to gain access to upstairs residential units, (iv) scheduling delays on the part of IOA and more. It would have led to an absurd result should the jury have allowed IOA’s preferred reconstruction of the Lease Agreement be the applied. Ultimately, the clear preponderance of all of the evidence

presented and all reasonable inferences thereto, in the light most favorable to 1221 Bower, confirm that Plaintiff failed to validly terminate the Lease Agreement. Accordingly, on this basis, Plaintiff IOA's motion should be denied, and the jury's verdicts should be affirmed.

Plaintiff introduced the entirety of the Lease Agreement as an exhibit to its Complaint and into trial as evidence. Plaintiff never pled nor motioned for the validity of the Lease Agreement to be at dispute. No determination was ever made that some clauses of the Lease Agreement were valid and others were invalid. The jury was never charged and instructed to only apply certain provisions of the Lease Agreement and ignore other provisions. 1221 Bower correctly relied on the entirety of the Lease Agreement, instead of a small piece of a single section.

Ultimately, after a week of trial, numerous witness testimonies and considerable evidence presentation, the jury reasonably, correctly, and validly entered verdicts in favor of 1221 Bower and while this court is considering Plaintiff's Motion for Judgment Notwithstanding the Verdict, the trial court should only be concerned with the existence of evidence, not its weight. The jury's verdict should not be overturned if **any** evidence exists that sustains the factual findings implicit in its decision. See *Road, LLC v. Beaufort County*, 433 S.C. 174-175 (2021).

CONCLUSION

It is for these above reasons that we respectfully request that this Court to deny Plaintiffs' Motion for Judgment Notwithstanding the Verdict and affirm the jury's verdicts in this case.

[Signature on the Following Page]

RESPECTFULLY SUBMITTED,

COBB HAMMETT SCAPELLATO
ANDREWS, LLC

s/ Hal E. Cobb, Esq.
Hal E. Cobb, Esq.
S.C. Bar No.: 100575
222 W. Coleman Blvd.,
Mt. Pleasant, SC 29464
(843) 936-6680
hcobb@chsalaw.com

February 29, 2024
Mt. Pleasant, SC

Attorney for Defendant 1221 Bower, LLC

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 11
COUNTY OF LEXINGTON) DOCKET NO. 2020-CP-32-04007

Insurance Office of America Inc.,)
Plaintiff,)
versus)
)
221 Bower LLC,)
Defendant.)

H E A R I N G

DATE: January 22, 2024
TIME: 3:16 p.m. - 4:57 p.m.
LOCATION: South Carolina Circuit Court 11
JUDGE: Courtney C. Pope
TRANSCRIBED BY: Jeanne Meldrim

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

1 APPEARANCES:
2
3 Ellis Reed-Hill Lesemann, Esquire
4 Lesemann & Associates LLC
5 418 King Street, Suite 301
6 Charleston, SC 29403
7 Attorney for the Plaintiff
8
9 Michelle Stewart, Esquire
10 Lesemann & Associates LLC
11 418 King Street, Suite 301
12 Charleston, SC 29403
13 Attorney for the Plaintiff
14
15 Benjamin Joyce, Esquire
16 Lesemann & Associates LLC
17 418 King Street, Suite 301
18 Charleston, SC 29403
19 Attorney for the Plaintiff
20
21 Hall Cobb, Esquire
22 Cobb Hammett, Attorneys at Law
23 222 West Coleman Blvd.
24 Mt. Pleasant, SC 29464
25 Attorney for the Defendant

Caroline Lista, Esquire
Cobb Hammett, Attorneys at Law
222 West Coleman Blvd.
Mt. Pleasant, SC 29464
Attorney for the Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Proceedings..... 4
Certificate of Reporter.....85

EXHIBITS

(No exhibits marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 THE COURT: We have several pretrial motions that
2 need to be heard; is that correct?

3 MR. JOYCE: That's correct, Your Honor.

4 MR. COBB: Yes, Your Honor. I do have good news.
5 So we resolved the issue on the motion for sanctions. We
6 are no longer going to be bringing that motion.

7 THE COURT: All right. Very good. Thank you
8 gentleman.

9 MR. COBB: Okay. The only thing in front of this
10 Court at this time on pretrial motions would be
11 plaintiff's motion in limine, plaintiff's motion to
12 exclude testimony from witness, and defendant's motion in
13 limine --- motion in limine; is that right?

14 MR. JOYCE: That's right.

15 MR. COBB: So I think we only have those three
16 things.

17 THE COURT: Very good. You all ready to argue? You
18 wish to do the plaintiff's?

19 MR. JOYCE: Your Honor, I think --- I think you're
20 going to find there's a lot of cross pollination as well.
21 Do you --- do you want us to --- how --- how do you want
22 us to handle that?

23 THE COURT: So ---

24 MR. JOYCE: For example, if --- if my motion in
25 limine is granted, then the motion exclude is moot,

1 because I'll withdraw that as a witness.

2 THE COURT: Right.

3 MR. JOYCE: So I --- I just didn't know how you
4 wanted ---

5 THE COURT: Well, let's just take it in the order in
6 which it makes sense to do. Which one coming first would
7 make more sense? Is it the plaintiff's? I usually just
8 do the plaintiff's first. But if your motion would ---
9 would then potentially dissolve another --- or get rid of
10 another motion, should we not hear yours --- your motion
11 in limine first.

12 MR. COBB: Well, my motion in limine is very ---
13 very specific. It's very directed. It's very targeted.
14 So I --- I could do mine probably a little quicker than
15 what plaintiffs could do on my motion in limine. So
16 I'll --- I defer to the Court and --- and to Mr. Joyce.

17 THE COURT: What's your --- what's your pleasure?
18 Or do you have one?

19 MR. JOYCE: I'm happy to do it however. We won't be
20 too long.

21 THE COURT: Okay.

22 MR. JOYCE: So I just figured we would go first
23 since we're the plaintiff, but ---

24 THE COURT: All right. Well, I'll tell you what,
25 why don't --- why don't we do yours first and --- and

1 we'll determine --- I'll allow you to respond. I'll hear
2 argument and we'll just take them --- we'll take them in
3 that --- that order.

4 MR. JOYCE: That's good, Your Honor.

5 THE COURT: All right. Thank you, gentleman. Hold
6 on one second, let me pull up my notes.

7 Please remind me of your name, sir. Mr. ---

8 MR. JOYCE: Ben Joyce on behalf of Insurance Office
9 of America.

10 THE COURT: All right.

11 MR. COBB: And I'm Hall Cobb on behalf of 1221
12 Bower, LLC.

13 THE COURT: Okay. All right. All right. Mr.
14 Joyce, I will hear arguments from you now, sir.

15 MR. JOYCE: May it please the Court.

16 THE COURT: Uh-huh.

17 MR. JOYCE: Your Honor, this is a commercial lease
18 dispute. The plaintiff has filed claim for declaratory
19 judgment and also breach of contract. This issue before
20 the Court is whether the plaintiff validly terminated the
21 lease agreement, because the landlord failed to repair
22 mold, sewage, and water leaks within 90 days as required
23 by the lease.

24 So it's a straightforward narrow issue for the
25 factfinder. They have asserted a counterclaim, which

Proceedings

1 essentially states we did not validly terminate the
2 lease.

3 THE COURT: Uh-huh.

4 MR. JOYCE: And they have also filed --- or have
5 also asserted a claim for breach of contract for a couple
6 issues like ---

7 THE COURT: Late payments on lease, I believe?
8 Okay.

9 MR. JOYCE: Yes. And we also have a --- a ---
10 another breach of contract claim for reimbursement of
11 rent.

12 THE COURT: All right.

13 MR. JOYCE: So (technical difficulty) issues that we
14 were seeking to exclude. The first issue, and this has
15 really been an issue that's popped up over the last two
16 months of this case. The defendant is trying to
17 introduce evidence of a building that was bought by an
18 LLC to which the president of IOA is a member of two
19 years after vacating the lease. And the theory that is
20 trying to be injected into this case is that this was the
21 plan all along and that this is the reason that IOA
22 wanted to --- to terminate and vacate the lease.

23 So again, the --- the issue before the Court is
24 straightforward, it's about 90 days, and it's whether or
25 not they fixed the damage.

1 So the fact is is that the motive any --- any kind
2 of ulterior motive that he is alleging is completely
3 irrelevant. And there's absolutely no evidence that ---
4 that would confirm that --- that any motive exists.

5 So that's --- that's the first issue before the
6 Court. I don't know if you want us to run through ---

7 THE COURT: Well, I'm going to --- I'm going to let
8 him respond to that first issue and then we'll --- we'll
9 take then one at a time.

10 MR. JOYCE: Okay.

11 MR. COBB: Thank you, Your Honor.

12 THE COURT: Mr. Cobb.

13 MR. COBB: Yes, Your Honor. May it please the
14 Court.

15 THE COURT: Yes, sir.

16 MR. COBB: Your Honor, we believe that --- that the
17 statement that had happened two years later is a
18 mischaracterization. And I --- I do agree with Mr.
19 Joyce, this is a commercial lease dispute. And it's a
20 question about whether or not it was validly terminated
21 or not.

22 And the reason why it matters, the --- the reason
23 why it why matters is the property was actually owned by
24 an affiliate of the tenant from 2012 to 2019. And the
25 tenant stayed in there during that nine years. And they

1 had water leaks from condo units above, and the same
2 place that they're complaining of for how they validly
3 terminated the lease allegedly.

4 So in --- on October 1st of 2020, after the leak and
5 after the start date that they claim they gave notice.
6 The president of IOA who at the time was the regional
7 president, Mr. Rob Motley --- had an e-mail saying, all
8 right, how do we get out of this lease?

9 And prior to that, he said we have five more years
10 to go. And we believe that Mr. Motley, based an e-mail
11 that we received from February 21st of 2021, less than
12 three months after they --- after IOA --- excuse me,
13 Insurance Office of America, the tenant, got out of the
14 property --- all right --- starting looking to buy
15 property, not on behalf of Insurance Office of America,
16 or their affiliate, but on behalf of Mr. Motley directly.
17 It just took time for them to find property that Mr.
18 Motley bought under an LLC he owns with a co-owner.

19 And then Insurance Office of America had everybody
20 work from home. And then when Mr. Motley and his LLC
21 bought this building, Insurance Office of America
22 reestablished their office space in the Columbia market
23 in that building. And that building is literally three
24 blocks down the road on West Main Street.

25 So Your Honor, the --- the concern that I have and

1 the reason why I have is there is a lot of evidence that
2 is being prepared to come in to say that the landlord was
3 bad, the landlord didn't fix the leak, the landlord
4 didn't repair the damages. They're going to talk about
5 mold as well.

6 But the problem is if you look at what the landlord
7 is saying why they are trying to strictly comply with
8 this one section, which --- by the way, if you read on in
9 that section, there's more to it and if you read on it in
10 the lease, there's a lot more to it --- as to what the
11 defense is for landlord. The question why it matters,
12 because again, they're going to claim that we just --- we
13 need to get out of it because landlord, didn't do this in
14 90 days.

15 But there's an alternative reason as to why they got
16 out of it. And again, the fact that the water leak that
17 they're complaining of happened while they owned the
18 property before they became just a tenant of the
19 property, it just rings disingenuous to me.

20 And because we have an e-mail as early as
21 February 21, 2021, less than three months after, to me
22 that is enough evidence to give the facts to the jury to
23 understand, hey, were --- were they trying to, you know,
24 find a loophole that should have worked anyway. And
25 utilize that loophole so Mr. Motley could ultimately

1 become the landlord for the company that he controls.

2 And as a result, Mr. Motley is now the directed
3 officiary of the rent paid by IOA versus my client who
4 was under lease with Insurance Office of America. So
5 that --- that's why we think it's relevant. That under
6 401 and under 403, we think seeds the --- the
7 requirements for the motion in limine to keep that out.
8 And that's --- that's our issue with that one point.

9 THE COURT: All right. What is your response to ---
10 this working? Can y'all hear me?

11 MR. COBB: I --- I can hear you, but I don't know if
12 it's working. I don't --- I don't hear you on the
13 speaker, but I can hear you fine.

14 THE COURT: All right. All right. I'd like to know
15 your response, Mr. Cobb, to Mr. Joyce's original
16 argument, which is that no matter if even in the
17 alternative, but there was an ulterior motive. Does it
18 matter because the repair was not done within the
19 90 days? Or is it relevant? I'm not saying that he's
20 admitted to there being a motive, but even if there were
21 one, is it relevant if --- if the repairs were not made
22 within the 90 days?

23 MR. COBB: I believe it is relevant based on the
24 character and the credibility of the testimony they
25 intend to elicit out of parties, Crissy Warner, who is

1 the office manager for Insurance Office of America, and
2 of Mr. Rob Motley, who is the president of Insurance
3 Office of America.

4 THE COURT: All right. All right. Mr. --- Mr.
5 Joyce, any further argument?

6 MR. JOYCE: Your Honor, I would just say that it ---
7 it doesn't relate to a claim, or counterclaim, or defense
8 in this case --- before the Court. It doesn't make any
9 fact more or less true. It has nothing to do with
10 whether the landlord fixed the damage within 90 days.

11 And again, if it rings disingenuous to him, that ---
12 that's just not enough. I mean what --- what is being
13 offered to do is to mislead a jury from determining
14 what's --- what's to be decided. It's --- it's --- it's
15 meant to inflame a jury against our client. It's not
16 relevant, would be unfairly prejudicial under 403.

17 THE COURT: All right.

18 MR. JOYCE: Thank you.

19 THE COURT: Thank you, sir. But you had some
20 additional motions and we'll go ahead and address those
21 now. I'll --- I'll make rulings either at the end of
22 this hearing or depending on where we are may make them
23 tomorrow morning. But let's go ahead and hear in the
24 rest of your argument.

25 MR. JOYCE: Thank you, Your Honor. So to piggy ---

1 to piggyback off of that one, another ulterior motive
2 that --- that is being put out there is that this was all
3 a --- a plan just to save --- save money and --- and work
4 remotely and when terminating the lease.

5 Again, it's a little bit at odds, I'm not sure which
6 way they're going to go, whether or not we wanted to work
7 remote and --- and -- and save money, or we wanted to go
8 to buy another office space. I mean, again, it's
9 just --- it's another argument that they're putting forth
10 that is completely irrelevant.

11 THE COURT: All right.

12 MR. JOYCE: And ---

13 THE COURT: So your argument for that is basically
14 relevance like the other one? Okay.

15 MR. JOYCE: Correct.

16 THE COURT: All right.

17 MR. JOYCE: Your Honor, again, and another --- just
18 in the same vein, you know, not needing as much space in
19 the replacement office space, the spaces that they were
20 looking at potentially just an insinuation that we just
21 didn't need the building or something. So again, these
22 are all irrelevant, just theories that are being inserted
23 into the case to try to mislead from --- from just
24 the --- the issue before the Court.

25 THE COURT: All right. Mr. Cobb, any response, sir?

1 MR. COBB: Yes, Your Honor. Your Honor, again the
2 why is important here. Why did Insurance Office of
3 America choose to terminate the lease? When the lease
4 was --- when the lease was terminated a work-from-home
5 model was discovered prior to the lease termination
6 because of COVID.

7 There was also a badge scanner to let individuals
8 into the office, that was broken. And they sent
9 everybody home, Your Honor. They didn't have people
10 working. So from March to August --- or the end of March
11 to August, they had nobody there. And they discovered
12 that if --- business was going just fine.

13 Your Honor, this lease was an expensive lease. When
14 Highway Properties III, LLC the affiliate of Insurance
15 Office of America entered into negotiations with 1221
16 Bower to sell the property in 2019, one of the things
17 that Highway Properties III said is like, hey, we want to
18 sell it to you, but we want this dollar amount.

19 And my client went back in negotiation said, well,
20 because the lease is getting ready to terminate, we're
21 not interested in buying it at that price, we'll buy it
22 for cheaper.

23 So Highway Properties III, LLC had Insurance Office
24 of America extend that lease until March 31st of 2025.
25 This is in September of 2019 when my client actually

1 bought the property. So, you know, roughly a year later,
2 they're terminating the lease after my client bought this
3 property and spent a lot of money on it. So I just, you
4 know, when I look at the relevancy in terms of the
5 disingenuous and --- and --- and Mr. Joyce has a point,
6 you know, you had water leaks that preexisted in the
7 same --- in the same place that they're complaining of.

8 You had, you know, the decision-maker looking
9 forward to getting out of this lease to line his own ---
10 and I don't actually blame him. I would have been
11 opportunistic too. I think that was a smart move, but
12 not at the expense of my client.

13 And so the problem that we have and as Mr. Joyce
14 continues to try to --- and he's going to hammer this ---
15 this whole time. And I don't blame him, that's what I
16 would do if I were in his side in his shoes.

17 They talk about my client didn't repair the property
18 in 90 days, but you got to read the rest of the lease,
19 Your Honor. And my client's computation for 90 days, for
20 anything that's not --- that's reasonable in delay,
21 he --- it --- it takes the time up. It goes longer.

22 And you got to understand, this is a condo
23 association. My client doesn't own the condo above it.
24 He's not responsible for the toilet and the plug. And
25 there's --- and --- and the condo owner --- and the condo

1 association have to repair the leaks. Plumbers came out
2 there multiple times. There were delays in that 90-day
3 period that they speak of as a result of Insurance Office
4 of America also wanting to delay a contractor or wait for
5 something else and there was a recurrence of the leak.

6 But the leak was not the responsibility of my
7 client. It was the responsibility of the condo
8 association. So I feel like --- I feel like Highway ---
9 excuse me --- Insurance Office of America, they knew ---
10 they knew that the co-owner association --- the condo
11 association had to repair the leaks. And the reason why
12 they knew that is because they had owned the property
13 beforehand. They had been working with the condo
14 association's property manager and Scott Berry who works
15 for Insurance Office of America, served on the condo
16 association board.

17 So, you know, again, there's just --- there's ---
18 there's just a lot going on here and it's more than
19 whether or not 90 days. What --- what I believe the
20 Insurance Office of America want to do is they want to
21 put up pictures on the wall and show where the water leak
22 was, show where there was mold.

23 By the way, the mold's --- the mold looks gross and
24 the mold is serious, but the problem is that kind of mold
25 doesn't happen in 90 days. That's our --- that's going

1 to be our testimony that we're going to get out of Dave
2 Dunningham from Kleen Sites, who did the actual mold
3 remediation in that property.

4 Again, the water leak in this place occurred all the
5 way back to 2015 when Insurance Office of America owned
6 it. So why now? Why terminate the lease after they
7 just --- they --- they just sold it to my client. And
8 I --- that's why I think the why in terms of these
9 ulterior motives matters because they were looking to
10 expose a loophole that quite frankly when you strictly
11 comply with the lease doesn't exist anyway. And, you
12 know, but why do they want to do it? So that's ---
13 that's the real question.

14 And they're going to try to tell the jury it was
15 solely related to water leak. And our opinion is that's
16 just not true. And we think the evidence is relevant to
17 explain that accordingly. Because if you have bad
18 motives, and you try to --- and you try to find a
19 loophole, that --- that just --- that puts two and two
20 together that you're the bad actor. And that's why we
21 believe the relevance is important.

22 THE COURT: All right. Mr. --- Mr. Joyce, any
23 rebuttal?

24 MR. JOYCE: Provision of the lease, it's --- you
25 know, it's --- it's in our pleadings, it's in our

1 complaint, it's in their counterclaim. So the issue
2 before the Court and the provision of the lease states:
3 If the lease premises are damaged or destroyed by fire,
4 flood, tornado, or by the elements, or through any
5 casualty or otherwise after the commencement of the lease
6 term, the lease shall continue in full force and effect.

7 The landlord at its expense, shall properly restore,
8 repair, or rebuild the lease premises, including but not
9 limited to the storefront, to the same condition as it
10 existed when the professional lease --- premises were
11 turned over to the tenant at the commencement of the
12 lease term within 90 days after such damage or
13 destruction.

14 So here's the key part. In the event the landlord
15 fails to restore the lease premises as afore said, tenant
16 sole remedy against landlord shall be to terminate the
17 lease as of the date of such casualty. So Your Honor,
18 that's all we can do. That's our --- that's our remedy
19 there is to terminate the lease. There's no qualifier
20 there. There's no exception there as to, well, we really
21 think this is why you were terminating the lease. You
22 put them on notice of a leak and --- and water and ---
23 and then which turned into sewage and mold, and it took
24 longer than 90 days to fix.

25 So what happened, we terminated the lease. And

1 there's claims about whether or not we did so validly.
2 So the attempts to try to bring in alleged ulterior
3 motives that have --- that, you know, aren't grounded in
4 any fact, don't make any fact more or less probable,
5 doesn't relate to a claim or counterclaim in this case.
6 It's --- it's --- it's being done to confuse, mislead and
7 inflame a jury from what the true issue is before the
8 Court.

9 So, you know, in that regard it's relevant, it's
10 under --- or under 401, 402, and then it's extremely
11 prejudicial under 403 and should be excluded.

12 MR. COBB: Your Honor, may I respond to that?

13 THE COURT: Yes.

14 MR. COBB: Your Honor, the section that Mr. Joyce
15 reads to you on their lease --- and by the way, again,
16 this is the original lease from January 1, 2012, that
17 Highway Properties III LLC went in with Insurance Office
18 of America. This lease has never changed except for
19 amendments down the road that didn't change any of this
20 boilerplate language.

21 THE COURT: Uh-huh.

22 MR. COBB: All right? And if you go under 11.1, you
23 don't stop there. You got to go to the last paragraph.

24 THE COURT: Where is the rest of it?

25 MR. COBB: And it says ---

Proceedings

1 THE COURT: Where's --- where's --- what --- do I
2 have a copy of the rest of the lease?

3 MR. COBB: I ---

4 THE COURT: Is it an exhibit? I just want to follow
5 along with what you're --- you're saying.

6 MR. COBB: Your Honor, permission to approach?

7 THE COURT: Certainly.

8 (Discussion among attorneys)

9 MR. COBB: Your Honor, this last paragraph says
10 tenant shall give to landlord prompt written notice of
11 any damage to or destruction of any portion of the lease
12 premises resulting from fire or other casualty.

13 There's an argument here about notice. And again,
14 the reason why we're --- we're saying these ulterior ---
15 ulterior motives are relevant is because there's a
16 question about, you know, the --- there's a question
17 about whether or not Insurance Office of America
18 contacted the property manager which is a company called
19 CAMS. You're going to hear that a lot. It stands for
20 Community Association Management Services. Contacting
21 CAMS --- versus contacting --- and CAMS works for this
22 condo association. All right? So by giving notice to
23 CAMS, not giving notice to 1221 Bower does that meet
24 this --- this requirement under this section?

25 So that's going to be an issue for the Court as

1 well. The reason why it's important is because the
2 testimony that is going to be presented is that notice
3 was given by text message from Insurance Office of
4 America agent Scott Berry to Angela Adleman --- to Angela
5 Adleman of CAMS. But again, CAMS doesn't work for 1221
6 Bower. CAMS works for the condo association board.

7 It wasn't until September 22nd anyone from Insurance
8 Office of America directly contacted 1221 Bower. And
9 there's notice provisions in this --- in all --- all
10 entwined in this. So when you look at the e-mail threads
11 on September 25, 2020, after this August 14th date of
12 this text, Crissy Warner e-mails the internal group at
13 Insurance Office of America. She's the office manager.
14 And in that e-mail thread, she says hey, you know, we
15 have COVID issues, we have badge scanner issues. Office
16 doesn't really work that great for us. You have the
17 water leaks, they're a problem. What --- what can we do
18 to just get out of this?

19 And so on October 1st, that's when Rob Motley says,
20 what --- what can we do to get out of this lease?

21 My point is they want to apply this 90 days from
22 that start period, but historically, they had water leaks
23 and they knew that CAMS and the condo association board
24 was responsible for fixing those leaks before the
25 landlord could ever get into the property to fix it.

1 And so it wasn't --- it wasn't a motivation to get
2 out of the lease until September 25th when it started
3 getting talked about. And so that's when they try to
4 backtrack these dates.

5 And my point is, Your Honor, they're trying to force
6 a round peg into a square hole --- wait a minute, reverse
7 that --- square peg, round hole. And --- and that's ---
8 that's why I think it's relevant.

9 And --- and Your Honor, I know we keep talking about
10 this 90 days computation. But if Your Honor will ---
11 will indulge me, page 23 of 31 in that lease. And if you
12 look at 15.16 section. In the heading for the section,
13 it's time is of the essence --- time of the essence.
14 15.16. It's on page 23.

15 THE COURT: All right.

16 MR. COBB: All right? And Your Honor, in the --- in
17 the pleadings --- in the plaintiff's pleadings in their
18 complaint, they bring up 15.16. And they say in the
19 first sentence, time is of the essence with respect to
20 all provisions of this lease. And then they stop. You
21 have to read the second sentence, Your Honor. The
22 foregoing notwithstanding, whenever a period of time is
23 herein prescribed for action to be taken by landlord,
24 landlord shall not be liable or responsible for and there
25 shall be excluded from the computation of any such period

1 of time, any delays due to strikes, riots, acts of God,
2 shortages of labor or materials, war, governmental loss,
3 regulations or restriction, or any other causes of any
4 kind whatsoever which are beyond the reasonable control
5 of the landlord.

6 So again, Your Honor, this whole 90-days thing ---
7 it --- the --- the reason why I keep wanting to bring up
8 these true motives is because they're trying to say
9 90 days started August 14th. They're trying to say
10 my --- my client was in violation of section 11.1 of a
11 lease that again, remember, they accepted and they wrote.
12 They drafted these things. My client never drafted any
13 of the --- the lease or any of those amendments that
14 continue the terms.

15 And so, you know, so why now? You know, was it
16 really this leak? They had the leaks before. This
17 is --- Ron Motley saw an opportunity to become his own
18 landlord for his own company? I --- I just think the why
19 is important again. And I think these two --- these two
20 sections, which are the only two sections pled by the
21 plaintiff in their complaint, kind of require the
22 question of why to be answered by the evidence that we'll
23 present in and elicit through the testimony of the
24 witnesses. And that --- that's my --- that's my whole
25 purpose.

1 Now, I'm sorry I went too long on that explanation,
2 but I wanted to make sure that I got that point across as
3 clearly as I could. Thank you, Your Honor.

4 THE COURT: All right.

5 MR. JOYCE: Your Honor, just to kind of bring it
6 back to what we were talking about which is was whether
7 or not they can inject these ulterior motive theories
8 into the case about the --- the contract provisions which
9 provide no qualifiers or exceptions for that. So, again,
10 this is being offered to prejudice IOA and inflame a jury
11 against us. That's --- that's the only purpose here.

12 The --- the lease provision is clear. They --- they
13 think we didn't validate or didn't terminate it validly.
14 We think we did. So that's --- that's what the case is
15 about. But they're bringing all this irrelevant that is
16 not --- not grounded in --- in any evidence. So again,
17 Your Honor, irrelevant. It's --- it's --- it's meant to
18 mislead and inflame a jury. And on another note, just so
19 that we're clear, the e-mail that was referenced, Crissy
20 Warner an IOA staff member talking about terminating the
21 lease. She said, I'm not sure how long the current
22 toilet leak has been going on, but we reported it on
23 August 17th. Perhaps if we were able to get action a
24 little sooner, we would not have the current hazardous
25 situation with the mold and the extensive amount of

1 repair work that will be needed. As the branch opps
2 lead, I feel like an unnecessary amount of time is spent
3 dealing with building issues. What options do we have
4 considering these issues, to potentially be able to end
5 our lease?

6 So I just wanted to make sure that that was before
7 the Court and that was actually what was said by Crissy
8 Warner.

9 Your Honor, I think we've spent enough time on this
10 issue. We're happy to (background noise).

11 THE COURT: Yeah, let's --- I've --- I've got my
12 notes and I've heard both of your arguments on that. So
13 let's move on to any other motions that you may have that
14 we need to take up.

15 MR. JOYCE: Thank you, Your Honor. So I think we
16 have resolved the issue about broom clean condition that
17 is in our motion in limine.

18 THE COURT: Okay.

19 MR. JOYCE: The --- the point on that is that ---
20 that the defendant filed a pleading in this case that
21 claimed the property was not left ---

22 THE COURT: Right.

23 MR. JOYCE: --- in good condition, and inserted a
24 picture of a storage unit that had a bunch of just stuff
25 inside of it ---

Proceedings

1 THE COURT: Uh-huh.

2 MR. JOYCE: --- not an accurate depiction of what it
3 looked like when we terminated the lease. We then
4 submitted pictures of when we moved out, vacated the
5 property and after cleaning it. And I believe we've
6 worked through that, that that's not going to be brought
7 up in a --- in any kind of insinuation that that was how
8 the property was left.

9 MR. COBB: Correct. There are only three issues
10 about broom swept that we plan to bring up, but nothing
11 related to the pictures that my client took. I believe
12 it's two days before they actually left the premises.

13 THE COURT: All right. All right. Very good. So
14 that motion has --- seems to have resolved itself for
15 that particular issue with the broom --- broom ---
16 broom ---

17 (Simultaneous speaking)

18 THE COURT: --- clean sweep. Okay.

19 (Simultaneous speaking)

20 THE COURT: Oh, no. Go ahead.

21 MR. COBB: (Inaudible).

22 THE COURT: All right. Very good. Thank you.

23 MR. JOYCE: So the --- one other issue, Your Honor,
24 is the alleged failure to disclose leaks that Highway
25 Properties III when it sold the building to AJ Leone.

1 Again, this is an attempt to insert a completely
2 irrelevant issue in the case and turn it into trying a
3 case within a case about seller disclosure when the
4 seller is not even the party to this lawsuit, and neither
5 was the buyer.

6 And on top of that, Your Honor, you know, even if it
7 were found to be potentially relevant, it --- it was an
8 as-is sale. So Mr. Leone bought the --- bought the
9 building. There were no reps and warranties. Bought
10 it --- bought it as is. So I don't think we're taking
11 the position that they can't talk --- talk about prior
12 water leaks, but any insinuation that there was some kind
13 of failure to disclose or mislead is what we would be
14 moving (background noise).

15 THE COURT: Mr. Cobb.

16 MR. COBB: Yes, Your Honor. Your Honor, we agree
17 with Mr. Joyce. We have no issue with --- we're not
18 bringing up seller disclosure. There's no argument
19 there.

20 THE COURT: Okay.

21 MR. COBB: We bought --- my client bought the
22 property leaks and all. We just want to make sure that
23 we're allowed to be able to talk about the prior water
24 leaks specifically in the area that's being complained of
25 because the accumulation of mold in the wall from where

1 the ---

2 THE COURT: All right. So there's --- there will be
3 no testimony or no argument from your --- from defense
4 regarding failure --- any potential failure to disclose
5 this?

6 MR. COBB: (Inaudible).

7 THE COURT: Okay. All right. And does that take
8 care of your --- your motion?

9 MR. JOYCE: It does, Your Honor.

10 THE COURT: Okay. Very good. Thank you.

11 MR. JOYCE: And that --- the --- the next portion of
12 our motion, and this is the next to last bullet point on
13 page 2 of 9 in our motion in limine, Your Honor. There's
14 been an insinuation that Highway kept rental proceeds
15 from the subtenant that was in the office space in unit
16 105. It's completely false. Their own itemization of
17 damages shows that --- that all this was reconciled.
18 There was no keeping of any rental proceeds. So I wasn't
19 sure what that meant, and we were --- we just didn't ---
20 didn't want any kind of negative inference.

21 THE COURT: All right.

22 MR. JOYCE: (Inaudible).

23 THE COURT: All right. Mr. Cobb, will you address
24 that, sir?

25 MR. COBB: Yes, Your Honor. I think --- and I

1 apologize keep wanting to call him Ben, but Mr. Joyce.

2 THE COURT: That's okay. That's all right.

3 MR. COBB: We --- we do not disagree that Insurance
4 Office of America after December 31st of 2020 took rent
5 from the sublease tenant in unit 105. However, I believe
6 the purpose of the wording --- and I think it's been
7 misread is that Highway --- Insurance Office of America
8 was the only entity privy of contract to the --- to the
9 sublease. And so the sublease tenant was paying all
10 rents to Insurance Office of America until Insurance
11 Office of America left the premises.

12 THE COURT: Okay.

13 MR. COBB: After that, it was from January of 2020
14 to June of 2020, there were a lot of negotiations between
15 my client and the subtenant and my client was not in
16 privy of contact with.

17 They ultimately worked it out. My client collected
18 some rent and we --- we've shown that accordingly.
19 But --- but after Insurance Office of America left the
20 premises, they did not take rent, to our knowledge, from
21 anything we saw. It's just they were taking rent from
22 the subtenant while they were in the property. That was
23 the point of that.

24 THE COURT: I see.

25 MR. COBB: Okay.

Proceedings

1 THE COURT: All right. Does that --- is that ---

2 MR. JOYCE: Just so we're --- we're clear that
3 that's about us keeping rent while we were undergoing
4 the --- the attempted repairs; is that what was ---

5 MR. COBB: Yeah. Yeah. I mean, well ---

6 MR. JOYCE: So you're --- what I wanted to make
7 clear is that you're not going to infer in front the
8 jury, or make any argument, or elicit any testimony from
9 the witness that Highway kept the rent money after it ---
10 it vacated or moved out?

11 MR. COBB: Yes, correct.

12 MR. JOYCE: Okay.

13 MR. COBB: Yeah. Yeah.

14 THE COURT: Okay.

15 MR. COBB: But --- but again, I --- I just want to
16 make sure it's clear for the record ---

17 THE COURT: Uh-huh.

18 MR. COBB: --- only party privy of contract to that
19 sublease was the sublease tenant, Insurance Office of
20 America. 1221 Bower is not a party to it and didn't have
21 any rights ---

22 THE COURT: Uh-huh.

23 MR. COBB: --- to that sublease agreement.

24 THE COURT: All right.

25 MR. JOYCE: That --- that ---

Proceedings

1 THE COURT: That's your under ---

2 MR. JOYCE: That's (unintelligible).

3 THE COURT: Okay.

4 MR. JOYCE: We can --- we can move forward.

5 THE COURT: All right. I think he just wants to
6 make sure that there's not an allegation or argument
7 thrown out that they in some fraudulent or malicious way
8 withheld rent proceedings that were --- rent proceeds
9 that were supposed to go to your client.

10 MR. COBB: Yes, Your Honor. And we understand that.
11 And we believe that did not happen in this case. That's
12 not a part --- not part --- not part of our fact pattern,
13 not part of (unintelligible).

14 THE COURT: All right. So Mr. Joyce, does that ---
15 is that what you were looking for?

16 MR. JOYCE: (Inaudible).

17 THE COURT: Okay. All right. Very good.

18 MR. JOYCE: So, Your Honor, the last portion of the
19 motion in limine is about --- it's about the alleged
20 damages in this case.

21 THE COURT: Uh-huh.

22 MR. JOYCE: Your Honor, to be Frank, the --- the
23 damages have been a moving target throughout this
24 litigation. We've received numerous iterations of
25 damages, numbers, and itemizations in this case. The ---

1 the case was set for trial last October. We received a
2 updated damages itemization three or four days before a
3 trial was to start. It --- it may have been five days.

4 So the component of their --- of --- of --- of their
5 damages that is just speculative and --- and based on
6 assumptions that may or may not happen are specifically
7 there our replacement tenant that they've secured that
8 came in after we left ---

9 THE COURT: Uh-huh.

10 MR. JOYCE: And they are trying to claim damages
11 against IOA based on the assumption, you know, ten months
12 from now, a year from now, that this replacement tenant
13 is not going to renew. When I deposed Mr. Leone about a
14 month ago on this specific topic, he conceded at first
15 that it was speculative.

16 So, Your Honor, again just a side issue, we
17 received --- we received more information this week on
18 damages from them. We're assuming, I guess, they're
19 going to update their damages figure. We haven't
20 received a new itemization based on new leases that they
21 may or may not have secured.

22 So Your Honor, the point for the motion in limine is
23 that probably close to 100 to \$150,000 of their --- of
24 their damages claim --- I don't have the number right in
25 front of me, is based on whether these tenants are going

1 to be renew or not going to renew like a year from now.

2 So it's our position that that's just --- it ---
3 it's --- it's not reasonable enough from a certainty
4 standpoint to be able to put that in front of a jury.

5 THE COURT: Okay. All right. Mr. Cobb, your
6 response, sir.

7 MR. COBB: Thank you, Your Honor. Your Honor, I ---
8 I don't --- I don't know if it would be helpful, but
9 would you like to see kind of the footprint of the
10 property we're talking about? Would that be of any value
11 to you?

12 THE COURT: If you think it's helpful. You --- you
13 can --- unless there's any objection to that.

14 MR. JOYCE: No objection, Your Honor.

15 THE COURT: All right.

16 MR. COBB: Your Honor, do you see the circle on far
17 left of the page?

18 THE COURT: Yeah, the --- this bigger circle?

19 MR. COBB: Yes, Your Honor.

20 THE COURT: All right.

21 MR. COBB: Your Honor, those are units 101, 102,
22 103, 104, and 105. Those are the five units that are
23 under the lease that we're --- we've got this
24 argument ---

25 THE COURT: Okay.

Proceedings

1 MR. COBB: Your Honor, unit 105 was the sublease
2 tenant. And my client ultimately was able to work out a
3 direct lease with that sublease tenant.

4 THE COURT: Uh-huh.

5 MR. COBB: Your Honor, that lease runs out in
6 December of 2024. There's an option to renew, but it's
7 not a guarantee. Your Honor, units 101 and 102, were
8 pretty quickly relet after Insurance Office of America,
9 left. That lease runs out August of 2024 of this year.
10 They have an option to renew. It's not a guarantee.

11 Your Honor, on --- on unit 104, half of it was cut
12 and included with unit 105 as part of the agreement
13 to --- for unit 105 to stay, they expanded her space.

14 THE COURT: Okay.

15 MR. COBB: All right? So that leaves unit 103, and
16 have of 104, almost like an L, if you will. So roughly
17 about 1500 square feet.

18 THE COURT: Okay.

19 MR. COBB: My client's unable to lease it, turn it
20 into executive offices. And he also bought some property
21 in that transaction from Insurance Office of America's
22 affiliate, Highway Properties III in the building
23 directly next door which isn't circled in the picture.
24 It's not the circle but it's the property right next to
25 it.

1 THE COURT: Okay.

2 MR. COBB: And so he had property over there. And
3 so he combined, and he --- he's marketing all those as
4 executive offices. Just last week he got two --- two ---
5 three new leases in unit 103 and 104 for executive
6 offices.

7 THE COURT: All right.

8 MR. COBB: We just got that information --- I was at
9 the Bar convention. My co-counsel's grandmother passed
10 away, so I have been drinking from firehose. I do plan
11 to update the damages requested minus the net sum of
12 those leases based off the term.

13 THE COURT: All right.

14 MR. COBB: But to Mr. Joyce's point, we don't
15 believe that it's fair to speculate that these rents will
16 continue to come in, that these tenants continue to stay.
17 Anything that goes beyond a certain date, it --- it
18 is --- it's conjecture of the other way, Your Honor. So
19 we're taking on all of the risk of the assumption that a
20 renewal will happen.

21 So I think that the question is, you know, are ---
22 is it fair for us to seek damages from --- for example,
23 with the unit 101 and 102, it's Kenneth Schuler
24 cosmetology school, Your Honor.

25 And again, the Insurance Office of America lease

1 would have ended March 31st of '25 --- '25. So I believe
2 what Mr. Joyce is saying is hey, from September 20, 2024,
3 to March of 2025, they have an option. And because they
4 have that option, and they've been there for a while, you
5 shouldn't seek rent for that period.

6 We're the position that we should seek rent for that
7 period because we don't have a guarantee they're going to
8 stay. Nobody at Kenneth Shuler has come in and said
9 we're going to re-up that lease. We got the option,
10 we're --- we're pulling trigger.

11 And, you know, the economy could change. They could
12 find a better space. Anything could happen. This is our
13 one bite of the apple to --- to get the damages if we win
14 the liability part based off the breach of lease.

15 So Your Honor, in terms of speculation, or --- or
16 things of that nature, I think it's got to be included,
17 because we can only go off what the facts we know at
18 present. And we know that, for example, Units 101 and
19 102 are --- are --- are rented out until August 31st of
20 2024. And that --- and that's why --- that's why we're
21 seeking, you know, for that gap from August 20th ---
22 excuse me --- from September of 2024 to March 31, 2025,
23 for that to be filled in in terms of our damages. Does
24 that --- that make sense?

25 THE COURT: Uh-huh. It does. I'm just --- that's

1 my thinking face. I understood.

2 MR. COBB: Well, and it --- and I --- and I do
3 appreciate Mr. Joyce's question, and it --- and it is a
4 fair question. But the problem is, we are --- we're
5 going to do this trial, you know, April of 2025 ---

6 THE COURT: Uh-huh.

7 MR. COBB: --- so and --- and Mr. Joyce also was
8 correct, the damages calculation has been a little bit of
9 a moving target. Damages continue to accrue, there were
10 certain things that Mr. Leone felt that were allocated.

11 We had discussion with Mr. Joyce. We removed
12 certain --- certain --- certain things. We corrected one
13 thing on a rent escalator. So I think that we've had a
14 pretty open dialogue about damages all the way through.
15 We also provided to Mr. Joyce every single invoice of
16 every single expense or every requirement that Insurance
17 Office had been required to pay under their lease to the
18 landlord. And with provided the checking account
19 statements that showed where, every check got paid that
20 matched up to invoice through the history of time.

21 So we did a deep dive on the --- on the damages.
22 And actually I got --- hats off to Mr. Joyce. He's the
23 one who --- who motivated me to go and do that deep dive
24 so we could prove it. And I think that we have good
25 damage number. I do need to decrease it somewhat for

1 these three executive office leases that got done last
2 week. But again, Your Honor, bar convention, had my
3 (unintelligible) yesterday and I'm just --- just trying
4 to get everything together. And to top it all, Mr.
5 Leone's daughter got married Saturday, so he was not
6 available. So we'll --- we'll --- we'll make sure that
7 we adjust for damages, ask at the appropriate time based
8 off those three (unintelligible).

9 THE COURT: All right. All right.

10 MR. JOYCE: I just --- I'm just wondering what the
11 appropriate time is since we're starting trial.

12 THE COURT: Uh-huh. Uh-huh.

13 MR. JOYCE: So it's --- it's just extremely
14 prejudicial that (background noise).

15 THE COURT: Uh-huh.

16 MR. JOYCE: And how are we going to examine
17 witnesses when we don't even know what figures
18 (inaudible).

19 THE COURT: Mr. Cobb, when can you --- can --- can
20 you have this request for damages finalized?

21 MR. COBB: Well, Your Honor, the --- the
22 spreadsheet, that's the last spreadsheet I filed. This
23 is what I gave you on January 4th in discovery.

24 MR. JOYCE: Right. I think we've established that
25 your --- your damages numbers aren't firmed up, correct?

Proceedings

1 MR. COBB: The only things that aren't firmed up
2 is --- is in this damages running total, the attorney
3 fees is near the target, because we had them as of 12/29.
4 And we need to give you a ---

5 (Simultaneous speaking)

6 MR. COBB: --- a credit for these three new leases.

7 THE COURT: All right. So when will be able ---
8 able to --- tonight?

9 MR. COBB: I can actually do it in (background
10 noise).

11 I'll do them as soon as we get out of here ---

12 THE COURT: Hmm.

13 MR. COBB: --- and I'll (unintelligible).

14 THE COURT: All right. And so he'll --- you know.
15 Let's get them to you.

16 MR. JOYCE: (Inaudible).

17 THE COURT: No, you go ahead.

18 MR. JOYCE: Another (unintelligible) attorney's fees
19 and we would move in limine to have any kind of
20 consideration of attorney's fees till (background noise).

21 MR. COBB: Well, Your Honor, they are damages under
22 the contract. That's --- that's --- I don't necessarily
23 disagree with --- with Ben in a normal situation, but the
24 way the contract was the written by Insurance Office of
25 America and their affiliate under 12.5, it specifically

1 states, attorney fees as damage based off --- based off
2 the (unintelligible) as recovery to the client. And
3 under 15.23 of the lease, it says specifically the only
4 party that can get attorney fees for any litigation
5 associated with the --- with this lease is the landlord.

6 THE COURT: 15.23 and ---

7 MR. COBB: And ---

8 THE COURT: --- 12.1?

9 (Simultaneous speaking)

10 MR. COBB: --- five, Your Honor.

11 THE COURT: 12.5?

12 MR. JOYCE: Your Honor, it's not evidence for the
13 jury.

14 THE COURT: Right. Understand.

15 (Simultaneous speaking)

16 MR. JOYCE: --- issue.

17 MR. LESEMANN: Your Honor, if I --- if I may, we're
18 just trying to help things be smooth. Because if the
19 spreadsheet comes and it's got that information on it,
20 that the jury shouldn't see, we're going to have to
21 object and it's going disrupt things where, you know, if
22 we're not --- we're not disagreeing that there's an
23 attorney fee provision in the lease, we're not
24 disagreeing that it's unilateral.

25 THE COURT: Uh-huh.

1 MR. COBB: But again, that's a post-trial issue.
2 That is not for the jury to see, because then they're
3 going to get confused, but if they try to award
4 attorney's fees which is clearly not their province. So
5 any --- any spreadsheet that they would intend to
6 (background noise) demonstratively, or through evidence,
7 has got to not include an attorney fee (unintelligible).

8 THE COURT: Mr. --- Mr. Cobb, you --- you certainly
9 can create your spreadsheet with regards to the contract
10 damage and then a separate correspondence with the
11 attorney's damages, or you want that in front of the
12 jury?

13 MR. COBB: Your Honor, again --- well, and two
14 things --- that's a great question. But to address
15 (unintelligible) point. I didn't (background noise)
16 actually intend to put the spreadsheet in as an exhibit.

