IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

ELIZABETH REETZ *Plaintiff*,	)	CASE NO. _____
vs.	)	FIRST MOTION *for* PARTIAL SUMMARY & DECLARATORY JUDGMENT *and* FIRST MOTION *for* CLASS CERTIFICATION
BBCS-HAWKEYE HOUSING, LLC, *Defendant*.	)	

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COMES NOW, Elizabeth Reetz, by and through her attorney, Christopher Warnock, and asks that partial summary & declaratory judgment be rendered on the issue of the legality of Defendant's lease and that the instant case be certified as a class action, stating to the Court as follows:

I. Introduction

Plaintiff Elizabeth Reetz ("Tenant") is suing her landlord Defendant BBCS-Hawkeye Housing, LLC. ("Landlord"). Landlord has a standard lease, lease rules and addenda ("Lease"), Attachment One. The Lease contains provisions that exculpate and limit the liability of Landlord and provide for indemnification of Landlord by Tenant as well as provisions that provide for the payment by Tenant of Landlord's attorney fees all of which violate Iowa Code Chapter 562A, the Iowa Uniform Residential Landlord Tenant Act. ("IURLTA").

The instant case is legally and factually almost identical to *Staley v. Barkalow*, 834 N.W.2d 873 (Table), 2013 WL 2368825 (Iowa App. 2013) ("*Staley*") where the Court of Appeals ruled on the appropriateness of summary & declaratory judgment and class certification. As the Court of Appeals held in *Staley* this Court should render declaratory judgment, determining if the challenged lease provisions are illegal. *Staley* at

23-4. If the clauses are illegal, then under *Staley* their inclusion in a lease, even without enforcement, gives rise to a cause of action under the IURLTA. *Staley* at 14-15.

This case is also almost identical to the summary & declaratory judgment rendered on remand of Staley v. Barkalow, LACV 073821 (March 19, 2014 6th District) ("Staley Remand") Attachment Two, and the partial summary & declaratory judgments and class certification orders rendered in by Chief Judge Grady in Walton v. Gaffey, CVCV 76909 (July 12, 2015, 6th District) ("Gaffey") Attachment Three, and in Kline v. Southgate Property Management, CVCV 76694, (July 12, 2015, 6th District) ("Kline") Attachment Four. In their rulings both Judge Russell and Chief Judge Grady ruled that provisions limiting liability are illegal under the IURLTA. *Staley Remand* at 9-12; *Gaffey* at 7.

Finally, where tenants also challenged the legality of lease provisions common to all class members, the *Staley* Court held that certification of a class was appropriate. *Staley* at 16-23. In other persuasive rulings under similar circumstances with similar lease provisions, Judge Turner and Chief Judge Grady also ordered class certification. *Amor v. Houser*, CVCV 75753 (April 24, 2014 6th District) Attachment Five; *Gaffey* at 10; *Kline* at 12.

II. Landlord's Lease Contains Prohibited Provisions

A. Summary & Declaratory Judgment

In the *Staley* Appeal, the Court of Appeals found that the trial court erred in not rendering summary & declaratory judgment on the issue of the legality of defendant landlord's lease,

> "The purpose of a declaratory judgment is to determine rights in advance." *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 312 (Iowa 1998). In a

> declaratory judgment action, "there must be no uncertainty that the loss will occur or that the right asserted will be invaded." Id. The question "is whether there is a substantial controversy between parties having antagonistic legal interests of sufficient immediacy and reality to warrant declaratory judgment." *Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335, 336 (Iowa 1975). Summary judgment is appropriate if the record shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Walker*, 801 N.W.2d at 554.
>
> The use (inclusion) of certain provisions in a rental agreement is prohibited, even without enforcement, if the landlord "willfully uses a rental agreement containing provisions known by the landlord to be prohibited." Iowa Code § 562A.11(2). The district court did not address this issue because it erroneously ruled enforcement was required under chapter 562A. On remand, *the district court should consider whether the challenged lease provisions are provisions that "shall not be included"* and whether the inclusion was made willfully and knowingly. See id. §562A.11; see also *Summers*, 236 P.3d at 593 (stating landlord's "provision requiring tenants to pay its attorney fees in any legal dispute is clearly prohibited by the Landlord and Tenant Act, and [landlord] should have known that from simply reading the Act").

Staley Appeal at 23-4.

As Judge Russell noted in granting summary & declaratory judgment in the *Staley* Remand, "To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party of a particular result under controlling law," citing *McVey v. National Organization, Inc*., 719 N.W. 2nd 801, 802 (Iowa 2006). *Staley* Remand at 5. Tenant has filed, along with the instant motion, a very short Statement of Undisputed Material Facts. As noted in the Statement, the only facts necessary for summary judgment are that Ms. Reetz was a tenant of Landlord and that Ms. Reetz signed one of Landlord's standard leases, which is abundantly clear from her lease, Attachment One. This Court should proceed to render summary & declaratory judgment with regard to the challenged provisions of Landlord's lease.

B. Prohibited Clauses

Iowa Code §562A.9 provides, "The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law…" Iowa Code §562A.9(1).

Iowa Code §562A.11 states,

> 1. A rental agreement shall not provide that the tenant or landlord:
>
> a. Agrees to waive or to forego rights or remedies under this chapter provided that this restriction shall not apply to rental agreements covering single family residences on land assessed as agricultural land and located in an unincorporated area;
>
> b. Authorizes a person to confess judgment on a claim arising out of the rental agreement;
>
> c. Agrees to pay the other party's attorney fees; or
>
> d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith.
>
> 2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney's fees.

Iowa Code § 562A.11

Under the IURLTA, landlords are prohibited from including illegal lease provisions, even if there is no enforcement of these clauses. See *Staley Appeal* at 14-15. If the enforcement or inclusion of the prohibited clause was knowing and willful, then the landlord is subject to up to 3 months rent as punitive damages, actual damages and reasonable attorney fees. Iowa Code §562A.11(2); *Staley Appeal* at 15.

1. Indemnification and Exculpatory Provisions

Landlords are specifically prohibited from using leases or lease rules that exculpate or limit their liability or provide for indemnification. Iowa Code §562A.11(1)(d). Landlord's lease and lease rules have a large number of exculpation, liability shifting and indemnification provisions. Lease §19 states, "Tenant acknowledges that Landlord is not responsible for Tenant's losses resulting from flood, earthquakes, natural disasters, power failures, or fire or any other cause where the Landlord was neither negligent nor the proximate cause of the Tenant's loss."

Lease § 21(a), entitled "