17 THE COURT: Okay.

18 MR. COBB: I was going to hand it to Mr. Leone on
19 the stand and have him testify to what his damages were
20 in terms of ---

21 THE COURT: I see.

22 (Simultaneous speaking)

23 MR. COBB: --- only reason why --- and --- and I
24 admit --- (background noise) --- I was willing
25 (background noise). But because of the way it's written

1 in the contract, 12.5 and 15.23, it felt like a
2 contractual provision that would be in their purview.

3 So I'm --- I'm okay to make it a post --- make it
4 a --- a --- a bench issue and not (background noise)
5 just the way the lease reads and we're going to ask the
6 jury to read the lease.

7 I --- I just worry it might confuse them, and that's
8 why I kind of did it the way I did. That might confuse
9 the jury that there would be wait a minute, you asked for
10 all these damages, this lease provision says attorney
11 fees, why aren't attorney fees here? And that was
12 the --- that was kind of where I went back and forth.

13 But I'll --- I'll defer to the Court's judgment on
14 this point.

15 MR. LESEMANN: Your Honor, again, I think what would
16 confuse the jury is to even address that at all. Again,
17 that would never be something that the jury would award,
18 or --- or ask to award. Now, if we know that the --- if
19 the damages spreadsheet itself is not going to be
20 admitted into evidence, then that's all the more reason
21 why the attorney-fee issue should not be addressed. You
22 know, because again, the witness shouldn't be giving
23 testimony of I paid X, Y, Z, then that would certainly
24 confuse the jury that she should be potentially
25 considering whether to award it.

1 So the one thing I just would add is that --- and we
2 can stipulate to this, Your Honor. We obviously intend
3 to win this trial. We intend for our termination of the
4 case to be determined to be valid. But if we were to be
5 wrong, and if the defendant were to win and to show that
6 we breached the lease, we would not take the position the
7 defendant had wasted its claim to attorney's fees by not
8 presenting it to the jury.

9 So I've got that just on the record and to --- to
10 Your Honor, as a --- as a member of the bar to basically
11 say we would not be claiming any waiver is again, it is a
12 post-trial issue.

13 THE COURT: Now, Mr. Cobb, does that --- does that
14 satisfy you, or do you still wish --- and I
15 understand --- I understand that you want on the
16 spreadsheet he gives the total number in testimony to the
17 jury, but that's inclusive of your attorney's fees; is
18 that --- is that --- do I have that right?

19 MR. COBB: (Unintelligible) separate the two.

20 THE COURT: Okay.

21 MR. COBB: --- so it would be on just the net
22 attorney fees on the stand. And again, the reason why I
23 was thinking ---

24 (Simultaneous speaking)

25 THE COURT: I under --

1 MR. COBB: --- I have no (unintelligible) with what
2 he says.

3 But Your Honor, I have a problem with the --- again,
4 I'm going to ask the jury to read this lease ---

5 THE COURT: Right.

6 MR. COBB: --- (unintelligible) 45. And if you look
7 at page 18 of 31, at the top it starts with 12.5. And if
8 you read the --- the last --- the last VII --- and I
9 thought it was funny, I --- Ellis said I intend to win
10 the case. I intend to win this case too, Your Honor.
11 But I like that. That was good.

12 But it says all reasonable expenses incurred by
13 landlord enforcing or defending landlords rights and/or
14 remedies of law, equity, or hereunder, including
15 reasonable attorney fees.

16 I'm just concerned that --- and that's --- again,
17 it --- it goes back to my confusion about where and how
18 to bring up that subject. And I just don't want the jury
19 to think that, you know, I --- I don't --- I'll do
20 what --- again, whatever this Court prefers. And I trust
21 Ellis implicitly in terms of what he says. So I'm ---
22 I'm good with whatever the Court prefers. But that's why
23 I was going to have Mr. Leone on the stand speak of
24 damages. And once we got that figure, I was going to
25 have him speak of attorney fees.

1 THE COURT: Uh-huh. Okay.

2 MR. LESEMANN: Your Honor, if I just might add ---

3 (Simultaneous speaking)

4 MR. LESEMANN: --- one last item. Again, it's a
5 prevailing party issue. I --- and so until --- I mean,
6 well, not --- until the landlord is a prevailing party,
7 there is not a question as to any of --- (background
8 noise). Once the jury makes that decision, then we would
9 know whether the landlord prevailed or not. And then and
10 only then does it become an issue.

11 You know, IOA has obviously has incurred a lot of
12 attorney's fees as well. And so it's something to act
13 like it's a burden that's --- that --- that the landlord
14 is facing that the tenant's not also facing. And we
15 think we had the right to terminate the lease, and we've
16 had to spend all this money just to try to --- just to
17 confirm that.

18 So, again, with it being something --- it would be
19 so (unintelligible) I think this is an evidentiary issue.
20 This is clear the evidence of attorney's fees is not
21 presenting someone who's not making that decision.
22 They're not going to have to make that --- they never
23 will make that decision. That's the --- that's the
24 decision for you or for whoever would be the presiding
25 judge in Lexington that would take that on.

1 So I just --- again, wanted to make sure we brought
2 that up so that we didn't have a big disruption during
3 the trial. Because I think it would be very improper for
4 there to be any evidence of attorney's fees that's put in
5 front of that jury.

6 THE COURT: All right. Mr. Cobb, I want you to
7 prepare the statement of damages --- the spreadsheet of
8 damages for which your client will testify without the
9 use of the attorney's fees. Obviously, you know, you can
10 certainly prepare a --- a spreadsheet that includes all
11 of your attorney's fees. And if things go your way, then
12 we certainly will --- will address it at that time.

13 MR. COBB: (Unintelligible) ask you a procedural
14 question, Your Honor?

15 THE COURT: Certainly.

16 MR. COBB: And I apologize, I'm not as experienced
17 as Ellis in Court. Just my --- my dumb question. So we
18 win, and I do expect us to win honestly. I --- I really
19 do. But we win and what happens next? Because the way I
20 did my jury charge is because of the wording of that
21 12.5, I said, you know, it --- it goes down in damages,
22 and I do --- I did the separate line for attorney fees.
23 So we're going to do attorney fees outside the jury. So
24 the jury comes back, they deem who breached the
25 contract ---

Proceedings

1 THE COURT: Uh-huh.

2 MR. COBB: --- if I win at that point in time, do we
3 say where immediately, (unintelligible) attorney fees
4 after the Court dismisses the jury?

5 THE COURT: Yes. I would not --- I --- if they're
6 sitting back here, you know wow that goes, but I would
7 not --- I mean I --- we certainly do it after the jury
8 is --- is gone ---

9 MR. COBB: Okay.

10 THE COURT: --- and has rendered their verdict.

11 MR. COBB: Your Honor, I'm fine --- I'm fine
12 with ---

13 THE COURT: Okay.

14 MR. COBB: --- I --- I just --- I thank you for
15 letting me explain why I kind ---

16 THE COURT: Absolutely.

17 MR. COBB: --- that issue about (unintelligible).

18 THE COURT: Absolutely.

19 MR. COBB: I'll --- I'll have that statement, that
20 updated spreadsheet without any notice of attorney fees.
21 I'll do a separate one real quick.

22 THE COURT: All right.

23 MR. COBB: I'll get to ---

24 THE COURT: And if you can provide that to him. I
25 hope to start tomorrow as around 10:00. And so if you

1 can give that to him, you know, if you could do it
2 tonight, that would be better but ---

3 (Simultaneous speaking)

4 MR. COBB: --- just adding a couple ---

5 THE COURT: Okay.

6 (Simultaneous speaking)

7 MR. COBB: --- it --- it's done.

8 THE COURT: Okay. Very good. Please get that to
9 him before tomorrow morning then.

10 MR. COBB: Yes. Yes, ma'am. It ---

11 THE COURT: Okay.

12 MR. COBB: --- go out tonight.

13 THE COURT: All right. Very good. Thank you.

14 MR. JOYCE: Thank you, Your Honor. That --- that
15 concludes (background noise). One additional motion to
16 exclude a late disclosed witness that was disclosed, I
17 believe it was Tuesday ---

18 THE COURT: Uh-huh.

19 MR. JOYCE: --- (unintelligible). Again, basis is
20 that we asked for --- for witnesses back in 2021. This
21 is a gentleman that works for a commercial broker that
22 the landlord hired at one point. At no point during the
23 three years of --- of the litigation was the witness
24 disclosed until Tuesday.

25 THE COURT: All right.

1 MR. JOYCE: We anticipate that they're --- they
2 potentially might try to offer him as an expert witness.
3 And you can see how that would be prejudicial. We
4 haven't had an opportunity to --- to get his opinions to
5 depose him.

6 THE COURT: Uh-huh. Mr. Cobb, are you using him?
7 Are --- are you planning to call this witness?

8 MR. COBB: No, Your Honor, I don't intend to call
9 him as a expert witness at all. The only reason why he
10 was added at the 11th hour is a third-party subpoena went
11 out to him. I got the information, and then we took the
12 deposition testimony of --- of Gerry Shauer on
13 January 8th who was a late addition on behalf of the
14 plaintiff's side.

15 And after I took his testimony, he test --- he
16 testified in his deposition two things, that made the
17 inclusion of this witness relevant. Number one, that
18 this witness did a bad job trying to relet --- or market
19 the premises after Highway --- Insurance Office of
20 America had left.

21 THE COURT: Okay.

22 MR. COBB: And number two, that --- I'm sorry, I did
23 have a number two.

24 THE COURT: That's all right. But there were two
25 reasons that you ---

Proceedings

1 MR. COBB: There --- there were. And I ---

2 THE COURT: It's okay.

3 MR. COBB: --- really ---

4 THE COURT: It'll come to you in the middle of the
5 night.

6 MR. COBB: It will. But Your Honor --- no, it
7 was --- it --- it was a matter of --- of responding to
8 that test --- oh, the second reason was in Mr. Shauer's
9 testimony, his deposition that I took on January 8th, he
10 stated that AJ Leone had a bad relationship with
11 post-Insurance Office of America tenants. And his
12 behavior would --- would be off-putting, because Mr.
13 Leone had a tenant who came in and left, which we'll talk
14 about in my motion in limine as well in just a minute.

15 So it --- it was intended to off-set the testimony
16 of Gerry Shauer in the event that Gerry Shauer and
17 Jessica Colby are allowed to testify. That's my main
18 point in my motion for --- motion in limine. If they're
19 not allowed to testify, I do not plan on calling this
20 witness. So but he was just to contradict the statements
21 of Gerry Shauer and I do plan --- and --- and Gerry
22 Shauer is somebody that they plan to call as a expert.

23 I plan to challenge his expertise based off of a
24 couple different criteria.

25 THE COURT: Okay.

1 MR. JOYCE: Your Honor, it sounds like they're
2 trying to offer him as an expert witnesses. And again,
3 the disclosure was this week. And we --- we've not had
4 an opportunity to get his opinions. This is going to be
5 addressed on the fly again like the damages during trial,
6 extremely prejudicial for us to have to not only deal
7 with a --- a moving target of damages numbers, but then
8 try to figure out what this witness's opinions are while
9 we have a jury seated.

10 MR. COBB: Your Honor ---

11 MR. JOYCE: And that's why there's depositions,
12 that's why Mr. Cobb opposed our commercial broker expert
13 witness. And we didn't have time to depose him in three
14 days while we were trying to file all --- all our
15 motions.

16 MR. COBB: Your Honor, but he was going to surprise.
17 They did subpoena him. And when I got the e-mail, I ---
18 I took Mr. Shauer's deposition. I realized that in the
19 event that the Court does allow reletting marketing
20 efforts to come in that's my motion in limine. Then Mr.
21 Lappen's testimony was necessary to contradict statements
22 about Attorney Partners who's commercial real estate
23 (unintelligible) and the work he does.

24 Attorney Partners also, Your Honor, represents
25 Insurance Office of America even today. And I believe

1 Mr. (Unintelligible) so I believe it's Brandon Shockley
2 at that --- at that company who helped him with the
3 purchase of the property down the street.

4 THE COURT: All right. So why don't we hear your
5 motion in limine ---

6 MR. COBB: Thank you, Your Honor.

7 THE COURT: --- to determine whether that is ---
8 whether --- Mr. Joyce, did you have any motions? I don't
9 want to cut you off, that --- that would --- and --- and
10 we'll --- we'll circle back to this --- to this expert
11 witnesses. All right.

12 MR. COBB: Your Honor, in the event that my motion
13 in limine is approved by the Court, I believe it makes
14 the issue of the motion to exclude moot, because I'll ---
15 I will --- I will --- I will not be calling that
16 individual as a witness.

17 So Your Honor, we're looking at removing three
18 witnesses from this trial, and here's why. We have asked
19 under 401 and under 403 South Carolina rule of evidence,
20 that any testimony, evidence statements, demonstrative
21 exhibits, hearsay, or inference of the reletting ---
22 reletting efforts, marketing efforts, any --- any --- any
23 challenge to the lease payment amounts to new tenants of
24 1221 property under units 101 to 105, following Insurance
25 Office of America leaving the premises on December 15,

1 '20, not be submitted because of relevance and because
2 they have a high probability of misleading and confusing
3 the jury under 403.

4 Your Honor, I --- I make these --- let me start with
5 my argument on 401 to start off with. Under the lease
6 that you have in front of you if you'll please turn ---
7 if you'll please turn to --- I apologize. I should have
8 the page ready. If you'll please turn to page 18 again.
9 18 of 31.

10 THE COURT: All right.

11 MR. COBB: And if you look at 12.6, reletting the
12 lease premises. It says specifically --- and again,
13 remember, my client never drafted this. This was
14 accepted by Insurance Office of America when they were an
15 affiliate of. It says in the event of termination of
16 this lease, or repossession of the lease premises after
17 an event of default, landlord shall not have any
18 observation to relet or attempt to relet lease premises
19 or any portion thereof, or to collect rent after
20 reletting.

21 Landlord may relet the whole or any portion of the
22 lease premises for any period to any tenant and for any
23 use and purpose on such terms as it deems appropriate,
24 may grant any rent or other lease concessions as it deems
25 available, including reduced or abated rent.

1 Your Honor, we believe that the case law is pretty
2 clear that you have a duty to mitigate damages. So
3 reletting is fine. And my client did take on that duty
4 and has worked to relet the premises as I showed you on
5 that graph, 101, 102, 105, part of 104 and now executive
6 office space in 103 and 10 --- and the other part of 104,
7 are being marketed and being relet to --- to different
8 and varying degrees of success and timing.

9 THE COURT: Okay.

10 MR. COBB: But Your Honor, what my client has never
11 done is he's never weighed the provision where he has the
12 right to sublease in his sole discretion make decisions
13 about who he relets to, how he relets it, how he breaks
14 it up, what he does in it. So in the event Insurance
15 Office of America wins their case and they say that they
16 validated --- they --- they validate their position.
17 They terminated the lease correctly. Then it's moot and
18 not relevant.

19 And in the event they lose, it's moot because even
20 though my client has assumed the duty of reletting the
21 premises, this provision, this clause says he can do it
22 the way he thinks best. It --- it takes away any ---
23 any --- any judgment or subjectivity in terms of how he
24 is handling the reletting of the premises in terms of
25 mitigating damages based off the fact that Insurance

1 Office of America left him with five --- with, you know,
2 four empty units and a sublease tenant in number five.

3 So we're not arguing duty. And I --- I just --- and
4 I saw, I think it was 156 today there was a memorandum in
5 opposition for my motion in limine on this point. Your
6 Honor, the relevancy again is because it's moot either
7 way. You --- you --- you don't --- you don't --- you
8 don't get the right to question or challenge and judge
9 how he's worked on the reletting, who he hired to do the
10 reletting, what he's done for the executive office space
11 to relet. But he has a duty and we accepted that duty
12 under case law.

13 The other thing, Your Honor, the only other duty
14 under this lease that he has is under Section 12. --- and
15 I apologize, I --- I think it's 12.4 --- is at the very
16 top of page 18, you'll see at the --- at the very start
17 where it says after the first comma, "diminished," and
18 this is reference to any rent that he missed out on
19 because Insurance Office of America took, you know,
20 breached the lease --- diminished by any net sums
21 thereafter, received by landlord through reletting the
22 lease premises during said period after deducting
23 expenses incurred by landlord as provided in that section
24 hereof.

25 Your Honor, our damages spreadsheet gives credit for

1 any reletting efforts. Again, we're not challenging that
2 responsibility. We're just saying that under this ---
3 and we're not challenging the case law about the duty to
4 mitigate damages. We're saying that this provision
5 disallows IOA --- Insurance Office of America to come
6 into this courtroom and parade people and say that he
7 just did that job in reletting. If he had done a better
8 job, his damages wouldn't --- wouldn't --- wouldn't have
9 been so high.

10 Again, he's never waived that clause in writing in
11 actions, and the case law is clear about the duty, but
12 the case law is also clear about this provision. And to
13 say that this provision is --- is --- is actually waived
14 by the fact that he actually did try to mitigate his
15 damages, it --- it just --- it doesn't --- it doesn't
16 fly, Your Honor. It doesn't track.

17 And that's why under 401 we believe it's irrelevant
18 because of that section, and because he did work, and he
19 is giving credit in the damages.

20 But Your Honor, let's move on to my 403 argument.
21 So when Mr. Leone was able to get a tenant in part of 104
22 and, you know, you can see like, you know, if you cut 104
23 in half diagonally, Your Honor, on your sheet, you know,
24 part of it went to 105, and the other part of it went to
25 104.

1 And the name of the company, was Strand and Shade.
2 And the owner of Strand and Shade is a lady named Jessica
3 Colby. Jessica Colby and AJ Leone got along great. But
4 something happened in Christmas of 2022. There was a
5 cold snap. Now, again, remember, these are condos.
6 Above the condos, above these units, the sprinkler system
7 froze and burst. And it put water all throughout the
8 residential condos, and all the way into her unit, and
9 the Unit 105, so she could not work in her premises under
10 her lease. AJ Leone, 1221 Bower had Unit 106 on your
11 sheet that was empty. And at the request of Ms. Colby,
12 Mr. Leone allowed her and Art of Aesthetics who was in
13 Unit 105 and half of 104 to utilize 106. And Art of
14 Aesthetics paid rent for the use of 106.

15 Now, 106 wasn't set up for a hair coloring and hair
16 die place. The only sink and the --- and the plumbing in
17 there was in a bathroom. And so it was definitely an
18 inferior space to what she had in 104, but again, damage
19 was caused by a common area element, not by my client.

20 And so Ms. Colby requested that she be able to have
21 office --- you know, some space to be able to keep her
22 business going. She didn't have business interruption
23 insurance, and Mr. Leone acquiesced. She didn't like the
24 space and she didn't want to pay for the space. Mr.
25 Leone said, look, you got to pay for the space.

1 My whole point is in the testimony that we took and
2 in our exhibits, Ms. Colby is going to come in here, and
3 she's going to say some pretty nasty things about AJ
4 Leone. And she's going to call AJ Leone a slumlord who
5 destroyed her business.

6 Now, he is not responsible for a sprinkler on a
7 30-story building that he doesn't own breaking. And
8 that's not his fault. He didn't --- he --- he ---
9 he's --- he doesn't own that sprinkler. He doesn't own
10 the whole the building. He owned the unit that she was
11 leasing from.

12 She also goes further to say --- and I --- and I
13 think this is the biggest problem in terms of 403.

14 The slumlord comment is bad, but what I really don't
15 like is in her testimony she talks about --- about AJ
16 Leone and she said, I'm going to say --- I'm going to
17 cite this: I asked Ms. Colby, why don't you trust AJ at
18 this point in time? It sounds like you all had a good
19 relationship.

20 And she answers: Because I started to see what type
21 of person he was. Also, you know, we're from the same
22 area. I know how this works. We're both from the north.

23 I ask her: You think people from the north are bad?

24 And she says: You got to watch your back when you
25 live in the north. You got to look over your shoulder.

1 It's not like down south where here where everybody is
2 nice and friendly. Nobody is nice and friendly up north
3 and everybody's got an agenda.

4 So she's trying to completely --- you know, and ---
5 you know, it's completely irrelevant. She's trying to
6 prejudice the jury, make AJ Leone look like he's a bad
7 guy because he simply didn't want to give her free rent
8 in Unit 106 that he allowed her to move into temporarily
9 until unit 104 was fixed from the water damage from the
10 sprinkler system upstairs.

11 Ms. Colby is --- her frustration is noted. I mean,
12 I --- I would be mad if I couldn't, you know, get into my
13 lease premises. But her rent was abated in 104. She had
14 to pay rent on 106, she didn't want to do it. And that's
15 why she got all mad.

16 Mr. Leone offered her an opportunity to get out of
17 her lease. She took it, but in her deposition testimony,
18 Your Honor, she goes further to say, she would have
19 stayed there had Mr. Leone let her basically stay in 106
20 for free. It --- it can't be like Willy Wonka, Veruca
21 Salt, I want what I want now. You know? That's what
22 she's basically saying. She wanted that free rent for
23 the consideration.

24 Again, Your Honor, Ms. Colby is under 403 and ---
25 and coming in under --- it's meant nothing more than to

1 prejudice the jury against AJ Leone in the offer of her
2 testimony.

3 The second thing is the expert Gerry Shauer. Now,
4 I've known Gerry Shauer for 20-plus years. He is an
5 awesome guy. He used to own a spa down in Charleston
6 right at the bottom of the Francis Marion that is right
7 by Marion square. And great runner, fast --- fastest ---
8 he's the fastest guy I've ever met, like a gazelle. He's
9 a great guy. And Gerry about 11 --- 11 years ago went
10 full time into commercial real estate and office leasing.
11 And they brought him in as a expert and I took his
12 deposition.

13 And in his deposition testimony, he admitted a few
14 things to me. Number one, he doesn't do a lot of leasing
15 up in the Columbia area. He told me that Columbia is
16 different in terms of the type of system they put
17 commercial property on.

18 Number two, he told me for the executive office
19 space which is really the only thing AJ Leone has left to
20 lease in 103 and part of 104, that AJ Leone was doing it
21 wrong and the reletting was wrong. And he's going to
22 testify that he's an expert.

23 But when I challenged that questioning, he said he'd
24 only done seven executive office spaces, they were all
25 contiguous, and they were downtown on Peninsula and

1 Charleston.

2 Let me tell you, downtown Charleston and Irmo are
3 not --- not equivalent. They're --- they're not the
4 same. You do things very different in terms of trying to
5 market property. So the reason why we think the 403
6 applies to the reletting efforts in the testimony of
7 Gerry Shauer and Jessica Colby, is we think it will
8 prejudice the jury. They're --- they're trying to say,
9 hey, look AJ didn't fix the --- the leaks and vis-a-vis
10 the repairs when we were his tenant. And then afterwards
11 he didn't do the same thing again. He didn't try to
12 mitigate his damages properly.

13 But Your Honor, we think that will --- that will ---
14 that will just --- it'll infuriate the jury, it will make
15 AJ Leone look like a bad guy. We don't think it's
16 relevant. We think 12.6 applies. I appreciate that
17 today clients --- opposing party filed a amendment to
18 their answer to our counter claims trying to say that
19 we're not allowed to bring the Section 12.6.

20 All I would say to the Court on that, Your Honor, is
21 in the original pleadings, not --- not only their
22 complaint, but our counterclaim, we both included an
23 entire copy of this lease. So 12.6 has been relevant and
24 it's been there since day one.

25 And so for those reasons, that is why I'm asking

1 that any testimony related to reletting marketing efforts
2 be void.

3 Now, I've --- I've got another one, Your Honor. But
4 I can wait and allow --- allow Ben to talk since you
5 know, we did back and forth earlier.

6 MR. LESEMANN: Your Honor, if it please the Court.
7 Ellis Lesemann, I was going to handle this --- this
8 aspect of things.

9 THE COURT: All right.

10 MR. LESEMANN: And so it's a lot to unpack and I was
11 looking at the clock that's --- that's in front of
12 Melinda's desk. And I think it was such a good idea to
13 let the jury go, seeing that it's 4:30.

14 So I heard counsel indicate that he acknowledges
15 that there is a duty to mitigate under South Carolina
16 common law. So I think that actually resolves the
17 motion, because if he's saying that there is a duty to
18 mitigate and that it's applicable to really any contract
19 claim including this lease claim, then it's a matter of
20 relevant evidence for this case.

21 And I think the difficulty is when you're a
22 defendant, you can't put the plaintiff in charge of your
23 defense. Right? We can't just let the plaintiff talk
24 about what a good and efficient job that he did and that
25 his professionals did to mitigate their damages, and then

1 not allow IOA to present evidence that he did not.

2 At that point what this motion is actually doing is
3 it's asking you to sort of entertain a request to discard
4 due process. Well, absolutely. We get to confront a
5 claim and we get to confront a claim for damages that's
6 been presented against us. And when one of the those
7 defenses is an acknowledged common law duty to mitigate,
8 well that's certainly something that's going to be
9 relevant and it's going to be discussed. So the duty to
10 mitigate exists and it was not waived.

11 And Mr. Cobb has acknowledged before, Your Honor,
12 that the duty of --- to mitigate applies. So if it
13 applies, then there's no basis or which so exclude
14 evidence relating to something that's an applicable duty
15 in a lease dispute.

16 So and again, I already mentioned that if we can't
17 actually challenge the damages done, if we can't
18 present --- if you look at the motion, it says that we
19 can't talk about additional amounts that were paid.

20 Well now, the next thing that this motion is
21 attempting to have is inviting you to disregard is the
22 measure of contract damages. Well, of course we get to
23 talk about other monies that have been received, and that
24 could be received, and that are likely to be received in
25 the future, because we think it's speculative for the ---

1 for the landlord to claim well, all these people that are
2 leasing from me now, you know, they're all going to
3 disappear as soon as they can. They'll go away. I'm not
4 going to every make another dollar after this trial.

5 So we obviously get to present evidence to at least
6 allow the jury to decide is that reasonable? Did --- did
7 the landlord prove to a preponderance of the evidence
8 that he's unlikely to ever receive another dollar from
9 all these people? So that's another issue that defeats
10 that motion.

11 Next is causation. The jury's got to decide, and I
12 know Your Honor would charge them that the conduct of IOA
13 has got to be the cause --- the proximate cause of the
14 landlord's alleged damages. So this is where we come up
15 with Ms. Colby, because we notice that Ms. Colby was in
16 the premises, and then she was gone, and that the
17 landlord was making a claim after they brought a tenant
18 in, and the tenant was gone. They now started claiming
19 rent for that space again against IOA.

20 So we thought, well, not trying to cast any stones,
21 but knowing what we know about the landlord, we were
22 curious, well I wonder if Ms. Colby had the same
23 experience. Well, it was a water intrusion. And --- and
24 Mr. Cobb is going to present evidence along the lines of
25 what he said. And Ms. Colby sees things differently.

1 She saw him as --- as unconcerned with her issue.
2 She --- she saw him as not stepping up to fix it, rather
3 waiting for insurance money. And she saw him as
4 basically pushing her out.

5 So when we have a situation like that where they are
6 claiming the dollar damages, we get to show that dollar
7 of damage was not caused by IOA, that was caused by the
8 landlord.

9 Now, Your Honor, do I think that you would be
10 correct if she were to call Mr. Leone a slumlord and you
11 felt like that went beyond the pale. Those are issues I
12 think that could be taken up, and we're not bringing her
13 up so that she can call him a slumlord.

14 And although we had a lot of talk about what
15 people's agendas were before, we're not bringing her as a
16 witness so that she can talk about that she thinks that
17 Mr. Leone has an agenda because he's from up north.
18 That's --- those were extraneous comments that were made
19 during a deposition. That's not her purpose. Her
20 purpose is to say, low and behold, I was in the same
21 building. I had a water leak. I had a situation because
22 I'm a licensed cosmetologist. I have to be able to
23 operate in a certain type of facility in order for my
24 license not to be revoked by LLR and the substitute space
25 that Mr. Leone put me in was substandard, and I was at

1 risk for losing my license, and my space wasn't getting
2 fixed quick --- those sorts of things. So that's what
3 that is about, again because when he's claiming oh, okay,
4 the fact that Ms. Colby left, it's IOA's fault is what
5 he's saying. And we have the opportunity to say it's not
6 IOA's fault.

7 So I don't want to belabor things longer since ---
8 since defendant has acknowledged the duty to mitigate and
9 then allows for us to present evidence about it. That
10 allows for us to present evidence from a disclosed expert
11 witness about it.

12 And when we get to the point of --- of --- of
13 qualifying that expert, Your Honor's going to make the
14 gate-keeping decision on whether when you hear about Mr.
15 Shauer's credentials and his background, whether you're
16 going to allow him to testify as an expert.

17 And then with Ms. Colby, again, if they are going to
18 withdraw --- and let me again, it's their --- their
19 making a claim for damages relating to her that we think
20 is actually the landlord's own fault under those
21 circumstances, so we get to present that.

22 Also, low and behold, it was a similar situation of
23 failing to address a --- a water intrusion event. So I
24 don't think that the --- as --- as soon as there was an
25 acknowledgement that their duty to mitigate exists, I

1 think that that puts us in a position to where --- if
2 there's a duty to mitigate, then that's an issue that has
3 to be addressed in this trial, and it should be addressed
4 in the trial.

5 So we are --- Your Honor, we'd ask that you deny
6 that motion because the duty exists, the measure of
7 damages for contract law requires it. It would violate
8 our right to due process not to be able to present a
9 defense. It also addresses issues of causation of
10 damages. And the --- not only today as Mr. Cobb
11 acknowledged that duty, but he's acknowledged it in prior
12 pleadings.

13 And so insofar as the lease, if there's any
14 ambiguity, well then that's something that can be
15 presented by intent and other issues. But again, there
16 is no waiver of the duty to mitigate, because the
17 acknowledgement exists, so there can't be any artificial
18 constraints in our belief on that evidence.

19 MR. COBB: Your Honor, may I speak to those points?

20 THE COURT: Yes, please, sir.

21 MR. COBB: Your Honor, the duty to mitigate applies,
22 but Section 12.6 of the lease also applies. Remember,
23 this lease has been in place since January 1st of 2012.
24 It was a lease that was created by the tenant with its
25 affiliate. It predates 1221's involvement on this

1 property by seven years.

2 Your Honor, in terms of the duty to mitigate, we
3 don't disagree there --- there --- and --- and again,
4 we've given credit for every dollar of rent received in
5 terms of damages just like we were supposed to under
6 12.5.

7 But in terms of the duty, the duty itself is only
8 challenged of how the duty is done if a contractual
9 provision doesn't exist. And, again, Your Honor, this
10 was a contractual provision IOA --- Insurance Office of
11 America was just fine with back in January 1st, 2012.
12 And it does exist, so it's not --- it's not a question of
13 was mitigation done, it's a question of how was
14 mitigation done and that's the challenge.

15 In terms of the actual damages, where --- where we
16 talk about there's not another dollar after this lease
17 runs out. One of the things that when you see that lease
18 and its amendments --- which are not in front of you, but
19 I can provide to you --- Insurance Office of America
20 actually had the ability to go until 2027, but they have
21 an opt-out clause, March 31st of 2025. When we calculate
22 our damages, we did it the same --- we applied the same
23 theory to that lease that Insurance Office of America
24 would opt out on March 31, 2025, just like we did when
25 these leases end on their current phase and then not have

1 been renewed.

2 So I would just say what's good for the goose is
3 good for the gander. We try to be consistent on our
4 damages request. So not another dollar being received
5 from these tenants after their maturity dates of their
6 lease. I would just challenge we're just trying to be
7 consistent in the way we apply it.

8 In terms of due process, Your Honor, nobody's
9 challenging due process. Nobody's saying you can't ask
10 about the damages, you can't ask about the amount of rent
11 you got. You can't ask about the amount per square feet.
12 We're fine with all that. What they can't do is
13 challenge how and what he did in the reletting --- and
14 actually, I apologize --- rent per square foot. They can
15 ask about it, they just can't challenge what he charged
16 because of 12.6.

17 And again, Your Honor, 12.6 was not birthed by my
18 client, it was birthed by the tenant. Now they want this
19 Court just to throw it in the trash. And that's the real
20 problem I have with --- with --- with the statements.

21 In terms of Jessica Colby's negative statements
22 about AJ Leone, again, they're real. She is a fire
23 cracker in deposition. How are we going to control her
24 on the stand? I don't think she can be controlled. And
25 once the toothpaste is out of the tube and you instruct

1 the jury not to hear something, you can't unhear what is
2 heard. You can't unring a bell. And I'm very concerned
3 about her emotional state and her personal revenge
4 mentality against AJ Leone.

5 Your Honor, in terms of causation, the --- the
6 question that --- that --- that Ellis brought up was how
7 do you --- you know, we want to prove that these damages
8 in terms of the excess, you know, were caused by AJ
9 Leone's, you know, lack of reletting. And that's a fair
10 point, Your Honor. But for the fact that they contracted
11 out of that. They don't have the right based off the
12 contract.

13 And again, that contract came before my client was
14 ever involved. But now they want to conveniently have
15 that contract clause removed. Again, mitigation of
16 damages, 100 percent behind that. The how they did it
17 and the challenge of how they did it, I'm not. All
18 credit is being given as per the lease. And that's why
19 we'd ask the motion in limine be approved on any
20 testimony, anything by that.

21 And also, Your Honor, from an efficiency standpoint.
22 We lose three witnesses. We still have the motion to
23 exclude out there about witness Rob Lathan. I don't need
24 to call Rob Lathan if we don't have Jessica Colby and
25 Gerry Shauer up. So that --- that --- and that ---

1 that's my points on --- on just rebuttal.

2 (Simultaneous speaking)

3 THE COURT: Yes, sir. Yes. Yes.

4 MR. LESEMANN: So you've been very patient us. IOA
5 has the burden of proof to show that the landlord failed
6 his duty to mitigate. We have the burden of proof on
7 that. We have --- we can't be deprived of the ability to
8 present evidence on something that we --- we have the
9 burden of proof. I think that maybe what counsel is
10 trying to say he's --- he's acknowledging that the duty
11 to mitigate exists, but then he's saying somehow that it
12 may have been waived in a way. But that's not really
13 what he's saying because he's acknowledging that it's
14 existing, but the --- the --- the end result of his
15 argument is that only the landlord can talk about
16 mitigation even though it's something that we have the
17 burden of proof.

18 We have to show that his efforts were unreasonable.
19 That's why you bring forward an expert witness because
20 that's the kind of witness who can talk about that. So
21 as you know, Your Honor, waiver is a clear and
22 unequivocal relinquishment of a known right. Language
23 that counsel's talking about doesn't say "duty," doesn't
24 say "mitigate," doesn't say "waive," doesn't say
25 "waiver," doesn't say tenant agrees to be responsible for

1 damages in the event that the landlord fails to mitigate.
2 It doesn't say avoiding damages to minimize damages to
3 mitigate damages, or anything. It says that the landlord
4 shall not be obligated. Okay.

5 Well the landlord's never obligated. The land ---
6 landlord could leave the space open and then he could
7 change it into executive office suites instead of a large
8 office. And then we get to talk about whether that means
9 that we caused those damages or whether the damages were
10 mitigated. So it's not a waiver, particularly when he's
11 acknowledging that the --- that the duty exists.

12 And if at worst if there's some idea of how does
13 that relate to a duty to mitigate --- to --- to mitigate,
14 well, we have a witness who is the president of IOA who
15 was president in 2012 who can talk about what that
16 provision was intended to mean.

17 So Your Honor, I don't want to belabor the point,
18 but where there's not a clear and unequivocal waiver,
19 where there's an acknowledgement the duty to mitigate
20 exists, and where it's something where we have the burden
21 of proof as IOA on this issue, I just don't see how we
22 can be --- you muffled on that point where we have the
23 burden of proof on the defense.

24 So with that, I just appreciate all your time
25 and --- and thank you for considering this issue as well

1 as the other ones. And I guess one thing I'd say is Your
2 Honor, it's a lot. And it may take some time to think
3 about it. Some of these issues would affect opening
4 statements and things like that. So we'll just be happy
5 to proceed in however Your Honor thinks best on --- on
6 accepting and --- and receiving your rulings.

7 THE COURT: So Mr. Cobb --- excuse me.

8 MR. COBB: Thank you, Your Honor. Your Honor, just
9 one more point.

10 THE COURT: Sure.

11 MR. COBB: Again, they contracted out of that ---
12 they --- they --- they, you know, the waiver by the
13 tenant was in this 12.6. It says very specifically:
14 Landlord may relet the whole or any portion of the lease
15 premises for any period to any tenant for any use and
16 purpose upon such terms as it deems appropriate, and may
17 grant rent or other lease concessions as is deems
18 available --- advisable, including reduced or abated
19 rent.

20 Your Honor, again, we're not challenging the duty.
21 We're not saying the duty was waived by this clause.
22 We're saying the --- the ability for them --- the burden
23 of proof to challenge it doesn't exist, because they
24 contractually don't have the right to do so.

25 But Your Honor, I do think we beat that horse pretty

1 dead and I know we're running out of time. I had one
2 more part of my motion in limine that I'd like to
3 address. But it's kind of intertwined a little bit with
4 Jessica Colby. I mentioned earlier on December ---
5 Christmas of 2022 there was a third-story sprinkler
6 leak ---

7 THE COURT: Right.

8 MR. COBB: --- because the --- because of how cold
9 it got. I don't know if y'all remember how cold --- was
10 pretty cold during that, like, one-week period before New
11 Year's.

12 THE COURT: Anything under 60 degrees feels very
13 cold to me. I don't remember, but go ahead.

14 MR. COBB: But Your Honor, because of that ---
15 because of that leak, you know, one of the things that
16 we'll talk about here is water leaks. And we know that
17 that was a --- a big water leak, and we just don't want
18 an inference for the jury --- and this was under 403, to
19 exclude any --- any water leaks post the Insurance Office
20 of America leaving the premises. Because there's an
21 inference that my client controls the water leaks. And
22 my client doesn't own these condos above it. That's
23 owned by other condo owners and these are common elements
24 that are controlled by a condo board.

25 And so the confusion available to the --- the jury

1 but talking about these water leaks post-Insurance Office
2 of America leaving, infers to the jury and they can very
3 easily confuse it that my client's responsible for every
4 single water leak that triggered into the property, and
5 that's just not the case.

6 And I --- I just don't think that it can be clearly
7 enough stated by and through the testimony, and I sure
8 don't want the jury to go back there and say, yeah, there
9 was a water leak. Yeah, 1221 is responsible for that
10 water leak so she should be held responsible, you know,
11 for this 90 days, and ignore the rest of the lease and,
12 you know, Insurance Office of America win. And I believe
13 that that prejudice is real. And I just don't think it
14 creates --- I --- I think the prejudice outweighs any
15 probative value of that --- of that water leak.

16 Now, if I lose the point about Jessica Colby
17 testifying, we can say there was issue that popped up,
18 perhaps that would be the language changes. But again, I
19 just don't want any --- any water leaks happen after
20 Insurance Office of America left come into evidence.

21 And that's the last point in my motion in limine.

22 MR. LESEMANN: Your Honor, just briefly. Again, it
23 just happens that it was another water intrusion. To
24 have the witness say that there was an event and then not
25 be able to describe it makes it so odd. And again, what

1 we're --- why Ms. Colby came into the picture is the
2 landlord is claiming damages for the time period after
3 she left. And she didn't just leave because there was a
4 water intrusion event. She didn't leave that day. She's
5 upset because of how the landlord handled the issue.

6 And so again, the landlord is claiming damages that
7 we believe are the result of his own doing, not that he
8 caused the leak, but how he acted in response and after
9 the leak.

10 We certainly don't think he intentionally caused the
11 leak. But, again, it's hard to separate that and how
12 could the witness come in and talk about the
13 circumstances about why she thought the landlord behaved
14 unreasonably and unfairly if she can't talk about what
15 happened.

16 And so again, they brought this in by leasing the
17 space, and then losing a tenant, and then coming back to
18 IOA and reinvigorating a claim for damage on that suite
19 104.

20 So that's why that --- and again, would she say
21 inflammatory things about AJ that are, you know, she
22 could say he's a bad landlord. Should she say he's a
23 slumlord or he's from up north and he has an agenda, you
24 know, agreed that Your Honor will gatekeep those types of
25 things.

1 But what happened, why she left, and who is --- is
2 that really legally attributable to IOA and damages? And
3 shouldn't she be able to explain what happened and tell
4 the truth so that the jury can make that decision?

5 MR. COBB: Your Honor, just again, I --- I don't
6 think Ms. Colby's necessary. I think first point in my
7 motion in limine in 401 and even in 403, it --- it just
8 rings true. And as a result if I --- if the Court
9 should, you know, grant me a win on those, then, you
10 know, again, Ms. Colby, Mr. Shauer and Mr. Lappen will
11 just be unnecessary witnesses. We can save three
12 witnesses in this trial. And not --- and we can remove
13 three witnesses in this trial.

14 THE COURT: All right. Mr. Cobb, and Mr. Joyce, and
15 Lesemann?

16 MR. LESEMANN: I'm going to answer to whoever
17 you --- but just think too, like, lease ---

18 THE COURT: Lesemann.

19 MR. LESEMANN: Thank you, so much.

20 THE COURT: All right. Thank you gentleman for all
21 of your arguments. I greatly appreciate good lawyering.
22 Let me tell you that I am going to take some --- take
23 a --- a wee bit of time to reflect on my notes in order
24 to make some informed decisions. And so hopefully I will
25 get the opportunity to e-mail you both my decisions.

1 If you will provide me with your contact --- I'm
2 sure I could look it up, but it could be faster if you
3 all just provide me --- Mr. Lesemann has started a page
4 it looks like. If you can give me --- if you can just
5 put yours on their --- their sheet, I will e-mail you the
6 decisions that are made tonight as expeditiously as I can
7 so that you all don't hopefully spend too much time
8 preparing based on those decisions. Okay?

9 And so you'll also get --- Mr. Cobb, you'll get
10 a --- the --- that statement over to Mr. Joyce with
11 regards to the damages.

12 MR. COBB: It's the first thing I'm planning ---

13 THE COURT: Sure. Sure. Very good. Thank you.

14 And --- and does that take care of everything, my
15 rulings and then the statement sheet? Is there anything
16 else that we need to address before the jury comes in
17 tomorrow? And I'll tell you if anything pops up
18 overnight, if you all will just e-mail me as well so that
19 my clerk and I are prepared to handle that, we'll
20 certainly get moving as soon as we can tomorrow morning.

21 MR. LESEMANN: Your Honor, there is a --- we filed
22 today a motion to amend that has been affected by the
23 proceedings in front (unintelligible) and based on
24 counsel representation that he believes and he concedes
25 that the duty to mitigate still exists.

1 Our motion would be if the Court were to disregard
2 evidence or to --- to limit or exclude evidence about the
3 duty to mitigate with the idea being that this landlord
4 had no duty to mitigate. We think that that contractual
5 penalty or that provision would be potentially
6 unenforceable as a penalty because it would not be a fair
7 representation of what the damages are. It says if you
8 breach in year and month one of a ten-year lease, you're
9 liable for everything regardless of whether the landlord
10 does anything or not.

11 For counsel to have said that the duty to mitigate
12 does exist, that might --- that might allow for us to not
13 have that motion come forward because it would no longer
14 be a penalty provision. If Your Honor did decide that
15 no --- no duty to mitigate evidence and none of the
16 things that he's asked to be excluded would be allowed
17 in, then we would be asking for Your Honor to allow us to
18 amend our reply. Because something that says that
19 landlord can collect whatever damages they want whether
20 they make any effort to avoid them or not, regardless of
21 what caused them or not, we would allege that that is an
22 unenforceable penalty under South Carolina law.

23 So that was one motion that we had filed today. But
24 if you were to rule that mitigation to evidence is going
25 to come forward and would be allowed based on the

1 acknowledgement of the (unintelligible) of the duty, due
2 process causation, other things, then we would not need
3 to amend on that basis.

4 THE COURT: I understand.

5 MR. COBB: Your Honor, I would just object, because
6 what --- what --- what Mr. Lesemann's asking this Court
7 to do is to rewrite this lease that's been around since
8 January 1st of 2012. They're asking to strike it. And
9 I --- I just don't think that's fair. This was
10 considered, it was bargained for exchange, it was part of
11 the lease that was assigned. And they purchased the
12 property in 2019 by my client and now they don't want to
13 live with it. And it was their lease. And I think just
14 think striking a provision of the lease very clearly
15 states, again, that he has --- he --- excuse me, I'm
16 sorry for using too many (unintelligible). Mr. Leone has
17 the ability as his sole discretion to work on how to
18 relet. Even though we've taken on the duty to mitigate,
19 we haven't waived or terminated or changed that
20 provision. We haven't said no. We --- we think 12.6
21 didn't apply. We think the whole lease is applicable.
22 There has never been until just now, a challenge about
23 the enforce --- enforceability or validity of this lease
24 in its entirety. So at this last hour to try to
25 challenge that and say, oh, you know, well if, you know,

1 we --- this provision, we don't want it in there. I
2 mean, it's like that old Jim Carrey movie, Liar Liar.
3 It's bad for my case, that's why I don't want
4 (unintelligible).

5 The reality is the contract's enforceable, it's
6 valid. It's never been challenged to today, and I don't
7 think --- and I would object to this amended answer to
8 the counterclaim for those reasons.

9 THE COURT: All right.

10 MR. LESEMANN: Your Honor, briefly. The reason it
11 came up is that in prior pleadings, counsel fully
12 acknowledged the duty to mitigate. In the summary
13 judgment pleading and in other pleadings, in a pre-trial
14 brief, there was --- and then more recently, this
15 argument came forward that this was some kind of waiver,
16 or that the duty to mitigate was no longer applicable.

17 Counsel clarified earlier, no it is applicable, the
18 duty to mitigate does apply, but only landlord gets to
19 testify about it. So that's what's put us in this odd
20 situation.

21 The reason that's coming forward now is there was
22 never the position taken that that constituted a waiver
23 of the common law duty to mitigate until very --- very
24 recently. That wasn't in their pretrial brief, wasn't in
25 their prior pleadings. And they've used phrases like

1 consistent with its legal duty to mitigate in prior
2 pleadings.

3 So the reason that was filed now is because this
4 argument has developed. And just because two parties and
5 even my client might agree to a provision doesn't mean
6 that it can't be invalidated as a contractual penalty.
7 Right? Because --- or otherwise contractual provisions
8 would never be in validated.

9 But again, Your Honor, this issue would be subsumed
10 by your ruling. Your ruling is seeing that the --- the
11 tenant has the burden of proof to --- to --- on the duty
12 to mitigate. And the evidence is going to be allowed
13 then it --- it no longer is the penalty provision that
14 most recently the landlord's been trying to make it into.

15 MR. COBB: Your Honor, I --- I --- I appreciate Mr.
16 Lesemann --- I appreciate Ellis's point. I --- I just
17 respectfully disagree with him. (Unintelligible). The
18 duty is never something that we've shied away from. What
19 we're saying is the duty exists but how we accomplish the
20 duty is impeach --- it --- it can't be impeached by
21 Insurance Office of America. It's their clause, they
22 wrote it in there. And to have that stricken now, the
23 12th hour. We --- it's not that we developed this new
24 idea. It's been our pleading since day one. We've never
25 said there wasn't a duty to mitigate damage. But we've

1 always said this entire lease in its entirety, it's
2 enforceable and valid including that Section 12.6 that
3 says what decisions he makes are for the --- they ---
4 they can't be challenged. She can't go and say, well,
5 you could have done it better. And --- and that's ---
6 that's what they waived in this lease when they wrote it.

7 THE COURT: Okay.

8 MR. COBB: Thank you, Your Honor.

9 THE COURT: All right. Gentleman, thank you again
10 for your argument. I'm --- we're going to adjourn for
11 the night. Ask that you all be here around 9:45 or so.
12 Yes. Please. Thank you. And we will get you those
13 rulings at some point this evening. Okay?

14 Give me --- give me a few minutes, I got to travel
15 back to Aiken and then --- then I can sit down and read.

16 UNIDENTIFIED SPEAKER: Drive safe.

17 THE COURT: All right. Thank you.

18 MR. COBB: Are we allowed to leave anything in the
19 courthouse or should we take it all (unintelligible)?

20 I know they have a lot of boxes. I've got a few
21 boxes too. I just didn't know what you would prefer.

22 UNIDENTIFIED SPEAKER: The courtroom is locked.

23 THE COURT: Yes. Then yes. I --- I don't have an
24 issue with it. Sometimes I look in the bailiffs and
25 security tell me. And in Aiken we certainly leave them.

Proceedings

1 And so if that is okay. That --- that's --- all right.
2 Very good. So the courtroom will be locked. You all can
3 do that.

4 (PROCEEDINGS CONCLUDED AT 4:57 P.M.)

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF TRANSCRIBER

I, JEANNE MELDRIM, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of CIRCUIT COURT 11 for LEXINGTON COUNTY, South Carolina, on the 22nd Day of January, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 7, 2024

A handwritten signature in black ink that reads "Jeanne Meldrim". The signature is written in a cursive, flowing style with a small dot above the 'i' in Meldrim.

Jeanne Meldrim

Transcriber

1 STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 11
2 COUNTY OF LEXINGTON) DOCKET NO. 2020-CP-32-04007

3
4

5 Insurance Office of America Inc.,)
6 Plaintiff,)
7 versus)
8)
9 221 Bower LLC,)
10 Defendant.)

11
12
13

14 H E A R I N G

15
16
17

18 DATE: January 23, 2024
19 TIME: 10:35 a.m. - 4:54 p.m.
20 LOCATION: South Carolina Circuit Court 11
21 JUDGE: Courtney C. Pope
22 TRANSCRIBED BY: Jeanne Meldrim

22 LEGAL EAGLE
23 Post Office Box 5682
24 Greenville, South Carolina 29606
25 864-467-1373
 depos@legaleagleinc.com

1 APPEARANCES:

2 Ellis Reed-Hill Lesemann, Esquire
3 Lesemann & Associates LLC
4 418 King Street, Suite 301
5 Charleston, SC 29403
6 Attorney for the Plaintiff

7 Ann Cunniffe, Esquire
8 Lesemann & Associates LLC
9 418 King Street, Suite 301
10 Charleston, SC 29403
11 Attorney for the Plaintiff

12 Ellis Reed-Hill Lesemann, Esquire
13 Lesemann & Associates LLC
14 418 King Street, Suite 301
15 Charleston, SC 29403
16 Attorney for the Plaintiff

17 Benjamin Joyce, Esquire
18 Lesemann & Associates LLC
19 418 King Street, Suite 301
20 Charleston, SC 29403
21 Attorney for the Plaintiff

22 Hall Cobb, Esquire
23 Cobb Hammett, Attorneys at Law
24 222 West Coleman Blvd.
25 Mt. Pleasant, SC 29464
Attorney for the Defendant

Caroline Lista, Esquire
Cobb Hammett, Attorneys at Law
222 West Coleman Blvd.
Mt. Pleasant, SC 29464
Attorney for the Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Proceedings.....	4
Certificate of Reporter.....	188

EXAMINATIONS

Witness	Direct	Cross	Redirect	Re-cross	Further
Motley	52	73	111		
Dunnagan	124	134	156	157	
Berry	158				

EXHIBITS

COURT'S EXHIBIT

Number	Description	Marked	Entered
1	Juror note	4	

PLAINTIFF'S EXHIBITS

Number	Description	Marked	Entered
1	Lease	59	59
10	Termination of lease	73	73
22	Mold report	127	127
23	remediation proposal	129	129
7	Photos	131	131
11	Text	167	167
6	Photos	172	172
13	Proposal	177	177
8	Photos	180	180

DEFENDANT'S EXHIBITS

Number	Description	Marked	Entered
17	E-mail	82	82
47	E-mail	122	122
45	Report	149	149

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 THE COURT: I need to place something on the record,
2 please. I --- I'm going to do something different than
3 what I said in chambers. I received a note from juror
4 number 184. And I will place this as Court's Exhibit 1.

5 (Court's Exhibit 1 marked)

6 Juror number 184 says she wishes to be removed from
7 the jury. I did have a brief conference with the
8 parties' attorneys in the back and I stated that I was
9 hesitant to remove the juror, but I would speak with the
10 juror to determine why she wanted to be removed.

11 When the juror got home --- I believe during voir
12 dire this juror stood up and said she had been mugged and
13 nothing was done about it. And that she got home she
14 began to think and I believe it festered a lot that she
15 was very angry that her apartment complex still has not
16 remedied the --- the light or made the complex any safer
17 for her.

18 And she's very emotional when she spoke with me.
19 And I --- I believe it to have been sincere and genuine.
20 I don't believe she's appropriate for a jury. She told
21 me that she --- that she was --- very prejudiced ---
22 believed that she would be very prejudiced toward the
23 tenant for any situation that may have arisen in this ---
24 this conflict.

25 So out of an abundance of caution, I am going to

1 remove juror number 184 and place the alternate on --- on
2 the jury. I do not do so lightly, but I --- I am
3 strongly --- I feel very strongly that she was too
4 emotional and too invested in her situation to sit
5 properly and give both parties a fair chance.

6 So Mr. Alternative Number --- whoever the alternate
7 is, I don't know the alternate's juror number. But
8 whoever the alternate is will be replacing. And I will
9 go back here in the back and --- and notify the alternate
10 that they have been --- actually, I'll do that on the
11 record. When that jury comes out, we'll place that on
12 the record and --- and then we'll swear them in.

13 Juror Number 65 will --- will now be --- Juror
14 Number 65 is our alternate will now be a member of the
15 jury. Thank you.

16 Are there --- are there --- do the attorneys have
17 any objections to what I've done?

18 MR. LESEMANN: None for the plaintiff, Your Honor.
19 But there is another issue that if I can bring up
20 (unintelligible) jury.

21 THE COURT: Certainly. Yes. All right.

22 MR. LESEMANN: Your Honor, we just received a ---
23 the ruling clarification and response to --- to what Mr.
24 Cobb wrote to the Court late last night. And we
25 understood that the ruling would mean that you had

1 excluded Ms. Jessica Colby as a witness on the basis of
2 prejudice, that you were not ruling seeing that counsel
3 had acknowledged that there was a duty to mitigate that's
4 existed in this case. That you were not ruling that no
5 evidence relating to reletting, or mitigation, or no
6 testimony, or --- or things like that could be presented.

7 You indicated that you were be reserving your ruling
8 on Mr. Shauer as a expert witness until he came forward.
9 And we just needed to understand what the Court meant by
10 the ruling today that said that plaintiff would not
11 present evidence about reletting or market efforts. And
12 so certainly Ms. Warner, Mr. Motley, Mr. Berry, the IOA
13 witnesses themselves, they're not going to speak to those
14 issues.

15 But we would need to be able to present that again
16 through an expert witness. We'd need to be able to bring
17 that forward in cross-examination. I'm just trying to
18 understand whether you are ruling --- because I don't
19 believe it was the ruling, but I want to make sure that
20 we had clarification of what was meant by plaintiff not
21 being able to bring forward evidence about reletting or
22 remarketing efforts.

23 And because the duty to mitigate is where we carry
24 the burden of proof, it's something that relates to
25 causation, all the issues that we talked about yesterday.

1 So if I could ask that we just have a --- a reiteration
2 of what is. I understand that you're --- the Court also
3 has ruled that you didn't want to hear about leaks and
4 other issues that happened subsequent to when we left.

5 However, that also speaks to an issue of damages.
6 They're claiming damages relating to a tenant who left
7 due to a water leak. And so that puts us in a difficult
8 position because it was that issue and the landlord's
9 reaction to that issue that ends up being the cause of
10 those damages.

11 So I just need --- and I know we're all ready to get
12 started, but those two clarifications caused us some
13 significant concern about how they reconcile with the
14 Court's earlier rulings.

15 THE COURT: Certainly. So let me ask you this ---
16 let me get some clarification first before I respond.
17 With regards to the reletting and --- and marketing. Is
18 that witness going forward today?

19 MR. LESEMANN: No Your Honor. Since that's part of
20 the --- that's a defense to the counterclaim ---

21 THE COURT: Right.

22 MR. LESEMANN: --- that would be a rebuttal ---

23 THE COURT: Okay.

24 MR. LESEMANN: --- that would come forward after the
25 defendant has tendered the case. And through

1 cross-examination of their witnesses. But Your Honor, I
2 would anticipate that that would be tomorrow.

3 The mitigation issue, Your Honor, would not be
4 presented in plaintiff's case-in-chief. Our case is
5 declaratory judgment that the 90 days passed without the
6 premises being restored.

7 THE COURT: All right. Mr. Lesemann and Mr. Cobb,
8 what I would like to do is to provide you both with a
9 clarification --- a written clarification, but I want to
10 do that later today unless there's for some reason a
11 change and switch within --- in witnesses or --- I mean,
12 I don't imagine he'll --- we'll get to that today as a
13 rebuttal witness. But I would like to give you all a
14 written clarification on both of the issues that you
15 brought up today. And I will do so maybe over lunchtime,
16 maybe right at the end of the day, but in enough time for
17 you all to prepare. I'm certainly not trying to make you
18 stay up all night.

19 So allow me to thoughtfully give that ruling to you
20 written, or I can read it out here, but I --- I want to
21 spend some more time on that ruling.

22 Mr. Cobb.

23 MR. COBB: Yes, Your Honor. Just one --- one
24 clarification. And again, I don't know the sequence of
25 the plaintiff's witnesses. And I would assume or presume

1 that AJ Leone would probably be there first. Maybe,
2 maybe not. Before your ruling, if he is their first
3 witness, I --- you know, that would --- my --- my
4 indication based off reading the ruling is it would not
5 be allowed to ask Mr. Leone about the reletting,
6 remarketing efforts post Insurance Office of America
7 leaving the premises; is that accurate?

8 THE COURT: Is he your first witness?

9 MR. LESEMANN: No he is not, Your Honor. And you
10 would have the --- the --- obviously the Court gets
11 whatever time the Court would want. But you'd have the
12 opportunity to review that ruling and our view before Mr.
13 Leone would ever testify. And we believe that he is
14 going to be a witness called by the defense.

15 And again, the idea that we wouldn't be able to
16 question him about the damages claim he's making is ---
17 is such a far step. It's a due --- it's a due process
18 issue for us not to be able to challenge someone's
19 damages claim.

20 MR. COBB: Your Honor, we just --- we'll reiterate
21 what's in our motion in limine in terms of the --- in
22 terms of the situation. We have no issue. And we
23 believe that the ruling was meant to say that opposing
24 counsel can proffer that testimony outside of the jury
25 for purposes of preservation for the record. But

1 nevertheless we --- we don't believe that it's (technical
2 difficulty) by the jury.

3 THE COURT: Understood. Understood both of those
4 arguments. I --- let me give you all that clarification.
5 If that witness is not going first, then what we'll do is
6 charge the jury and begin our opening statements. But is
7 any of that in your opening statement?

8 MR. LESEMANN: No. We can --- we can handle that to
9 where issue can be preserved into perspective until Your
10 Honor has had the opportunity ---

11 THE COURT: All right. All right. So I'll get that
12 done as soon as possible for you gentleman. Okay? All
13 right.

14 MR. COBB: Thank you.

15 THE COURT: What juror number does she
16 (unintelligible).

17 UNIDENTIFIED SPEAKER: (Unintelligible).

18 THE COURT: Okay. So I need the clarification on
19 that reletting, the clarification on (unintelligible).
20 Okay. Thank you. Thank you. All right.

21 All right. Gentleman, anything else that we need to
22 handle outside of the purview of the jury?

23 MR. LESEMANN: Your Honor, if I might. We filed an
24 opposition --- a motion, to --- on this ---
25 (unintelligible).

1 THE COURT: Yes.

2 MR. LESEMANN: And so it was hand-filed yesterday
3 (inaudible) courthouse. If I might be able to give you
4 (unintelligible) copy of that. That would help the Court
5 reconsider --- reconsider its ruling.

6 THE COURT: All right.

7 MR. COBB: Your Honor, given the fact that I
8 (technical difficulty) and I was staying at the hotel. I
9 did not draft one or do it. I think my oral argument
10 yesterday stands. And I think 12.6 of the lease is ---
11 is really all that this Court needs to look at. It's ---

12 THE COURT: Okay.

13 MR. COBB: --- about (unintelligible) the duty.
14 It's about how the duty is achieved and that how it was
15 waived in this contract.

16 THE COURT: All right. Understood. And I --- I
17 do --- I still have extensive notes on --- on that.
18 And --- and my clerk and I will be very careful in our
19 written clarification of that ruling. Okay. Thank you.

20 MR. COBB: And we don't have anything (inaudible).

21 THE COURT: Okay.

22 MR. LESEMANN: No, nothing further from the
23 plaintiff.

24 THE COURT: All right. Very good, gentleman. So
25 I'm going to call the jury in, charge the jury, and then

1 we'll go straight into our opening statements. How long
2 do you anticipate for your opening?

3 MR. LESEMANN: Your Honor, I believe for the
4 plaintiff it would be the range of about 20 minutes.

5 THE COURT: Okay. And how about you?

6 MR. COBB: About the same, Your Honor.

7 THE COURT: I'm going to add 15 to each of you all
8 because you all will tell the truth. Okay. All right.
9 So we'll do that. All right. Very good.

10 Can we bring the jury in, please?

11 Yes, can you --- you can release her. The --- let
12 me put this on the record. The juror that I have removed
13 is in a separate room. She is not with the jury now.

14 All right. Yes. Remove her and then we'll bring
15 the rest of the jury in. Thank you.

16 (Jury enters courtroom)

17 THE COURT: All right. Please be seated. Good
18 morning ladies and gentlemen of the jury. The case that
19 we are about to begin is the Insurance Office of America
20 versus 1221 Bower LLC. Before we begin this trial. I
21 want to tell you that this trial probably will be
22 different from what you might expect. Can you hear me?
23 Okay. Very good.

24 Many people do not have the chance to attend actual
25 court sessions the way that you are doing now, and they

1 may think from watching television or even movies that
2 trials are full of high drama, intense action, and
3 riveting circumstances. All of those things may be true
4 sometime, but this trial is not for entertainment
5 purposes. It is a fundamental part of democracy, an
6 effort to make sure that justice is done between the
7 parties before the Court. Making sure that justice is
8 done is often slow, deliberate, and repetitive which is
9 the opposite of what you may have seen on television.

10 This courtroom is a place of honor. It's dedicated
11 to the protection and preservation of citizens' rights
12 through our justice system. The attorneys appearing
13 before you are advocates for the parties that they
14 represent, but first and foremost, they are they are
15 officers of the court and they are sworn to uphold the
16 integrity and fairness of our judicial system and to help
17 you search for the truth. You should expect them to be
18 professional, competent, and ethical in the
19 representation of their client's interest.

20 Remember that in just a moment you will take an oath
21 to try this case and reach a fair and just verdict. As
22 the jury you are also expected to be professional,
23 reasonable, and ethical. Thank you for accepting the
24 important responsibility of jury service and for your
25 contribution today to our judicial system.

1 What I will say now is meant to serve as an
2 introduction to this case. These remarks are not about
3 the law in this case. I will instruct you on the law at
4 the end before you decide the case. But before the trial
5 begins, I want to explain to you the procedure that we
6 will follow so that you can better understand what is
7 going on. You will be allowed to take notes during this
8 trial. You have been selected as fair and impartial
9 jurors whose purpose it is to find and determine the
10 facts. You are the sole judges --- judges of the facts.

11 If at any time I make any comment regarding the
12 fact, you must disregard my comment. You are to
13 determine the facts from the testimony that you will hear
14 and any other evidence that is presented to you. You
15 should not be influenced by any opinions or any
16 statements that you may have heard outside of this
17 courtroom.

18 It is especially important that you perform your
19 duty in determining the facts in a diligent manner. That
20 is because there is no way to fix an incorrect
21 determination of the facts by a jury. When you comply
22 with the oath that you will take to impartially determine
23 the facts of this case, you will have fulfilled your
24 duty as jurors, and no one will have the right to
25 criticize your verdict.

1 On the other hand and with equal emphasis, the same
2 law that makes you all the judges of the facts makes me
3 the judge of the law. The law as given by the Court is
4 the only law that you may consider. You must accept and
5 follow that law even though you may disagree with it. I
6 cannot tell you as the jury what the facts are, but you
7 cannot disagree with me about the --- what the law is or
8 what you think it should be. Your job is to take the law
9 as I give it to you and apply it to the facts as you find
10 them from the testimony of the witnesses and any other
11 evidence that is presented.

12 And after that doing that, you will render your
13 verdict, a true and just verdict, under the solemn oath
14 that you will take as jurors.

15 Until I advise you to begin your deliberations, you
16 must not discuss this case with anyone, including your
17 fellow jurors. That also includes your friends, family
18 members and anyone who is involved in this case. This
19 includes discussions face-to-face, those by telephone,
20 text messages, e-mail, blogs, social media, or any other
21 method of communication.

22 You may not use a computer, cell phone, or any other
23 electronic device with communication capabilities at any
24 time while you are in the courtroom, or during your
25 deliberations. During your breaks for meals and

1 overnight, you may also use those devices if necessary.
2 However, at no time --- at no time may you use those
3 devices to get or to send any information about this
4 case. This information includes information about a
5 party, information about a witness, an attorney, a court
6 officer, any news accounts about this case.

7 You cannot conduct any research on any of the topics
8 raised. Any topics that you may think would be helpful
9 in deciding the case, or any testimony that is presented
10 by any other witnesses.

11 During the trial do not read, listen to, or watch
12 any news reports about this case. This includes anything
13 that may be in the newspapers, on the Internet, radio, or
14 telephone. You must not consider anything that you may
15 have read or heard about this case outside of this
16 courtroom whether before the trial or during this trial.
17 After the case is submitted to you, you must discuss it
18 only in the jury room with your fellow jurors.

19 The attorneys and the parties in this case as I
20 advised you yesterday, I have instructed them not to talk
21 to you at all. And so if you do see anyone involved in
22 this case, and they do not even say hello, or --- or nod,
23 they are not being unfriendly, they simply following my
24 instructions. It is important that you keep an open mind
25 and do not decide any issue in this case until all of the

1 evidence has been presented, the parties have made their
2 closing arguments, and I have instructed you on the law
3 in this case.

4 Now, in just a moment the attorney for the plaintiff
5 will make what is called an opening statement. The
6 attorney will explain to you the issues in this case or
7 at least what the attorney thinks are the issues in this
8 case.

9 The attorney for the defendant will also make an
10 opening statement. What the attorneys tell you during
11 their opening statements is not evidence in this case.
12 It is only their contention as to what the issues are in
13 this case.

14 The evidence in this case will be presented to you
15 by the testimony of sworn witnesses from this witness
16 stand and by exhibits that will be introduced into
17 evidence.

18 Now, from time to time during this trial, you will
19 hear one of the lawyers say something like, Your Honor, I
20 believe we have a question of law or a matter of law to
21 discuss with you. Or Your Honor, may we approach the
22 bench? I myself may find it necessary to remove the jury
23 from the courtroom for a short while so that the
24 attorneys and I can discuss a matter of law.

25 The reason that we do this is because the jury, you,

1 are the sole judges of the fact in this case. And
2 sometimes when I am discussing the matters of law with
3 the attorneys, it's necessary for me to make some
4 comments about the facts in this case so that I can rule
5 whether or not a particular law applies. Because I am
6 not supposed to tell you what I think the facts are I
7 will excuse you from the courtroom while those
8 discussions take place so that you will not be influenced
9 by anything that I may say or do in connection with those
10 facts.

11 Now, in determining what the true facts are in this
12 case, you the jury must decide whether or not the
13 testimony of the witnesses is believable. It will be my
14 responsibility to rule as a matter of law whether or not
15 certain testimony is admitted. But once the testimony is
16 admitted whether or not you believe it, it's solely up to
17 you.

18 In deciding whether to believe a witness, you have
19 the right to consider whether or not the interests ---
20 whether the witness has an interest in this case, whether
21 the --- the witness is prejudiced toward either party in
22 this case, and whether the witness has had an opportunity
23 to have seen the matters and things about which the
24 witness is testifying. You may also consider the way the
25 witness acts on the witness stand. You have a right to

1 consider anything that is in the record that will help
2 you to evaluate the testimony of the witnesses.

3 Okay. Okay. All right. So you as the jury have
4 the right to consider anything that is in the record that
5 will help you to evaluate the testimony of the witnesses.
6 That means that it is your duty to pay close attention to
7 the witnesses. You must observe the witnesses, listen to
8 the witnesses, pay close attention to the attorneys and
9 to the Court as well. Do not let your mind wander, do
10 not daydream. But you must pay close attention to this
11 testimony so that at the end of the trial you will be
12 able to determine what the true facts of this case are,
13 apply the law to those facts, and render a true and just
14 verdict.

15 What's your juror number? Juror number 289,
16 congratulations. It is your added duty as the foreperson
17 to preside in the jury room and be the jury's
18 spokesperson here in court. So what that means, Ladies
19 and gentlemen of the jury, if there is an issue, you will
20 see him first and he will render a note to the bailiffs.

21 Okay. Can I have you to switch seats with this
22 gentleman right here? Thank you, sir. I do not care
23 where any of the members sit with the exception of the
24 foreperson, and so he will always sit here closest to the
25 bailiff.

1 In order to preserve --- oh, I have one more matter
2 to --- to place on the record. Juror number 65, you were
3 originally selected as an alternate. You are now a
4 member of the jury.

5 All right. In order to preserve everyone's rights,
6 I will give the parties and attorneys an opportunity to
7 object to anything that I have said.

8 Are there any exceptions, or any matters of law that
9 we need to take up by the plaintiff?

10 MR. LESEMANN: None from the plaintiff, Your Honor.

11 THE COURT: All right. Are there any objections or
12 any matters that we need to take up from the defendant?

13 MR. COBB: No, Your Honor.

14 THE COURT: All right. Thank you. At this time,
15 Ladies and gentlemen of the jury, we will begin the
16 trial. All right. Opening statements.

17 MR. LESEMANN: Thank you, Your Honor. Ladies and
18 gentlemen, my name is Ellis Lesemann. And I introduced
19 myself briefly to you yesterday. I'm an attorney in
20 Charleston, South Carolina. We also have an office in
21 Aynor. I don't know if any of y'all ever heard of that,
22 but it's a small town close to --- close to Conway.

23 Since we're going to spend some time together. What
24 I wanted to do first is quick introductions. As part of
25 the legal team here, Ben Joyce, and Ann Cuncliffe who are

1 also with the law firm. They are here. And you'll hear
2 from then with regard (unintelligible) the course of the
3 trial.

4 We're here on behalf of the Insurance Office of
5 America, which is an insurance agency. It's not like
6 Allstate or State Farm, it's where you go to buy
7 insurance. We are insurance agents who help you buy
8 insurance for yourself, for your business. And that's
9 what Insurance Office of America is. They have an office
10 in Columbia, and this case is about their former office
11 location in Columbia.

12 With me from my client, from the Insurance Office of
13 America --- or you may hear is IOA, so that saves a
14 little time, that's what IOA is --- is Mr. Brandon
15 Stewart, he is corporate counsel. He is seated behind
16 (unintelligible).

17 Also if y'all can see everyone behind the lectern
18 there, Mr. Rob Motley is the president of IOA. Ms.
19 Crissy Warner is the regional operations manager for IOA.
20 Mr. Scott Berry is a producer, meaning he's somebody who
21 work with people who help them get --- meet their
22 insurance needs. So he is an agent. So those are the
23 folks that are here today.

24 The parties again are the tenant, IOA --- former
25 tenant, and then 1221 Bower which is the name of the

1 company or the entity that owns this space that's in
2 dispute. So those are the parties to the case. The
3 tenant is the plaintiff, the landlord is the defendant.

4 We're here because we have an issue --- we have a
5 dispute we were not able to work out on our own. So what
6 we do in those situations is we come and we allow for the
7 jury to assist us with that. And as Judge Clyburn Pope
8 mentioned, it's a solemn duty, it's an important duty,
9 one that we all depend on to these types of disputes that
10 you would resolve.

11 And at the end of the case, you'll do what is ---
12 you'll render what's called a verdict. And those words
13 comprise from Latin, means speaking the truth. So you
14 all will speak the truth in this case. You'll hear a lot
15 from plaintiff, you'll hear a lot from the defendant.
16 But the truth will be how you ultimately resolve this
17 case.

18 Now, being a landlord-tenant dispute, there is a
19 lease. So the space that we're talking about is out in
20 the Harbison area, it's close to Columbiana Centre. It's
21 on a road called Bower Parkway. So it's in the building
22 that's got some offices and things on the first floor,
23 and it's got apartments on the second floor. You hear
24 that phrase, "mixed use," a mixed-use building. So
25 there's those two types of uses in the same building.

1 The space that where we were was owned --- is ---
2 and is owned by the defendant. So one of the things that
3 you have here is there's some kind of cases where you
4 don't have a contract to go by. It might be an accident,
5 but you have to decide okay, well, who am I going decide
6 is at fault? But in this case you do have this contract,
7 it will be entered into evidence, and will be something
8 that --- that you can review. And it's something I know
9 Mr. Foreman's reviewed many times in his life. Not this
10 particular document, but leases and things like that.

11 And it has important provisions. There are several
12 that you'll hear about, but the significant one here is
13 in section 11.1. So you'll hear testimony --- IOA has
14 been in that office space --- they were in that office
15 space since 2005. And you'll hear about things that
16 happened from time to time, leaks through the balcony.
17 You'll hear about leaks through ceilings and walls.
18 You'll hear about water intrusion events and things like
19 that.

20 So there are events that happened in 2020 that were
21 different from anything that had happened before. You
22 heard me mention those apartments above the office.
23 Well, one of those toilets began to leak into the office
24 and that's --- so that's not water. Ultimately what that
25 is is that's sewage that starts to leak. And there was

1 one instance that began actually in December of ---
2 of --- of 2019 and continued into 2020. That was an
3 inconvenience, that was an issue that happened and there
4 is another one.

5 There's another one that occurred in August '14.
6 And so as you look forward you'll see that when
7 (unintelligible) office they recognized that there's a
8 stain on the ceiling tile and they don't really know what
9 it is, there's something coming from somewhere.

10 Well ultimately this was sewage water that was
11 coming from the toilet above. And as things go
12 forward --- and this is what this is is a text message.
13 This is Angela Adleman, she operates as the property
14 manager for the --- for the association.

15 So again, one thing I wanted to explain is this
16 building is like a condominium. Now, you normally think,
17 oh okay, well a condominium's like apartments. That's
18 all --- that's true. There are also condominiums where
19 there are offices and apartments. Right? And
20 residences. So someone can own the office condo just
21 like might own --- or they might own a residential condo.
22 So again, this is --- building is a mix of those two.

23 And so on August 14th, it's clear that there's now
24 damage to the premises as a result of a --- what was not
25 known to be a sewage leak at the time, but which quickly

1 became known as that. And so we talked about this lease
2 provision again. What we're going to ask you to help us
3 determine relates to the section 11.1. What that lease
4 provision says is if the --- if the premises, right? If
5 the office is damaged by various causes --- it includes
6 something as a casualty or otherwise. Right? So if
7 there is damage to the leased premises, the lease will
8 continue. And then the landlord --- okay? And that's
9 defendant. The landlord at their expense will promptly
10 restore, repair, or rebuild the lease premises, including
11 but not limited to restore property to the same condition
12 as it existed when the possession of the lease premises
13 were turned over to them at the commencement of the lease
14 term back 2012, within 90 days after such damage or
15 destruction.

16 In the event landlord fails to restore the lease
17 premises as aforesaid, tenant's sole remedy against the
18 landlord shall be to terminate this lease as of the
19 date of such casualty or event. Right? We noticed it
20 August 14th. We gave notice to the property manager on
21 August 14th. And so that is the date of the casualty as
22 the evidence will show you.

23 So we've been through already a significant jury
24 selection process. The attorneys have addressed a lot of
25 issues with the Court. So this is a time --- this is a

1 process that involves a lot of --- of formality for good
2 reason.

3 At the same time we're actually bringing a pretty
4 straightforward issue to you. We have an issue that
5 began on August 14th I'm going to talk to you more about.
6 The landlord is on notice of this as of --- by his own
7 admission --- by the 17th of August. 90 days from
8 August 14th would be November 12th. 90 days from
9 August 17th when the landlord admits that he knew about
10 what was going on would be November 15th. So what we're
11 going to ask you to determine is was the premises
12 restored to the same condition as it was at the beginning
13 of the lease within 90 days after such damage
14 (unintelligible). Because we present to you that it was
15 not.

16 And since it was not, again, what the lease is
17 saying as you'll see, you don't get to move out right
18 away, you have to give the landlord 90 days. And in fact
19 we continue to pay rent which the client --- which ---
20 which IOA did --- my client did. They continued to pay
21 rent during that time period.

22 And then after that 90 days had expired when the
23 premises were not restored to the condition in which they
24 were (inaudible), they issued a notice terminating the
25 lease. So that is from the plaintiff's case. That is

1 the question for us to answer.

2 So I mentioned too that there is the notification
3 that was sent the 14th. Eventually this becomes an
4 insurance claim. And so when the landlord was
5 representing when was the date of the damage that caused
6 the loss August 14, 2020. And you'll see that this form
7 confirming that August 14th is the operative date signed
8 by Mr. AJ Leone, the gentleman here on behalf of the
9 defendant. So we have an agreement as to when this
10 occurred and the notification that was made.

11 Ms. Warner who is seated in the courtroom, I
12 introduced you to her. She sent an e-mail to Angela
13 Adleman, again, who operates as the property manager, the
14 only person that IOA had ever presented these sort of
15 issues to while they were in the premises. Presents this
16 issue to her by e-mail on the 17th of August.

17 Mr. Leone, we expect that he'll testify when he was
18 asked when did you know about this issue? Were you aware
19 of water leaks as of August 17, 2020? We anticipate that
20 he'll testify that on or about, yes. And then later in
21 his --- in his testimony, we believe that he'll say and
22 he'll affirm that yes he was aware of this issue as of
23 August 17th.

24 So I showed you one picture. When we first --- my
25 client first noticed what was going on, but as things go

1 if they aren't addressed quickly and with urgency, they
2 get worse. So here's a spot you can see in the office
3 where that brown stain coming from the toilet above
4 evolves to where the ceiling tiles become so saturated
5 with the sewer water that they collapse. And then the
6 trash can is placed so that it can collect the sewer
7 water as it continues to fall from the unit above.

8 Ultimately you can go inside --- and that may be a
9 little bit hard to see. But you go inside and you
10 see --- will eventually (unintelligible) go inside the
11 wall --- (inaudible). And they find deterioration of the
12 installation, the inside, and they begin to see what is a
13 significant issue that this sewer leak is.

14 As the issue doesn't get addressed quickly, what was
15 a sewer intrusion turns into a mold infestation. Well,
16 the evidence will show you the office only got tested for
17 mold because IOA insisted. The evidence will show you
18 that the landlord was prepared to put up a new piece of
19 sheetrock and keep moving forward.

20 At IOA's insistence a mold remediation professional
21 came in to test in fact that there was there the black
22 mold as you can see from those photographs. And it's
23 going to have to be remediated only because tenant
24 insisted. They've got employees with respiratory issues
25 and no one needs to be working in an office environment

1 where there is sewer water intrusions and mold.

2 So what might have looked like an innocent brown
3 spot --- the curious brown spot on a ceiling tile evolves
4 into something that is unacceptable and hazardous. So as
5 we go forward (unintelligible) into mediation, evidence
6 will show you that there is continued leaks. The
7 property manager is expected to testify in this case,
8 Mr. --- Ms. Angela Adleman, they would --- kept coming
9 out and they kept finding more leaks. And
10 (unintelligible) know how to fix it. Well, part of that
11 is because of a lack of urgency. Part of that is because
12 they didn't take it seriously until the tenant began to
13 stomp their feet and began to say, my office smells like
14 beep.

15 And then finally, the landlord comes along. And
16 again, as the lease says, there's 90 days. The lease
17 provision says the tenant has to put up with this issue
18 for 90 days. That's the amount of time the landlord has
19 to come back and to restore it completely to its prior
20 condition. And as I mentioned too that 90-day
21 calculation if you began on August 14th, takes you to
22 Thursday November 12, 2020. The work wasn't completed by
23 then so and that's the letterhead from my office.

24 Evidence will show that on December 1, 2020, IOA,
25 within its rights under the lease, issued a notice of

1 termination to the landlord indicating that you failed to
2 restore the premises within the 90 days. We put up with
3 this mold, we put up with the sewage, but since you
4 failed after we put you on notice and after you admit
5 that you knew of this issue, we're exercising our right.

6 Because again, these things can happen, right?
7 Things can happen. But there's only so long if you're
8 the tenant that you have to continue to deal and to pay
9 and to wait. And in this case the parties agreed that
10 period would be 90 days.

11 So the proof of loss, the form I showed you, the
12 evidence will show there was approximately \$17,000 of
13 work. And there was an insurance claim submitted and
14 that is what was reimbursed.

15 But on November of that work --- on November 30th
16 after the 90-day period had already expired, the
17 contractor was out and did \$2900 of work. And then again
18 in January --- January 11th of 2021, which is 150 days
19 after August 14th, the contractor was out it do another
20 \$2,370 plus the \$420 for ceiling tiles, et cetera.

21 And so in doing the math of the total job, a third
22 of it wasn't done until after that date had expired ---
23 are the 90 days. And so there will be evidence that
24 you'll receive that will show that the premises were not
25 restored to their original condition within the 90 days.

1 So that's what we'll be asking you to resolve for us
2 is that there was the obligation on the part of the
3 landlord. It isn't qualified, it doesn't have a lot of
4 exceptions. It says if the premises are damaged you've
5 got 90 days to restore them to their original condition.
6 If you don't do so, the tenant can terminate the lease.
7 And it says that's the tenant's sole remedy. You'll see
8 that language in the lease.

9 So the tenant is faced with the decision to ---
10 well, do we --- we exercise this right, our sole remedy?
11 Meaning, can't sue them for damages, can't sue them for
12 the fact that you haven't been able to do all the
13 business that you wanted to be able to do, or that you
14 had equipment that got damaged, all those things. What
15 it says, you can terminate the lease, that's your sole
16 option.

17 That's what IOA did. IOA was within its rights to
18 do it, the evidence will show you. What you'll hear
19 although that language in the lease is quite clear,
20 you'll hear a lot of reasons. Well, we didn't really
21 have notice until September when they admit that they
22 knew it as of August 17th. They'll say well, we really
23 get more time when the lease says that there's 90 days
24 and that this is a very specific condition that deals
25 with this issue. And then they'll say well, we couldn't

1 do anything about this, it was sort of beyond our
2 control.

3 Well it wasn't a war, it wasn't a catastrophe, it
4 was an issue. There's a toilet in the unit above that's
5 leaking, fix it. There's mold, remediate it. There's
6 sheetrock damage, replace it. Clean it, and then replace
7 the carpet and replace the ceiling.

8 There's going to be a suggestion to you that there's
9 \$17,000 worth of work. Now, combined with that, all
10 these hazards that we're talking about. There'll be
11 testimony to you to say that that work was impossible for
12 them to complete within that (inaudible). Well,
13 provision says you got 90 days, that's when you have to
14 do it.

15 The evidence will show that it was not impossible
16 and that the landlord did not act promptly and did not
17 act really at all in --- in an effective way until the
18 tenant was very upset and was raising the issue and
19 raising the alarm, the tenant faced with a decision as a
20 building where there are leaks.

21 And now in 2020, a building where there are multiple
22 sewer leaks, and where there has now been mold, and where
23 they feel like the relationship with the landlord is not
24 good. And the landlord does not take these issues
25 seriously. And the landlord is a lot more concerned

1 about getting IOA's insurance to pay for it, or getting
2 someone else's insurance to pay for it than they are
3 fixing the issue.

4 So as you'll hear from the testimony from the
5 witnesses when they take the --- the option and the sole
6 remedy, and they do terminate the lease. And we're going
7 to ask you to validate that decision. Defendant for its
8 part will say not our fault, that's not --- the lease
9 doesn't say what it plainly says, and that there's other
10 explanations. And not only that, although these issues
11 happen, these issues weren't addressed and they weren't
12 addressed quickly enough. They're going to ask you to
13 enter a verdict against IOA who simply exercised the sole
14 remedy that it had the lease provided. They're going to
15 ask you to enter some kind of judgment for hundreds of
16 thousands of dollars against my client who had no fault
17 in this situation. Not our toilet, not our building, not
18 our responsibility. Very clearly when there's damage the
19 landlord should fix it. The landlord has to fix
20 (unintelligible). Landlord failed to do it.

21 So the judge will tell you in the case if there are
22 damages that you claim that you were the first person to
23 breach the lease or if you are the cause of your own
24 damages, you can't hold someone else responsible for
25 that.

1 This defendant is intending to ask you to have IOA
2 pay them hundreds of thousands of dollars although it was
3 IOA who had to deal with this leak, this sewage
4 intrusion, this mold, this lack of urgency in this issue.
5 And again you'll find they had the right to leave and
6 they did leave.

7 So that's the claim that we've presented to you.
8 You'll hear a lot of testimony. You will as the judge
9 indicated, you'll need to weigh the credibility of the
10 witnesses. You'll receive photographs and documents.
11 The good thing about photographs and documents, they
12 don't know whose side they're on, all they can do is
13 reflect what they show. The lease, all it can do is it
14 says what it says. As you look at those you know you can
15 look at those for what they say. And as you go through,
16 you can listen, and you can weigh that credibility of
17 those witnesses.

18 And as you find where are you being asked to follow
19 a distraction or a non-issue versus when are you being
20 asked to resolve a very simple issue. Is there damage?
21 Was it fixed within 90 days of the damage? And if it
22 wasn't, doesn't the lease say the tenant has the right to
23 say I'm out, I'm done? Which is what happened in the
24 case.

25 So closing argument will ask you to enter a verdict

1 in favor of the plaintiff that it rightfully exercised
2 its right to terminate this lease and that there are no
3 damages to ever be awarded to the defendant for something
4 that was their responsibility and their issue. And
5 ultimately through the lack of repairing the issue on
6 time, their fault.

7 The lease provision that we've talked about also
8 allows for and there's a time provision where your ---
9 your space as a tenant is affected by this damage. You
10 can ask for an adjustment to your rent.

11 So at the close of the case some of the evidence
12 that will be presented will ask you for an adjustment for
13 that time period from August 14th to the end of December
14 when we paid rent.

15 Now, again, not relating to all the rent that got
16 paid for all the years prior to that, but for that time
17 period when there is mold, sewer intrusion, odor, and an
18 environmental hazard for our employees. And so with that
19 we'll ask that you return and remunerate a judgment and
20 verdict in favor of the plaintiff.

21 Thank you and look forward to spending the next
22 couple of days with you so that you can help us resolve
23 this case.

24 MR. COBB: Thank you, Your Honor. Well, while I'm
25 waiting for the IT to go, let me do my introductions.

1 My name is Hall Cobb. It's nice to meet you again.
2 I am the attorney for 1221 Bower LLC, which is not only
3 the defendant, but also a plaintiff.

4 Because as Mr. Lesemann told you, we have
5 countersued the Insurance Office of America for breaching
6 the lease that we're going to be talking about.

7 And I thought it might be helpful to give you an
8 idea about what this property looks like. There are five
9 consecutive office buildings. All right? Excuse me,
10 office --- commercial office condos. And these condos
11 are up here on the screen. (Unintelligible).

12 --- I want to talk about is (unintelligible) I want
13 to tell you how thrilled I personally am to be in front
14 of you today, not because we're taking up your time, but
15 I'm from Lexington. Lexington High School class of '88,
16 go Wildcats.

17 I know this area, I know (unintelligible) I know
18 where Bower Park is. And when you're going down off
19 Saint Andrews Road and you turn left onto Harbison
20 Boulevard, you go down to the Buffalo Wild Wings, you
21 turn right. And that will take you out to Bower --- that
22 will take you up to those properties. Across the street
23 is (unintelligible) and a big retail area. (Technical
24 difficulty) is the Regal Theater. So if that gives you
25 an idea of where this property is, hopefully that helps.

1 There are two buildings, side-by-side, that are
2 almost identical. But in this first building on the
3 first floor are these five condos. Now, what's not
4 shaded is this block right here, that the Unit 105. And
5 for these condos, the --- the property doesn't have
6 traditional (unintelligible) they're all condos. There
7 are residence condos above it and commercial condos below
8 it. (Inaudible).

9 All right. So (technical difficulty) square footage
10 of these five units give you a little bit --- it's not as
11 clear, and I apologize on that. Give you a little bit
12 better understanding, is 7,822 square feet. And that's
13 this plot right here. And so Unit 105 has 11,003 square
14 feet; and then 104 is not up there, but it's roughly, 13,
15 1400 square feet; 103, 1003 square feet; 102, 1265 square
16 feet; and 101, 3385 square feet. So this is is a big
17 group of office condos.

18 Now, the upstairs residential condos are not owned
19 and were not owned by my client. And so whenever you
20 have a condo group, you have what's called a condo
21 association. It's like a (unintelligible) the
22 neighborhood or any (unintelligible) like an HOA type.
23 And so with a condo association, all the condo unit
24 owners have to pay condo association fees, right?

25 And so when a condo association is created it is

1 controlled by a board. And the board is made up of
2 individual owners of these condos that have to serve on
3 (inaudible). And that condo association hires a property
4 management company to service all the areas of the condo
5 that are under this condo association.

6 And in this case a company called CAMS, common ---
7 CAMS Community Association Management Services, is
8 property manager for the condo association board.

9 Just for (unintelligible). The --- the condo
10 association board has a formal name. It's the Bower
11 Commons Co-owners Association. I just think condo
12 association is easier to say so that's why I'm choosing
13 to say that.

14 So CAMS has an agent that works (inaudible). And
15 that agent is named Angela Adleman. And y'all will hear
16 from Angela in this witness testimony. And she'll tell
17 you about all the work and all the communications she got
18 with Insurance Office of America.

19 But I really want to (unintelligible) this point.
20 CAMS works for the condo association board. CAMS does
21 not work for 1221 Bower.

22 Now, with me today and what --- who we introduced
23 the other day (unintelligible) Leone the (technical
24 difficulty) of 1221 Bower. And he's part owner. But
25 because 1221 Bower owns these five units, he got pulled

1 and he is on the condo association.

2 Now, let me give you a little bit of history about
3 these five units. So as Mr. Lesemann told you, Insurance
4 Office of America has leased this property for --- from
5 January 1st of 2012 to the point when they moved out
6 which was December 15th of 2020. And we're telling y'all
7 they wrongfully moved out. I'll tell you why in a
8 minute.

9 Now, when my client entered into negotiations with
10 Insurance Office of America's affiliate, IOA Properties
11 III, LLC, they talked about hey, do we buy it with
12 Insurance Office of America's (unintelligible) or without
13 it? And one of the things that my client will testify to
14 is hey, I'm only willing to pay you your price if
15 Insurance Office of America is staying there for an
16 additional five years.

17 So Insurance Office of America re-upped its lease.
18 And by the way, the lease that we're going to be talking
19 about was not written --- none of the amendments were
20 ever written or drafted by my client. They were all
21 drafted by Insurance Office of America and their
22 affiliate, IOA Properties III, LLC. So they're related.

23 When my client bought the property it was September
24 of 2019. Okay. So my client didn't own it for years and
25 years and years. But through the discovery process and

1 through testimony that y'all are going to hear, guess
2 what? Leaks began happening as far back as 2015 from
3 upstairs unit owners.

4 Now, we talked about our --- Mr. Lesemann talked
5 about the specific lease that was recorded on August
6 (technical difficulty). And on August 17th, Crissy
7 Warner, the office manager for Insurance Office of
8 America e-mailed CAMS, Angela Adleman, and Scott Berry
9 texted Angela Adleman on August 14th.

10 Now, the condo association is responsible for
11 dealing with other unit owners upstairs and negotiating
12 with those owners to try to get a plumber in to fix the
13 leak. And also the --- the in-between walls the plumbing
14 is the common element. And what that common element
15 means is my client doesn't own it, the condo owner
16 upstairs doesn't own it, it's owned by the common
17 elements by the --- by the --- by the condo association.

18 So when you start looking into it and you see what
19 happened, you got to understand, Angela Adleman, CAMS,
20 was the perfect person to talk to.

21 When you also look into it further, you'll note, and
22 see, and hear it through testimony that when IOA
23 Properties III, LLC began (unintelligible) Insurance
24 Office of America own that property, they had a gentleman
25 named Scott Berry, very nice guy (unintelligible)

1 Insurance Office of America. He's going to testify that
2 he was on the same condo association board. He was used
3 to going to Angela Adleman and he was used to dealing
4 with water leaks that happened before Insurance Office of
5 America lost its (unintelligible) landlord and my client
6 stepped and became the landlord when they bought the
7 property.

8 Now, they talked about the insurance
9 (unintelligible). (Technical difficulty) talked about
10 the date of (unintelligible) August (unintelligible) had
11 a dollar amount. But what they didn't show you in that
12 insurance form is that insurance form was not an
13 insurance form for 1221 Bower submitted, it was an
14 insurance form the condo association put in. And the
15 reason why the condo association put in that insurance
16 (inaudible) was because it was a common element that
17 created the problem. That was where the issue was.

18 The reason why AJ Leone signed that insurance form
19 is he was a director of this condo association board. He
20 wasn't acting on behalf of the property owner, 1221
21 Bower.

22 I heard statements that there was lack of urgency, I
23 heard statements (inaudible) that no one was taking this
24 seriously, but that is just simply not true. You'll see
25 that in the evidence that's provided. You'll see that

1 Angela Adleman returned every e-mail, returned every
2 text, and got on and tried to schedule plumbers over and
3 over and over again, because the leak was still out
4 there.

5 The plumber would go out, he would say it was dry,
6 come back, not dry. And again, remember this leak was
7 coming from an upstairs residential owner's unit. Not my
8 client's unit, not the downstairs unit. We were --- we
9 were --- we were dealing with the leak from somebody
10 else.

11 But to say it wasn't taken seriously, the time frame
12 just doesn't prove it. I want you to remember too that,
13 you know, we're still in COVID. And we're still dealing
14 with trying to get people into the downstairs offices.
15 Because at this point in time, Insurance Office of
16 America wasn't using this property at all even though
17 it's pretty big. They were working from home.

18 And the reason why they were working from home and
19 started off in March (unintelligible) COVID (technical
20 difficulty) back then they had a COVID scare, then they
21 brought (technical difficulty) back and they had
22 (unintelligible). And they said we're just going
23 (unintelligible) (technical difficulty). And then they
24 discovered a water leak on August (inaudible).

25 And they saw that ceiling tile in this office right

1 here in Suite 103 right where I'm pointing. And the leak
2 happened in between this office, this office, and that
3 wall right there. Now, this office was Scott Barry's
4 office. This office was part of (unintelligible)'s
5 office. And we'll talk a little bit more about that.
6 But I want to point out where this was. Right here.
7 Wasn't over here. This was sealed off (technical
8 difficulty) was right there.

9 Now, it's interesting we're --- we're talking about
10 dates, the 90 days, and --- and when Mr. Lesemann sees
11 we're going to argue and justify and say 90 days and then
12 he wants you to ignore everything else in the lease.

13 I understand why he wants you to do that, but the
14 problem is you can't. The lease exists. It was born by
15 and through the brain trust of Insurance Office of
16 America (unintelligible), and IOA Properties III, LLC.

17 My client bought the property, he got an assignment
18 of that existing lease. Again, he didn't change a thing
19 on it. So on December 1st after a lot of back and forth,
20 my client received a letter from Mr. Lesemann's
21 office --- actually (technical difficulty) registered
22 agent of 1221 Bower LLC --- said hey, you're in violation
23 of section 11.1, because you didn't get it repaired in
24 90 days. It's your fault, we're out. Our sole remedy,
25 we get out (inaudible).

1 And then on December 2nd when my client's trying to
2 figure out what to do, trying to figure out if he can,
3 you know, get something together for Insurance Office of
4 America (technical difficulty) satisfy them. They file
5 this lawsuit. Now, what's interesting about this
6 lawsuit, is it cites to two --- sorry --- cites to two
7 very specific parts of the lease. And the first ---
8 first cite is to 11.1. And they want to point out the
9 highlighted part about 90 days. And they talk about in
10 the event landlord fails to restore the lease premises
11 (unintelligible) sole remedy against landlord shall be to
12 terminate to this lease.

13 (Unintelligible) they want you to not read anything
14 else other than that and (unintelligible) only. They
15 want you to stop reading right there. They don't want
16 you to read anything else.

17 But here's the problem with that, the lease exists,
18 and --- I'm sorry --- that's my kids. Sorry. In the
19 lease --- excuse me, there's a section in 15.16. And if
20 you look at paragraph 25 and 26 of the complaint by
21 Insurance Company of America, you see here again 1221
22 Bower. It says: Tenant entitled to exercise to
23 terminate the lease through landlord's failure to remedy
24 the damages within 90 days after such damage or
25 destruction on August 14, 2020. See lease at 11.1.

1 And then it says landlord's lack of diligence and
2 failure to properly repair the lease premises is also a
3 breach of section 15.16 of the lease. (Unintelligible)
4 15.16. And they quote: Time is of the essence with
5 respect all provisions of this lease. Time is of the
6 essence within all --- with --- to all provisions in this
7 lease.

8 Now, what's interesting about that is you go and you
9 look in their first cause of action. And again they cite
10 11.1 --- excuse me --- and again you have cited 11.1 and
11 11. --- and 15.16. But the problem is 11.1 has more to
12 it. And the last paragraph of 11.1 it says very clearly,
13 (technical difficulty) landlord. Landlord is 1221 Bower.
14 Prompt written notice of any damage to or destruction of
15 any portion of the lease premises resulting from fire or
16 other casualty. (Technical difficulty) make that same
17 mistake.

18 Now, Mr. Lesemann also told you that my client was
19 aware as of August 17th that they had a leak. But again,
20 my client wasn't aware of damage or repair issues. My
21 client was aware as a board member, and Angela Adleman
22 was working with an upstairs condo unit owner and
23 bringing plumbers out over six times to fix the unit
24 upstairs leak.

25 So when Insurance Office of America had the ceiling

1 tiles fall down in the office, they put the trash can,
2 you saw the picture. That was dated September 22nd of
3 2020. At that point in time, a gentleman named Jason
4 Robinson from Insurance Office of America finally for the
5 first time e-mailed my client and said hey, look at this
6 these pictures, please help, please get involved. First
7 time my client was actually given any written notice.

8 Now, Insurance Office of America says strict
9 compliance, 90 days, that's it. But what's good for the
10 goose has to be good for the gander. So we are going to
11 challenge that notice (inaudible). You'll hear a lot
12 about it. But that's really not the only reason why we
13 care about this lease, because in their own complaint, it
14 cites section 15.16: Time is of the essence with respect
15 to all provisions in this lease.

16 You have to read the very next sentence. And this
17 is why I'm --- I'm --- I'm --- I wish we weren't even
18 here. Because this sentence is clear (inaudible) there's
19 no question as to what it says. It says: Before
20 going --- notwithstanding reading that first sentence,
21 whenever a period of time is herein prescribed for action
22 (unintelligible) by the landlord --- 90 days, landlord
23 shall not be liable or responsible for (technical
24 difficulty) excluded from the computation of any such
25 period of time any delays due to the following: Strikes.

1 No strike. Riots. No riots. Acts of God. (Technical
2 difficulty). Shortages of labor or materials, war. No
3 war. (Unintelligible) loss regulations and restriction.
4 But here's the key phrase: Or any other causes of any
5 kind whatsoever which are beyond reasonable control of
6 the landlord.

7 Now, again, (unintelligible). The timing of the
8 plumbers to get in there by the condo association was
9 difficult. Insurance Office of America did not give the
10 condo association a key to access these five suites. So
11 whenever a plumber needed to come out, Angela Adleman
12 from CAMS on behalf of the condo association had to
13 coordinate with not only the condo unit owner upstairs,
14 but also the Insurance Office of America to get into the
15 downstairs property. Again, they weren't using it, it
16 was vacant. They were all working from home.

17 Further, whenever the plumber would come back and
18 say hey, it's dry, there's no presence of a leak, there
19 were delays also issued in the month of September where
20 Crissy Warner said hey, can we just wait to get the
21 repairs done and have it --- have it done with another
22 contractor and other (unintelligible).

23 When you're talking about a residential condo and
24 they lease that property out to a third party, a
25 subtenant, you have to work to get access to that condo.

1 You got to give them notice, you got to try to get in
2 there so you can get a plumber in there to go and stop
3 the leak. Makes sense, right?

4 One of these times when they were trying to get
5 access from this condo owner, they literally had to call
6 the police because the tenant wasn't willing to give them
7 access to go there and try to repair (inaudible).

8 And then on top of it, you're dealing with a condo
9 association that has a responsibility, not just to my
10 client, but to all the owners. So you have to do an
11 insurance claim, you have to get bids. They have to get
12 competitive bids on work done. And they have to
13 coordinate everything together. And you're going to see
14 that nobody was dropping the ball. Nobody was not taking
15 this seriously. Everybody was trying to work to resolve
16 it. And once my client really understood the nature of
17 actual damage inside Unit 103 on September 22, 2020, he
18 did everything he could to try to (unintelligible) keep
19 that moving.

20 Now, we're going to dissect this lease during this
21 trial. And there are other provisions inside this lease
22 that are problematic. And the reason where there are
23 other provisions in this lease is there's (technical
24 difficulty) cure periods for the landlord. And the
25 landlord should have had additional time, not only

1 through clause 15.16, but also through other --- other
2 sections.

3 There were also requirements of Insurance Office of
4 America to notify my client's bank. My clients never had
5 a --- never had this property without a bank lending
6 money, and they got a mortgage on it. Inside the lease
7 it says, hey, if there's a mortgage on it, tenant, you
8 can't do anything until you notify the bank. They never
9 notified his bank.

10 So when we counter --- so again, I just want to
11 point out (unintelligible) these things are beyond the
12 reasonable control of the landlord. And that is the
13 point of our --- of our defense.

14 But now let's talk about our countersuit because
15 this is where I really want to make sure that everybody
16 understands. On January 1, 2012, defendant failed to pay
17 rent and additional rent which was required under two
18 sections of the lease. They had some other breaches, but
19 they (unintelligible). That is an event of default.

20 And based on this event of default for failure to
21 pay rent from January 1st of 2021, to when the lease
22 could have ended which was March 31, 2025, that is a lot
23 of time. And this was a big property, almost
24 8,000 square feet.

25 So under Section 12.4 and 12.5, my client is

1 entitled to damages. And we have countersued and we're
2 going to be requesting damages from Insurance Office of
3 America.

4 Now, I will tell you when Insurance Office of
5 America left these premises on December 15th of 2020,
6 under a section of the lease they were supposed to leave
7 it broom clean. Now we're challenging that. I'm going
8 to tell you why we're challenging it. There are three
9 (unintelligible) reasons. Number one, there was an
10 office space that was being created up here that they
11 didn't complete construction on.

12 Number two, they left a lot of personal items in 104
13 that their counsel had to (unintelligible) key to go and
14 help get somebody to unlock the door get it out in
15 January 2021.

16 And number three, this lock right here, Insurance
17 Office of America had subleased that unit to a med spa.
18 And so in the termination letter that Mr. Lesemann put
19 out they said hey, we're terminating the lease. We're
20 out. By the way, there's a subtenant in there, good
21 luck.

22 So imagine moving out of your rental house for
23 whatever reason and leaving your kid (unintelligible).
24 You know, good luck. (Unintelligible) whatever.

25 So it's not broom swept when you leave all these

1 things behind.

2 Now, you're here today to --- to help us determine
3 how to resolve this case. Now, this thing is three-years
4 old. It's gone on way too long. We're tired. I know
5 you guys are new to it, but I promise you we need you
6 desperately. If we could resolve this ourselves we would
7 have. We know that you guys will understand what we're
8 going to provide you. I think the judge gave you very
9 good and very clear instructions.

10 You'll get a lot of testimony. I've got counsel
11 here that I admire and think very highly of. They're
12 going to do a good job, we're going to do a good job.
13 And within a day when Mr. Lesemann told you about a
14 verdict speak the truth, the truth is this: The lease
15 exists, the entire lease exists. Nobody's challenging
16 the validity or the enforceability of this lease. And so
17 when you try to stop reading a lease at a section, when
18 you try to ignore the rest of the lease, (unintelligible)
19 property (unintelligible).

20 And so when you're looking at this and you're
21 looking at the totality of all the evidence, I believe
22 that you're going to find that there's no way Insurance
23 Office of America validly terminated this lease. And I
24 think you're going to find that there's no other result
25 of the fact that they are in breach of this lease and

1 they have created significant damages for my client.

2 And I appreciate you being here. Thank you so much
3 again. And we'll --- we'll be --- we'll be --- we'll be
4 as quick as we can. So (technical difficulty). Thank
5 you.

6 THE COURT: Okay. All right Mr. Cobb.

7 Madam Clerk at this --- thank you. Madam Clerk at
8 this time, will you please swear the jury. We --- we did
9 not swear the jury in. And it was my mistake. Thank
10 you.

11 (Jury sworn)

12 THE COURT: Thank you. Very good. Thank you, Madam
13 Clerk. All right. Please call your first witness.

14 MR. LESEMANN: Thank you, Your Honor. The plaintiff
15 would call Mr. Rob Motley.

16 (Witness sworn)

17 ROB MOTLEY, HAVING BEEN DULY SWORN, TESTIFIED AS
18 FOLLOWS.

19 CLERK: Please state your name spelling your last
20 name for the record.

21 THE WITNESS: Rob Motley, M-O-T-L-E-Y.

22 THE COURT: Mr. Motley excuse me (unintelligible).
23 The microphones are not projecting. (Unintelligible).
24 Thank you.

25 DIRECT EXAMINATION

1 BY MR. LESEMANN:

2 Q. Thank you. Could you just tell the jury a little bit
3 about yourself? Where do you work? What's your position?

4 A. Yeah, so I'm with Insurance Office of America
5 (unintelligible). And my position currently is the
6 president. We are as Mr. Lesemann mentioned, an
7 insurance agency, we're not an insurance company. We
8 work with our clients for their personal insurance, or
9 business insurance, (inaudible) secure the best
10 protection in the market working with different insurance
11 companies.

12 Q. Where do you live?

13 A. I'm here in Lexington. I moved here as a child and
14 the last 48 years this has been home.

15 Q. How long have you been with IOA?

16 A. Since December 1st of 2003.

17 Q. What sort of clients does IOA represent?

18 A. We --- we represent really the gamut, both
19 personal --- personal lines, personal insurance,
20 homeowners, commercial --- I mean, you know, auto
21 coverage, all the way to large businesses and everywhere
22 in between. We help businesses secure their insurance
23 for both employee benefits as well as the property and
24 casualty (unintelligible), commercial vehicles, et
25 cetera.

1 Q. So do you --- does IOA maintain an office in order to
2 facilitate that business?

3 A. We do. We do.

4 Q. About how many employees does --- does IOA Columbia
5 office have?

6 A. We're probably in the 25-employee range.

7 Q. When --- when you first joined, IOA was in a prior office
8 location before you were at the 1221 Bower?

9 A. That is correct.

10 Q. And where was that office located?

11 A. We were located here in Lexington in the --- on ---
12 right off Hope Ferry Road and Sunset Boulevard.

13 Q. And then about what time did you move to --- to Bower
14 Parkway?

15 A. December --- I mean, January 1st of 2012.

16 Q. It was mentioned a little bit in opening statement, but
17 if you could take a moment and explain IOA versus the original
18 landlord IOA Properties III and how that came about. And ---
19 and how did that --- that entity, IOA Properties III, how did
20 it come to be that they became the owner of that building?

21 A. Yeah. So IOA is a subsidiary of IOA group. IOA
22 group owns several different subsidiaries, the insurance
23 agency being one. We own a payroll company or, you know,
24 IOA group owns a payroll company. IOA group owns a
25 sports merchandising company. IOA group owns a Web

1 design company. And IOA group has Properties III as a
2 entity that hold --- held this property.

3 Q. So that time frame 2012, is that a few years after the
4 real estate recession and when there was a lot of economic
5 upheaval?

6 A. It --- it was.

7 Q. And during that time frame did --- did IOA make the
8 decision to purchase some various --- various properties?

9 A. We did. Not only in the Columbia area, but in other
10 markets. Had the opportunity with --- with what was
11 going on in the --- in the marketplace, property values
12 were lower and so we thought it was a wise investment to
13 do so.

14 Q. So it has been mentioned eventually that the defendant
15 comes to own the units. How did that come to be where the
16 ownership changed?

17 A. So sometime before the sale took place, I had a real
18 estate broker approach me, ask me if we would be
19 interested in selling the facility. I said --- I
20 responded, you know, certainly we would be open to
21 anything. Price would have to be right. The real estate
22 broker brought us back a offer. I took it to the IOA
23 group board, presented it to them. They made the
24 decision to enter into negotiations to ultimately sell
25 the --- sell the building.

1 Q. And when that sale happened it wasn't 1221 Bower, but was
2 it Mr. Leone who was actually the original purchase ---
3 (inaudible)?

4 A. (Inaudible).

5 Q. And do you understand the nature of that --- was
6 there --- do you know what an as-is sale is?

7 A. Yeah. So the property was sold as is. Yes. Yeah.
8 Sold as --- as is.

9 Q. So how is that different from what a normal sale
10 (inaudible)?

11 A. So as is, the --- the purchaser takes the property
12 as is. He has the opportunity to do whatever type of
13 inspections, ask for any type of information, check into
14 the facility to make sure that it does meet their desire.
15 You know, to purchase it.

16 Q. So I'm going to go back to 2012 and January 1, 2012, when
17 you mentioned that IOA, again the tenant, right? Overtook the
18 space. Where --- was the --- was the space when --- when you
19 moved in, there was --- there was carpet?

20 A. Yes, sir.

21 Q. Okay. And there were ceiling tiles?

22 A. Yes.

23 Q. And there were sheetrock walls?

24 A. Yes, sir.

25 Q. Okay. Was there any mold in --- in the sheetrock walls?

1 A. No, sir.

2 Q. Okay. Was there any sewage leaking into the sheetrock
3 walls?

4 A. No, sir.

5 Q. So as far as the condition of the premises, none of
6 those --- it --- so --- so there was --- there was no active
7 mold or --- or sewage leaks at the time (unintelligible)
8 condition of the premises?

9 MR. COBB: Objection, Your Honor. Calls for a ---
10 calls for --- it's speculative in nature. He can't say
11 in terms of whether or not there was mold in the common
12 areas at that time.

13 MR. LESEMANN: Your Honor, the witness has testified
14 he was in the office. He was the (inaudible) manager of
15 that office. So I think can he testify as to whether
16 there was mold and sewage leaking in there.

17 MR. COBB: Your Honor, unless he took the ceiling
18 tiles down (unintelligible) common areas he cannot
19 speculate for himself.

20 THE COURT: All right.

21 MR. COBB: Objection.

22 THE COURT: All right. I will sustain the objection
23 and ask you to rephrase the question.

24 BY MR. LESEMANN:

25 Q. Are you aware --- at the time --- were you --- were you

1 in the office every day in 2000 --- January 2012 time frame
2 on --- on a regular basis?

3 A. Regular basis, yes.

4 Q. Are you aware of any sewage leaks that were occurring in
5 January 2012?

6 A. No, sir.

7 Q. Are you aware of any mold infestations that were
8 happening as of January 2012?

9 A. No, sir.

10 Q. Was the office built out in a usable condition?

11 A. Yes, sir.

12 Q. All right. And, you know, is there a written lease
13 that's in place for the --- the premises that we talked about?

14 A. Yes, sir.

15 Q. I'll show you what's been premarked as Exhibit Number 1.
16 Now, if you could look through that behind that tab.

17 All right. Rob, would you take a moment just to look
18 through that lease and then there's also the amendments behind
19 it. And would you just let us know whether that is the --- a
20 true and accurate copy of the lease for the lease premises as
21 well as the amendments?

22 A. The exhibits are the amendments; is that what ---

23 Q. Yeah. Well, yeah. They --- they follow that. Yes.

24 A. Yes, sir.

25 Q. Is the lease to the premises a document that IOA would

1 have maintained in its files in the course of its business?

2 A. Yes, sir.

3 MR. LESEMANN: Your Honor, at this time we would
4 move for admission of Exhibit 1 which is the lease
5 agreement and the five amendments to those (inaudible).

6 THE COURT: (Unintelligible).

7 MR. COBB: No objection, Your Honor.

8 (Plaintiff's Exhibit 1 marked and entered)

9 BY MR. LESEMANN:

10 Q. Rob, could you talk a little bit about the issues that
11 began to arise in 2020 as it relates to the condition of the
12 premises and the issues that IOA was having?

13 A. Yeah. So sometime the week of August 14th, I got a
14 phone call from Parker McMillan who is a producer. And
15 he had come into the office, noticed that there was a
16 leak, reached out to me. I contacted Scott Berry, asked
17 him to check out what the leak was --- or to find out
18 what's going on.

19 And Scott went out, which was where he identified
20 that there was a leak and served notice.

21 Q. Okay. And so at the time it was suggested that office
22 was completely vacant. Again, was it around March, I believe,
23 of 2020, when the global pandemic COVID was declared, to your
24 recollection?

25 A. Yes. Yeah. So shortly after there. Sometime

1 it --- it feel --- seems like the first of April.
2 Sometime in April we went fully remote. Continued just
3 to listen to the Federal and State directives as to
4 determine what we could and couldn't do, should and
5 shouldn't do.

6 Seems like (unintelligible) exact dates, seems like
7 sometime in June, we were able to allow 25 percent of our
8 employees to come back into the office. And sometime
9 around July we were able to up that to 50 percent of the
10 employees in the office. Producers had the ability ---
11 in addition to the employees coming in, the producers had
12 the ability to come into office as often as they want.
13 So we were --- we were --- we were back to 50 percent at
14 the time of the --- time of the damage.

15 Q. So did IOA --- setting aside that sewer intrusion and the
16 mold, did you --- did you want to be in the office to do your
17 work?

18 A. Yes, absolutely. We need to be in the office to do
19 work.

20 Q. Were you --- was IOA trying to comply with Federal and
21 State guidelines, and directives, and how to maintain a safe
22 workplace as far as COVID was concerned?

23 A. We were.

24 Q. Do you have employees that have sensitivities to
25 respiratory issues and other sorts of issues that you need to

1 look out for?

2 A. We do.

3 Q. Now, in --- at the time was there a sublease in place
4 that had IOA subleased a portion of the premises that it had
5 leased?

6 A. That is correct.

7 Q. Okay. And was that to Ms. Kim Chapman?

8 A. I believe so.

9 Q. Okay. And just to address that issue real quickly, what
10 do you --- what kind of business does Ms. Chapman run?

11 A. If my recollection is correct, it's is day spa or
12 something of that nature.

13 Q. Do you acknowledge that she invested some money to make
14 that an appropriate space for her day spa?

15 A. I believe she did.

16 Q. When --- and I'm moving forward a little bit, just to ---
17 just to talk about this real quick, when the decision was made
18 for IOA to --- to --- to --- that you were going to leave
19 because the landlord had not restored the property to its
20 original condition, did --- were --- were --- did you have
21 some concern about Ms. Chapman and her business?

22 A. So yeah, we obviously did. There was discussions
23 around, that is correct.

24 Q. So was the decision to try to --- when --- when the
25 decision was made with that --- that tenant did not leave. In

1 your mind, were you trying to protect her business because her
2 particular space had not been where the mold and the sewage
3 had --- had accumulated?

4 A. Right. Her space was not damaged to my knowledge.

5 Q. So did you have occasion from time to time to go and to
6 look at the area of the office where these problems were
7 happening?

8 A. I did from time to time.

9 Q. Okay. Do you recall the trash can that was placed in the
10 office?

11 A. I recall this image does remind me of going into
12 there --- to the office, correct.

13 Q. So if you could just explain how the issue progressed
14 from the spot that is first seen in the picture on August 14th
15 to how things continued on, to your knowledge?

16 A. So to my knowledge --- I do travel a significant
17 amount for our company. Even when --- when I'm in the
18 office I'm probably in --- in --- in the office
19 25 percent of the time. So I rely tremendously on our
20 team, Crissy and Scott. As I was traveling they would
21 make me aware that the damage was pretty significant.

22 In fact the --- the call that I got that was most
23 alarming is that we've got black mold and we've got
24 sewage everywhere, it's in the walls, smells like, you
25 know, bleep. And --- yeah. I mean just a --- just a

1 real nasty situation.

2 Q. Was there another incident that began in December of 2019
3 that also was causing some concern?

4 A. It was a similar situation. There was sewage in a
5 different part of the building that caused some of
6 the --- some --- same --- same issues as far as damage.

7 Q. And then when --- how --- how was that issue resolved?

8 A. I would --- and I --- I was traveling a bunch. I'd
9 have to defer that to Crissy or somebody else that was
10 dealing with it every day.

11 Q. Sure. So have you ever met the --- the --- the Mr. Leone
12 who is seated here in the courtroom?

13 A. I did. I can't recall when it was --- it was
14 after --- sometime after --- shortly after he had
15 acquired the building. I believe he was traveling to the
16 upstate and stopped in to introduce himself.

17 Q. Did he contact you to discuss the issues about the sewage
18 and the mold and try to do what he could as the landlord to
19 try to alleviate the situation for you; did you hear from him
20 at all?

21 A. I did not.

22 Q. There's mention about Angela Adleman and --- and --- and
23 her --- how she plays into all this. You --- do you know who
24 Ms. Adleman is?

25 A. Yes, I do.

1 Q. Okay. And how did --- did IOA consider to be (technical
2 difficulty) issue (unintelligible) routine (unintelligible)
3 typically would have been Mr. Leone, or was it Ms. Adleman?

4 A. Ms. Adleman.

5 Q. Was that consistently the case?

6 A. Consistent.

7 Q. So as this issue arises in August, does it get worse,
8 or --- or better with time?

9 A. Definitely gets worse.

10 Q. And did you mention this is the second incidence of a ---
11 of a --- of a sewer leak that IOA had dealt with?

12 A. Yes.

13 Q. And again, we'll hear from Crissy today about --- about
14 her understanding of --- of what all happened. But to --- to
15 your knowledge, how did this go from --- from there? From
16 August 14th, walk us forward a little bit of --- of how this
17 issue was handled or was not handled. And how did this lead
18 into IOA making a decision to exercise its rights?

19 A. Yeah, so there was certainly delays in getting
20 anything done. My team Crissy and Scott were
21 consistently concerned about the lack of urgency, the
22 lack of responsiveness. We were certainly concerned for
23 the employees in the office. We --- we asked them to go
24 back and work from home. This office space is a pretty
25 big office space and the images showed different condos,

1 but it's a wide-open office space.

2 And so our --- our concern there was that, you know,
3 not --- not sure how it would affect others in the
4 office. Was it getting through the HVA system? Was it
5 spread through the office? So we made the decision to
6 have everybody return to --- return to home work.

7 Over the course of the time period Crissy and Scott
8 would surely voice their frustrations, their concerns,
9 their --- their concerns about the lack of concern, about
10 the --- is this --- is this ever going to end? And so at
11 some point we --- we got together and reached out to see
12 what our options were in our lease --- reached out to our
13 internal counsel to figure out what we could do because
14 of the situation that we were being put in. And from
15 there we made ultimately the decision based off of
16 the --- the lease agreement and the remedy that we had
17 in, we made a decision to terminate.

18 Q. Okay. If you could go in the lease document. Rob do you
19 see the numbers at the bottom that say plaintiff 00-something?

20 A. Yes, sir.

21 Q. If you could go to plaintiff 0013.

22 A. Okay.

23 Q. Okay. Have you reviewed that provision before?

24 A. Yes, sir.

25 Q. Which provision are we looking at here, this --- what

1 section is this that --- that you're --- that I've drawn your
2 attention to?

3 A. Section 11.1.

4 Q. And what's your understanding of how that relates to the
5 situation that we're talking about (inaudible).

6 A. So we've had a --- we've had a casualty. We've had
7 damage to our --- our facility --- to our property.

8 The landlord has obligations to repair it and to
9 restore it to its original condition, same condition.
10 And the landlord has 90 days in order to perform those
11 duties.

12 Q. As you're looking at that provision, you know, Rob, were
13 you aware that there was an association involved? This was
14 a --- a --- a condo regime as the word is used?

15 A. Yes, sir.

16 Q. Okay. And so is the reference there to the association,
17 or to the landlord in terms of --- of the --- the party that
18 has to go and --- and to make this --- make these repairs?

19 A. Landlord.

20 Q. And at the time, who was the landlord?

21 A. 1221 or Mr. Leone.

22 Q. Yeah, the defendant?

23 A. The defendant. Yes, sir.

24 Q. Okay. And so are there --- as far as the 90 days, what
25 was the date of the damage?

1 A. The date of ---
2 Q. That text message.
3 A. Yeah. The text message, August 14th.
4 Q. August 14th?
5 A. Correct.
6 Q. So if using a calendar, if you count forward 90 days and
7 that ends up being November 12th ---
8 A. Correct.
9 Q. --- 2020, do you believe the 90-day period was over as of
10 November 12, 2020?
11 A. I do.
12 Q. As you look at the language here, does --- is --- is
13 there any clause that says that in 90 days (background noise)
14 landlord fails to be diligent or to act with urgency?
15 A. I do not.
16 Q. And so as --- on --- on review of the lease, what did you
17 understand that IOA's right was --- do you think that landlord
18 failed at its expense to restore the storefront and --- and
19 the --- these premises to the same condition as it existed
20 when you originally took possession?
21 A. Yeah, our sole remedy was to terminate the lease.
22 Q. So as of November 12, 2020, had the lease premise been
23 restored to the condition as it was in January 2012 when you
24 took it over?
25 A. (Inaudible).

1 Q. Was the sheetrock work finished?

2 A. It was not.

3 Q. Were there --- and again, Crissy can speak to this in
4 some detail, but are you aware of additional leaks occurring
5 during the time frame?

6 A. I do recall her stating that there were additional
7 leaks.

8 Q. Had the --- had the office been repainted after the
9 repair?

10 A. It was not.

11 Q. Had the flooring been replaced after the repair?

12 A. No.

13 Q. Had the ceiling been replaced after the ---

14 (Simultaneous speaking)

15 A. It did not.

16 Q. So for these reasons, this is why IOA --- do --- do those
17 relate to IOA's belief that the premises were not restored to
18 their original condition?

19 A. That is correct.

20 Q. And so does the fact that the issue had happened twice
21 during 2020, was that of concern to you?

22 A. It was certainly a concern. A concern about what
23 else is out there, what --- what else is going to happen
24 as this building ages or --- that we are not aware of
25 yet.

1 Q. Is this incident in August of 2020, is it of a severity
2 that's beyond what you had seen previously?

3 A. Yes, sir.

4 Q. Does it cause you concern in terms of making the decision
5 whether to exercise the remedy and were you involved in that
6 decision?

7 A. Repeat the question.

8 Q. Were you involved in the decision to exercise the remedy
9 to terminate the lease?

10 A. I was.

11 Q. And does the interaction or lack of interaction with the
12 landlord or the landlord's response, did that factor in?

13 A. Absolutely. Absolutely.

14 Q. Is this a building that appeared to have plumbing issues
15 to you?

16 A. Apparently so.

17 Q. Were --- were --- were you concerned that those would
18 continue to get worse?

19 A. Yes.

20 Q. And did you feel like you had an untenable situation in
21 terms of the amount of time and the approach that the landlord
22 was taking addressing these sort of issues?

23 A. Yes. I mean we talked about that quite a bit, you
24 know, what if this happens again? Or it's my team and
25 they're going to spend the amount of time that they're

1 having to spend to do the --- quite frankly, the work of
2 the landlord. And that's --- and I just --- I couldn't
3 be in a position that we were going to continue to
4 have --- we were going to have issues if that's the way
5 that we were going to (background noise) the landlord was
6 concerned. Wasn't going to put my team back through
7 that.

8 Q. Okay. Just a quick moment. All right. So could you go
9 to the --- the page of the lease that marked Plaintiff 18,
10 Section 12.7.

11 A. Okay.

12 Q. What does that section say?

13 A. Would you like me to read it?

14 Q. Well, just what --- what's the heading of it?

15 A. Default by landlord.

16 Q. Okay. And what are the first few words of that section?

17 A. Unless otherwise provided herein.

18 Q. Okay. Do you have an understanding of what --- what's
19 IOA's understanding when there's a section that says unless
20 otherwise provided herein, what is your understanding of ---
21 of the significance of that?

22 A. Not sure if I --- sure if I understand your
23 question.

24 Q. Okay. I --- do you believe that the section 11.1 that we
25 discussed, is that the section that specifically relates to

1 the issue that we've discussed?

2 A. Yes.

3 Q. Okay. Do you believe that the default section speaks
4 about things generally? Do you believe that that section has
5 relevancy?

6 A. I --- I don't believe it has relevancy.

7 Q. And does the --- does the section also begin unless
8 otherwise provided herein?

9 A. (Inaudible).

10 Q. Okay. And so herein meaning within the lease?

11 A. Yes.

12 Q. Okay. So then with regards to damage and the landlord's
13 duty to complete it within 90 days, is there a provision of
14 the lease that in IOA's mind otherwise provides?

15 A. Yes.

16 Q. With regard to --- are you familiar --- here in the
17 insurance business, with like a force majeure clause?

18 A. (Inaudible).

19 Q. Okay. And so in terms of the scope of the repair, if
20 it --- if it had been --- it's one of IOA's complaints the
21 scope of repair was not diligently pursued?

22 A. Correct.

23 Q. And is one of IOA's concerns that due to that fact issues
24 with the sewage and the mold were allowed to fester?

25 A. Yes.

1 Q. And when you look at that, you saw that proof of loss
2 form that --- and had about a \$17,000 scope of work. Is it
3 IOA's belief that that work could have easily within completed
4 within 90 days?

5 A. Yes.

6 Q. And are you aware of any strikes, or earthquakes, or acts
7 of God, or anything that --- that in IOA's mind would
8 alleviate the landlord's responsibility to stop that leak,
9 address the mold, fix the sheetrock, repaint, put in the
10 carpet, and put in the ceiling?

11 A. There's nothing --- nothing.

12 Q. If you can turn to Exhibit 10 --- I'm sorry, tab 10.

13 A. Oh, tab 10. Sorry.

14 Q. Do you recall that a notification was issued to the
15 landlord on December 1, 2020?

16 A. Yes.

17 Q. And is this a true and accurate copy of the notice that
18 was issued?

19 A. Yes, sir.

20 Q. Is this a document that my law firm sent at IOA's
21 request?

22 A. (Inaudible).

23 Q. And this is a document that IOA would keep as part of its
24 business records relating to this lease and this office?

25 A. Yes, sir.

1 MR. LESEMANN: Your Honor, I would ask for admission
2 of Plaintiff's Exhibit 10, which is the notice of
3 termination of the lease.

4 MR. COBB: No objection.

5 (Plaintiff's Exhibit 10 marked and entered)

6 BY MR. LESEMANN:

7 Q. Did IOA exercise its right to terminate the lease?

8 A. We did.

9 Q. Did IOA believe it was justified in doing so?

10 A. We were.

11 Q. And why do you believe so?

12 A. The repairs were not completed and restored back to
13 the original condition in terms of the agreement.

14 Q. Are you asking the jury to confirm that IOA was within
15 its right in exercising its sole remedy?

16 A. I am.

17 Q. And would you ask that the jury also make an award of
18 equitable rent reimbursement as is provided under Section 11.1
19 during that period of damage?

20 A. I would.

21 MR. LESEMANN: Thank you. Nothing further, Your
22 Honor.

23 THE COURT: Thank you. Any cross-examination?

24 MR. COBB: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. COBB:

2 Q. Mr. Motley, how are you doing today, sir?

3 A. I'm good.

4 Q. Good to see you again, sir. Mr. Motley, you mentioned
5 earlier that on August 14th Insurance Office of America served
6 notice. Isn't it true that nobody from your office had
7 actually given prompt written notice to the landlord until
8 September 22, 2020?

9 A. We provided text communication on August 14th.

10 Q. Okay. Did you provide that text communication
11 (inaudible)?

12 A. That was provided from Scott Berry to Angela
13 Adleman.

14 Q. And Angela Adleman, just for clarification, does she work
15 for 1221 Bower?

16 A. She was --- I mean, she was our contact and the
17 agent for 1221 Bower.

18 Q. Okay. She was?

19 A. That's --- that's the way --- that's our
20 understanding.

21 Q. So are you not aware in March of 2020 an e-mail by AJ
22 Leone to Crissy Warner that he was the contact for 1221 Bower?

23 A. I'm not aware.

24 Q. We'll get to that when we question Ms. Warner.

25 So in the event that nobody from 1221 Bower informed your

1 team to notify Adleman, would you believe prompt written
2 notice was given to AJ Leone before September 22, 2020?

3 A. I believe prompt notice was given on August 14th.

4 Q. Okay. Written notice prompt was given to Angela Adleman,
5 correct?

6 A. Correct.

7 Q. And again, do you have any evidence that states that AJ
8 Leone gave any instruction to anyone on your team to contact
9 Angela Adleman instead of him?

10 A. Would you repeat the question?

11 Q. Sure. Do you have any evidence or any knowledge
12 firsthand of anybody on your team hearing direct from AJ Leone
13 hey, don't worry about sending notice to me, don't send me any
14 e-mail, just send it so Angela Adleman?

15 A. I don't have direct notice of it.

16 Q. So it's hearsay. Now, you said that your team was not in
17 the office as a result of the water damage that was reported
18 on August 14th, correct?

19 A. As a --- as a --- I don't remember the day we
20 actually asked them to move out. I think it's once we
21 realized how bad the damage was.

22 Q. Are you familiar with an issue with the badge scanner?

23 A. I'm familiar with an issue with the badge scanner.

24 Q. And are you familiar that Ms. Warner told the team, hey,
25 don't come in till we get this badge scanner issue fixed?

1 A. I am aware of that. I couldn't tell you the time.

2 MR. LESEMANN: Your Honor --- well, thank you. I
3 was --- it's a out-of-court statement that has not been
4 presented in evidence yet, so I would object on that on
5 that basis unless there's some presentation of what
6 that --- that statement was.

7 MR. COBB: I can --- I can bring up the exhibit
8 (unintelligible) e-mail. I can do that.

9 THE COURT: All right. I will allow. I will allow
10 you to bring the exhibit up.

11 MR. COBB: While I pull --- I'll pull that exhibit,
12 I'm going to keep going. Just in the interest of ---

13 BY MR. COBB:

14 Q. Now, you said that you need to be in the office to work
15 (unintelligible) (background noise) answer (unintelligible)
16 question about (unintelligible) in the office, correct?

17 A. Yeah, I mean we were --- we were better served when
18 we were in the office.

19 Q. Okay. So from August 14th of 2020 until when --- how
20 long were --- what --- was the Columbia office in
21 nonexistence? How long did it take you to (unintelligible)?

22 MR. LESEMANN: I'll just object. It
23 mischaracterizes the testimony.

24 MR. COBB: Your Honor, it's meant to show that in
25 the event that they need to be in the office, they waited

1 a long time to get in the office (unintelligible) ---

2 (Simultaneous speaking)

3 MR. COBB: --- clearly they didn't need to be in the
4 office.

5 MR. LESEMANN: It was --- Your Honor, you've already
6 ruled on that point for one. And secondly, there was no
7 testimony that August 14th was the date when everybody
8 left. August 14th is the date the damage was first
9 observed.

10 THE COURT: All right. I'll sustain the objection.

11 BY MR. COBB:

12 Q. So ---

13 THE COURT: Did you hear me Mr. ---

14 (Simultaneous speaking)

15 THE COURT: You were talking when I made my ruling.
16 That's okay. I --- I sustained that objection. Just
17 (unintelligible).

18 MR. COBB: (Unintelligible).

19 BY MR. COBB:

20 Q. You mentioned that when your internal team was talking
21 about terminating the lease, that you had discussions around
22 issues about the sublease tenant in Unit 105. What were those
23 discussions?

24 A. I don't recall the specifics. I just know that ---
25 that there was concern about what that was --- how that

1 was going to leave them. But I couldn't get into ---
2 couldn't tell you the details of that.

3 Q. Okay. But isn't it true that Insurance Office of America
4 was under contract with Kim Chapman for her med spa, not 1221
5 Bower?

6 A. The --- repeat the question ---

7 Q. Sure.

8 A. --- I mean, clarify.

9 Q. Yeah, 1221 Bower didn't lease that property to Kim
10 Chapman --- Chapman that was done by Insurance Office of
11 America, correct?

12 A. That is correct.

13 Q. So when you left, y'all just kind of left Ms. Chapman
14 hopeful that it would work out with 1221 Bower when you
15 terminated the lease?

16 A. I --- I was not involved in discussions with her. I
17 don't know what was worked out for her.

18 Q. Now, you mentioned sewage and black mold in terms of the
19 cavity above, I believe (unintelligible) ceiling tiles,
20 correct?

21 A. I --- I wouldn't --- I can't tell you that that's
22 the only place it was, but I mentioned the sewage and
23 black mold.

24 Q. Okay. And you saw the pictures, they're kind of
25 grotesque mold, right?

1 A. Yes, sir.

2 Q. And so the mold remediation initial report was done. I
3 believe investigation was done on September 25, 2020, so
4 roughly 40 days after August 14th; is that right? 41 days?

5 A. I don't have those records in front of me.

6 Q. Sure. Fair enough. On September 30th was the
7 (unintelligible) report from that investigation; are you
8 familiar with that report?

9 A. I'm familiar with the report. I'm not familiar
10 (inaudible).

11 Q. So do you think that mass amount of mold could have grown
12 from August 14th to September 25th?

13 MR. LESEMANN: Objection.

14 BY MR. COBB:

15 Q. Now, it is true that this leak (unintelligible) office
16 (unintelligible) happened before when Insurance Office of
17 America had leased from its affiliate IOA Properties III LLC,
18 correct?

19 A. I couldn't tell you whether it was (unintelligible)
20 his property or not.

21 Q. But would you agree that the residential condo unit where
22 the leak came from was not owned by 1221 Bower?

23 A. I would agree.

24 Q. All right. And you talked earlier about the lease, did
25 you ever draft the lease?

1 A. Like Rob Motley.

2 Q. Yeah, the --- the lease and its amendments. It's
3 Plaintiff's Exhibit 1 that's in front of you in the binder.
4 Did you ever have a hand in writing that lease?

5 A. Insurance --- I mean the --- the IOA Properties, I
6 believe is the one that wrote that lease.

7 Q. Okay. Okay. All right.

8 MR. COBB: May I approach the witness, Your Honor?

9 THE COURT: Yes.

10 (Attorneys conferring)

11 BY MR. COBB:

12 Q. Mr. Motley, if you would go to at the very bottom, it
13 says plaintiff 0290; do you see that?

14 A. 0290?

15 Q. Yes, sir.

16 A. Okay. Got it.

17 Q. Okay. All right. And will you do me a favor? At
18 the --- at the from, in the middle of this e-mail, who --- who
19 wrote that e-mail?

20 A. Crissy Warner.

21 Q. And are you cc'd on this e-mail?

22 A. I am.

23 Q. And that date is --- what's --- what's that date?

24 A. September 24th.

25 Q. Okay. And will you take a minute just to remember this

1 e-mail (unintelligible) ask you a couple questions. Just let
2 me know when you're ready, sir.

3 A. Okay.

4 Q. Okay. All right. If you'll go to the next page
5 (background noise) 0291.

6 A. Okay.

7 MR. COBB: Permission to approach, Your Honor?

8 THE COURT: Yes.

9 BY MR. COBB:

10 Q. Would you do me a favor --- would you --- this again is
11 the e-mail from Crissy Warner that you're copied on, correct?
12 Will you read that paragraph right there?

13 A. For confirmation, the Columbia office is closed.
14 Producers come and go as needed, but the combination of
15 code and security issues forces us to keep the closed to
16 our service (unintelligible).

17 Q. Okay. All right. So again, there were more reasons
18 going on than just the water leak and the issues, correct?
19 For you all to not be in the office?

20 A. That is correct.

21 MR. COBB: Your Honor, I'd like to admit this as
22 Defendant's Exhibit 17.

23 THE COURT: Any objection to Defendant's 17?

24 MR. LESEMANN: No, Your Honor.

25 THE COURT: Okay. So moved.

1 (Defendant's Exhibit 17 marked and entered)

2 BY MR. COBB:

3 Q. And we'll come back to that e-mail in a little bit, but
4 let --- let's go back to the lease. Let's just kind of
5 (unintelligible). So on this --- on this lease --- let's
6 start with the top. Okay. Do you agree this is the lease in
7 front of you for (unintelligible)?

8 A. Yes.

9 Q. So we're not challenging its enforceability, validity, or
10 anything else, correct?

11 A. Correct.

12 Q. And isn't it true that 1221 Bower never did anything with
13 this lease that's --- accept the assignment of the lease at
14 the time of the purchase?

15 A. To my knowledge, correct.

16 Q. Now, there's something that came up earlier and I do want
17 to correct something. In the original purchase September of
18 2019, contract initially was in AJ Leone's personal name; does
19 that --- does that ring a bell?

20 A. I don't recall.

21 Q. Okay. And then he and another entity came in on
22 (unintelligible) 31 and then they converted the name to 1221
23 Bower?

24 A. That's my understanding.

25 Q. But in terms of the landlord, do you agree that 1221

1 Bower was the landlord for all (unintelligible) purposes at
2 the time since the purchase in 2019?

3 A. I don't know what time --- I don't know what time
4 that changed.

5 Q. Okay. It --- it was --- it was that same time ---

6 A. Okay.

7 Q. I just want to make sure we're not (unintelligible)?

8 A. Okay. Yeah.

9 Q. All right. So let's --- let's look at this lease in a
10 little detail. All right. So landlord is identified 1.10
11 (inaudible) definition. And in this case the landlord
12 (unintelligible) (background noise) (inaudible) (background
13 noise).

14 (Discussion regarding feedback from microphone)

15 THE COURT: Ladies and gentlemen of the jury, if you
16 wish to stand up, stretch a bit, let's go ahead and do
17 so.

18 (Off the record)

19 THE COURT: Thank you, sir. Continue.

20 BY MR. COBB:

21 Q. Okay. So for purposes of this lease, the landlord and
22 the landlord's address is strictly important for notice
23 provisions under this lease; do you agree with that?

24 A. I would agree.

25 Q. (Inaudible) really --- really (unintelligible). All

1 right. Under Section 3.2, Insurance Office of America is
2 required to pay rent, correct? (Unintelligible).

3 A. Yes. Thank you. Yes.

4 Q. All right. And under 3.4 Insurance Office of America's
5 responsible for paying other expenses such as association
6 dues, expenses, utility bills, property taxes, things like
7 that correct?

8 A. Correct.

9 Q. All right. Just related to those five units, correct?

10 A. I believe that would be correct.

11 Q. Okay. The lease ultimately only covers those five units?

12 A. Okay.

13 Q. Do you agree?

14 A. Uh-huh. Yeah, I believe that's what it covers.

15 Q. Okay. Let's look at (unintelligible) (technical
16 difficulty) landlord which shall not (unintelligible), alter
17 renovate, or improve the interior of the lease premises
18 provided the same be performed in a good and (unintelligible)
19 manner in accordance with (unintelligible) practice
20 (unintelligible) value of the building. Any work done by the
21 tenant under permissions to the section shall not interfere
22 with the use by other tenants of their premises
23 (unintelligible)?

24 A. (Inaudible).

25 Q. So let me ask you a question, before IOA --- Insurance

1 Office of America terminated the lease were you doing work in
2 Unit 101 to build out an office?

3 A. I believe we were --- yes, closing in --- closing in
4 a wall to build an office.

5 Q. Okay. So it --- was it a closet you were closing off or
6 did you just have like an area that you wanted to make into an
7 office?

8 A. I recall it was area that a cubicle was in ---

9 Q. (Unintelligible).

10 A. --- so we just put a --- putting up a wall with a
11 door.

12 Q. Okay. So just to --- just to make it more private?

13 A. Yeah, nothing --- nothing structural, just ---

14 Q. Got it. Did you get permission from 1221 Bower to do
15 that?

16 A. I don't recall if --- I wasn't involved in that, so
17 I don't recall.

18 Q. Who --- who would know the answer to that question?

19 A. That would either be Crissy --- yeah, probably be
20 Crissy.

21 Q. All right. Was that work completed before December 15,
22 2020, when Insurance Office of America left?

23 A. I do not believe we completed the work.

24 Q. Now, under section 9.4, can you read that sentence ---
25 the highlighted, sir?

1 A. The lease premises and area adjacent to the lease
2 premises in the building shall be left in broom clean
3 condition.

4 Q. Okay. All right. So are you familiar that personal
5 property was left behind in unit (unintelligible)?

6 A. I was not aware of that.

7 Q. Who would be aware of that?

8 A. Probably Crissy.

9 Q. Crissy. She would have contacted (unintelligible)?

10 A. I ---

11 Q. --- (unintelligible)?

12 A. (Inaudible).

13 Q. Now, Unit 105, again, there's no controversy here. Kim
14 Chapman was there with all her stuff, she was left behind,
15 correct?

16 A. To my knowledge, correct.

17 Q. Do you believe that Insurance Office of America left the
18 property broom swept?

19 A. I do. That's --- that is what was related to me
20 from my team.

21 Q. So did you ever do a personal inspection?

22 A. I was traveling at the time.

23 Q. Okay. Dealing with the subtenant left, I mean, how do
24 you broom sweep a tenant out --- a subtenant?

25 A. Yeah.

1 Q. Do you believe leaving a subtenant behind is the
2 equivalent of broom swept?

3 A. I believe the --- the space that we were occupying
4 was broom swept.

5 Q. But you were releasing all the spaces, correct?

6 A. I guess that would be the case. Yeah.

7 Q. All right. We talked a lot about 11.1. When your
8 internal team and internal counsel were discussing quitting
9 the lease, was this paragraph ever talked about?

10 MR. LESEMANN: Your Honor, just ---

11 MR. COBB: Not attorney-client confidentiality.
12 It's internal counsel. He didn't say anything about
13 bringing outside counsel in, Your Honor.

14 THE COURT: Let me. Let me hear his observation.

15 MR. COBB: Sorry. Sorry.

16 MR. LESEMANN: No. Internal counsel, those ---
17 those were attorneys. There's attorney-client privilege
18 in terms of as you're seeking legal advice, that
19 privilege still applies. They're --- they're licensed
20 attorneys, so if he is trying to invade the
21 attorney-client privilege, we absolutely object to that.

22 MR. COBB: Your Honor, the testimony was pretty
23 clear that they went (unintelligible) discussions in what
24 they can could do in terms of the lease to get out of the
25 lease. He didn't say that they were looking for legal

1 advice. He just mentioned that they went to in-house
2 counsel. In-house counsel ultimately brought in Mr.
3 Lesemann. That's the attorney-client confidentiality.

4 MR. LESEMANN: Why would you go to counsel other
5 than to get advice? And the --- again, the fact that
6 there was a discussion that occurred, that's fine. It's
7 the content of the discussion that the law protects as
8 sacrosanct.

9 THE COURT: All right. And so I am going to sustain
10 the objection, Mr. Cobb. I do find that --- that that's
11 going to be a attorney-client privileged conversation.
12 If you wish to ask other questions. All right.

13 BY MR. COBB:

14 Q. So Mr. Motley, when was prompt written notice given to AJ
15 Leone by Insurance Office of America? Not by Angela Adleman,
16 but by Insurance Office of America, by one of your team?

17 A. I --- I couldn't tell you the exact date.

18 Q. All right. Does September 22, 2020, sound right? Jason
19 Robinson sent an e-mail?

20 A. That could be correct.

21 Q. And September 22nd, wasn't that the day that the ceiling
22 tile collapsed and ---

23 A. I was not there. I couldn't tell you.

24 Q. Are you asking this Court and this jury to apply strict
25 compliance to this lease in your client?

1 MR. LESEMANN: Your Honor, I would object as far as
2 I'm not sure if that seems sort of a legal question
3 or --- or what exactly Mr. Cobb ---

4 MR. COBB: Can I rephrase it, Your Honor?

5 THE COURT: Yes. Well, I'll allow him to rephrase.

6 BY MR. COBB:

7 Q. Do you believe that (inaudible) in terms of the way your
8 (inaudible) 90-day clause apply to my client's space?

9 A. I believe the 90-day clause applies; is that what
10 you're asking?

11 Q. All right. Yes. Yes, sir. Do you believe that --- that
12 this paragraph doesn't apply?

13 A. Which paragraph are you referring to?

14 Q. This one that I've highlighted about the prompt written
15 notice to the landlord specifically states landlord.

16 A. It's --- it's part of the contract. Part of the
17 lease.

18 Q. And --- for --- for any reason, would you think I was ---
19 I was misstating the fact that AJ Leone never got an e-mail
20 from anybody on your team on September 22nd of 2020?

21 A. (Inaudible).

22 Q. Do you --- do you believe that there's any evidence that
23 shows otherwise, to your knowledge?

24 A. That --- that shows what? Can you repeat the
25 question?

1 Q. That shows that AJ Leone was --- got prompt written
2 notice from anybody on your team prior to September 22, 2020?

3 A. I know that there was communication provided that he
4 was aware of; is --- is that what you're asking me?

5 Q. No. I'm asking are you aware of any evidence --- any
6 e-mails to that can prove anybody from your team gave prompt
7 written notice to AJ Leone of this issue prior to
8 September 22nd?

9 A. I'm --- I'm not aware of any.

10 Q. Okay. Fair enough. Okay. All right. And let's go to
11 the --- the Article 12, default remedies. Under 12.1, under
12 A, can you read that out, please?

13 A. If tenant shall fail to pay any installment of rent
14 or any other amount payable to landlord hereunder is
15 herein provided to obtain insurance coverage required
16 here under comply with provisions of section 75 regarding
17 hazardous material.

18 Q. Okay. Obviously, we don't care about subparts two and
19 three, but effective January 1st of 2021, did Insurance Office
20 of America pay any more rent or additional rent as required
21 under 3.2 and 3.4 of this lease to 1221 Bower?

22 A. We did not pay any additional rent.

23 Q. Okay. Let's look at 12.4 real quick. No termination.
24 Now --- now I apologize, because I'm going to ask you to read
25 again, you got a great voice and I'm getting a little dry. So

1 would you read 4.4 for the jury?

2 A. In the event that landlord elects to repossess the
3 leased premises without terminating this lease, then any
4 addition additional costs and expenses recoverable from
5 tenant pursuant to Section 12.5 below, tenant shall be
6 liable for and too shall pay to landlord at the address
7 specified for notice to landlord herein. All rent and
8 other amounts payable to the landlord pursuant to the
9 terms of the lease which is accrued to the date of such
10 repossession, plus total rent required to be paid by
11 tenant to the landlord during the remainder of the term
12 until the date of the expiration of the lease terms.

13 Q. Okay.

14 A. Diminished by any net sums --- diminished by any net
15 sums thereafter received by landlord through reletting
16 the lease premises during the said period after deducting
17 expenses incurred by landlord as provided in Section
18 12.5.

19 Q. Okay. So are you --- I did the same thing. I
20 (unintelligible).

21 THE COURT: It's all right.

22 THE WITNESS: It didn't get me.

23 MR. COBB: Sorry about that.

24 THE WITNESS: Thank you. You have to repeat the
25 question.

1 MR. COBB: Your Honor (unintelligible).

2 THE COURT: It's just water. It's just --- no ---

3 (Simultaneous speaking)

4 THE COURT: --- it's just water. All right.

5 BY MR. COBB:

6 Q. Okay. So you understand that under 12.4 in the event of
7 a default under 12.1, my client has the right to seek damages
8 against Insurance Office of America?

9 MR. LESEMANN: Your Honor, I would object. It's
10 believed that the lease terms been admitted into evidence
11 which speak for themselves as far as that goes and their
12 legal construction and that's just for the jury to apply.
13 It's just not for the witness to change or vary in terms
14 of his own interpretation of those.

15 MR. COBB: I mean, he asked him to the do the same
16 thing on 11.1. You can't --- you can't do one and then
17 ask me not to do the same.

18 MR. LESEMANN: Well, it's --- the legal effect of it
19 is different. It's asked --- under was --- was that the
20 remedy and is that what they chose to exercise based on
21 the 90 days. But again ---

22 THE COURT: Mr. Cobb, what is your question again?

23 MR. COBB: I'll --- I'll re-ask it. I'll ---

24 I'll ---

25 THE COURT: If you'll rephrase it. I --- just so

1 there's no confusion. I'm going to sustain and he's
2 going to rephrase that question.

3 BY MR. COBB:

4 Q. Mr. Motley, do you understand that my client's seeking
5 damages from Insurance Office of America because they're
6 claiming that Insurance Office of America breached this lease?

7 A. Yes, sir.

8 Q. Okay. And do you understand that they're citing this
9 Section 12.4 as part of their damages calculation?

10 A. I --- I don't know what they're referencing but I
11 know that they're bringing that claim.

12 Q. Okay. All right. And under Section 12.5, the header of
13 this is additional causes and expenses in default. I'm not
14 going to read this into --- or have you read this into the
15 record, but I would just (background noise) also my client is
16 seeking damages under this clause as well. Are you --- you
17 understand that my client is seeking damages not only under
18 12.4, but under 12.5 as well?

19 A. I understand he's seeking damages under it, yes.

20 Q. Fair enough. Okay. Now, you were asked about the
21 Section 12 (unintelligible) default by landlord. This one ---
22 I'm sorry --- I am going to ask you to read the whole thing
23 into the record. And are you good to do it here? I'm going
24 to go over to --- shimmy over here ---

25 A. I'm fine.

1 (Simultaneous speaking)

2 Q. --- clear?

3 A. Yup, I'm fine. Unless otherwise provided herein, if
4 landlord defaults in the performance of any term,
5 covenant, condition required to be performed by landlord
6 under the lease, landlord shall have 30 days following
7 receipt of written notice from tenant specified in
8 (unintelligible). Provided however that the nature of
9 landlord's obligation (unintelligible) 30 days
10 (unintelligible) required for performance. Landlord
11 shall not be in default. If the landlord commences
12 performance within such 30-day period, (technical
13 difficulty) (background noise). Said 30-day period shall
14 be extended by the period of time during the landlord is
15 actually prevented from performing such obligations
16 (unintelligible) tenant delays enforcement
17 (unintelligible) delays provided that landlord is at all
18 times diligently prosecuting such performance to
19 completion.

20 Q. All right. Now, you testified earlier about unless
21 otherwise provided here (unintelligible). And what was your
22 answer to that?

23 A. I don't recall, but you --- read it back to me,
24 but ---

25 Q. What's --- what's in general, you said the reason why we

1 don't have to provide Insurance Office of America
2 (unintelligible) give this 30-day additional time to secure
3 this alleged default is because the sole remedy language in
4 11.1?

5 A. That is correct.

6 Q. All right. And so you believe that 11.1 ends there,
7 right?

8 A. Correct.

9 Q. Okay. But let's go back to 15.16 real quick. And that's
10 the force majeure clause. And you testified that you're
11 experience with force majeure clauses, right?

12 A. Little bit, yes.

13 Q. All right. Will you do me a favor and just reread for
14 the record the highlighted section, 615.16.

15 A. Foregoing notwithstanding, whenever a period of time
16 is herein described (inaudible) be taken by landlord,
17 landlord shall not be liable, responsible for and
18 (unintelligible) shall be excluded from the computation
19 of any such period of time any delays due to strikes,
20 (unintelligible) acts of God, shortages of labor
21 materials, war, government laws, relations, or
22 restriction, or any other causes of any kind whatsoever
23 which is beyond the reasonable control of the landlord.

24 Q. Okay. We agree that 11.1 provides (unintelligible) time
25 90 days?

1 A. Yes, sir.

2 Q. (Unintelligible) believe that under Section 12.7, the
3 language, unless otherwise here in, includes the entire
4 contract, not just Section 11.1?

5 A. Correct.

6 Q. All right. So isn't this otherwise here in this language
7 that the landlord has more time in that computation?

8 A. If --- if these particular items come into play.

9 Q. Okay. All right. And let's talk about particular items,
10 specifically, you know, the last part of the sentence: Or any
11 other causes of any kind whatsoever which are beyond the
12 reasonable control of the landlord.

13 Okay. So do you believe it's beyond the reasonable
14 control of the landlord to have to deal with the upstairs
15 separate condo owner to go and get a plumber into that unit to
16 stop a leak?

17 A. I believe that the owner of the building understands
18 the complexity of that property and that there could be
19 times that they are going to default.

20 Q. Okay. But you said, "the owner of the building." Aren't
21 there multiple owners of this building because they're all
22 different owners ---

23 (Simultaneous speaking)

24 A. I'm referring Mr. Leone's ownership.

25 Q. Okay. And don't you agree that --- isn't it true that

1 scheduling during COVID was tough with contractors?

2 A. I --- I --- I'm not --- I'm not a contractor. I
3 can't tell you.

4 Q. Okay. But that's --- that would be beyond my client's
5 control, right? I mean, he's not a plumber.

6 A. I mean, I --- I can't tell you what was taking place
7 with contractor's availability at that time.

8 Q. Okay. Isn't it true that nobody was working full time in
9 units 101, and 104, and the med spa being separate in 105 from
10 August 14th, you know, until y'all moved out?

11 A. I do not remember the dates that --- I don't
12 remember if we were in there --- I don't know what period
13 we moved back out after the damage occurred.

14 Q. Yes, sir. Isn't it true that --- that Angela Adleman for
15 CAMS on behalf of the condo association had to work and
16 negotiate times for Crissy and Scott to show up, open up the
17 downstairs units to let a plumber in so they could look up
18 above the ceiling tile?

19 A. I know there was coordination between them. Yes,
20 sir.

21 Q. But that --- any delays to that coordination, would that
22 be my client's fault? Would that be the landlord's fault?

23 A. I --- I --- I was not involved in that. I can't
24 tell you if there were delays.

25 Q. Okay. All right. Can you do me a favor, sir? Can you

1 read the next sentence into the record. And I'll highlight it
2 for you to make it easier.

3 A. At any time when there is outstanding mortgage,
4 deed, or trust, or similar security instrument covering
5 the landlord's interest of the lease premises, tenant may
6 not exercise any remedies for default by landlord
7 hereunder unless and until the holder of the indebtedness
8 secured by such mortgage, deed, or trust, or similar
9 security instrument shall receive written notice of
10 such --- such default in a reasonable time securing such
11 default shall thereafter have elapsed.

12 Q. Okay. So let's --- let's have that a second. And let's
13 go all the way back to 13.2. Sorry, I don't want you to get
14 (unintelligible).

15 Can you read that into the record, please, sir.
16 (Unintelligible)?

17 A. Tenant shall give prompt written notice to each
18 mortgage, deed, record of any default of landlord
19 hereunder. (Inaudible) 60 days from date of such notice
20 in which to cure --- to cure any such default. Such
21 notice shall be sent to the mortgage loan department of
22 such mortgage at its home office address.

23 Q. Okay. So at any time did Insurance Office of America or
24 any of your team give notice to 1221 Bower's bank, the lenders
25 that had a mortgage on that property?

1 A. Not that I'm aware of.

2 Q. But would you agree you were supposed to per this --- per
3 this contract?

4 A. It's in the contract.

5 Q. We're getting close. Okay. Remember --- remember we saw
6 in Section 11.1 in the last paragraph (unintelligible)
7 (background noise) notice. All right. Would you read the
8 contract deals with how notice should be given based off this
9 section 15.4? Take a minute to read it. You don't have to
10 read into the record. I just want to get your --- get your
11 thoughts about the instruction here.

12 A. Okay.

13 Q. All right. So would you agree this lease addresses how
14 to properly give notice to the landlord?

15 A. Yes.

16 Q. And do you believe that giving Angela Adleman notice was
17 appropriate instead of giving to 1221 Bower on August 14th by
18 your team?

19 A. I --- I'm not sure that I can --- because I --- I
20 don't know all the conversations that may have occurred
21 between Angela and my team, or AJ and my team. I just
22 know that all communications had been and was and
23 continued to be directed to Angela.

24 Q. Okay. Do you remember if Angela was contacted when IOA
25 Properties III owned these five units?

1 A. I believe she was.

2 Q. Okay. And was Scott Berry on the association board ---
3 the condo association board when highway Properties III owned
4 it?

5 A. At --- at one point he was, yes.

6 Q. Okay. So he worked pretty closely with Angela?

7 A. Yes.

8 Q. Okay. So is it fair and reasonable to say that maybe you
9 guys just didn't understand how to follow the lease and just
10 did what they did when y'all owned it beforehand?

11 A. Again, I'm not in --- asking me to answer for him.

12 Q. Fair enough. All right. I do want you to read this in.
13 Would you please read Section 15.7 into the --- into the
14 record?

15 A. Should landlord be in default under any of the terms
16 of the lease, shall give landlord prompt written notice
17 thereof in the manner specified in section 15.4, tenant
18 shall allow landlord a reasonable length of time in any
19 event not less than 30 days from date of such notice in
20 which to cure such default.

21 Q. Okay. Now, Insurance Office of America, it --- it's true
22 that Insurance Office of America is stating that August 14th
23 is the start date and November 12th is the end date, correct?

24 A. Correct.

25 Q. All right. And in terms of notice of any default, first

1 time that my client was ever given (unintelligible) notice was
2 September 22, 2021, by any member of your team in written
3 notice, correct?

4 A. That I'm aware of, correct.

5 Q. Okay. All right. Did you ever go and say, hey, you're
6 in default, you didn't (unintelligible) the 90 days, we're
7 getting ready to move out because there's no remedy unless you
8 cure this?

9 A. Not that I'm aware, no.

10 Q. Okay. Okay. (Unintelligible) Exhibit 10 again in the
11 binder. That's the termination letter. And just remind me
12 the date of that letter, sir?

13 A. December 1st.

14 Q. Okay. And then isn't it true the (unintelligible) by
15 Insurance Office of America (unintelligible) my client was
16 filed December 2nd?

17 A. I believe that is correct.

18 Q. Okay. All right. Can you read Section 15.17 into the
19 record, sir?

20 A. No amendment shall be effective to change or modify
21 this lease in whole or in part unless such agreement in
22 writing is duly signed by the party against whom
23 enforcement of such change or modification is sought.

24 Q. All right. So would you agree that would apply to the
25 notice provision in terms of how to change --- who gets notice

1 under the notice provisions on this lease to the landlord? It
2 had to be in writing?

3 A. Yes.

4 Q. Okay. All right. I believe --- (inaudible) exhibit
5 (unintelligible). All right. Now, Mr. Motley, these are the
6 properties we're talking about, 101, 102, 103, 104, 105,
7 correct?

8 A. Yes. Yes, sir.

9 Q. All right. You had mentioned this was all a wide open
10 area. Is that actually correct? All of this is wide open?

11 A. You've got all of ten --- if I'm --- recalling
12 correctly, all of 102, and then --- I mean, I can walk
13 down and show you on the screen how it's open.

14 Q. Let me --- let me give you a better diagram.
15 (Unintelligible) help. Is that --- is that a little bit
16 better, sir? (Unintelligible) better?

17 A. (Unintelligible).

18 Q. So when you say, "wide open," explain that --- explain
19 that more clearly.

20 MR. COBB: And by the way, Your Honor, if he wants
21 to walk down here and point, I have no objection.

22 THE COURT: Do --- do you wish to do that? It would
23 be easier?

24 THE WITNESS: I --- I think it would be easier.

25 THE COURT: All right. Very good. Please watch

1 your step right here.

2 MR. COBB: (Unintelligible).

3 THE WITNESS: Okay. Thank you. This is the
4 conference room, this is the wide open reception area,
5 all this is open cubicles, this is an office, storage
6 room, open cubicles, kitchen, office, office, restrooms
7 right there. (Background noise) I'm talking about all of
8 this (unintelligible) all that (unintelligible) is open.

9 BY MR. COBB:

10 Q. Okay. Where was the office being created out of the
11 cubicle space ---

12 A. Uh-huh.

13 Q. --- it was in 101, correct?

14 A. (Inaudible).

15 Q. Okay. So between units 102 and 103, (inaudible). Is
16 that a door well --- a door --- a doorway and stairs area from
17 102 to 103?

18 A. That is an open area with steps. (Unintelligible)
19 recall (unintelligible).

20 Q. And 103, actually, I guess this property is on a slope;
21 is that right?

22 A. (Inaudible).

23 Q. This property actually sits lower between 103 and 102?

24 A. Correct.

25 Q. What about a foot, two feet?

1 A. Yeah. Two or three steps.

2 Q. Okay. All right. But would agree when you're talking
3 about wide open, you're talking really about this being wide
4 open and this is kind of sealed off?

5 A. Yes. This is a wall here.

6 Q. Okay.

7 A. And storage room, storage room, restroom. That area
8 is open (unintelligible).

9 Q. Okay. And is there a glass door there that lets you into
10 104?

11 A. Correct.

12 Q. Okay. And then you can't get in 105 unless you go
13 through the ---

14 A. Right.

15 Q. --- the court --- the courtyard and that outdoor
16 (unintelligible)?

17 A. Correct.

18 Q. Thank you. All right. So when we're talking about the
19 leak, is it true that that's Scott Barry's office at the time,
20 that Insurance Office was in the premises?

21 A. Yes.

22 Q. Okay. And this is Parker McMillan that you testified
23 about? Do you recall (unintelligible) said hey, I got a leak
24 in my office?

25 A. I believe --- yes.

1 Q. Okay. And so the leak occurred roughly around here; is
2 that right? Or ---

3 (Simultaneous speaking)

4 A. Somewhere in that area, yes.

5 Q. So when you --- (background noise) --- trash can and
6 ceiling tile, is it roughly is right there is where it
7 happened?

8 A. Yes.

9 Q. Okay. Did you take time and look through the clean
10 status --- the clean status report about mold remediation and
11 the investigation on mold?

12 A. I looked over it briefly.

13 Q. Okay. Okay. In --- in the Insurance Office of America's
14 lawsuit, Insurance Office of America is suing my client for
15 66 percent of the rent it paid my client from August 14th I
16 believe to December 31st; are you aware of that?

17 A. Yes.

18 Q. Okay. So --- and again, these four suites weren't being
19 used because of --- initially because of COVID and a badge
20 scanner security issue before this leak was discovered,
21 correct?

22 MR. LESEMANN: Objection to form as
23 mischaracterizing the witness's former testimony.

24 MR. COBB: I think I'm saying exactly what he said,
25 Your Honor.

1 THE COURT: All right.

2 MR. LESEMANN: The --- that --- that they weren't
3 being used is not accurate. Witness talked about how
4 they had a buildup of employees, et cetera, you know, so
5 just again, that was the purpose of my objection.

6 MR. COBB: But he also talked about they went home
7 because of the badge scanner issue, and in Crissy
8 Warner's e-mail on my exhibit that I submitted that was
9 not objected to it clearly states.

10 MR. LESEMANN: Your Honor, they went home because of
11 the mold infestation and sewage, and the badge scanner
12 issue could not be corrected because they couldn't bring
13 a contractor in ---

14 THE COURT: All right.

15 MR. LESEMANN: --- at the --- at the recommendation
16 of the mold remediator until the issue was resolved. So
17 again, what is there's a lot of editorializing of the
18 evidence that's happening and it's inconsistent with what
19 the witness said.

20 THE COURT: All right. What I'm going to do is
21 I --- I am going to allow question, but your objection is
22 noted. So overruled and it's noted for the record.

23 All right. Mr. Cobb.

24 BY MR. COBB:

25 Q. I can't remember my question.

1 A. Me neither.

2 Q. So no IOA employees were in these four suites after
3 August 14th, correct?

4 A. I again, I can't tell you the exact timing that we
5 left the facility.

6 Q. Okay. All right. In --- in Suite 104 was this a
7 conference room? Conference table, conference chairs?

8 A. I believe there was a conference room table in there
9 but I --- I --- I don't recall.

10 Q. But this is pretty sealed off correct? This Unit 104?

11 A. Yes, there was a --- there was a glass door there,
12 correct.

13 Q. An investigation was done by Kleen Sites before
14 remediation. Isn't it true that it only covered Suites 101,
15 102, and 103?

16 A. I have no idea what it --- what it was for.

17 Q. Kleen Sites.

18 MR. COBB: Actually, do you already have this in
19 your binder?

20 MR. LESEMANN: It may be.

21 MR. COBB: You know what, I'll --- I'll deal with
22 it. Okay.

23 BY MR. COBB:

24 Q. Let --- let me ask you a question: Would you be
25 surprised that Unit 104 and Unit 105 had been included in the

1 mold investigation?

2 A. I --- I mean, I don't --- I don't know how it would
3 have (unintelligible).

4 Q. Okay. Were you aware of any leaks in Unit 104 and 105?

5 A. I was not aware of any leaks (background noise).

6 Q. So how did you come up with 66 percent of rent abatement
7 for this entire 7,872 square feet?

8 A. I don't recall how we came up with the exact
9 percentage.

10 Q. Okay. All right. So just to wrap up, Mr. Motley, and
11 I --- I appreciate you (unintelligible). You're the most
12 likeable opposing witness I've ever had testify.

13 Water leaks consisted in this property before my client
14 purchased it, correct?

15 A. Water leaks.

16 Q. All right. And there were leaks in the same place after
17 my client purchased it, correct?

18 A. I --- I can't attest to that.

19 Q. And are you aware that plumbers came multiple times at
20 every complaint of the water leak (unintelligible) on behalf
21 of the condo association to fix the water leak in the upstairs
22 condo unit?

23 A. Relating to this claim?

24 Q. Relating to the August 14th claim.

25 A. Again, I --- I can't tell you every --- every time

1 they were there, how often they were there.

2 Q. Okay. Mr. Motley, going back to the lease again, I --- I
3 just want to be --- I just want to be very, very clear.

4 (Unintelligible). This is a very specific clause. Beyond a
5 reasonable doubt the reasonable control of the landlord.

6 You're a landlord; is that not correct?

7 A. Excuse me?

8 Q. You're a landlord, aren't you sir? You own commercial
9 property?

10 A. I do.

11 Q. (Unintelligible) in a LLC or something you own commercial
12 property?

13 A. I do.

14 Q. As a landlord, do you believe that if the condo owner
15 above you that you didn't own was causing a leak and it took
16 time to get up there and repair that leak, would that be
17 beyond your reasonable control? As a landlord. You don't own
18 the condo above you, (unintelligible) leak coming inside your
19 unit.

20 A. And your --- and your question is?

21 Q. I mean, I'm --- I'm using this reasonable
22 (unintelligible) landlord. I'm utilizing your experience as a
23 landlord. Is that beyond your reasonable control to control
24 another unit owner above you?

25 A. I mean, certainly not to control them, but I'm not

1 sure --- I mean, you're asking me to comment on whether
2 the --- it was reasonable timing and --- and them having
3 access. I don't know what efforts he made. I don't know
4 what efforts. I'm not going to --- I'm not going to
5 comment on whether those are reasonable efforts or not.

6 Q. Okay. Fair enough. But you were one of the key decision
7 makers in terms of terminating the lease, correct?

8 A. Correct.

9 Q. And so you made that decision without knowing all those
10 facts?

11 A. I was going off the facts that my team was telling
12 me about issues at hand, the dealings with the landlord,
13 the lack of urgency, the lack of concern, the aggravation
14 involved.

15 Q. Okay. Who is Jason Robinson?

16 A. Jason was an employee of IOA --- I guess IOA
17 Properties.

18 Q. Okay. And where is he today?

19 A. I do not know.

20 Q. What was his role related to this lease and these
21 premises during this time period?

22 A. I do not recall what his role was.

23 MR. COBB: Okay. Mr. Motley, I really appreciate
24 your time, sir. I don't have any further questions.
25 (Unintelligible).

1 THE WITNESS: Thank you.

2 THE COURT: All right. Can --- can you all approach
3 the bench.

4 (Bench conference)

5 THE COURT: All right. Redirect.

6 MR. LESEMANN: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. LESEMANN:

9 Q. Mr. Motley, are you aware that AJ Leone, under oath, has
10 testified that he was aware of the leak as of August 17th?

11 A. Yes. Yes, sir.

12 Q. Do you believe that it's necessary to send somebody a
13 letter about something that they already admit that they know
14 about?

15 A. No, sir.

16 Q. Was the association through Angela Adleman directly
17 involved from the get-go from August 14th when that text
18 message was sent?

19 A. Yes, sir.

20 Q. Are you aware of anyone on the IOA team being told that
21 that text to Angela and that e-mail that was sent on the 17th
22 was not going to be acted upon because you instead needed to
23 send a letter to the --- AJ in --- in --- in Mount Pleasant?

24 A. I'm not aware of that.

25 Q. Were you aware of anyone being told that that was not the

1 way to bring issues with building defects, and leaks, and
2 things like that to the attention of the property manager and
3 the owner?

4 A. I was not aware.

5 Q. Were you aware of anybody on your team being told that
6 doing things the same way they'd been done, going to the
7 property manager who is --- is --- is she in Columbia to your
8 knowledge?

9 A. Property manager?

10 Q. Yeah. Ms. Adleman?

11 A. Yeah, I believe so.

12 Q. Are you aware of anyone being told that that is not the
13 way to report a issue with building damage?

14 A. (Inaudible).

15 Q. Now, we can have discussion about whether the efforts
16 were appropriate or not, but did Angela begin reacting after
17 receiving that text on the 14th?

18 A. Yes. To my knowledge, she did.

19 Q. Okay. And if Angela receives a text on the 14th and Mr.
20 Leone admits knowledge as of the 7th, would it appear to you
21 that they're communicating?

22 A. Yes, it would.

23 Q. Do you know if the --- if the e-mail that had come to ---
24 to Ms. Warner previously about the address in Mount Pleasant
25 was to make sure that AJ got the rent check to the place where

1 he wanted it to be delivered?

2 A. Repeat that. I'm sorry.

3 Q. Do you know if the e-mail that was discussed from March
4 of 2020 was to provide the address so that the rent check can
5 go to the right address?

6 MR. COBB: Objection. He wasn't on the e-mail. I
7 verified and he's --- it'd just be speculation.

8 THE COURT: All right.

9 BY MR. LESEMAN:

10 Q. Do you have any knowledge about the e-mail?

11 THE COURT: I'm going to allow the question. Go
12 ahead. I'll allow the question. Go ahead.

13 BY MR. LESEMAN:

14 Q. Do you have knowledge of whether that e-mail was to make
15 sure that the rent check was going to get mailed to the right
16 place?

17 A. I --- I don't have knowledge of the e-mail.

18 Q. Did you --- you were asked about Defendant's Exhibit 17,
19 the e-mail (unintelligible)?

20 A. Right here.

21 Q. Would you go to the page that's marked Exhibit 289.
22 Plaintiff's --- Plaintiff's 289 in the (unintelligible)?

23 A. Okay.

24 Q. You were asked to read one part of it, so I just wanted
25 to go through some. So this is an e-mail dated

1 September 5th --- 25, 2020, from Crissy Warner to a number of
2 people within IOA; is that correct?

3 A. Yes, sir.

4 Q. All right. And so you see the underlined language in the
5 e-mail?

6 A. Toilet leak and resulting mold issue.

7 Q. Yes.

8 A. Yes, sir.

9 Q. All right. So just to confirm, we talked about the
10 security scanner badge part of this e-mail. I just wanted
11 to --- as --- as is being reported, what is Ms. Warner saying
12 here under toilet leak?

13 A. We just spoke --- you want me to read it?

14 Q. Yes.

15 A. We just spoke with the plumber, they have been
16 inside the upstairs, and confirmed that there is a toilet
17 leak and that it is sewer water leaking into Parker and
18 Scott's office, not just leaking water pipe. They are in
19 the process of replacing the seal to that toilet and/or
20 whatever repairs need to be made to stop the leak. They
21 also --- they are also going to research the other areas
22 where we have stained ceiling tiles from other unknown
23 leaks in multiple areas.

24 Q. Okay. Do you see the section called resulting ---
25 heading --- the heading says resulting mold issue?

1 A. Yes, sir.

2 Q. All right. And if you could read that first bullet
3 there?

4 A. Scott spoke with the mold contractor this morning,
5 the contractor is a client of Scott IOA. They will be
6 here around 1 to 2 this afternoon. They had an emergency
7 call this morning and could not get here any earlier.

8 Q. Okay. What does the next sentence say?

9 A. We've been advised that we should not have any
10 employees in our office and we confirmed that it is just
11 Scott and I present.

12 Q. Could you go down to the bullet that says I am going to
13 notify?

14 A. I am going to notify the property manager Angela
15 that her contractor will not be needed until the area is
16 confirmed to be free of mold, and then their contractor
17 can come in do (background noise) work.

18 Q. And then the last bullet?

19 A. At the advice of the mold contractor, I have
20 informed Parker that he is not to come in and remove his
21 personal items at this point. The contractor will
22 decontaminate anything that is in his office.

23 Q. Can you identify anything that would have stopped the
24 mold investigation from being started on August 14th or on
25 August 17th when the notice was provided?

1 A. No, sir.

2 Q. Is that something that in your mind would have been ---
3 you were asked about a commercial landlord, if you were
4 getting brown --- brown water coming down, is that something
5 that could and should have been promptly investigated?

6 A. Absolutely.

7 Q. With a lot of talk about lease provisions, but again, did
8 you understand this lease to provide the landlord 90 days to
9 address damage?

10 A. I did.

11 Q. Okay. And do you believe that that's a very long and
12 reasonable amount of time for a landlord to come in and
13 address the issue while the tenant's still paying rent?

14 A. I definitely do.

15 Q. And looking at the issue, okay, we talked about Ms.
16 Adleman and --- and what issues are within people's control.
17 Are you familiar that Mr. AJ Leone is actually the director of
18 the association the --- home --- the owners association?

19 A. I am.

20 Q. Okay. And that Ms. Adleman is the property owner ---
21 property manager for the association?

22 A. (Inaudible).

23 Q. Okay. Are you aware whether the association has rights
24 to access areas and also to enter into units?

25 A. I believe they are.

1 Q. Okay. And so in light of this circumstance where you
2 have Ms. Adleman and Mr. Leone that have control of the
3 association, are these sort of issues in your belief within
4 their reasonable control?

5 A. Yes.

6 Q. Okay. And if you purchase property in a building regime,
7 is that part of the --- is it baked into the cake in terms of
8 the issues you may be faced?

9 A. It is. Absolutely. The complexities I was
10 referring to earlier.

11 Q. If the landlord had corrected the sewer intrusion and the
12 mold infestation, and gotten these issues within 90 days and
13 resolved within the time frame provided in the lease, do you
14 think that we'd be here today?

15 A. Not at all, we would be at Bower Parkway.

16 MR. LESEMANN: Thank you. Nothing further.

17 THE COURT: Re --- re-cross.

18 MR. COBB: (Inaudible).

19 THE COURT: Certainly.

20 RE-CROSS-EXAMINATION

21 BY MR. COBB:

22 Q. Did you ever see the water --- the brown water that Mr.
23 Lesemann just asked you about come --- coming into the Suite
24 into Parker McMillan's office?

25 A. I --- I was not there.

1 Q. All right. (Unintelligible).

2 THE COURT: All right.

3 BY MR. COBB:

4 Q. Will you please read this over and read your October 1st
5 e-mail to Scott Berry, Dave, and Crissy Warner about the
6 lease? And --- and just describe what the --- the content of
7 this e-mail is.

8 A. Is this --- not sure I understand. Are you asking
9 me just this particular e-mail out of this trail? What
10 I'm asking.

11 Q. (Inaudible) ask about your two responses (inaudible)
12 excuse me in this e-mail thread. I'm sorry.

13 (Attorneys conferring)

14 BY MR. COBB:

15 Q. Just look up when you're ready, Mr. Motley.

16 A. Okay.

17 Q. All right. So Mr. Motley ---

18 MR. COBB: Your Honor, may I approach the witness?

19 THE COURT: Yes.

20 BY MR. COBB:

21 Q. What is the --- what is the meaning of this --- this
22 e-mail thread? What's this e-mail thread meant to be?

23 A. I'm not sure context of other communication with it,
24 but it looks like we were trying to determine what our
25 lease agreement --- time on the lease agreement was.

1 Q. Well, isn't that because y'all are looking to get out of
2 the lease at this time?

3 A. I think that at this time --- and again, I don't
4 know specifically when --- when I was first approached
5 about this, but there was --- there was significant
6 concerns about what was taking place. There was concerns
7 whether we were going to be able to get into the
8 property, and the property's going to be restored, and
9 there's concerns about communication, lack of
10 communication. And there was almost a cry for help and
11 what our options.

12 Q. Okay. This is my exhibit that I just put in number ---
13 number --- Defendant's Exhibit Number 17. This is the same
14 e-mail thread, September 24th, that you were copied on ---

15 A. Okay.

16 Q. --- from Crissy Warner. Would you mind just reading the
17 September 25th e-mail, just that paragraph into the record,
18 sir? It starts for what it's worth.

19 A. So not ---

20 Q. This is --- this is Crissy --- No, sir. No, this is for
21 what it's worth. These are Crissy's words to you and other
22 members of the team, correct?

23 (Simultaneous speaking)

24 A. Okay. For what it's worth, I feel like we've had a
25 lot of issues with this office space regarding leaks

1 unrelated and (unintelligible) related response time
2 being able to accomplish anything is really unacceptable.

3 I'm not sure how long the current toilet leak has
4 been going on, but we reported it August 17th. Perhaps
5 if we were able to get a little action sooner, we would
6 not have had the current hazardous situation with the
7 mold and the extensive amount of repair that will be
8 needed.

9 As a branch office leader, I feel like an
10 unnecessary amount of time has been spent dealing with
11 the building issues. What options do we have considering
12 these issues (unintelligible) should be able to end our
13 lease?

14 Q. So on September 25th, you know, roughly a month and a
15 half after the --- the initial August 14th text that Scott
16 Berry sent Angela, Crissy Warner stated hey, Rob, how do we
17 get out of this lease?

18 A. Yeah, I think she was absolutely frustrated with
19 what was taking place. Her cry for help.

20 Q. Okay. And in this e-mail thread on October 1st, what are
21 you telling --- what are you telling Scott Berry and Crissy
22 about --- about the lease agreement in terms of the --- how
23 long it had?

24 A. I think there was some questions about --- I think
25 Scott was asking how long do we have a lease and there

1 was --- there's something in here where there was comment
2 about a year and I was responding verify that, because I
3 believe when we sold it we signed an additional lease.

4 Q. Right. So you corrected (unintelligible)?

5 A. Yeah.

6 Q. Okay. And then will you --- will you read the very top
7 and the date of that e-mail for everyone, sir? Just the ---
8 just the --- just that sentence right there.

9 A. So the question becomes is there a provision in the
10 lease when a situation like this arising and
11 (unintelligible) do not meet our expectations, is there
12 an out?

13 Q. Okay. So September --- all right. So August 14th, Scott
14 texts Angela. September 25th, Crissy sent an e-mail to you.
15 And October 1st, you're looking to get of the lease?

16 A. Looking to see what our options are based off the
17 experience they've been going through.

18 Q. But you just testified that had it been repaired in that
19 90 days we wouldn't be here. 90 days hadn't even gotten ---
20 gotten --- based all y'all's math, 90 days hasn't even run
21 yet. Y'all looking to get out?

22 A. Absolutely, but based off the time and everything
23 that's taking place, the 90 days were going to come and
24 go, which they did.

25 Q. Okay. Okay. All right.

1 MR. COBB: Your Honor, I'd like to introduce this as
2 Defendant's Exhibit Number 47.

3 THE COURT: Any objection to 47?

4 MR. LESEMANN: No, Your Honor.

5 THE COURT: All right. So moved.

6 (Defendant's Exhibit 47 marked and entered)

7 MR. COBB: Your Honor, I don't have any further
8 questions. Thank you so much Mr. Motley.

9 THE COURT: All right. Very good. This witness may
10 be excused. If you'll watch your step right here.

11 All right. Ladies and gentlemen of the jury. Thank
12 you very much for listening so attentively to that
13 testimony. At this time, we're going to allow you all to
14 have a lunch break. It is 1:36, and so I will ask that
15 you come back to this --- to the courthouse no later than
16 3:00 p.m. All right?

17 So if there are any transportation issues, please
18 call the clerk immediately.

19 Do not discuss this case with each other, or with
20 anyone else while you are out. All right? Thank you.
21 We'll see you back at 3:00.

22 (Jury exits courtroom)

23 THE COURT: All right. All right gentleman, we will
24 break for a much needed lunch break. So you all be back
25 here at 3:00. All right? Any issues come up y'all just

1 send us an e-mail. All right. Thank you. And we'll see
2 you at 3:00.

3 MR. COBB: So Your Honor, if you don't mind, for
4 planning purposes, (unintelligible) that we probably stop
5 right about 5:00 (unintelligible).

6 THE COURT: 5:00 to 5 --- you know, I don't want to
7 break in the middle of a witness. I don't know where we
8 would be. But 5:00 to 5:30. I don't think we can go ---
9 should go any later than 5:30 today. All right.

10 MR. COBB: I just wanted to ask.

11 THE COURT: All right. Very good. Thank you.

12 (Off the record)

13 THE COURT: All right. Gentleman. Are we ready to
14 bring the jury in? All right. Mr. Joyce will you be
15 questioning? All right. And Mr. Cobb, will you be
16 questioning, or is Ms. --- okay. All right. Very good.
17 All right. So I know who to look at when we're --- okay.
18 All right. Can we bring the jury in, please.

19 (Jury enters courtroom)

20 THE COURT: All right. Please be seated. All
21 right. Welcome back ladies and gentlemen. At this time
22 we will resume the trial.

23 Will the plaintiff call its next witness.

24 (Technical difficulty).

25 MR. JOYCE: (Unintelligible) (technical difficulty).

1 (Witness sworn)

2 DAVE DUNNAGAN, HAVING BEEN DULY SWORN, TESTIFIED AS
3 FOLLOWS.

4 THE WITNESS: Dave Dunnagan, D-U-N-N-A-G-A-N.

5 DIRECT EXAMINATION

6 BY MR. JOYCE:

7 Q. Good afternoon, Mr. Dunnagan. Could you tell the jury
8 what you do for a living?

9 A. I am self-employed or --- or part owner of an
10 environmental firm in Lexington. I do mainly indoor air
11 quality work that includes mold, asbestos, lead. Our
12 company has been in business almost 30 years. We also
13 have --- do soil and groundwater work on another side of
14 the company.

15 Q. And what's the name of the company?

16 A. Kleen Sites Geoservices.

17 Q. And you said Kleen Sites has been around for 30 years?

18 A. Almost 30 years.

19 Q. Have you been part of the company for that long?

20 A. Yes.

21 Q. Okay. Do you hold any certifications?

22 A. Yes, I'm a professional engineer, certified
23 industrial hygienist among other certifications, but most
24 of --- they relate to indoor air quality and mold,
25 asbestos, lead.

1 Q. And do you recall being contacted about 1221 Bower ---
2 Bower Parkway?

3 A. Yes.

4 Q. Okay. And who contacted you?

5 A. Scott Berry.

6 Q. Okay. How do you know Scott?

7 A. Scott handles all of our insurance. He does an
8 outstanding job and he is a very good friend. So when he
9 calls, I'm --- I'm to help.

10 Q. Okay. And was it about a mold issue?

11 A. It was an indoor air quality issue of --- that
12 appeared to be water damage related.

13 Q. Okay. So does September 24, 2020 --- does that sound
14 about right when you would have been contacted?

15 A. Yes.

16 Q. Okay. And how long did it take for you to get out to ---
17 to the property after Scott called you?

18 A. I think we were there the next day.

19 Q. Okay. So you all were able to meet quickly?

20 A. Yes.

21 Q. Can you just explain to the jury what you did when you
22 went there?

23 A. We did a full indoor air quality evaluation of, I
24 guess it was Suite 101, 102, and 103. That we have
25 direct read instrumentation for mold. We take other

1 metrics along with that and then took samples that
2 went --- they go to a lab.

3 And then once we get the results, we summarize that.
4 See if there's a --- if it's abnormal, and if it is then
5 provide a protocol to rectify the situation.

6 Q. Okay. You --- and y'all generated a report, right?

7 A. Right.

8 Q. Okay. Do you mind flipping to tab 22 in Exhibit
9 (inaudible).

10 A. Okay.

11 Q. All right. Mr. Dunnagan, does this appear to be a report
12 that you generated related to your inspection?

13 A. Yes.

14 Q. Okay. And again, this is a mold sampling of indoor air
15 quality inspection, correct?

16 A. Correct.

17 Q. And this report will just summarize the results from your
18 inspection?

19 A. Yes, and then also provide a remediation protocol.

20 Q. Okay. Is this a --- a true and accurate copy of --- of
21 the report that's generated?

22 A. Yes.

23 MR. JOYCE: Your Honor, at this time we'd move
24 what's been marked as Plaintiff's Exhibit 22 into
25 evidence, which is a copy of --- of Mr. Dunnagan's mold

1 report.

2 MR. COBB: No objection, Your Honor.

3 THE COURT: Very good. So moved.

4 (Plaintiff's Exhibit 22 marked and entered)

5 BY MR. JOYCE:

6 Q. Mr. Dunnagan, you testified earlier --- you mentioned
7 abnormal results, did --- did you find abnormal results in
8 your --- during your inspection?

9 A. Yes.

10 Q. All right. Could you just explain for the jury what was
11 abnormal, what you found?

12 A. The biggest issue was the visible mold that was
13 inside the wall between Scott and Parker's office. That
14 was the biggest issue.

15 Q. This is something that would need to be addressed ---
16 (Simultaneous speaking)

17 A. Yes, by --- but any guidelines that you follow. If
18 you have visible growth, you --- it calls for
19 remediation.

20 Q. Okay. And --- and just --- could you just generally
21 explain what remediation means? What it entails?

22 THE WITNESS: In this case it --- it's removing the
23 visible growth which was inside the wall. And then
24 cleaning the surrounding areas. So it's --- it --- with
25 the remediation in this case, there was a two-part

1 process where we put that wall in containment, removed it
2 and then cleaned the --- basically from ceiling to floor
3 in Suite 101, 102, 103. And then retested it to make
4 sure it was back to normal levels?

5 Q. So when you went out there and --- and did your
6 inspection, was there an air quality issue at that point?

7 A. Yes. The --- one of the mold genera was elevated
8 and which is not surprising given the visible growth.

9 Q. Okay. So if you look on the first page of your report,
10 it says Suite 101 up at the top. This would actually be, you
11 said, Suite 101, 102 and 103?

12 A. Yes. It's --- it's all three, but we refer it to as
13 just one, but it's those. It --- it did not include four
14 and five.

15 Q. All right. Okay. Thank you. And so did --- did you
16 also generate a proposal and an invoice for services?

17 A. Yes.

18 (Simultaneous speaking)

19 A. Yes. We were --- well, once we were asked for a
20 proposal to do the remediation and follow the protocol.
21 We invoiced for the --- the assessment and then gave
22 a --- a proposal to do the remediation.

23 Q. Okay. And who --- who did you provide the proposal to,
24 if you remember? And if you want we can flip to tab 23.

25 A. Okay. Okay. It went to Bower --- Bower Commons

1 Co-owners Association, Ms. Adleman.

2 Q. Okay. So Mr. Dunnagan, this would --- this would be a
3 true and accurate of the --- of the proposal that you
4 generated to Ms. Adleman?

5 A. Yes.

6 Q. And approximately --- this is going to cost \$7,485 for
7 you to go in there and do what you just discussed, the
8 remediation?

9 A. The remediation and then the retesting, yes.

10 Q. Your Honor, at this time we'd --- we'd move Exhibit 23
11 into evidence, which is a copy of --- of Mr. Dunnagan's
12 proposal?

13 MR. COBB: No objection.

14 THE COURT: All right. So moved.

15 (Plaintiff's Exhibit 23 marked and entered)

16 BY MR. JOYCE:

17 Q. All right. Mr. Dunnagan, so it would have been Ms.
18 Adelman's company that --- that ultimately retained you to do
19 the work?

20 A. Yes.

21 Q. Okay. When you got out there --- oh --- okay. So when
22 was the mold remediation scheduled for?

23 A. I --- I mean upon approval, we would get it, you
24 know, scheduled. That's how we do it. There was a few
25 weeks in between when we gave the proposal and we

1 actually did the work.

2 Q. Okay. So you all were ultimately approved and --- and
3 then you went out and did the work there?

4 A. Correct.

5 Q. Could you --- when --- when you got out to the side and
6 actually started with the mold remediation, what --- what did
7 the place look like once you started opening up the walls?

8 A. I think it's fair to say it was a bit worse than we
9 thought, but I mean, we --- we didn't know the --- the
10 protocol. So basically that we clear the visible growth
11 by two feet on each side, which is what we had planned to
12 do. So we were only going to take what we needed to
13 take, but as it turned out we had to take that entire
14 wall just based on what we found when we opened it.

15 Q. Okay. And --- and you all were actually out there for
16 about four days?

17 A. Correct.

18 Q. If you could please flip to tab 7 for me.

19 A. Tab 7?

20 Q. Yes, sir. And Mr. Dunnagan, these are a series of
21 photographs. We've got them projected up here on the screen
22 as well. Just if you could just take your time just to flip
23 through those and if you could let me know when you're ready.

24 A. Okay.

25 Q. Okay. Do these photos, is this is kind of a fair and

1 accurate depiction of what --- what it would have looked like
2 during the mold remediation?

3 A. Yes.

4 MR. JOYCE: Okay. And, Your Honor, at this time
5 we'd move these --- this series of photographs into
6 evidence as Plaintiff's Exhibit 7.

7 THE COURT: All right. Any objection?

8 MR. COBB: Just want to clarify that they're based
9 off the September 30th report at the time --- or was it
10 on the remediation --- I want to verify the date of these
11 pictures.

12 MR. JOYCE: These were in November.

13 MR. COBB: November? When you did the remediation.

14 MR. JOYCE: Yes, these ---

15 MR. COBB: No objection then Your Honor.

16 THE COURT: Thank you. So moved.

17 (Plaintiff's Exhibit 7 marked and entered)

18 BY MR. JOYCE:

19 Q. Mr. --- Mr. Dunnagan what are we looking at here up on
20 the screen?

21 A. That is the growth on the back of what appears to be
22 some ceiling tiles there. Actually it probably would ---
23 actually had some fiberglass in the walls too, but that's
24 the substrate that we took out ---

25 (Simultaneous speaking)

1 A. --- part of it. And so that --- that black that you
2 see is the growth.

3 Q. Okay. So this would have been removed from either the
4 wall or this would be a ceiling tile ---

5 A. Correct.

6 Q. --- from one of those ---

7 A. Was in the --- in the containment area. That was
8 what we took out. And that is presumed to be the source
9 of what we were seeing in the air.

10 Q. Okay. And what about --- what about this?

11 A. More of the same.

12 Q. It's just a --- is this a part of a wall?

13 A. I --- I'm saying yes. It was either wall or ceiling
14 tile. It appears to be sheetrock.

15 Q. Okay. Could you identify what this would be?

16 A. That's just looking into the basically the pipe
17 chase. You could see up --- you know, once the wall was
18 out you could see kind of several floors up.

19 Q. Seeing more of the same?

20 A. Yes.

21 Q. And the --- the --- the black on the framing, is that ---
22 what --- what would that be?

23 A. That's --- that's growth, but we were able to clean
24 that. Unfortunately, I don't know that we have any ---
25 when it was finished, but if it's sheetrock or ceiling

1 tiles, you take it out. Because it --- the mold ---
2 between the water that damages it and the mold that grows
3 into it, it's just better to replace it with wood. You
4 don't generally do that. You use a peroxide and --- and
5 pull the mold out. Because the mold grows on it, but it
6 also grows into the substrate. And so you pull that out
7 and clean it up. And it --- and it cleaned up quite
8 nicely.

9 Q. All right. So how many of your guys were out there
10 working with you on this?

11 A. We had four or five guys on it.

12 Q. And this was a --- a four-day process?

13 A. Yeah, three or four days. But, you know, part of
14 the last day would have been testing --- retesting it.
15 So some time.

16 Q. Okay. And when you say, "retesting," what do you ---
17 what do you mean by that ---

18 (Simultaneous speaking)

19 A. Yeah, the --- like I mentioned, we have a
20 direct-read instrument for mold and so we would scan it
21 and then take some lab samples to show that you're back
22 to normal levels.

23 Q. Okay. So is this the --- generally speaking, is this the
24 kind of condition that needs to be addressed?

25 A. Yes.

1 Q. And will it go away if you don't do anything?

2 A. No. It may --- it may go dormant, it may dry up,
3 but you'd have to clean it up to get rid of it.

4 Q. If --- if there's a --- an active water or sewage leak
5 could the situation get worse?

6 A. Sure.

7 Q. And if it's on a desk, could it --- it could be a health
8 and safety hazard?

9 A. Yes.

10 MR. JOYCE: Thank you Mr. Dunnagan. Answer any
11 questions that Mr. Cobb may have for you.

12 THE COURT: All right. Cross-examination.

13 MR. COBB: Thank you.

14 (Attorneys conferring)

15 CROSS-EXAMINATION

16 BY MR. COBB:

17 Q. Mr. Dunnagan, how are you?

18 A. I'm good.

19 Q. (Unintelligible). So I want to ask you about
20 (unintelligible). You had mentioned that you did Units 101,
21 102, and 103. I just have this diagram up here. What were
22 the walls when you took --- the sheetrock in Scott Parker's
23 office, the sheetrock in ---

24 (Simultaneous speaking)

25 A. Right.

1 Q. --- office here?

2 A. Right. Between it.

3 Q. So the mold (unintelligible) sheetrock (unintelligible)
4 correct?

5 A. Yeah, but not then. It just in their office
6 which --- yeah. When --- it actually would be that
7 whole --- whole wall.

8 Q. Okay. Now, did you take sheetrock down (unintelligible)
9 anything else --- where else in Unit 101?

10 A. No.

11 Q. Okay. So the issue that was in the premises was really
12 confined to those two offices?

13 A. The only other remove --- we --- we had --- there
14 were a few water damaged ceiling tiles and we replaced
15 those. Or we actually took ceiling tiles
16 (unintelligible) as I recall (unintelligible) so they
17 could (unintelligible).

18 Q. Okay. One of the things you --- you told me, sir, in
19 our --- when I did your deposition is that you said mold has a
20 very unique smell. What does mold smell like? What
21 (unintelligible)?

22 A. Well, it's typically a musty smell and the --- like
23 something that's been wet. Depends on how --- how bad it
24 is. But typically a musty-like smell.

25 Q. Would you tell me (unintelligible) investigation a lot of

1 people can mistake it as a strong sewage smell?

2 A. Yes.

3 Q. And can stains that smell be really (unintelligible)?
4 (Unintelligible)?

5 A. I mean, it isn't uncommon for sewer to be
6 (inaudible) for someone --- sewer is the problem and not
7 mold, but it is a --- it's a common --- I don't want to
8 call it mistake, but a, you know, perception.

9 Q. When you were doing your investigation, did you see any
10 evidence of a sewage spill in between walls when you took down
11 the sheetrock?

12 A. No. But we knew it was coming from above, you know,
13 from the apartments --- one of the apartments above.
14 That was considered, but we did not --- we didn't know
15 that until the wall was opened.

16 Q. (Unintelligible) all right. And this was (technical
17 difficulty) (unintelligible) report after (unintelligible)?

18 A. Right.

19 Q. Okay. If you don't mind turning to that real quickly.

20 A. Okay.

21 Q. All right. This was addressed to Scott Berry, correct?

22 A. Yes.

23 Q. All right. And any time that --- did you ever know how
24 many (unintelligible) Bower ---

25 (Simultaneous speaking)

1 Q. --- had you heard that (unintelligible)?

2 A. Not by that name. I knew that at that time Scott
3 and Angela were working together to get this corrected.
4 Scott was my point of contact to let us in and that kind
5 of thing. And so that's how that went.

6 Q. You --- you had said you had Scott had been friends; how
7 long have you y'all been friends for?

8 A. Ten years. Something like that. A good while.

9 Q. Seems like a nice guy?

10 A. Real good, yeah.

11 Q. All right. I want to drill down a little bit into your
12 letter (unintelligible) sir. We'll go to page 2.

13 A. Okay.

14 Q. On that first bullet point, can you --- can you explain
15 to me what you're trying to say about this bullet point?

16 A. The InstaScope scans?

17 Q. Can you explain that to the jury what that means?

18 A. Yeah. That the --- the instrument uses a green,
19 yellow, red, visual strategy which, you know, green is
20 good, yellow is caution, red's bad. Most of the scans
21 were in the green, meaning normal. Doesn't mean no mold,
22 it just (unintelligible) not a --- not a thing, but it
23 just means it was normal levels. In the wall where the
24 damage was it --- it was red at the wall.

25 Q. Okay. So when you say, "in the wall," (unintelligible)

1 is it correct to say that (unintelligible) where the sheetrock
2 in Parker's office and (unintelligible) something there to
3 read the air quality level?

4 A. We were at the --- not necessarily in it, but at it,
5 but the wall was actually open at that time. So ---
6 so ---

7 (Simultaneous speaking)

8 Q. --- cut the wall open?

9 A. I --- I assume Scott or Parker did. Just --- it was
10 showing the paint was bubbling from the moisture and so
11 forth.

12 Q. If you go down to your third bullet where it start off
13 (unintelligible) particle matter levels, can you explain that
14 a little bit more what this means?

15 A. Well, molds are particular. So we --- we often scan
16 and look at particulate matter. It can be --- it
17 could --- you know, there's a lot of different kinds of
18 particulate, not just mold. A lot of times when you have
19 high particulate, you have high mold (inaudible). So
20 that's important. It's good information.

21 Q. So can you explain why an outside sample was --- was so
22 off compared to indoors? I'm trying to understand that ---
23 that statement you made. You said they were still
24 substantially lower than the outdoor levels?

25 (Simultaneous speaking)

1 A. Considerable higher. Yeah. I mean, we still --- it
2 just --- it --- I mean, on a relative basis, it was
3 elevated higher than --- you've got --- there --- you
4 know, there isn't any legal level. But there are
5 suggestive levels, WELL Building and so forth. We were
6 still below that, but compared to --- compared to what we
7 would expect to see, it --- it was higher.

8 Q. Okay. And if you'll read the next bullet. What's TVOC
9 readings?

10 A. Total volatile organic compounds. That's aerosols,
11 you know, anything from gasoline to hair spray.

12 Q. (Unintelligible)?

13 A. Normal. Correct.

14 Q. Okay. And this last bullet point, it appears to be the
15 same inside as outside, correct?

16 A. Yes.

17 Q. All right. And what --- why is that --- (background
18 noise) what --- what does that mean nuisance?

19 A. Well, it --- it's irritating to some people if
20 you're, you know, smelling the sewer, but the reality is
21 at these levels, it's not dangerous.

22 Q. Okay. And when you mean "not dangerous," you mean it's
23 not life threatening, it's not ---

24 A. To what we know, it's not --- it's not a health
25 problem. I mean, it's, you know, (inaudible).

1 Q. You --- you talk in the next paragraph about the relative
2 humidity, why does the humidity matter (unintelligible)
3 report?

4 A. Well, basically, the elevated humidity lends itself
5 to moisture, and moisture can result in an organic
6 material as mold. So it's --- it's --- you try to keep
7 it under 55 percent indoor to the best you can. The
8 higher it is, the more chance you have of condensation
9 and moisture --- more chance of mold.

10 Q. And when you --- when you did this testing had it just
11 rained?

12 A. Yes.

13 Q. And could that have caused the humidity to be heightened?

14 A. Perhaps.

15 Q. All right. Now, you had also said in your testimony that
16 nobody was working in Units 101, or 102, or 103 when you went
17 in there and did your September 25th investigation, correct?

18 A. Right.

19 Q. All right. Was the AC turned on when you were there for
20 your investigation? Was it hot in there?

21 A. I honestly don't recall. I don't look at InstaScope
22 (inaudible). I don't recall it being uncomfortable
23 but --- it looks like we were running between 70 and
24 71 degrees, so ---

25 (Simultaneous speaking)

1 Q. (Inaudible)?

2 A. Right.

3 Q. All right. Go down --- when you go to the page 2 of 12,
4 or the mold inspection report with (unintelligible) diagram.
5 And I believe it's on --- it's on the bottom right-hand corner
6 it should say plaintiff 094; do you see it?

7 A. What --- what's that?

8 Q. Do you see it, sir?

9 A. Yes, I do. I'm sorry. I didn't see the plaintiff.
10 Yes, sir.

11 Q. All right. So you talk about green rooms here, what do
12 you mean by green rooms?

13 A. Normal. Normal ecology in terms of mold, normal
14 levels.

15 Q. Okay. All right. And you talk about yellow rooms, any
16 issues with yellow rooms?

17 A. No.

18 Q. You talk about red rooms, you only mention the hole in
19 the wall in Parker's office.

20 A. Correct.

21 Q. Okay. So inside Parker's office, not --- not going into
22 that wall, were the levels normal?

23 A. We would have sampled it at the wall and not at the
24 wall, but that's because you had the visible mold ---

25 Q. Right.

1 A. --- so it's picking that up.

2 Q. Right. But I'm looking at the top line under ---

3 (Simultaneous speaking)

4 A. Right.

5 Q. And it says normal?

6 A. Right. It's pretty big office, so, you know, if you
7 were next to the wall, you were getting exposure, if you
8 were out near the hallway, you know, not as much.

9 Q. So if you go down to the next page please. I think it's
10 5 --- plaintiff 0095.

11 A. Yes.

12 Q. Okay. That's a scan by (unintelligible) mold comparison.
13 What are you --- what you trying to tell us? What did this
14 report show?

15 A. Traditionally, you with a --- you compare with mold
16 levels indoor and outdoor. That's become not as big a
17 deal as it used to be. But what you can see is the
18 outdoor level is kind of your baseline. And if your HVAC
19 system is working reasonably well, you expect the inside
20 (inaudible).

21 Q. Okay. If the HVAC is working well --- reasonably
22 well ---

23 A. Right.

24 Q. --- you really only have an issue in the hole in Parker's
25 wall and the rest of the 101, 102, and 103 are pretty much

1 okay?

2 A. At that point in time, yes.

3 Q. At that point --- okay. That's September 25th when you
4 did the readings, right?

5 A. Right.

6 Q. Okay. Okay. If you'll go down to Plaintiff's 100, you
7 just have to flip, I think it's seven pages.

8 A. Okay.

9 Q. I believe it's down at the bottom. What does a
10 scan-by-scan comparison reports airborne particles --- what
11 are you trying to tell us?

12 A. Well, usually when you look at particulate matter,
13 you're looking at what's called PM10 and PM2.5, and
14 that --- that refers to the size of the particles. The
15 smaller --- the smaller the particle the worse it
16 health-wise. So PM10, by EPA, that's really for outdoor,
17 but if you're --- less than 150, then you're --- that's
18 considered acceptable. Anything more than that will be,
19 you know, somebody being burning something, fire or
20 something like that.

21 Q. So it's the --- it's the red double line here
22 (unintelligible) on the left, that's acceptable?

23 A. Yes.

24 Q. So it looks like the only thing in 101, 102, 103 that's
25 unacceptable is hole inside the wall, correct?

1 A. Yes, by EPA that's correct. If you were using WELL
2 Building, Parker's office would be (inaudible) --- I mean
3 which is a --- another standard.

4 Q. If you'll go to page 8 of 12 and it's bottom corner, it's
5 Plaintiff's 101.

6 A. Okay.

7 Q. Did you take these pictures (unintelligible) pictures
8 (unintelligible) investigation?

9 A. Yes, that's part of the --- you take the pictures as
10 you run the machine.

11 Q. Okay. And this picture on the --- on the left side,
12 (unintelligible) here, is this --- is this where the hole was?

13 A. Yes ---

14 Q. --- (unintelligible)?

15 A. Yes.

16 Q. (Inaudible)?

17 A. I think Scott did, and I'm --- my guess is I asked
18 him to. It was open and then we knew there was some
19 water damage in there, so that was an effort to minimize
20 the spread.

21 Q. Okay. If you go to Plaintiff's 103 at the bottom
22 right-hand corner. Okay. I want to --- I want to point out
23 this picture on the far left, this hole in the wall I'm
24 talking about. So (unintelligible) this mold on the wood is
25 pretty --- it's pretty dark. (Unintelligible) and looks kind

1 of yucky, right?

2 A. Correct.

3 Q. Okay. And are you aware that this leak was reported on
4 August 14th to Angela Adleman?

5 A. No, I --- I didn't have that knowledge at that time.

6 Q. Okay. So my --- my question is, if you get a leak that
7 starts on August 14th, and you did an investigation on the
8 hole in the wall on September 25th, that's what? 41 days ---

9 A. Right.

10 Q. --- give or take? Would you have that much growth of
11 mold grow on wood from just a water leak? Or would that have
12 to be a water leak over an extended period of time to be able
13 to get that amount of mold in this wall?

14 A. It really --- without more information that's hard
15 to say.

16 Q. Okay.

17 A. That's just it is. There's a lot of variables to
18 how fast the mold grows. So two days, it'll start, I ---
19 day or two to start depending on conditions it can be
20 fast or not.

21 Q. Were you aware that this was a slow water leak? It was
22 like a porous leak? It was just like a drip, drip, drip that
23 just kind of kept going?

24 A. I --- I --- I didn't know. You can just see from
25 the infrared the side of that wall is wet.

1 Q. Okay. And that was my next question. So if this whole
2 wall in Parker's office, is that a picture of this
3 (unintelligible)?

4 A. That general area. I --- I would say I think it's
5 incorporating more than just the hole. It's --- it's a
6 bigger area.

7 Q. Okay. When you say "wet," do you mean the sheetrock's
8 wet? The wood? (Unintelligible) or the insulation inside the
9 wall is wet? Or all of it?

10 A. Well, what the infrared is telling you surface
11 temperature and presumably where the hypothesis is, the
12 blue is cooler. And if it's --- a lot of times when it's
13 cooler, it's wet. That's what you're looking at
14 (unintelligible) picture.

15 Q. Okay. I'm going to go down to 104. And see the picture
16 in the upper right-hand corner where it says Scott's office
17 (unintelligible)?

18 A. Right.

19 Q. Okay. When you take down the wall and the sheetrock on
20 Parker's side, was that the sheetrock wall that you took down
21 in Scott's office as well?

22 A. Yes.

23 Q. Okay. So when you talk about walls, you only really took
24 down one wall, the sheetrock on one office ---

25 (Simultaneous speaking)

1 A. Both sides of the studs, correct.

2 Q. Okay. You didn't go down and take any --- any other
3 walls down when you were doing remediation in 101, 102, and
4 103, just one that one area?

5 A. Right.

6 Q. Okay. Now, I believe this little picture on Scott's
7 office, what is --- what is that, that little black dot?

8 A. That is where the water damage was affecting the
9 paint and the paint was starting to (unintelligible)
10 bubble just from the moisture.

11 Q. And if I'm looking at the ceiling (unintelligible) that
12 sort of semi-circle where (unintelligible) water's gotten
13 (unintelligible)?

14 A. Right.

15 Q. Was there any visible mold to the eye when you went into
16 Scott's office?

17 A. No.

18 Q. All right. Now, on October 7th, you had given a mold
19 remediation quote to Bower Commons Condo Association
20 (unintelligible) Condo Association? It's a mouth full.

21 A. Okay.

22 Q. Angela Adleman, how did you know to give this to Angela
23 Adleman? Did Melanie do it? (Unintelligible) or
24 (unintelligible) ---

25 (Simultaneous speaking)

1 A. I'm sure Scott let us know that was the contact
2 when --- where we knew there was an issue.

3 Q. Okay. So he didn't tell you to go to 1221 Bower, right?

4 A. I --- I'm not --- I --- what do you mean? I'm
5 sorry.

6 Q. You're --- no you're sure that it would have been Scott
7 or somebody from Scott's office, Insurance Office of America,
8 told you to contact Angela, correct?

9 A. Yes. I don't know how else we would have known.

10 Q. Okay. And on November 6th, you did a post-remediation
11 report. You said that last day, I guess you went from
12 November 2nd, November 5th in the clean-up; is that right?

13 A. Right.

14 Q. All right. The last day was just testing?

15 A. Yes, typically. Because there --- you --- once you
16 do the remediation, the air scrubber (unintelligible) so
17 that they can --- you --- you disturb just by the nature
18 of --- of remediation, you disturb the materials and have
19 the spores in the air. The air scrubbers filter the air
20 and need some time for that.

21 Q. Okay. Now, you made this --- this report out to Scott
22 Berry, why not to the condo association? Why to Scott?

23 A. Scott was my contact (background noise). I mean, my
24 understanding was Scott and Angela were working together
25 to fix the problem. I --- so I didn't --- I mean I feel

1 like I was --- they were working together, so they both
2 got copies.

3 MR. COBB: Permission to approach the witness, Your
4 Honor?

5 THE COURT: Yes.

6 BY MR. COBB:

7 Q. Now, what I just handed you is also on the screen.
8 Do --- do you recognize this as the correct and accurate final
9 version of the post (unintelligible) remediation mold
10 (unintelligible) air quality results you sent to Scott Berry
11 on November 6th, the day after you completed the mold
12 remediation, sir?

13 A. Yes. This is it.

14 Q. Okay. You know, unless there's objection, I'd like to
15 enter this as ---

16 MR. JOYCE: No objection.

17 THE COURT: Okay. So moved.

18 (Defendant's Exhibit 45 marked and entered)

19 BY MR. COBB:

20 Q. All right. Without going into too much detail can you
21 tell me what the results were post-remediation based off your
22 report?

23 A. They were good. Everything is back to normal. We
24 removed the wall, we did the testing. The only --- we
25 did recommend duct cleaning just based on the amount of

1 visible mold that we saw inside the wall.

2 Q. Okay. (Unintelligible)?

3 A. Yes.

4 Q. Okay.

5 A. Always.

6 Q. I know --- I know I would use you if I had mold.

7 (Simultaneous speaking)

8 A. Thank you. Yeah.

9 Q. So now I noticed the invoice on November --- excuse me,
10 on October 2nd. Again, that was made out to the condo
11 association. Was that the --- was that for the --- was that
12 for your September 25th ---

13 A. Yes. That's for the initial testing and protocol.

14 Q. Okay. So, again, I'm just going to hit this map again.
15 Scott's office was right here; is that right?

16 A. Yes.

17 Q. And Parker's office was right here?

18 A. Yes.

19 Q. And this was the wall that that you took out the
20 sheetrock on both sides (unintelligible), right?

21 A. Yes.

22 Q. Got it. So okay, let me --- let me --- let me ask you,
23 did you ever --- when you were in there, did you ever go into
24 (inaudible)?

25 A. No, the --- some of Parker's stuff was back close to

1 that area, but we --- 104 is the one right across from
2 Parker there.

3 Q. Yes, sir. It has a glass door to go into it?

4 A. Yeah. We --- we had no reason to go in there.

5 Q. Okay. All right. And are you aware that there have been
6 problems with the upstairs residential condo leaking water in
7 that spot all the way back to 2015?

8 A. No. I don't remember ---

9 (Simultaneous speaking)

10 Q. Are you ---

11 A. --- aware.

12 Q. Are you surprised that that was the case?

13 A. No, not really.

14 Q. Do you --- do you have to do a lot of mold remediation
15 for like condominiums and things of that nature because of
16 water intrusion from upstairs unit owners ---

17 A. Yes.

18 Q. --- downstairs units?

19 A. It's not uncommon.

20 Q. Okay. And so who normally owns, like, the innards
21 between, you know, the ceiling and the floor of the --- of the
22 upstairs owner and downstairs owner?

23 MR. JOYCE: Objection.

24 THE COURT: Based on --- what is your ---

25 MR. JOYCE: (Unintelligible) have knowledge about

1 this? I mean ---

2 MR. COBB: Well, he would have knowledge based
3 on ---

4 (Simultaneous speaking)

5 THE WITNESS: Honestly, most of the time when we're
6 involved in ---

7 THE COURT: Hold on --- hold on a minute.

8 THE WITNESS: Sorry.

9 THE COURT: One more time.

10 MR. COBB: I'm trying to figure out who he would
11 normally deal with. (Unintelligible) condo association.
12 I want to see if historically when he's done other
13 condos, if he's billed the unit owner or if he's billed
14 the association.

15 MR. JOYCE: Objection. Relevance.

16 THE COURT: All right. I'm --- I'll overrule and
17 I'll allow the question.

18 MR. COBB: Okay.

19 BY MR. COBB:

20 Q. So when you've done condo --- condo clean-up before, did
21 you normally bill the condo owner or the association?

22 A. Frankly, it's --- it's tricky. See what typically
23 ends up happening is there's two insurance companies
24 involved and so it's a --- may have to work out who's
25 responsible for what and --- and what --- often it's

1 they're only covering the unit that they're responsible
2 for. So --- so I guess it --- it ends up being split.
3 That's just in our experience with mold and asbestos.

4 Q. So you mentioned insurance, that's --- that's actually
5 where I was going next. So when a --- when a --- when an
6 association or the owner has to make an insurance claim, does
7 that sometimes delay how long it takes you to get engaged and
8 go in and start doing the work?

9 MR. JOYCE: Objection. Lack foundation.
10 Speculation.

11 MR. COBB: I mean, I --- I'm happy to --- I ---
12 I'll --- I'll go back to the beginning and I'll start
13 again. I mean, it's pretty clear where I'm going with
14 it.

15 THE COURT: All right. I'm going to let him
16 continue, but I'm going to --- I'm going to let him
17 continue for right now. So overruled.

18 THE WITNESS: It can. I mean, I've seen it going
19 both ways. I've seen the owner just pay it and
20 decide --- try to get it worked out (unintelligible) back
21 side. It --- it really depends on the situation. But
22 ---

23 (Simultaneous speaking)

24 THE WITNESS: --- can, I mean, if it --- you know,
25 some --- if waiting on approval that can delay it.

1 MR. COBB: Yes, sir.

2 BY MR. COBB:

3 Q. It's fair to say in your 40-plus years' experience,
4 you've seen insurance companies delay you being engaged?

5 A. Oh, yeah. Oh, yeah.

6 Q. What about getting paid?

7 A. Yeah. Yeah.

8 Q. Okay. So I want to go over the dates really quick. So
9 on September 25th, you go and investigate Units 101, 102 and
10 103?

11 A. Correct.

12 Q. Is that right? And you find that there's a problem in
13 Parker's office, and a little bit in Scott's office, maybe the
14 floor in Renee's office is in front of Parker's
15 (unintelligible) right?

16 A. Correct.

17 Q. Okay. All right. And you didn't find a problem really
18 anywhere else in the rest of the Suites 101 and 102, correct?

19 A. We --- we --- in the protocol said that we cleaned
20 those as a result of (unintelligible) yeah, but no ---
21 nothing other than some stained ceiling tiles visible.

22 Q. Got it. And that could have been water leaks from other
23 upstairs condo owners?

24 A. Condensation, whatever.

25 Q. (Inaudible) or like --- maybe like the ductwork for the

1 HVAC system or something ---

2 (Simultaneous speaking)

3 Q. --- water drips?

4 A. Yes, sir.

5 Q. Okay. So you issue your report on September 30th; is
6 that right?

7 A. Yes.

8 Q. Okay. And then on October 2nd, you give a quote to
9 Angela Adleman?

10 A. Right.

11 Q. Okay. And then on October 25th, does Angela Adleman
12 contact you to --- (background noise)?

13 A. As I recall, she was e-mailing Melanie to --- yeah,
14 get us scheduled.

15 Q. And it took a little while to get you scheduled then from
16 October 25th to November 2nd was ---

17 A. We --- we were about a week, yeah.

18 Q. All right. Because it just takes time to get three or
19 four guys together for two or three days, right?

20 A. Well, thankfully we were, you know, we were busy,
21 and we had ---

22 (Simultaneous speaking)

23 A. --- other commitments before we could get there.

24 Q. Now, are you aware that after you did this really nice
25 work and that you finished on November 5th, and issued a

1 really nice report on November 6th, the upstairs condo owner
2 had another leak on November 9th?

3 A. I think that was something I had heard that.

4 MR. COBB: Okay. All right. So I don't have any
5 further questions. Thank you so much, sir.

6 THE COURT: Redirect?

7 MR. JOYCE: Briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. JOYCE:

10 Q. Mr. Cobb spent a lot of time about the hole in the wall.
11 I just wanted to make clear this --- this affected the whole
12 wall cavity, correct?

13 A. (Inaudible).

14 Q. I mean, it was --- it was on the ceiling tiles, correct?

15 A. Yes.

16 Q. And I know it wasn't within your scope, but when you
17 opened up the wall this was --- this was sewer water, correct?

18 MR. COBB: Objection, asked and answered. He said
19 he didn't know.

20 MR. JOYCE: I --- I really ---

21 MR. COBB: My objection, Your Honor.

22 THE COURT: All right. I'll sustain --- I'll
23 sustain your objection. You can answer the ---

24 MR. COBB: Thank you, Your Honor.

25 BY MR. JOYCE:

1 Q. Did you see any evidence of sewage?

2 MR. COBB: Your Honor. Objection. Asked and
3 answered.

4 THE COURT: I'm going to overrule and allow him to
5 answer that question.

6 BY MR. JOYCE:

7 Q. Did you --- did you see any evidence of sewage when
8 the --- when the wall was opened up?

9 A. No, just a lot of mold.

10 Q. Okay.

11 THE COURT: All right. Re --- re-cross.

12 MR. COBB: Yes, thank you, Your Honor.

13 RECROSS-EXAMINATION

14 BY MR. COBB:

15 Q. Did you ever at any time tell anyone that Insurance
16 Office of America is unsafe to work in these offices outside
17 of maybe Parker's office?

18 A. No. I just said it was abnormal --- at the
19 level --- was abnormal given the visible growth.
20 (Inaudible).

21 Q. So you never told them it was so hazardous they needed to
22 stay out?

23 A. No.

24 Q. Did --- did you tell them you may not want to be there
25 when I remediate it? Loud and noisy and dusty?

1 A. Yes, typically. Yeah, that would be something we
2 would ask to happen, have the space for a few days and
3 then give it back to them.

4 MR. COBB: Thank you so much. No further questions.

5 THE COURT: All right. All right. This witness may
6 be --- may be excused. Place watch your step coming
7 down.

8 Plaintiffs will call their next witness.

9 MR. JOYCE: Your Honor, at this time the plaintiff
10 calls Scott Berry.

11 (Witness sworn)

12 SCOTT BERRY, HAVING BEEN DULY SWORN, TESTIFIED AS
13 FOLLOWS.

14 THE WITNESS: My name is Scott Berry, B-E-R-R-Y.

15 DIRECT EXAMINATION

16 BY MR. JOYCE:

17 Q. Good afternoon, Scott.

18 A. Good afternoon.

19 Q. How are you?

20 A. Good.

21 Q. Good. Can you just tell the jury just a little bit about
22 yourself, who do you work for?

23 A. Yeah. I'm --- I'm originally from South Carolina.

24 I grew up in Spartanburg. And I work for Insurance
25 Office of America. I've worked there since 2003.

1 Q. Okay.

2 A. Going on 21 years.

3 Q. And what's --- what's your position at IOA?

4 A. My position, in the insurance world, I'm called a

5 producer, which is salesperson. I sell commercial

6 insurance, property, and casualty, which would be

7 Workers' Comp, general liability, specialized in

8 commercial. I write business insurance.

9 Q. And have you held that role since you started at IOA?

10 A. Since I started, yes, sir.

11 Q. Do you like --- enjoy working for IOA?

12 A. I do, yeah. I've been there a while.

13 Q. And where was IOA's office located back in 2020?

14 A. Oh gosh, when I started?

15 Q. In 2020.

16 A. Oh. In 2020, it was on Bower Parkway.

17 Q. Okay. And you all moved in that space around 2012; is is

18 that ---

19 A. Around 2012.

20 Q. --- about right?

21 A. Seems like.

22 Q. Jury's kind of heard --- heard a decent amount about the

23 layout of the building, but could you just explain the

24 different floors and --- and general layout?

25 A. Yeah, there's a --- I think as someone said earlier,

1 it was a mixed-use building. So the bottom floors were
2 all retail or commercial. The upper two levels were all
3 residential condominiums. And the --- and the property
4 itself was an association, made up the commercial units
5 and the residential.

6 Q. Okay. And --- and IOA occupied in 2020, four of the
7 units ---

8 A. Correct.

9 Q. --- stairs in the ground level?

10 A. Right. There were two separate buildings, we
11 occupied one of those.

12 Q. Okay. And --- and the four units that IOA occupied, was
13 this kind of an --- an open floor plan?

14 A. Yeah, it was. Yeah.

15 Q. Okay.

16 A. If you walked in the front door, there was a
17 reception desk, and a small wall, and then a room full of
18 cubicles, and then outlined with offices.

19 Q. And which --- which unit was your office in?

20 A. On the diagram it was 102.

21 Q. Okay. And --- and were other offices located in 102?

22 A. Sure.

23 Q. Okay.

24 A. Yeah.

25 Q. Just generally, how --- if you could estimate how many

1 other folks?

2 A. Three or four. We had a conference room. Rob's
3 office, mine. There was an office to my left. And then
4 there was another unit that you went down up the steps to
5 it to a lower level that had offices as well.

6 Q. Okay. And that would --- would that have been 103?

7 A. Correct.

8 Q. Okay. And was that where Parker's office ---

9 A. That's right.

10 Q. --- located?

11 A. Yeah.

12 Q. So how many different offices were down in --- in 103?

13 A. In that area, there were two offices.

14 Q. Okay. So two folks working in 103?

15 A. There had been two office and one --- three cubicles
16 in that area.

17 Q. Okay.

18 A. And there had been a small storage room and a
19 hallway that lead to 104.

20 Q. Gotcha. Thank you for that. So back in 2020, if you
21 know, how many folks were --- were working for IOA's Columbia
22 office?

23 A. Somewhere in the 17 to 20 range, I guess.

24 Q. Okay. And we know that COVID came in --- in
25 March 2020 ---

1 A. Yes.

2 Q. --- but what was the staffing situation in terms of folks
3 working in the office as --- as COVID kind of progressed?

4 A. Well, the producers or salespeople could come and
5 do, you know, do what they, they had to do, use the copy
6 machine, scanner, that kind of thing. For the other
7 folks it was on a hybrid model, and then would --- I
8 think we maybe were 25 percent at one point. It ramped
9 up to 50 over a couple months. It was getting a lot of
10 information at that point on COVID and various protocols,
11 but that's --- that's about where we were.

12 Q. Okay. So does it sound right, you know, July you all
13 were at 50 percent?

14 A. That sounds about right, yeah.

15 Q. Okay. And how often were you individually just coming
16 into the office?

17 A. One or two days a week.

18 Q. Okay. And --- and how long ---

19 A. And --- and because I'm in sales, you know, I was on
20 the road a lot too. But I would come in for an hour or
21 two here or there, you know, where I'd need to.

22 Q. Gotcha. So you had --- had --- had been working there
23 since 2012?

24 A. In that location since 2012, yeah.

25 Q. And did IOA have to deal with water intrusion issues?

1 A. It did. I actually occupied a different office for
2 a period of time, so I'd been in this office maybe a
3 couple of years. But to answer your question, yeah, we
4 had --- we had a number of water events in the time that
5 we'd been there since 2012.

6 Q. Okay. So this was --- this was something that happened
7 more than once?

8 A. Uh-huh.

9 Q. Multiple occasions? And was it happening at --- at
10 various places in the ---

11 A. Different places. In 2015 Columbia experienced, you
12 know, a flood situation. We had some water intrusion,
13 had some exteriors walls, I think the door. Maybe some
14 balconies had some water issues. And I know we had a hot
15 water heater that leaked one time and some water damage.
16 Yeah, we'd had a number of leaks over that period of
17 time.

18 Q. Okay. So you --- you all had some events where rainwater
19 would come in, intrusion from --- from outside?

20 A. We did.

21 Q. And would you also have water or sewer intrusion coming
22 from --- from upstairs from the residential?

23 A. We did --- it was a water sewer situation that
24 occurred in the same general area about 45 years prior.

25 Q. Okay. So after the landlord purchased the building

1 in --- in 2019, did IOA have more water intrusion issues?

2 A. Yes. Yes, sir.

3 Q. And generally speaking, you know what --- what some of
4 the damage that would --- that would result from these events?

5 A. Most was the time it would be minor. We had a drop
6 ceiling in the offices similar to what we have here in
7 the courtroom. And you would see, you know, signs, water
8 stains on the --- in the ceiling tiles --- the acoustic
9 tiles. And whatever that happened, you noticed there was
10 a leak, get somebody involved to get somebody out there
11 to take care of it.

12 Q. Okay. So getting --- getting somebody involved, who
13 would --- who would you typically contact if you had a --- a
14 water event happen?

15 A. The association manager.

16 Q. Okay. And that would --- would that be Angela Adleman?

17 A. It was Angela Adleman, Angela was the property
18 manager there for a couple of years up until the time we
19 left. Before that was --- was another property manager
20 involved. Same company, it was a different manager.

21 Q. And is that just generally how --- how these situations
22 were handled?

23 A. Yes. Yes.

24 Q. And that was --- is that your understanding of who you
25 were supposed to contact if a situation like this came about?

1 A. Absolutely.

2 Q. So when you would reach out to Angela, did she ever tell
3 you to contact the landlord instead of her?

4 A. No. No.

5 Q. Had --- had you ever heard from the landlord in 2019,
6 2020; had you ever met him?

7 A. I don't think I met him until he stopped by sometime
8 in October of 2020.

9 Q. Oh. So this would have been two months after the ---

10 A. Right.

11 Q. --- water leak?

12 A. Yeah.

13 Q. And that was the first time that --- that you ---

14 A. The first time I had ever met him.

15 Q. Okay. But ---

16 A. He was on his way --- he was on his way to the
17 upstate, and he had stopped by, came in, and I showed him
18 around the office, showed him the damage.

19 Q. Okay. When --- when he --- when you --- when he stopped
20 by, did he say anything about you should contact me about
21 these issues, or --- or if you keep (unintelligible)?

22 A. Not that I recall.

23 Q. All right. Let's talk about the water and mold issue
24 that started in August 2020. Do you remember that?

25 A. Correct. Yeah.

1 Q. You --- you talked about minor issues earlier; was this a
2 minor issue?

3 A. It appeared to be fairly minor at the time, yeah.

4 Q. Okay.

5 A. I walked in my office and there was a small water
6 stain on the ceiling. I walked around to Parker's office
7 which you've heard we shared an office --- or a office
8 wall. So I walked around to --- around to Parker's
9 office and he had a much larger stain on his ceiling
10 (inaudible).

11 Q. Okay. So ---

12 A. But it wasn't a situation where ceiling tiles
13 were --- you know, were falling out of the ceiling or
14 anything like that. It appeared to be fairly minor at
15 the time.

16 Q. Okay. So what did you --- what did you do next after you
17 noticed the --- the ceiling tiles?

18 A. I sent a text to Angela and attached a couple of
19 pictures to it.

20 Q. Okay. Do you mind --- do you have your exhibit book up
21 there?

22 A. I do.

23 Q. Do you mind flipping to tab 11.

24 A. Okay.

25 Q. Mr. Berry --- or Scott, does that appear to be a copy of

1 the text message you would have sent Angela Adleman on
2 August 14th?

3 A. It does.

4 Q. And is this a --- is this a true and accurate copy of ---
5 of that text message?

6 A. Yes, it appears to be. Yes.

7 MR. JOYCE: Your Honor, at this time we'd --- we
8 move what's --- what we'll mark as 11 into evidence.
9 Text that Scott sent to Angela Adleman on August 14th.

10 MR. COBB: No objection, Your Honor.

11 THE COURT: All right. So moved.

12 (Plaintiff's Exhibit 11 marked and entered)

13 THE WITNESS: That picture there that's showing is a
14 picture of Parker's ceiling.

15 THE COURT: Yes.

16 BY MR. JOYCE:

17 Q. Okay. So Scott, what happened next? What did --- what
18 was the --- what was the response from Angela, the plan of
19 action?

20 A. So that she would get a roofer out to take a look.

21 Q. Okay. Did a roofer come out?

22 A. Uh-huh. A roofer came out, I believe CMS Roofing if
23 I recall.

24 Q. Okay.

25 A. And they came out fairly quickly. And it's my

1 understanding they said that there was not a roofing
2 issue, it was a -- a plumbing-related issue.

3 Q. Okay. So did --- at that point did it appear that it was
4 a leak that was coming from upstairs in the residential units?

5 A. It did.

6 Q. Okay. So after the roof --- roofing company came out,
7 what --- what happened after that?

8 A. Angela had a plumbing contractor to come out. This
9 is several days later. I don't remember the exact time,
10 but a plumbing contractor came out.

11 They came out and I remember they did not have a
12 ladder, they weren't able to get up and remove the
13 ceiling tiles to take a look and see what's going on. So
14 they weren't there very long and they left. And I had a
15 conversation with Angela about that. And we arranged for
16 the contractor to come back out, I guess a few days later
17 and bring out a ladder so they could get up and look at
18 it.

19 Q. Okay. So did plumber come out on multiple occasions over
20 the ---

21 A. On multiple occasions.

22 Q. Okay. Could they ever fix the leak?

23 A. They never appeared to be able to find where ---
24 where it was coming from.

25 Q. Okay.

1 A. All right.

2 Q. So each time they come --- they came out they'd have to
3 come back again (inaudible)?

4 A. Correct.

5 Q. But at --- at that point it was confirmed that it was
6 coming from a --- a toilet upstairs?

7 A. That was my understanding.

8 Q. Okay. All right. Scott, let's ---

9 A. I would say that each time the plumber came, you
10 know, they would take a look at it. I think they
11 actually went in the unit above. They would say that the
12 problem had been resolved, and they did --- and we would
13 continue to have --- have a leak in that area.

14 Q. Okay. All right. Scott let's --- let's kind of fast
15 forward a little bit, go to September 22nd. And if you could
16 bear with me just for a second. Okay. If you could start off
17 746 at the bottom; do you see where I'm at? It says subpoena
18 response 746 at the very bottom.

19 MR. JOYCE: Your Honor, may I approach?

20 THE COURT: Yes.

21 THE WITNESS: Okay.

22 MR. JOYCE: (Unintelligible).

23 BY MR. JOYCE:

24 Q. And if --- if you will just you could --- you could flip
25 over to the next couple pages just to refresh your

1 recollection of --- of this date and just let me know when
2 you're ready.

3 A. Okay.

4 Q. All right. So Scott, we're at September 22nd, this is
5 about 40 days after you texted Angela on August 14th?

6 A. Right.

7 Q. Had the situation gotten a lot worse?

8 A. That day it had. I came in and I guess the cleaning
9 crew had been there because, you know, we had not done
10 any of this. IOA had not (unintelligible). I came in
11 and there was plastic on the floor, the ceilings dropped,
12 and a plastic container was under, I guess the --- the
13 leaking area and it had several inches of water in it.

14 Q. Okay. So we had a ceiling tile that had fallen through
15 some ---

16 A. Uh-huh.

17 Q. --- water?

18 A. Correct.

19 Q. You had a --- a trash can that was filling up with
20 several inches of water?

21 A. Several inches of toilet water from what I
22 understand.

23 Q. And did your office smell?

24 A. There was definitely an odor.

25 (Simultaneous speaking)

1 Q. What did --- what did it smell like?

2 A. Like sewage.

3 Q. All right. And --- and if you could just flip to tab six
4 for us?

5 (Attorneys conferring)

6 BY MR. JOYCE:

7 Q. If you flip to tab six. So it's got --- these are
8 photographs ---

9 A. Uh-huh.

10 Q. --- do you recognize these photographs?

11 A. I do.

12 Q. Are these photographs that would have been taken around
13 September 22nd?

14 A. They would, yes. Yes.

15 Q. And is this is Parker office? This is the same trash can
16 that you're talking about?

17 A. That is Parker's office.

18 Q. And does that accurately represent the conditions at the
19 end of September at --- at the office space?

20 A. That's what it looked like on September 22nd.

21 MR. JOYCE: Okay. All right. Your Honor, at this
22 time I --- I'd move what we've marked as Exhibit 6 into
23 evidence, which is photograph of what the space looked
24 like around September 22nd.

25 MR. COBB: No objection, just clarification. It is

1 the pictures were taken on September 22nd; is that
2 accurate?

3 MR. JOYCE: Yeah.

4 MR. COBB: No objection.

5 THE COURT: So moved.

6 (Plaintiff's Exhibit 6 marked and entered)

7 BY MR. JOYCE:

8 Q. And Scott, at that point do you recall telling Angela
9 that you all need a --- a mold remediation company to come out
10 there?

11 A. I did.

12 Q. Were --- were you concerned?

13 A. I was very concerned. Yes.

14 Q. Clearly this is a much bigger issue than the --- the
15 other leaks that you dealt with?

16 A. Oh, yeah.

17 Q. So curious at that --- by this point had you heard
18 anything from --- from the landlord, or was Angela continuing
19 to ---

20 (Simultaneous speaking)

21 A. At this point Angela was continuing to be involved
22 and spearhead the ---

23 Q. Okay. So at this point what was --- what was the plan of
24 action to address this?

25 A. This point they were going to get a contractor to

1 come in and --- and just start tearing out the walls and
2 replacing the ceiling tiles.

3 Q. Okay. Were they wanting to do a --- a mold remediation
4 at the time?

5 A. Not (unintelligible) not at this point.

6 Q. So was --- were you and was your --- your coworkers at
7 IOA, were you all concerned about wanting to get a --- a mold
8 remediation done ---

9 (Simultaneous speaking)

10 A. I was, yeah.

11 Q. Okay. And is that ---

12 A. Mainly because you could see the bubbling on the ---
13 the paint coming through the wall. You know, that's one
14 of the pictures there that shows the --- the black spots
15 on the wall.

16 Q. And ---

17 A. I was concerned that the leak had been going on for
18 over a month now and still hadn't resolved it.

19 Q. Okay. And this is about the time you would have called
20 Dave Dunnagan?

21 A. No, I didn't reach out to Dave until the landlord
22 had a contractor to come in that was going to start
23 ripping out the walls and --- and doing the repair work.

24 So the contractor came in, I don't remember the
25 exact date. It was the contractor who cut the one-foot

1 by one-foot section out of the wall. That was a number
2 of days after this. And he was sent in by the landlord.

3 And Crissy was there day that day. And when he
4 opened it up and we could see the black on the wall.
5 That's when we said, whoa, we got to --- we got to do
6 something. You know, we got to get a remediation
7 contractor over to look at this.

8 Q. Gotcha. So at that point that would have been when you
9 all started discussing mold remediation?

10 A. Right that would be have been --- I was concerned
11 about mold at this point, but it would have probably been
12 a week later that contractor came in and opened up a hole
13 in the wall.

14 Q. Gotcha. So what was the --- the ultimate decision on how
15 the remediation was going to be handled? You --- you --- you
16 reached out to Dave, correct?

17 A. Well, Crissy and I had a conversation and we said
18 this (technical difficulty) --- can't just start ripping
19 out walls and exposing this to the office. We got to get
20 somebody in (inaudible).

21 And I know Dave, we've been friends a long time. I
22 understand what he does. And I told Crissy, I'll reach
23 out to one of my clients, let's get him in here and let
24 him take a look (inaudible). Even if we have to pay for
25 it out of our own pocket, IOA, let's get somebody in here

1 to do some testing to see what's happening.

2 Q. And did you tell Angela about that?

3 A. I did.

4 Q. Okay. So ---

5 A. Neither I or Crissy told Angela we got a --- you
6 know, we got to slow up with the contract --- contractor
7 here. We got to figure out what's going on.

8 Q. Did it seem like the landlord wanted to just put up new
9 sheetrock and leave the mold?

10 A. That was the plan at that point.

11 Q. And was that --- that's what you all were concerned
12 about?

13 A. That --- that was my understanding that contractor
14 was out there to start tearing down the wall and putting
15 up a new one.

16 Q. So you --- you ended up --- you --- you --- you spoke to
17 Dave, he came out there relatively quickly?

18 A. Very --- like the next day.

19 Q. Okay. And --- and we just heard from Mr. Dunnagan
20 ultimately he --- he did a test and did he find some mold?

21 A. I believe he did. Yes.

22 Q. Okay. And Mr. Dunnagan would have been sent you a
23 proposal?

24 A. He would have sent me the invoice and the test
25 results and which I would have shared with Angela. But

1 as far as a proposal for doing the remediation ---

2 (Simultaneous speaking)

3 Q. Just an --- just an invoice and --- and proposal?

4 A. For doing the remediation work?

5 Q. Correct.

6 A. I believe he sent the proposal to Angela directly,
7 but he could have sent to me and I passed it ---

8 Q. Yeah, let --- let's --- let's flip to --- to tab 13, if
9 you don't mind.

10 A. Okay.

11 Q. Scott, do you --- do you recall this e-mail?

12 A. I do.

13 Q. Okay. And --- and what is --- what is this e-mail about?

14 A. We'd received a remediation quote from --- from
15 Dave, and I passed it along on October the 2nd, 2020.

16 Q. And this would be a true and accurate copy of that
17 e-mail?

18 A. It would.

19 Q. And this e-mail, you forwarded over to Angela the same
20 day you received it from Kleen Sites; is that correct?

21 A. It looks --- yes. It looks that way.

22 Q. And that's on October 2, 2020?

23 A. Yeah. Yeah. October 2nd.

24 MR. JOYCE: Your Honor, at this time plaintiff would
25 move what was marked as Exhibit 13 into evidence, which

1 is a --- a copy of the quote and proposal sent by Mr.
2 Berry to Ms. Adleman.

3 THE COURT: All right. Any objection?

4 MR. COBB: No, Your Honor.

5 THE COURT: All right. So moved.

6 (Plaintiff's Exhibit 13 marked and entered)

7 BY MR. JOYCE:

8 Q. So after --- after you provided the quote and the
9 proposal to Ms. Adleman, what was --- what happened --- what
10 was the next steps in terms of --- of trying to get somebody
11 out there to --- to get the mold out?

12 A. At some point there was a conference call that took
13 place between the landlord, Angela, and me and Crissy and
14 a couple of other IOA representatives. And I know an
15 insurance claim had been started. So, you know, the plan
16 was to get the remediation work done. But they were
17 going to have their own remediation quote, so they had
18 reach out to someone else, tried to get another quote.

19 Q. And it was confirmed there was --- there was mold in the
20 office at that point ---

21 (Simultaneous speaking)

22 A. Correct. And Dave had done his testing, and
23 confirmed there was --- there was a presence of mold.

24 Q. Okay. So at this point this was the landlord just
25 wanting to get another mold company out there to get a second

1 opinion, or --- or what was your understanding?

2 A. That was my understanding. Yes, sir.

3 Q. Okay. So what --- did --- did that happen? Do you know
4 if another mold assessment was done?

5 A. I think so, but I'm --- I don't --- I'm not sure.

6 Q. Okay.

7 A. It was my understanding there was another estimate
8 given. Ultimately they decided to go with --- with Kleen
9 Sites.

10 Q. Do you know how long it --- it took for Kleen Sites to
11 get approved?

12 A. I don't. I know the work was started in early
13 November, so all this would have happened during the
14 month of October.

15 Q. Gotcha. So it would have been about a month after you
16 sent the e-mail to Ms. Adleman?

17 A. Yes. I know Dave started early November. So ---

18 Q. So again, we --- we just heard from --- from Mr.
19 Dunnagan, but he ended up coming out there. He did a --- a
20 mold remediation ---

21 A. He did.

22 Q. --- for a few days? And after the mold remediation was
23 completed, did you come back into the office and --- and see
24 evidence of a --- an active water leak?

25 A. After Dave had completed the remediation?

1 Q. Yes.

2 A. Yeah.

3 Q. Okay. Tell us about that. What --- what did you see?

4 A. Well, the way Dave had left the office space ---
5 space was they had come in and ripped out all the
6 sheetrock, took out all the ceiling tiles and left
7 the --- the wood studs of the office encapsulated with
8 a --- with a tarp or clear plastic. Some pictures would
9 show that.

10 Q. Yeah, let's --- you --- you said some pictures, if you
11 want to flip to tab A, you can keep --- you can keep ---

12 (Simultaneous speaking)

13 Q. --- tab A. Yes, sir.

14 A. Okay. Yup. So when Dave's crew got done, this is
15 the way the office space was left. It was --- had been
16 scrubbed clean. It was ready for a contractor to come
17 in. So I came in sometime after --- after this was done
18 within a day or two. And I could see water droplets on
19 the back of the --- of the plastic.

20 Q. Okay. And this is a --- a note, I guess it's your
21 handwriting?

22 A. That's my handwriting.

23 Q. Okay. Would this been --- had been a second time you
24 came out, or --- or after Dave left? Or what --- (inaudible)?

25 A. Hmm. I was in and out of the office occasionally to

1 use the copy machine, but this --- can't say that this
2 was the first time I'd been in there, but it was one
3 of --- one of few times I had been there since Dave
4 (inaudible).

5 Q. Okay. And what --- are these photographs that you would
6 have taken?

7 A. That would be one that I would have taken.

8 Q. And is this --- this a fair and accurate reflection of
9 how the space looked at around November 13th?

10 A. Yes. (Inaudible).

11 MR. JOYCE: Your Honor, at --- at this point, we
12 would --- plaintiff would move to enter in Exhibit 8 into
13 evidence which is set of photographs from November 13th.

14 THE COURT: Any objection?

15 MR. COBB: No, Your Honor.

16 THE COURT: So moved.

17 (Plaintiff's Exhibit 8 marked and entered)

18 BY MR. JOYCE:

19 Q. All right. Scott, so August 14th was your text,
20 November 12th was 90 days, the day after 90 days, this would
21 have been what --- what the place looked like?

22 A. Yes.

23 Q. Okay. So obviously the sheetrock left to do, walls left
24 to be put together?

25 A. That's correct. That's a picture of my office

1 looking towards Parker's office.

2 Q. Okay. And --- and carpet still need --- needing to be
3 replaced?

4 A. Correct.

5 Q. And then there's --- there's a active water leak still
6 going on too?

7 A. There was moisture behind that barrier.

8 Q. Okay. And that ceiling tiles still left ---

9 A. Yes, ceiling tiles ---

10 Q. So within the 90 days of --- of --- of the notice you
11 provided on August 14th, had --- had the office been restored
12 back to its --- its original condition?

13 A. It had not at this point, no.

14 Q. So Scott was --- was this an exhausting process?

15 A. Yes, it was a long few months there. Yeah.

16 Q. There's been some insinuation that --- that you and Ms.
17 Warner were not available to --- to meet or to be there for
18 anything ---

19 A. No.

20 Q. --- were you all available?

21 A. We were always available. No, that's not accurate
22 at all.

23 Q. So ---

24 A. And I --- and I can tell you, I --- I live in Irmo.

25 I live off Kennerly Road which is in the Irmo area. So I

1 was probably the closest person to the office. So a lot
2 of times I would get a call. You know, I was just the
3 most convenient person that could be there the --- the
4 fastest.

5 Q. Okay. So sometimes when Angela couldn't meet contractors
6 there would you --- you actually go and meet the contractors
7 there for her?

8 A. Absolutely.

9 Q. And this wasn't --- this wasn't your job was it?

10 A. No, it wasn't. And a lot of times Crissy and I
11 would coordinate. You know, if Angela couldn't make it
12 because of a conflict, we would make sure that somebody
13 was there to let a contractor in.

14 MR. JOYCE: All right. Scott, thank you. Those are
15 all my questions.

16 THE WITNESS: All right.

17 MR. COBB: Your Honor, permission to approach?

18 THE COURT: Yes.

19 (Bench conference)

20 THE COURT: All right. Ladies and gentlemen of the
21 jury, we're going to take a brief ten-minute recess. If
22 you would escort the jury room out, take them to the
23 bathroom, let them stretch. Thank you.

24 (Jury exits courtroom)

25 THE COURT: All right. All right. Gentleman, I

1 think --- I think the better thing to do is to start your
2 cross first thing in the morning. And ---

3 MR. COBB: Just looking over my notes, a lot of it I
4 can cut out, because it was --- some of it's redundant.
5 I think an hour is a good estimate.

6 THE COURT: Okay. All right. So I still think that
7 cuts it --- we're going to --- we're going to start first
8 thing in the morning. I'm trying to think how fast I can
9 get up here after school drop off. It will probably
10 still be cutting it at like 9:45. So if we could intend
11 to start at 9:45, I will try my best not to get a ticket
12 and be up hereby 9:45. Because I --- I do think this has
13 been a long day for them. And so we can start at 9:45
14 and you would anticipate about an hour or so.

15 How many more witnesses does the plaintiff have
16 left?

17 MR. JOYCE: One or two.

18 THE COURT: One or two.

19 MR. JOYCE: Yeah.

20 THE COURT: Okay.

21 MR. JOYCE: Well, I mean, we'll be done tomorrow for
22 sure.

23 THE COURT: Okay. And so then we'll obviously hear
24 his motions and ---

25 MR. COBB: Well, Your Honor, I don't believe they're

1 going to call my client. I think I'm going to have to
2 call my client on defense.

3 THE COURT: Okay.

4 MR. COBB: So I --- I --- I mean, we'll definitely
5 use with that, I think we'll use all of tomorrow for
6 testimony. I'm not sure we're going to give it to the
7 jury tomorrow at this rate.

8 MR. JOYCE: I --- I'd agree with that. I think
9 we're looking at Thursday.

10 THE COURT: Okay. All right. So that's okay.
11 We'll do what needs to be done in order to --- to
12 (unintelligible) case trial. And so I --- I just --- my
13 concern is that you get into cross today (technical
14 difficulty) for the last hour.

15 MR. COBB: Yes, Your Honor. And I --- I promise
16 I --- I'll try to be quick. I just --- there's a lot of
17 key points I'd like to make with ---

18 THE COURT: I certainly will allow you to ---

19 MR. COBB: Okay.

20 THE COURT: I think tomorrow will be a fresh start
21 for them. And we --- we will try to start promptly at
22 9:45.

23 MR. COBB: Yes, ma'am.

24 THE COURT: As soon as we get in I'll --- as soon as
25 I get in we will --- we will hit the ground running.

1 Okay?

2 MR. COBB: That's good, Your Honor.

3 THE COURT: All right. Any issues come up overnight
4 please, again, e-mail us so that we can try to take care
5 of them first thing in the morning. I'm going to call
6 the jury back in, let them know that we'll start fresh
7 tomorrow morning. And --- and actually the witness,
8 there are some implications in that for you.

9 THE WITNESS: Okay.

10 THE COURT: So you cannot confer with your counsel,
11 you're still on the stand.

12 THE WITNESS: Okay.

13 THE COURT: Okay. So you cannot contact your ---
14 your counsel while you are --- overnight. So just to
15 make sure that you're here, because you're on the hot
16 seat tomorrow.

17 THE WITNESS: Okay.

18 THE COURT: (Inaudible) still got probably four ---
19 three or four more minutes left in their little break.
20 And so we'll stand down until we bring them back in.

21 (Unintelligible) have any issues while we're outside of
22 their presence? Okay. All right. Very good. I'm going
23 to do some criminal work while y'all --- while we --- in
24 these next three minutes.

25 (Off the record)

1 (Jury enters courtroom)

2 THE COURT: All right. Please be seated. Okay.
3 Thank you, Ladies and gentlemen of the jury. At this
4 time we are going to adjourn for the day. Let me give
5 you some instructions for overnight. They're the same
6 instructions as lunchtime. Please do not attempt to do
7 any type of research on this case. We will give you all
8 the information that you need in order to make an
9 informed verdict.

10 And again, if you see any of us out and about, we're
11 not being rude just prohibited from speaking to the
12 members of the jury. Do not discuss this case with
13 anyone, not even your fellow jury members.

14 If there are any emergencies or any transportation
15 issues that you have, please give the clerk a call and we
16 will make sure that you come to court tomorrow morning.

17 All right. And so we're asking that you be here at
18 about 9:40 so that we can go ahead and get started a
19 little bit earlier tomorrow.

20 Are there any questions for me? All right. Very
21 good. You all have a wonderful rest of the evening,
22 we'll see you tomorrow morning.

23 (Jury exits courtroom)

24 THE COURT: All right. Very good. So we will
25 adjourn and we will reconvene tomorrow morning at 9:45.

Direct exam Berry

1 All right. Y'all have a good night.

2 (OFF THE RECORD AT 4:54 P.M.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF TRANSCRIBER

I, JEANNE MELDRIM, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of CIRCUIT COURT 11 for LEXINGTON COUNTY, South Carolina, on the 23rd Day of January, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 7, 2024

A handwritten signature in black ink that reads "Jeanne Meldrim". The signature is written in a cursive, flowing style with a large initial 'J' and a distinct dot above the 'i' in 'Meldrim'.

Jeanne Meldrim

Transcriber

1 STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 11
2 COUNTY OF LEXINGTON) DOCKET NO. 2020-CP-32-04007

3

4

5 _____
Insurance Office of America Inc.,)

6 Plaintiff,)

7 versus)

8)

9 221 Bower LLC,)

10 Defendant.)

11

12

13

14 H E A R I N G

15

16

17

18

19 DATE: January 24, 2024
20 TIME: 9:51 a.m. - 6:03 p.m.
21 LOCATION: South Carolina Circuit Court 11
22 JUDGE: Courtney C. Pope
23 TRANSCRIBED BY: Jeanne Meldrim

24

25

 LEGAL EAGLE
 Post Office Box 5682
23 Greenville, South Carolina 29606
 864-467-1373
24 depos@legaleagleinc.com

25

1 APPEARANCES:
2
3 Ellis Reed-Hill Lesemann, Esquire
4 Lesemann & Associates LLC
5 418 King Street, Suite 301
6 Charleston, SC 29403
7 Attorney for the Plaintiff
8
9 Michelle Stewart, Esquire
10 Lesemann & Associates LLC
11 418 King Street, Suite 301
12 Charleston, SC 29403
13 Attorney for the Plaintiff
14
15 Benjamin Joyce, Esquire
16 Lesemann & Associates LLC
17 418 King Street, Suite 301
18 Charleston, SC 29403
19 Attorney for the Plaintiff
20
21 Hall Cobb, Esquire
22 Cobb Hammett, Attorneys at Law
23 222 West Coleman Blvd.
24 Mt. Pleasant, SC 29464
25 Attorney for the Defendant

Caroline Lista, Esquire
Cobb Hammett, Attorneys at Law
222 West Coleman Blvd.
Mt. Pleasant, SC 29464
Attorney for the Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Proceedings.....	4
Certificate of Reporter.....	305

EXAMINATIONS

Witness	Direct	Cross	Redirect	Re-cross	Further
Berry		6	65	73	
Adelman	77	202	271	283	
Adleman Proffer	288	301			

EXHIBITS

COURT'S EXHIBITS

Number	Description	Marked	Entered
2	Jury note	5	

PLAINTIFF'S EXHIBITS

Number	Description	Marked	Entered
54	E-mail	23	23
38	Photos	28	28
44	E-mail	129	129
64	E-mail	134	134
65	Proposal	142	142
67	E-mail	176	176
66	E-mail	180	180
56	E-mail	185	185
55	E-mail	187	187
57	E-mail	192	192
69	E-mail	196	196
46	E-mail	196	196

PLAINTIFF'S PROFFER EXHIBITS

59	Document	290	290
61	Document	291	291
62	Document	296	296
52	Document	298	298
60	Document	301	301

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEFENDANT'S EXHIBITS

Number	Description	Marked	Entered
39	Text	32	32
41	Text	34	34
31	Text	37	37
42	E-mail	42	42
55	Document	235	235
37	E-mail	238	238
43	E-mail	240	240
21	E-mail	246	246
29	E-mail	248	248
25	Text	250	250
26	E-mail	252	252
27	E-mail	257	257
28	E-mail	259	259
30	E-mail	262	262
33	Text	264	264
34	E-mail	266	266
34	E-mail	268	268

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

Proceedings

1 THE COURT: All right. I did go another note from
2 the jury that I will --- it's --- it's --- it's fine, but
3 I do want to make y'all aware of it and so we will have
4 it marked as Court's Exhibit Number 2.

5 And I will just read it out. The jury requests the
6 following: One, could we please take break every hour to
7 hour and a half.

8 And two, can we please break for lunch by 1:00 p.m.
9 Thank you.

10 And so I did tell them a lot --- I explained to them
11 a lot just depends on where the witnesses fall, how I can
12 dictate that I am going to try to --- we've got some ---
13 some knee issues --- several people on --- on the jury.
14 And so I've told them they can stretch and stand up as
15 they please, but we will try to take those breaks every
16 hour, hour and a half which is what I do anyway unless
17 the testimony --- I don't like to break y'all's
18 testimony. Okay? Or y'all's questioning.

19 All right. So that was all they wanted. And we'll
20 just mark this as Court's Exhibit Number 2.

21 (Court's Exhibit Number 2 marked)

22 THE COURT: Any issues that we need to handle before
23 we bring the jury in this morning?

24 MR. COBB: No, Your Honor. May Ellis and I approach
25 real quick?

Proceedings

1 THE COURT: Yes.

2 (Bench conference)

3 (Jury enters courtroom)

4 THE COURT: All right. Very good. Please be
5 seated. All right. Welcome back, ladies and gentlemen.
6 At this time we will continue testimony of plaintiff's
7 witness three. Are we on --- let's see, we're on ---

8 MR. COBB: Scott Berry.

9 THE COURT: That's right. Redirect? We're on
10 cross? All right. All right.

11 Mr. Berry. If you will approach the stand, please
12 sir. Mr. Berry, you still under oath from yesterday.

13 All right, Mr. Cobb. Cross.

14 CROSS-EXAMINATION

15 BY MR. COBB:

16 Q. Mr. Berry, I have this exhibit --- this diagram that's
17 been brought up before. Can I just have you verify
18 (unintelligible) this was your office, and Parker McMillan's
19 office at the time of August 14th, (unintelligible)?

20 A. That's correct. Yes.

21 Q. And had that always been your office since you'd been
22 (unintelligible)?

23 A. It had not.

24 Q. Where --- where was the office located?

25 A. One down from Parker McMillan's office. So that ---

1 right there. Yeah.

2 Q. Now, we had talked about --- you --- you had talked about
3 how the --- the --- the property in the building is set up ---
4 made of a bunch of condos, right?

5 A. Correct.

6 Q. All right. And so with a condo, there is a condo
7 association board?

8 A. Correct.

9 Q. Okay. And were you ever a member of that condo
10 association board?

11 A. I was.

12 Q. How long were you a member of that board, sir?

13 A. Three years. Approximately three to four years.

14 Q. All right. And when did you start and leave
15 (unintelligible)?

16 A. Maybe around 2017 and I guess I finished whenever
17 the unit space transferred.

18 Q. So that was in, like, September of 2019 ---

19 (Simultaneous speaking)

20 A. Right.

21 Q. (Unintelligible) ---

22 A. Correct.

23 Q. (Unintelligible)?

24 A. Yes.

25 MR. COBB: All right. Your Honor, permission to

1 approach the witness.

2 THE COURT: Yes.

3 BY MR. COBB:

4 Q. All right. (Inaudible) condo association board recognize
5 what these documents I just handed you are?

6 A. They look like the bylaws or governing documents.

7 Q. Okay. All right. And so if you look in the stack I gave
8 you, there's a staple; do you see that?

9 A. The first few pages?

10 Q. Yes, sir.

11 A. Yes.

12 Q. Okay. This (technical difficulty) if you look ---

13 A. Okay.

14 Q. --- in the upper corner, what --- what is that timestamp
15 date?

16 A. The file date?

17 Q. Yes, sir.

18 A. June the 19th, 2018.

19 Q. Okay. You were on the board when those amendments to the
20 (technical difficulty)?

21 A. Yes, probably. I don't --- I don't remember this
22 document, but yes.

23 Q. Okay.

24 A. --- like.

25 Q. Do you remember --- do you remember there being ---

1 A. I ---

2 Q. --- some point ---

3 A. I really don't.

4 Q. Okay. Any reason to believe that in this amendment they
5 changed --- or the --- excuse me --- the condo association
6 changed what the common elements of the --- of the property
7 was?

8 A. I don't recall, sir. I don't remember. There were
9 three people on the board. Jason Robinson with IOA
10 Properties was the president of the board and we had one
11 other board member.

12 Q. Okay. And was that other board member local like you
13 are, sir?

14 A. Yes. That's correct.

15 Q. And you mentioned Jason Robinson (unintelligible); is
16 that right?

17 A. Right.

18 Q. So (unintelligible) board meetings regularly?

19 A. We would have an association meeting annually, yes.

20 Q. All right. And who would run that --- that association
21 meeting, sir?

22 A. That would be Jason.

23 Q. All right. And did you have a property manager that
24 would assist in that meeting?

25 A. We did.

1 Q. Who was that property manager?

2 A. That would have been CAMS.

3 Q. Okay. CAMS --- who (background noise) (unintelligible)
4 during that time?

5 A. Angela.

6 Q. Okay.

7 A. Adleman.

8 (Simultaneous speaking)

9 A. Angela Adleman.

10 Q. Okay. And just for the record, I'm going to point to her
11 right over here ---

12 A. Okay.

13 Q. --- this is Angela Adleman?

14 A. Okay. That is Angela.

15 Q. Great.

16 A. Good morning.

17 Q. All right. So in the time --- I'm going to show it on
18 the screen, but (unintelligible) you'd rather see on the
19 screen or on (unintelligible). Behind that is the actual
20 master (unintelligible) that created the (unintelligible).
21 Now, is the condo association established with this
22 (unintelligible) property?

23 A. The association?

24 Q. Yes.

25 A. Yes, that would be it.

1 Q. All right. And it's kind of (unintelligible) how you
2 select board members, what you're supposed to do, what the
3 purpose of the condo association is, correct?

4 A. Yes. Correct.

5 Q. All right. So I just have a few questions about this
6 document.

7 A. Okay.

8 Q. If you'll (unintelligible) up top of the page, you'll see
9 page numbers. If you can do me a favor and go to page 6 of
10 69. And it says article one, definitions.

11 A. Yes, sir.

12 Q. Okay. And under section one, it just says unless
13 (unintelligible) herein, or ---

14 A. Hmm.

15 Q. --- unless --- (unintelligible) 2031 plan of action
16 (unintelligible) amendment thereto should have the
17 (unintelligible) hereto, unless the condo association requires
18 otherwise shall (unintelligible)?

19 So would you read the definitions for this condo
20 association and would be included in this section?

21 A. I would.

22 Q. Okay. (Technical difficulty). All right. If you'll
23 turn to the next page. Okay. And if you look at M, would you
24 mind reading paragraph M out loud, please, sir.

25 A. General common elements and general common area and

1 facilities have the same meaning and are as defined in
2 the act and each means and includes generally all of the
3 condominium property after excluding the units and the
4 limited common area and facilities. And more
5 specifically, and then there's one through seven.

6 Q. What does number two say?

7 A. The foundations, main walls, load bearing walls,
8 roofs, non-reserved parking areas.

9 Q. Okay. What does number one say?

10 A. The compartments or installations of central
11 services (unintelligible) such as power, light, gas, cold
12 and hot water, sewage, refrigeration, water tanks, pumps
13 and the like. Not excluded as limited common elements.

14 Q. Okay. So in layman terms as a prior board association
15 member, how would you define that to the jury (unintelligible)
16 what that means?

17 MR. COBB: Am I hearing a beep? Am I beeping
18 something?

19 THE COURT: Law enforcement.

20 (Simultaneous speaking)

21 MR. COBB: --- set something off.

22 MR. JOYCE: Objection to the question.

23 MR. COBB: Come on man, there's a time limit.

24 THE COURT: What's your objection to?

25 MR. JOYCE: Lack of foundation. I mean, he can say

1 what the document says.

2 MR. COBB: Your Honor, he just submitted to being on
3 the board. He just submitted to be involved when the
4 amendments were made. He submitted he was part of the
5 condo association that was created by the board. Being a
6 board member he would be (unintelligible) knowing what
7 this document says.

8 MR. JOYCE: It says what it says. And the question
9 was define it. So I ---

10 MR. COBB: To define in the --- in the --- from the
11 standpoint or the foundation a prior board association
12 member.

13 THE COURT: All right. I'll allow that. I'll allow
14 that question.

15 MR. COBB: I may have to rethink it.

16 THE COURT: I'm going to overrule his objection.
17 Sorry, because we had --- overrule the objection, allow
18 the question. Just want to make sure we tread on the
19 right path.

20 MR. COBB: Got it, Your Honor. Thank you.

21 BY MR. COBB:

22 Q. So Mr. Berry, from being on the board, what --- what
23 would be a general common element or a general common area in
24 this facility (unintelligible) (background noise).

25 MR. JOYCE: Objection, Your Honor. This is defined

1 in the --- in the document.

2 THE COURT: You asking --- what are you asking him?

3 MR. COBB: Well, let me --- let me just fast forward
4 a little.

5 THE COURT: All right. We'll sustain that. He's
6 going to move on.

7 BY MR. COBB:

8 Q. This is Unit 103, correct sir?

9 A. Correct.

10 Q. And (inaudible) ---

11 A. Well, 102. Yeah.

12 Q. This is unit 102?

13 A. Correct.

14 Q. And there's a wall right here, correct?

15 A. That's correct.

16 Q. Inside of these walls are studs, pipes, things like that?

17 A. Correct.

18 Q. All right. And above the ceiling tiles is a cavity
19 between the subfloor and the ceiling tiles, correct?

20 A. Correct.

21 Q. All right. And there's pipes, wires, and this additional
22 sheetrock for a firewall ---

23 A. Uh-huh.

24 Q. --- insulation for a firewall ---

25 A. Right.

1 Q. --- (unintelligible). All right. So there's a lot of
2 stuff inside that belongs to the condo association?

3 A. Correct.

4 Q. Is that accurate?

5 A. Yeah, I would say so.

6 Q. Can we just refer it to as like the guts? The guts of
7 the inside?

8 A. Right.

9 Q. Okay. All right. I want to --- I want to go back to
10 this one and if you'll do me a favor and turn to page 9 of 69
11 under article two.

12 A. Okay.

13 Q. All right. And can you read section one into the record
14 for everybody?

15 A. Where is section one? Responsibility for
16 administration. The administration of Bower Commons
17 horizontal property regime the maintenance, repair,
18 replacement, and operation of the general common area and
19 facilities, and limited common area and facilities is
20 herein provided. And those acts required by the
21 association by the condominium documents should be the
22 responsibility of the association. Such administration
23 shall be in strict accordance with the provisions of this
24 act as master deed and bylaws in section ---

25 Q. All right. So the condo association --- so is it through

1 that this states that the condo association is responsible for
2 the guts that we just talked about in general common area,
3 facilities and limited common area facilities?

4 A. Correct. I would --- I would say so.

5 Q. And while you were on the condo association is that what
6 you took care of?

7 A. Yes. Yeah.

8 Q. And --- and did you take care of just Units 101 to 105?

9 A. No, it would have been the --- the property as a
10 whole.

11 Q. Okay. And the property as a whole, was it just the first
12 building that 101 to 105 was, so this --- the second building
13 as well?

14 A. Two buildings were part of the association.

15 Q. Okay. And how --- how --- how many condo owners do you
16 think ---

17 A. Oh my goodness.

18 Q. --- there were in these buildings?

19 A. I really don't know. It's probably in this document
20 somewhere the number of units that were available, but
21 20? That's just a guess.

22 Q. (Inaudible)?

23 A. That's just a guess.

24 Q. Okay. So at least 20 owners ---

25 A. Uh-huh.

1 Q. And in some --- and in some cases you might have one
2 owner own multiple units like IOA Properties III, and
3 ultimately ---

4 (Simultaneous speaking)

5 A. Right, that's correct.

6 Q. Can you turn to the next page, please, page ten of 69.
7 All right. And I want to go under section two, under units,
8 under A. And I'd like you --- I don't know if you can see it,
9 but can you read where it starts: In addition to the
10 description shown by, and I'll point it out up here.

11 A. Oh, yes. I see that.

12 Q. All right. And if you can read that (unintelligible) the
13 next page?

14 A. In addition to the description above by the
15 buildings and unit plans, each unit is further described
16 as being bounded by the unfinished surfaces of its
17 lower-most floor, upper-most ceiling and perimeter walls.
18 Specifically included within each unit are the finished
19 surfaces of the unit, paint, plaster wallpaper, tiles,
20 paneling, sheetrock, or other drywall material,
21 acoustical ceiling tile, carpeting, and interior non-load
22 bearing walls. Continue?

23 Q. Yeah, just finish the sentence if you don't mind.

24 A. All --- all as contained within the boundaries of
25 each unit as shown on the buildings and unit plans

1 together with the --- with all interior doors, the
2 entrance doors, windows, window glasses, and window
3 screens.

4 Q. (Unintelligible) stop there ---

5 A. All right.

6 Q. --- we're good. (Unintelligible).

7 A. Okay.

8 Q. So based off of that, the --- again, the unit is
9 (unintelligible), correct?

10 A. That's correct.

11 Q. Okay. And the unit is essentially from the sheetrock to
12 the ceiling tile so what the unit actually is, correct?

13 A. Correct.

14 Q. All right. And so if you're the owner of that unit,
15 that's what you --- you don't own the guts, you don't own
16 above the ceiling tiles, correct?

17 A. The unit space within the unit.

18 Q. Okay. Okay. Would you do me a favor and in that same
19 paragraph --- and I'll just point to it up here --- would you
20 read this last sentence of this section to the jury please?

21 A. The owner of each unit shall be responsible for the
22 maintenance, upkeep, and repair of the unit and its
23 appurtenances subject to the rules, regulations,
24 covenants, and conditions set forth or incorporated
25 herein by reference.

1 Q. (Unintelligible) down on that same page under section
2 three, where it says common area and facilities. Do you see
3 under common elements number two right here? That
4 (unintelligible) of the unit?

5 A. Yes.

6 Q. And would you read that into the --- to the jury as well?

7 A. That portion of the unit building not otherwise
8 herein defined as being embraced within the individual
9 units, including but not limited to the foundations,
10 roofs, floors, ceilings, perimeter walls of the units,
11 load-bearing interior walls and partitions, walls
12 enclosed in common pipe casing, if any and other common
13 facilities pipes, wires conduits, chimneys, air ducts,
14 and public utility lines, including the space actually
15 occupied by the above.

16 Q. Okay. All right. So we have a clear understanding of
17 what a unit is ---

18 A. Uh-huh.

19 Q. We have a clear --- true under this document?

20 A. Correct.

21 Q. All right. You have a clear understanding of what the
22 unit owner's responsibility is under this document, correct?

23 A. Correct.

24 Q. And we have a clear understanding of what the condo
25 association's ownership in this building is, you know, around

1 these units ---

2 A. Correct.

3 Q. Okay. All right. So while you were on the board,
4 and --- and it sounds like you just (unintelligible) building.
5 Seems like you got ---

6 A. That's --- that's the circumstances.

7 (Simultaneous speaking)

8 A. Yeah, to a large degree.

9 Q. Seems like you (unintelligible) by maybe Jason to help
10 run the facilities locally?

11 A. There was another gentleman in our office for a time
12 who was more hands-on than I was and I got a little more
13 hands-on I guess after --- after he had left.

14 Q. Okay. All right. And --- but you weren't paid for that?
15 That was just something the ---

16 A. I was not.

17 (Simultaneous speaking)

18 A. Volunteer --- volunteer position, yeah.

19 Q. (Unintelligible). All right. So when we spoke before
20 what I (unintelligible) ---

21 A. Uh-huh.

22 Q. --- (inaudible) ---

23 A. Uh-huh. Feels like a while.

24 Q. You had --- you had mentioned that before my client
25 bought the property ---

1 A. Uh-huh.

2 Q. --- there had been a leak in between Parker's office and
3 your new office right there when you were in this office; is
4 that correct?

5 A. That's --- that's accurate.

6 Q. All right. Do you remember what time that was?

7 A. Approximately maybe four years prior to this event.

8 Q. So roughly (inaudible)? Sound right?

9 A. Seems a little more recently. Maybe '15, '16.

10 Yeah.

11 Q. And do you remember what the cause of that leak was?

12 A. I think it was a toilet.

13 Q. The upstairs unit ---

14 A. Uh-huh.

15 Q. --- owner's toilet? Now, in that situation, were you
16 plugged in to kind of help Jason Robinson in terms of dealing
17 with issues like this --- like this leak that happened in
18 between Parker and your new office?

19 A. I don't remember being involved in that one, but
20 just knowing about it because my office was right beside
21 it.

22 Q. Now, in this property, (unintelligible) happened after
23 you got involved, correct?

24 A. Some other water events? There were other --- yes.

25 Q. And what was your standard operating procedure when there

1 would be a water event at this property when IOA Properties
2 III still owned the units?

3 A. My understanding, we'd reach out to the property
4 manager and let them know ---

5 Q. Okay.

6 A. --- so this could be --- so they could respond.

7 Q. Now, when you talk about (unintelligible) do you mean IOA
8 Properties III property manager, or do you mean the condo
9 association's property?

10 A. The condo association.

11 Q. So CAMS (unintelligible)?

12 A. CAMS, yes.

13 Q. And --- and that makes sense because the --- the bathroom
14 upstairs is not IOA Properties III or 1221, it's somebody
15 else's?

16 A. Correct.

17 Q. So when insurance office --- excuse me, when IOA
18 Properties III sold the property to my client, did that ---
19 did that change your work environment at all, or
20 (unintelligible) change (unintelligible)?

21 A. Not for me, no.

22 Q. You just were able to get off the board of the condo
23 association?

24 A. Right.

25 Q. That was (unintelligible) right?

1 A. Yeah, I guess.

2 Q. Okay.

3 A. Yes, you can say that.

4 Q. All right. Okay. So even if they were (unintelligible)
5 and it was --- (unintelligible) Plaintiffs Exhibit 24, let's
6 make a tab.

7 MR. COBB: And by the way, I apologize, Your Honor.
8 I --- I would like to submit --- I would like to submit
9 the master deed for the condo association,
10 Plaintiff's --- Plaintiff's Exhibit Number 54.

11 THE COURT: All right. Objection to Defendant's 54?

12 MR. JOYCE: No objection.

13 THE COURT: All right. So moved.

14 (Plaintiff's Exhibit 54 marked and entered)

15 BY MR. COBB:

16 Q. So would you go to tab 24 in the plaintiff's binder
17 please sir. In your exhibit. (Unintelligible)?

18 A. Yes.

19 Q. (Inaudible).

20 A. Yeah, sworn --- sworn statement.

21 Q. Yes, sir.

22 A. Proof of loss.

23 Q. Now --- now, when you were on the board, did you, Jason,
24 or the other guy who was on the board ever have to fill out
25 insurance paperwork like this for any insurance claims ---

1 (Simultaneous speaking)

2 A. I --- I did not. I did not.

3 Q. All right. On that Exhibit 24, I know that it's been
4 said that it's been signed by (unintelligible)?

5 A. Uh-huh.

6 Q. But can you tell me who the beneficiary, or who the
7 insured is for that proof of loss statement? Is it 1221
8 Bower ---

9 (Simultaneous speaking)

10 Q. --- condo association?

11 A. Bower Commons Co-owners Association.

12 Q. Okay. So when AJ Leone signed it, he signed on behalf of
13 the condo association, correct?

14 A. Yes.

15 Q. Okay. Now, after the property sold, did you ever talk to
16 Crissy Warner, or Rob Motley, or anybody at Insurance Office
17 of America or IOA Properties III, LLC, what did you do if
18 there was (unintelligible)?

19 A. No, never had that conversation.

20 Q. So when issues happened after my client got the
21 property ---

22 A. Uh-huh.

23 Q. --- did you --- those issues were related to non --- not
24 to the unit, but to --- to the common elements, the --- the
25 leak --- the other unit (unintelligible), correct?

1 A. Rephrase your question? Excuse me.
2 Q. Yeah, it --- it was kind of a messy question.
3 When there was an issue ---
4 A. Uh-huh.
5 Q. --- after my client bought the property ---
6 A. Okay.
7 Q. Did you go to Angela Adleman to deal with it, correct?
8 A. This is the first instance I know that we --- we
9 reported anything, I think after the transfer.
10 Q. I guess my question is ---
11 A. At least the only thing I was involved with.
12 Q. My question is: When you texted Angela Adleman on
13 August 14th, when ---
14 A. I did.
15 Q. --- ceiling tiles (inaudible)?
16 A. Correct.
17 Q. All right. So why text Angela?
18 A. I guess leading up to that time, that was what, you
19 know, that would be the normal way that we handled those
20 situations.
21 Q. Right.
22 A. We put --- we would let her know that we had an
23 event going on that involved the --- involved the
24 property.
25 Q. Is part of being on the condo association board, kind of

1 the sheriff of all the other condo unit owners to try to get
2 access to those water leaks and get in there?

3 A. It would ---

4 MR. JOYCE: Objection. It's defined in the --- in
5 the document you showed him.

6 THE COURT: All right. Sustained.

7 MR. COBB: (Unintelligible).

8 BY MR. COBB:

9 Q. So isn't it true that when you were on the condo
10 board ---

11 A. Hmm.

12 Q. --- when there were water intrusions, that was the condo
13 association issue that you would make sure that CAMS
14 (unintelligible)?

15 A. Yes, any --- anything involving the property we
16 let ---

17 Q. Okay. And so the ceiling tile in (unintelligible) office
18 from August 14th, that was caused by an upstairs primary unit
19 owner?

20 A. That's what --- that's my understanding. Didn't
21 know at the moment, but that's my understanding, yes,
22 sir.

23 Q. And your understanding at first it seems like that might
24 be (unintelligible)?

25 MR. JOYCE: Objection. I think it mischaracterizes.

1 MR. COBB: Well, okay. Well let's look at his text.
2 I'll come back to that.

3 THE WITNESS: Okay. All right.

4 MR. COBB: Come back to that.

5 THE COURT: All right. So we'll --- we'll sustain
6 that and then we'll move.

7 MR. COBB: Yeah. We'll --- we'll (unintelligible).

8 THE COURT: Okay.

9 MR. COBB: Permission to approach, Your Honor.

10 BY MR. COBB:

11 Q. This is the picture you sent to Angela Adleman via text
12 on August 14th of 2020?

13 A. Okay.

14 Q. And it's from a --- from a --- from a position based off
15 this square being Parker's office, was that corner here or
16 (unintelligible)?

17 A. Where you're pointing.

18 Q. So was that (unintelligible)?

19 A. That's correct.

20 Q. And is --- is this --- is this entire building
21 (unintelligible) right here, or is there a eave or anything
22 like that above it?

23 A. I mean there's a wall there, but whether or not
24 there's a eave, I ---

25 Q. All right. Go ahead. I'm sorry. Right here?

1 A. Yes.

2 Q. So this is all the outside?

3 A. Correct. Yes.

4 Q. There's --- the second floor is the same --- the same out
5 path, the same --- the same footprint, correct? It's the
6 same? It just goes straight down right here and same floor to
7 the third floor, and the floor to the second floor?

8 A. You mean the exterior walls?

9 Q. Yes, sir.

10 A. Yes, they're all --- there's a slope there, they all
11 look the same.

12 Q. Okay.

13 (Attorneys conferring)

14 MR. JOYCE: Your Honor, request permission to make
15 this Plaintiff's Exhibit 38. (Unintelligible) photos,
16 but this is a specific photo out of that pack.
17 (Unintelligible).

18 THE COURT: Any objection to 38?

19 MR. JOYCE: No. No objection Your Honor.

20 THE COURT: Okay. So moved.

21 (Plaintiff's Exhibit 38 marked and entered)

22 BY MR. COBB:

23 Q. So Scott, when --- when IOA Properties III, LLC sold the
24 property and (unintelligible) helping to take care of things
25 (unintelligible) the property, did you ever contact Jason

1 Robinson for --- as a unit owner (unintelligible) unit owner
2 to (unintelligible) or did you always stay involved?

3 A. I guess Jason would get involved when things
4 escalated or, you know, needed to. But just a normal
5 maintenance issue would probably be handled just directly
6 with Angela.

7 Q. Okay. Unless those issues were common elements or
8 (unintelligible) other unit; is that fair?

9 A. No, just --- yeah, anything involving the property.

10 Q. I'm going to give you a text.

11 A. Okay. No worries. Yeah.

12 Q. Scott do you recognize this text thread between you and
13 Angela Adleman?

14 A. Yes.

15 Q. Okay. And it looks lake (unintelligible) with the date.
16 And would you just read that out loud what said at the very
17 top of the (unintelligible)?

18 A. I spoke with CMS. We need a plumber out here to
19 figure this out. I think it may be toilet issue.

20 Q. Okay. So who was CMS?

21 A. It's a roofing contractor.

22 Q. All right. So you texted (unintelligible) ---

23 A. Uh-huh.

24 Q. --- and did you recommend (unintelligible) for her to
25 call?

1 A. I did not.

2 Q. Did --- did she recommend?

3 A. I believe it was Angela's.

4 Q. And were you --- were you --- were you (unintelligible)
5 issue, or did you think (unintelligible)?

6 A. I wouldn't say I definitely knew it was a toilet
7 issue, but I speculated that it was.

8 Q. So but (unintelligible) with Angela, it looks like she
9 (unintelligible) (technical difficulty)?

10 A. Yes, she had CMS called immediately.

11 Q. And who is Arrow Plumbing?

12 A. It was a plumbing contractor that I think Angela had
13 asked to come out.

14 Q. Okay. And it looks like you texted Angela on August
15 (unintelligible)?

16 A. 10:15 Arrow Plumbing may come this afternoon to
17 investigate the leak.

18 Q. And then if you turn the page, you --- you responded on
19 August (unintelligible) 248. (Unintelligible)?

20 A. On August 19th or August 20th?

21 Q. Top of the second page.

22 A. The plumber just left, call me when you can.

23 Q. And did she call you?

24 A. I believe so. Angela was always responsive, so I'm
25 sure we talked.

1 Q. (Inaudible)?

2 A. Yeah.

3 Q. She was taking that seriously?

4 A. Yeah. Angela was always responsive. She was always
5 responsive to me.

6 Q. (Inaudible). Now, on August 24th you texted her again.
7 Could you read what you texted her on August 24th?

8 A. Can you come by the office Wednesday morning and
9 look at the water damage issue we have going on? Do you
10 want me to keep reading?

11 Q. No.

12 A. Okay. Good. All right.

13 Q. What was the next --- what was the next text in terms of
14 how she responded?

15 A. She responded and says I can't do Wednesday, someone
16 meet me tomorrow at 9:00 ---

17 (Simultaneous speaking)

18 Q. That would have been Tuesday August 25th, so
19 (unintelligible)?

20 A. That would have been Tuesday August the 23rd, yes.

21 Q. All right. So she's probably been in there just to see
22 the water damage that you talked about, correct?

23 A. Right.

24 Q. All right. And was the water damage at that time only
25 the ceiling tile? Again, this is August 24th. On that ---

1 that picture that I just gave you of the ceiling? Had it
2 gotten worse by that time? (Unintelligible)?

3 A. This was the 14th.

4 Q. (Unintelligible)?

5 A. Okay. Had it gotten worse is what you're asking?

6 Q. (Unintelligible)?

7 A. (Inaudible) it is.

8 MR. COBB: Your Honor, I'd like to submit this text
9 as Defendant's 38.

10 THE COURT: Any objection?

11 MR. JOYCE: No objection, Your Honor.

12 (Defendant's Exhibit 39 marked and entered)

13 THE COURT: Last one was 38. Mr. Cobb be ---

14 MR. COBB: 39.

15 THE COURT: All right. So Exhibit 39 will be
16 entered.

17 BY MR. COBB:

18 Q. Scott, this is a text thread between you and Angela
19 Adleman starting September 11, 2020?

20 A. Uh-huh.

21 Q. Can you --- can you just read that (unintelligible)?

22 A. Yeah. It said, any update on the leak situation?
23 (Unintelligible) was here earlier this week, he couldn't
24 locate the toilet causing the damage. I assume it's
25 coming from (unintelligible) unit.

1 Q. Okay. And how does Angela respond?

2 A. She says it is --- well, it --- it's coming from his
3 unit. We called him and he said he is no longer the
4 owner of that unit, so I'm trying to get their
5 information. If I can't find them, we will have to force
6 entry. Their close attorney didn't send in the
7 paperwork. I guess she meant the closing attorney.

8 Q. Okay. And then you ask her to do what?

9 A. Please call me on this when you can.

10 Q. Okay. So a couple things just happened here.

11 A. Uh-huh.

12 Q. Number one, it looks like (unintelligible)?

13 A. Uh-huh.

14 Q. Is that accurate?

15 A. That's accurate.

16 Q. And number two, it looks like that --- it looks like
17 they're having a problem --- Angela having a problem getting
18 the upstairs unit owner to be contacted.

19 A. According to this text, yes.

20 Q. Are --- are you comfortable in (unintelligible) Angela's
21 (unintelligible) about the damage to the condo association
22 (unintelligible)?

23 A. Yes.

24 MR. COBB: Okay. Your Honor, I'd like to --- I'd
25 like to put this in (unintelligible) Defendant's Number

1 41.

2 THE COURT: Any objection?

3 MR. JOYCE: No objection, Your Honor.

4 THE COURT: All right. So moved.

5 (Defendant's Exhibit 41 marked and entered)

6 BY MR. COBB:

7 Q. You had sent a text to Angela about --- I believe it was
8 from August. You were concerned about some signs that were
9 put up, I believe on the walls --- the exterior walls of those
10 buildings?

11 A. Yeah, I was asking her --- yeah --- what that was
12 about.

13 Q. Okay. And were you upset that --- that AJ Leone or 1221
14 Bower didn't contact Insurance Office of America first before
15 putting those signs up?

16 A. Yeah, I pulled in one morning, they had signs up
17 with the unit numbers, so I was just asking her what that
18 was about.

19 Q. (Inaudible)?

20 A. I don't know that it so much bothered me, I was
21 just --- it was just different and hadn't --- not sure I
22 knew that the transfer had taken place on the property at
23 that point. I was just wondering what it was all about.

24 Q. (Unintelligible). You were complaining about it?

25 A. I was complaining about it, yeah.

1 Q. Okay. (Inaudible)?

2 A. Right.

3 Q. (Inaudible). Scott, this appears to be a text thread
4 between you, Angela and Crissy Warner; do you recognize this
5 text thread?

6 A. Yes.

7 Q. Okay. Now, you referred to ---

8 A. Uh-huh.

9 Q. --- in your --- in your text in the middle of the first
10 page ---

11 A. Yes.

12 Q. --- will you read what that says?

13 A. Sure. It says, Eric Monroe was here and apparently
14 we have some drama going on between him and his tenant
15 upstairs. The tenant (unintelligible) enter the --- the
16 tenant isn't allowing them in the unit.

17 Q. All right. And will you turn the page. And outside that
18 emoji will you read the next bullet that you wrote?

19 A. The police are here now.

20 Q. Okay. And then skip Angela's comments. Will you go down
21 to your last bullet (unintelligible)?

22 A. I said, no the police told Eric he must give the
23 tenant 24 hours' notice. They're coming back on Friday
24 morning at 9:00 a.m. to let Eric in the unit. Crissy is
25 arranging for the --- continue?

1 Q. Yeah. (Unintelligible).

2 A. Okay. Crissy is arranging for the plumbers to come
3 back. Someone from the property management side also
4 needs to be here. This should not be on IOA to
5 (unintelligible).

6 Q. Okay. Can you --- can you tell us what happened?

7 A. This particular event is --- my understanding that
8 the unit owner above us was trying to get in the unit
9 that he was leasing and the tenant wouldn't allow entry.

10 Q. That was a delay to get a plumber in there to try to fix
11 the leak (unintelligible)?

12 A. We were trying to figure out where the leak was,
13 yeah. Trying to get somebody in there --- or the
14 management --- Angela on behalf of management.

15 Q. Okay. Why were you involved at the point? You're not on
16 the condo board (inaudible)?

17 A. I'm not.

18 Q. Okay. And was it --- was it just because you were local?

19 A. I think it's a combination of, you know,
20 geographical location. I was the closest highway person
21 to the office, so a lot of times it was convenient for me
22 meet people there. I didn't mind meeting people there.
23 And also the fact that the leak involved my office.

24 Q. Right.

25 A. I also think played in to at the time as well.

1 Q. Why not --- why not (unintelligible) Jason's office or
2 whoever was handling property management for --- handling the
3 real estate? Why --- why --- why should you wear that ---
4 wear that burden? What --- what --- what's --- what's that
5 responsibility?

6 A. Again, I was the closest IOA person to the office
7 and I've been there since the day we'd moved in. The
8 person that would normally have handled this had left IOA
9 earlier, and I guess I was trying to be helpful.

10 Q. Now, do you remember --- do you remember what date this
11 happened?

12 A. Oh gosh. I don't --- don't see a date stamp on that
13 text.

14 Q. Do you believe this would have happened sometime in
15 September of 2020 though?

16 A. Yes. I would --- I would think that this would have
17 been a --- a text thread from sometime in September.

18 MR. COBB: Your Honor, I'd like to present this as
19 exhibit number --- Defendant's Exhibit Number 31.

20 THE COURT: Any objection to 31?

21 MR. JOYCE: No objection.

22 THE COURT: So moved.

23 (Defendant's Exhibit 31 marked and entered)

24 BY MR. COBB:

25 Q. All right. (Unintelligible) landlord (unintelligible)

1 unit owner?

2 A. Uh-huh.

3 Q. And the leak's coming from upstairs and the condo
4 association's property manager they're --- and the police are
5 getting involved to get a plumber into ---

6 A. Uh-huh.

7 Q. --- the unit? Is that beyond the landlord's reasonable
8 control in terms of getting the leak repaired or getting the
9 leak fixed?

10 A. Try --- trying to gain access to the unit above?

11 Q. (Inaudible) because you're --- in --- in the complaint
12 there is --- there is a statement ---

13 A. Huh-uh.

14 Q. --- (unintelligible) 12 about lack of diligence ---

15 A. Right.

16 Q. --- now, (technical difficulty) about (unintelligible)
17 but how could 1221 Bower, you know, be responsible for access
18 to another person's condo unit and the police were called?

19 A. They wouldn't in this instance. (Unintelligible).

20 Q. There --- and there are multiple delays I'm going to ask
21 you about.

22 A. Okay.

23 Q. You would agree with that one, right? That's --- that's
24 an example of ---

25 A. Gaining access to the unit above was outside their

1 control?

2 Q. (Inaudible)?

3 A. Yeah. That one. Yes, sir.

4 Q. So isn't that true that Insurance Office of America's
5 (unintelligible) this 90-day provision clause in the --- in
6 the lease to be allowed to terminate this lease?

7 A. Yeah, it's my understanding.

8 Q. Do you think that they should at least have another day
9 (unintelligible) it was (unintelligible) on this delay?

10 A. That would seem reasonable, yeah.

11 Q. We'll get to more on that.

12 A. Okay.

13 Q. (Inaudible)?

14 A. I don't.

15 (Mr. Cobb discussing exhibits with the court
16 reporter).

17 A. Angela said see below. I guess that was to the
18 landlord. Said the 28th question mark. Let's get into
19 this unit sometime next week if possible. If the tenant
20 is still using that toilet, then it's still causing a
21 leak.

22 Q. Okay. So the e-mail below, you were --- you were --- you
23 were saying hey, don't wait from the 17th to the 28th, that's
24 11 days, can we get somebody in there now, correct?

25 A. Correct.

1 Q. All right. And --- and Angela told you (unintelligible)
2 e-mail (unintelligible) e-mail asking (technical difficulty)
3 and y'all were having the other work done, I guess that other
4 work was you need to finish up the construction on I guess a
5 cubicle built out here?

6 A. Yes. I --- well, I assume. Doesn't say that
7 though. So ---

8 Q. All right. If you go to the same page?

9 A. Okay.

10 Q. All right. Do see that Angela on September 17, 2020
11 e-mail, what does it say?

12 A. What date are you asking about?

13 Q. (Unintelligible) second page of that handout. It's right
14 there.

15 A. Okay. September 17th. Angela, there is a lot of
16 stomping around upstairs this morning. Did Eric get
17 access to the unit?

18 Q. Okay. And if you go (unintelligible) it looks like
19 Angela did respond in that e-mail thread?

20 A. In --- yes. Looks like --- yes.

21 Q. Okay. So again, you're --- you're kind of helping
22 Angela, saying hey, I know somebody's upstairs to be able to
23 gain access to (unintelligible) condo unit?

24 A. Because I heard them. Yeah.

25 Q. Got it.

1 A. Yeah.

2 Q. And were you in your --- I know you --- I know you
3 mentioned earlier --- yesterday that you travel some, correct?

4 A. Correct.

5 Q. All right. So how much do you travel versus how much
6 time you're in the office?

7 A. Hmm. I was probably in the office maybe two days a
8 week and out and about maybe three.

9 Q. Okay. When you were traveling, did you go beyond
10 (unintelligible) state (unintelligible)?

11 A. I have accounts in Georgia and North Carolina, but
12 mostly South Carolina.

13 Q. You have to spend the night out a lot and
14 (unintelligible)?

15 A. I don't.

16 Q. (Unintelligible)?

17 A. Most everything's a day trip. It's a benefit to
18 being in Columbia.

19 Q. All right. So do you see that there's a delay being
20 requested that (unintelligible)?

21 A. From the 17th to the 28th?

22 Q. Right.

23 A. Yeah.

24 Q. You're challenging that? You're like let --- let's ---
25 let's --- let's get this leak fixed and let's --- let's not

1 delay this anymore, correct?

2 A. That's what I'm asking, yeah.

3 MR. COBB: All right. Your Honor, I'd like to put
4 this in as Defendant's Exhibit Number 42.

5 THE COURT: Any objection to 42?

6 MR. JOYCE: No objection.

7 THE COURT: So moved.

8 (Defendant's Exhibit 42 marked and entered)

9 BY MR. COBB:

10 Q. So would you agree that some of the delays in getting
11 repair work done within this 90-day period, IOA was --- or
12 Insurance Office of America was pushing back in terms of what
13 time Angela Adleman could schedule to have people enter to do
14 work?

15 A. I wouldn't say that, no. I mean, I think we were
16 always available to meet a contractor at the job site, we
17 did that.

18 Q. Okay. All right. But you were there only a couple days
19 a week ---

20 A. When I say job site, at the --- at the property.

21 Q. Right. You were there (inaudible)?

22 A. That's correct.

23 Q. Okay. And when you weren't there Crissy
24 (unintelligible)?

25 A. Uh-huh.

1 Q. But Crissy lived kind of far away from this property,
2 correct?

3 A. I don't know exactly where Crissy lived, but it's my
4 understanding it's the Lexington area.

5 Q. So roughly in rush hour maybe a (unintelligible)-minute
6 drive?

7 A. Maybe. Approximately.

8 Q. All right. Would you do me a favor. In that big binder,
9 would you go to plaintiff's tab number 13. All right.
10 And --- and what was the date of this e-mail?

11 A. October 2nd.

12 Q. Okay. That's the e-mail that you sent out to who?

13 A. I sent to Angela and cc'd Crissy.

14 Q. Okay. And what --- what is the purpose of this e-mail?

15 A. I am providing her with a quote from Kleen Sites for
16 remediation of the office space.

17 Q. All right. And you mentioned an insurance adjuster in
18 the e-mail, correct?

19 A. I do.

20 Q. All right. Can you explain to us what the insurance
21 adjuster's part in this --- in this time frame is?

22 A. At some point --- some point after September 22nd,
23 the association's property --- or excuse me, their
24 insurance carrier was put on notice of a claim. A claim
25 was filed.

1 Q. Okay. I'm sorry, (unintelligible). Whose insurance
2 carrier was put on notice?

3 A. The association's ---

4 Q. Condo association?

5 A. Bower --- yeah. Bower Commons.

6 Q. All right. You had testified yesterday that --- well,
7 let me back up. You're --- you were the one who stated let's
8 get Kleen Sites to give us a quote for doing this work,
9 correct? On mold remediation and doing the investigation?

10 A. I --- I'm the one who contacted Kleen Sites to come
11 give us an air sampling and see what was going on.

12 Q. Okay. All right. That's Dave (background noise)?

13 A. Dave Dunnagan, yeah.

14 Q. Nice guy?

15 A. Very nice guy.

16 Q. (Inaudible)?

17 A. Okay.

18 Q. All right. So I said (unintelligible)?

19 A. I did not.

20 Q. Okay. So ---

21 A. David mentioned it. Very good guy.

22 Q. So you testified yesterday that it was the --- it was the
23 second quote over Kleen Sites was the landlord's idea; do you
24 (unintelligible)?

25 A. I do. Somewhere I had heard that someone was

1 getting a second quote.

2 Q. Okay. But do you believe it was the landlord
3 (unintelligible) second quote?

4 A. It was my understanding it was the landlord. It
5 could have potentially been the insurance carrier.

6 Q. My --- my reason for asking (unintelligible) is
7 (unintelligible) insurance ---

8 A. Yeah.

9 Q. --- insurance carrier for the condo association why would
10 the landlord (unintelligible)?

11 MR. JOYCE: Objection. Calls for speculation.

12 THE COURT: Sustained.

13 BY MR. COBB:

14 Q. My question is: Could have been the condo association
15 that (unintelligible) ---

16 MR. JOYCE: Same objection.

17 BY MR. COBB:

18 Q. --- board member (unintelligible) responsibility under
19 that board association --- under that board association
20 (unintelligible). I --- I try to get out of this objection
21 and I screwed it up.

22 MR. COBB: Can I just re-ask ---

23 THE COURT: Yes. We'll let you. Please rephrase
24 it.

25 BY MR. COBB:

1 Q. Is it fair that it could have been the condo association
2 that requested the second quote for purposes of mold
3 remediation?

4 MR. JOYCE: Same objection, Your Honor.

5 MR. COBB: Your Honor, he just testified that he had
6 heard somewhere the landlord. But he also testified that
7 the insurance was for the condo association, not for the
8 landlord. So again, he testified yesterday that the
9 landlord wanted a second quote. That doesn't, you
10 know ---

11 THE COURT: All right.

12 MR. COBB: (Unintelligible). That's what I'm trying
13 to get that it wasn't the landlord who wanted a second
14 quote.

15 THE COURT: All right.

16 MR. JOYCE: Lacks foundation and calls for
17 speculation.

18 THE COURT: Then it does call for speculation, so I
19 am going sustain that objection.

20 BY MR. COBB:

21 Q. Did you hear the landlord --- did you see anything in
22 writing (unintelligible) the record from AJ Leone that the
23 landlord wanted a second mold remediation quote over and above
24 the one that you had --- you had gotten from Dave Dunnagan?

25 A. I don't recall anything.

1 Q. Do you know who ultimately paid for the Kleen Sites
2 invoices?

3 A. My understanding it was the insurance carrier.

4 Q. For the condo association?

5 A. For the condo association. I think those amounts
6 were shown on that proof of loss that we looked earlier.

7 Q. (Unintelligible). Okay. Now, Dave Dunnagan, I believe
8 he came in on September 25th to do the investigation?

9 A. That sounds correct. Yes.

10 Q. Okay. Now, when you did the investigation, he --- there
11 was a square hole in the sheetrock in Parker's office right
12 here; do you remember that?

13 A. I do.

14 Q. Probably like my --- probably my --- my chest high; does
15 that sound right?

16 A. Sounds about right.

17 Q. Okay. Now, Dave Dunnagan testified that he had not cut
18 the hole, the hole was there when he got there ---

19 A. Hmm.

20 Q. --- didn't you testify that --- that he cut the hole. Do
21 you remember exactly who cut the hole?

22 A. It's my understanding it was a contractor sent to
23 take a look at the damage and start reconstructing the
24 walls.

25 Q. But again, Insurance Office of America really, can you

1 specific ---

2 A. I did not cut the hole in the wall, no.

3 Q. Okay.

4 A. No.

5 Q. But (unintelligible) you did not cut it, that's ---

6 A. Right.

7 Q. --- makes sense. But you wanted mold remediation done
8 because you could smell a really nasty smell in your office
9 and Parker's office, correct?

10 A. And you could --- you could see it. Yeah.

11 Q. What do mean (unintelligible)?

12 A. Well, there's bubbling on the paint as Dave
13 mentioned. So you can tell something was going on
14 underneath.

15 Q. Do you (unintelligible) Dave said yesterday that, you
16 know, a lot of times mold can smell like sewage?

17 A. I heard that, yeah.

18 Q. (Inaudible)?

19 A. I think Dave's an expert at mold.

20 Q. So is it possible when you were complaining about the
21 smell in your office it could have been mold and not sewage?

22 A. Based on Dave's testimony yesterday, yeah.

23 Q. And I know that there was a picture with a big trash can
24 from, I guess probably the maids or somebody put in there.
25 (Unintelligible)?

1 A. I didn't, no. I don't --- I'm assuming it was the
2 cleaning crew because we came in --- came in on a Monday
3 or a Tuesday and it was already there.

4 Q. All right. And my understanding is that there was water
5 in that trash can?

6 A. There was, yeah.

7 Q. Was it sewage water? I mean, could you tell --- I don't
8 mean to be gross, but did it have feces, urine, or was it
9 just ---

10 A. Didn't smell very good. No.

11 Q. (Inaudible)?

12 A. Right.

13 Q. (Inaudible).

14 A. And it had probably four --- four to six inches of
15 water.

16 Q. So a fair amount, that's a lot of water ---

17 A. Uh-huh.

18 Q. --- especially (unintelligible) trash can.

19 So Dave does his scan on September 25th. When do you
20 talk to Dave about his results of his investigation?

21 A. Dave did an air sampling, and I think we got the
22 results, you know, three or four days later maybe.

23 Q. Now, Dave sent you on October 2nd (unintelligible) the
24 mold remediation; is that correct?

25 A. Yes.

1 Q. Okay.

2 A. According to --- to ---

3 (Simultaneous speaking)

4 Q. (Unintelligible) looks like you sent out to Crissy ---
5 excuse me --- to Angela Adleman later that --- later that day,
6 correct?

7 A. Correct.

8 Q. All right. So isn't it true that Dave didn't actually
9 start until almost exactly a month later the mold remediation?
10 November 2nd?

11 A. That sounds about right. Yeah.

12 Q. And it took him, you know, three and a half, four days.
13 Sounds like the last day was just running post-remediation
14 testing, but it took him --- took him a few days to get
15 (unintelligible)?

16 A. It did.

17 Q. At any time did Dave say to you, hey Scott, don't have
18 anybody in our office, it's hazardous, it's --- it's --- it's
19 going to mess people up, they're being exposed to serious
20 mold. Did he ever tell you it's not a safe place for people
21 to work at inside this building?

22 A. I think we had a conversation and he --- I think we
23 had a conversation to the effect that let's --- let's see
24 what the air sampling comes back with. And I don't think
25 he ever said keep your people out of here, but I think it

1 was kind of implied, let's --- let's wait and see what
2 happens.

3 Q. Okay. (Unintelligible) report?

4 A. When it was first received. I haven't read it
5 recently.

6 Q. And it --- and you --- you were here yesterday during his
7 testimony, right?

8 A. Uh-huh.

9 Q. Okay. And isn't it true that really the big problem in
10 terms of everything was ingrained and (unintelligible) read
11 was inside the hole in the wall between your and Parker's
12 office? (Unintelligible) for being outside (unintelligible)
13 normal --- normal elements?

14 A. I thought he said that there was indication of mold
15 in my office and Parker's office.

16 Q. I think he --- I think what he said is that the hot spot
17 was right here though ---

18 A. Uh-huh.

19 Q. And if you look (unintelligible) graph
20 (unintelligible) ---

21 A. The red. Uh-huh.

22 Q. --- (unintelligible). And your office was actually
23 (unintelligible) pull that up if you want to see it.
24 (Unintelligible).

25 A. Okay.

1 Q. (Unintelligible).

2 A. No, I don't disagree with you, but ---

3 Q. So is it --- is it true that --- that Dave may have said,
4 hey, don't have people in the office while we're doing the
5 mold remediation work?

6 A. Yes, I think that that's ---

7 Q. And he never said don't have people in the office
8 (inaudible)?

9 A. No. No.

10 Q. So there were owner contractors that were scheduled
11 during that time period to do work in this building; were you
12 aware of that?

13 A. I was not.

14 Q. Okay. The contractor finished up the --- the office
15 (unintelligible)?

16 A. I wasn't aware of that.

17 Q. Were you aware that the badge scanner was broken
18 (unintelligible)?

19 A. Probably saw an e-mail come from Crissy, but I don't
20 remember, you know, the specifics on it.

21 Q. Help me understand about Unit 104. Is Unit 104 pretty
22 much locked up from 103? Is it --- is it pretty separated?

23 A. It's --- there's a glass door that separates them,
24 but yes, they're separated.

25 Q. Okay. So there's a glass door, there's --- there's a lot

1 of space (unintelligible) correct?

2 A. It was being used as a storage area at the time, but
3 yeah.

4 Q. Wasn't there a conference room table and conference room
5 chairs set up in this --- in this office right here this
6 conference room right here?

7 A. I don't remember if it was that space or the space
8 above, but it --- yeah, it could have been. I don't ---
9 I don't really remember what all was in that office.

10 Q. Okay. Y'all are going to tired of seeing my face.
11 (Unintelligible) or else she's going to get mad about her
12 (unintelligible) don't tell her.

13 So isn't it true that 103 was kind of sectioned off,
14 cordoned off as well?

15 A. Yes. Well ---

16 (Simultaneous speaking)

17 A. --- there was a hallway there that had two or three
18 steps, but there was no way to close it off from the rest
19 of the ---

20 (Simultaneous speaking)

21 A. --- space.

22 Q. It wasn't a pocket door or a (unintelligible)?

23 A. No.

24 Q. But then this was --- this like kind of white line here,
25 even that separates the unit, this was pretty much open,

1 right?

2 A. It was all open.

3 Q. Okay. So in this --- is Unit 105, did the med spa
4 (unintelligible)?

5 A. Yes.

6 Q. I think it's Art of Esthetics ---

7 (Simultaneous speaking)

8 A. Right.

9 Q. Were you involved in that sublease at all?

10 A. I was not. Not at all.

11 Q. Didn't have anything to do with it?

12 A. Nothing to do with it.

13 Q. Now, we talked about 90 days and we talked about Angela
14 Adelman's responsiveness and ---

15 A. Hmm.

16 Q. --- (unintelligible) what was the condo association's
17 responsibility and what was the landlord's responsibility?

18 A. Uh-huh.

19 Q. Have you read the lease that was created when IOA
20 Properties III, LLC and Insurance Office of America first
21 started ---

22 A. I have not.

23 (Simultaneous speaking)

24 Q. --- (unintelligible)?

25 A. I have not. I wasn't involved with that.

1 Q. All right. So you had mentioned several times I believe,
2 that --- that Angela was very responsive (unintelligible)
3 correct?

4 A. Yeah, Angela was always responses to my texts and my
5 e-mails.

6 Q. So what do you think caused the delays of getting the
7 water leak fixed in the unit upstairs that was causing damage
8 to Unit 103, Parker's office, and a little bit in your office
9 too?

10 A. It --- we had contractors come out on numerous
11 occasions try to discover where the leak was coming from.
12 You know, we just never --- never could find it or the
13 property manager never could find it.

14 Q. (Unintelligible)?

15 A. Just seemed to go on and on.

16 Q. Is it --- is it true that you kind of lost faith in Arrow
17 Plumbing by that time after they'd been out there six times?

18 A. That's --- that's an accurate statement. Yeah.

19 Q. And is it true that you --- you insisted that Shuler
20 Plumbing ---

21 A. That wasn't my recommendation, but I would --- I ---
22 I would probably say that we needed a new contractor at
23 that point, but that wasn't my recommendation.

24 Q. At no time did you tell Angela Adleman that she --- that
25 you were going to hire Shuler Plumbing to come out and help

1 instead of Arrow?

2 A. I could have.

3 (Simultaneous speaking)

4 A. I know Shuler was a --- an IOA client, I believe at
5 the time. Similar to ---

6 (Simultaneous speaking)

7 Q. (Inaudible) messenger ---

8 A. I could have been the messenger of it, yeah.

9 Q. (Unintelligible) Shuler did come out and did work
10 upstairs?

11 A. I believe so.

12 Q. Okay. And that would have been roughly early --- early
13 November, like I believe --- I'm sorry. I apologize.

14 (Simultaneous speaking)

15 A. Would have been ---

16 Q. (Unintelligible)?

17 A. I don't remember the exact date.

18 Q. Okay. Would --- would --- does November 9, 2020, sound
19 about right?

20 MR. JOYCE: Objection. He just testified he doesn't
21 know the exact date.

22 THE WITNESS: Yeah.

23 THE COURT: All right.

24 MR. COBB: (Unintelligible) Your Honor.

25 THE COURT: Okay. You can refresh.

1 BY MR. COBB:

2 Q. Were you responsible on behalf of Insurance Office of
3 America of giving notice to the landlord of any disputes under
4 the lease that Insurance Office of America had?

5 A. No. I would say no.

6 Q. Who would have been that individual that was responsible
7 for letting the landlord know hey, you got a problem?

8 A. Probably would have been IOA Properties.

9 Q. (Unintelligible)?

10 A. If he was still at IOA at that time. I --- I don't
11 recall if he was still. I think Jason was still there,
12 so yeah.

13 Q. Let's talk about --- let's talk about December 15th. How
14 involved were you (unintelligible) from this property?

15 A. I wasn't. I mean, my personal effects were in my
16 office. I was responsible.

17 Q. So you're saying (inaudible)?

18 A. Wouldn't say --- I wouldn't say that. But ---

19 Q. (Inaudible)?

20 A. I didn't have the responsibility of coordinating the
21 move out, no.

22 Q. (Inaudible). All right. I want to --- and I --- I've
23 kept you on the stand for a long time ---

24 A. Uh-huh.

25 Q. --- give you a break, sir, but ---

1 A. Thank you.

2 Q. --- but I want to bring up the complaint. Now, I
3 mentioned this earlier, and on November 17th can you read
4 that --- that sentence? Make it a little bit bigger. This is
5 the lawsuit that (background noise) my client (inaudible).
6 And (unintelligible)?

7 A. As stipulated in section 15.16 of the lease, time is
8 of the essence with respect to all the provisions of the
9 lease. Landlord through its lack of diligence and
10 failure to repair the lease premises has breached his
11 provision of the lease.

12 Q. Okay. And are you aware that the first time
13 (unintelligible) Insurance Office of America gave written
14 notice to 1221 Bower was September 22nd?

15 A. I --- I'm not. No.

16 Q. Okay. And do you believe that it was the landlord's lack
17 of diligence based off being able to fix this water leak from
18 upstairs?

19 A. It's my understanding the landlord was notified of
20 the water leak when we originally reported it, so he was
21 on notice.

22 Q. What --- what could he have done better? You stated lack
23 of diligence ---

24 (Simultaneous speaking)

25 Q. --- done better? (Unintelligible)?

1 A. I --- I saw the landlord once in this --- you know,
2 three and a half, for month span. So to my knowledge, he
3 only came to the premises once to take a look at the
4 damage.

5 Q. Well, only one time when he met you?

6 A. That's correct. Yes. That's correct.

7 Q. So you --- would you agree that that's a true statement
8 that the landlord through its lack of diligence failure to
9 repair the lease premises is breached? That condition of the
10 lease?

11 A. I do think the situation could have been a little
12 more urgently dealt with when it was reported in August,
13 and maybe wouldn't --- wouldn't have gotten to the point
14 where we were in (unintelligible).

15 Q. Okay.

16 (Simultaneous speaking)

17 A. We had --- I mean, we had a number of plumbers
18 coming in and out, you know, during that period of time,
19 and just for whatever reason never could resolve the
20 issue.

21 Q. (Inaudible). All right. Could you read number 26
22 (unintelligible)?

23 A. Landlord's lack of diligence and failure to promptly
24 repair the lease premises is also a breach of section
25 15.16 of the lease. See lease at 15.16, time is of the

1 essence with respect to all provisions of the lease.

2 Q. Okay. So you're --- you're familiar with insurance
3 contracts, correct?

4 A. I am.

5 Q. Okay. And are you familiar force majeure provisions in
6 contracts?

7 A. Not really. Go ahead and you can fill me in.

8 Q. No, I'm asking if you are.

9 A. No. No.

10 (Simultaneous speaking)

11 Q. (Unintelligible) contract force majeure?

12 A. I'm not sure what you're referring to.

13 Q. Okay. If you go to section 15.16 of the lease ---

14 A. Uh-huh.

15 Q. --- have you had a chance to read this, sir?

16 A. I have not.

17 Q. Would you do me a favor, (unintelligible) have this in
18 here again. But would you read the highlight --- highlighted
19 section to the jury then please?

20 A. The forgoing notwithstanding, whenever a period of
21 time is within prescribed for action to be taken by the
22 landlord, landlord shall not be liable or responsible for
23 and there shall be excluded from the computation of any
24 period of time, any delays due to strikes, riots, acts,
25 acts of God, shortages of labor or materials, war,

1 government laws, regulations, restriction, and other
2 causes of any kind whatsoever which are beyond the
3 reasonable control of the landlord.

4 Q. Okay. So let's break this down a little bit. So the
5 90 days under the Section 11.1 of the lease. That's
6 prescribed --- that's a period of time (unintelligible) would
7 you agree ---

8 (Simultaneous speaking)

9 MR. JOYCE: Objection, Your Honor. He's --- he's
10 already testify he --- he hasn't read the lease. I don't
11 know that he can interpret the applicability of this
12 provision and whether it even applies. The correct
13 speaks for itself.

14 MR. COBB: It does speak for itself, Your Honor.
15 That's what I'm trying to make sure that I understand.

16 MR. JOYCE: And that's why you don't get testimony
17 through a witness who said that he hasn't read the
18 contract and --- and he's trying to get him to interpret
19 that.

20 UNIDENTIFIED SPEAKER: (Inaudible).

21 THE COURT: She can't hear you.

22 MR. JOYCE: Yes, that objection. That's why you ---
23 why you don't get testimony through a witness who has
24 testified he hasn't read the contract. And now opposing
25 counsel's try to get him to interpret ---

1 MR. COBB: Your Honor, he --- the witness testified
2 that he's been involved in this real estate, that he was
3 tasked with the job that would have --- that would have
4 included this lease at that time in terms of who to go
5 and talk to would have been the condo association was
6 served on that board. I think it's only --- he's ---
7 he's a very respected individual in his field with a ton
8 of experience. I don't think that it's going outside
9 the --- the --- the --- the rails to ask him what the
10 sentence does in terms of this 90 days that Insurance
11 Office of America is trying to, you know, live and die
12 by.

13 MR. JOYCE: This is a --- a lease agreement.
14 It's --- it's not involving the condo owners association.

15 THE COURT: All right. Mr. Joyce, I'm going to
16 sustain your objection. So we'll move on. You can ask a
17 different --- ask in a different way, or ask a different
18 question.

19 BY MR. COBB:

20 Q. Isn't it true that there was --- isn't it true that my
21 client wasn't the plumber who came out six, seven times to
22 repair the ---

23 (Simultaneous speaking)

24 Q. --- August 14th, December 1st (unintelligible)?

25 A. That he was not the plumber?

1 Q. Yes, sir.

2 A. That's correct.

3 Q. All right. So he was not the plumber, right?

4 A. Correct.

5 Q. And my client --- you don't know if my client's
6 (unintelligible) or not, correct?

7 A. Have no clue.

8 Q. All right. So isn't it true that --- that there was
9 still some COVID restrictions in the world in the period of
10 August 14th of 2020 to December 1, 2020?

11 A. COVID was happening during that period of time, yes.

12 Q. Okay. And isn't it true that --- that scheduling a
13 contractor to get into a third-party unit owner's building and
14 into my client's building, that Insurance Office of America
15 was leasing ---

16 A. Uh-huh.

17 Q. --- that had to meet the contractor to the let the
18 contractor in by and through the condo association, isn't that
19 a lot of moving parts?

20 A. Yeah, there's some moving parts to it, yes, sir.

21 Q. And is it fair to say that beyond the reasonable control
22 of the landlord on all those parts that I just mentioned?

23 A. The scheduling of the plumber to get into the unit
24 above, or the property manager; is that what you're
25 saying?

1 Q. Right. (Inaudible)? Or the --- or the plumber not being
2 able to find or fix the leak effectively every time he went
3 out?

4 A. Yeah. I would say so.

5 Q. Thank you. I just have one last question for you,
6 sir ---

7 A. Uh-huh.

8 Q. --- and thank you. Thank you again for all your patience
9 here today.

10 A. Okay.

11 Q. When you met with AJ Leone, I believe it was probably
12 sometime in, you know, after you reported this leak, correct?
13 You met AJ Leone in person? You said it was the first time
14 you ever met him?

15 A. That's correct.

16 Q. When you met him, how did that meeting go?

17 A. To my knowledge, the meeting was fine. He wasn't
18 there that long. I showed him around the office, you
19 know, it's my recollection he was in and out probably in
20 about 15 minutes.

21 Q. Did he apologize that you guys were going through
22 this ---

23 (Simultaneous speaking)

24 A. He did say that. Yeah. He did.

25 MR. COBB: Your Honor, I don't have any further

1 questions. Thank you.

2 THE COURT: All right. Very good. Thank you. At
3 this time we're going to allow the jury to have a
4 ten-minute break. So we'll bring the jury back in at
5 about 15 after. Thank you.

6 (Jury exits courtroom)

7 THE COURT: All right. Very good. We'll stand down
8 for ten minutes.

9 (Off the record)

10 THE COURT: All right. So we have everyone? All
11 parties are here?

12 MR. COBB: Yes, Your Honor.

13 THE COURT: All right very good. All right. So
14 we'll bring the jury back and resume redirect --- or
15 begin redirect.

16 (Jury enters courtroom).

17 THE COURT: All right. Very good, Ladies and
18 gentlemen of the jury. Let me also remind you --- please
19 be seated. Let me also remind you that at any time that
20 you need to stretch, work your knees out, your back,
21 please feel free to do that during testimony. All right.
22 All right. Mr. Joyce.

23 MR. JOYCE: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. JOYCE:

1 Q. Scott, you were asked about the common elements; do you
2 recall that?

3 A. I do.

4 Q. Would you agree that there was damage within I --- IOA's
5 unit outside of the common elements?

6 A. Yes.

7 Q. Damage to the ceiling tiles?

8 A. Ceiling tiles.

9 Q. Damage to the walls?

10 A. Walls.

11 Q. Damage to the carpet?

12 A. Carpet.

13 Q. Mr. Cobb discussed with you 1221 Bower having no
14 responsibility to gain access to a tenant upstairs; do you
15 remember that?

16 A. Right.

17 Q. And he insinuated this would be a condo owners
18 association issue?

19 A. He did.

20 Q. Okay. You're aware that --- that Mr. Leone is the
21 president of the condo owners association, right?

22 A. Right.

23 Q. And he controls the condo ---

24 A. Right.

25 Q. --- owners association?

1 A. Yes.

2 Q. So in that --- that tenant issue that came up in November
3 after the mold was remediated ---

4 A. Right.

5 Q. --- that was a one-day issue ---

6 (Simultaneous speaking)

7 A. I guess it would have been a two-day issue. Yeah.

8 The day they tried to gain access and the 24-hour period
9 of time ---

10 (Simultaneous speaking)

11 A. --- give ---

12 Q. They got -- they got in ---

13 A. Right.

14 Q. And that was with, I guess, Mr. Leone and Mr. Adleman ---
15 Ms. Adleman working together?

16 A. I'm not sure.

17 Q. Okay. Can you --- do you have the master deed up there
18 that Mr. Cobb was ---

19 A. Do I have what now?

20 Q. The master deed exhibit that he was going through?

21 A. Do you know what number?

22 Q. It's 54.

23 MR. JOYCE: Oh, it's not in the binder.

24 THE COURT: Yes it's not in the binder.

25 THE WITNESS: I can't (unintelligible).

1 BY MR. JOYCE:

2 Q. Scott when you --- can --- can you flip to page 23 of 69?

3 A. Okay.

4 Q. Okay. Do you see section six association as agent?

5 A. I do.

6 Q. Could you please read that section for me?

7 A. Section six, association as agent. Each owner by
8 requiring or holding an interest equitable or legal in a
9 unit accepts and acknowledges the irrevocable appointment
10 of the association as his agent to adjust all claims
11 arising under insurance policies purchased by the
12 association and to execute and delivery leases upon the
13 payment or satisfaction of claims.

14 Q. Thank you, Scott. And can --- could you flip to page 66
15 of 69?

16 A. 66?

17 Q. Of 69, yes.

18 A. Okay. One more. Okay.

19 Q. Are you there?

20 A. I am.

21 Q. Okay. You see section three, right of entry?

22 A. I do.

23 Q. Could you read that, please?

24 A. Section three, right of entry. Each and every
25 co-owner by accepting a deed to a unit and all others

1 claiming under such co-owner thereby grants to the
2 management agent or such other person designated by the
3 board in the event fire or some other similar emergency
4 is in the opinion of such agent or designated person
5 threatening his unit, the right to enter the same
6 regardless of whether such co-owner is present at such
7 time. For such purpose, each and every co-owner shall
8 provide the association with a key to his unit.

9 Q. So Scott, you texted Angela, I guess on August 17th, that
10 you thought it was the toilet upstairs, correct?

11 A. Correct.

12 Q. Okay. Why --- why didn't Angela or agent as --- I'm not
13 sure landlord or co-owner association president, why --- why
14 wouldn't they try to gain access to the unit up there then?

15 A. I can't answer that in my mind.

16 Q. Do you think it was within their reasonable control to do
17 that?

18 A. I think so, yes.

19 Q. Okay. You were asked a lot about the responsiveness of
20 Ms. Adleman, and your --- your testimony was she was
21 responsive, right?

22 A. She was. Yeah.

23 Q. Doesn't necessarily mean the issue was getting fixed
24 though, right?

25 A. That's correct.

1 Q. Sent the same plumber out?

2 A. Numerous times.

3 Q. --- times?

4 A. Uh-huh.

5 Q. Was it in their reasonable control to hire a competent
6 plumber?

7 A. It was.

8 Q. So ---

9 MR. COBB: Objection. Calls for speculation, Your
10 Honor. He can't ask that question.

11 THE COURT: Ask --- I'll ---

12 MR. COBB: No, he --- he asked him about a competent
13 plumber. He can't say if the plumber is competent or
14 not, he just said he lost faith in them in his early
15 testimony.

16 MR. JOYCE: Well --- well he was asked about a --- a
17 plumber that IOA suggested in November that came out and
18 actually I think fixed the water leak.

19 MR. COBB: But it was his client that he knew. I
20 mean, that's a ---

21 THE COURT: All right.

22 MR. COBB: (Inaudible).

23 THE COURT: Yeah. All right.

24 MR. JOYCE: He asked him (unintelligible) questions
25 as well. So I'm asking him reasonable control questions.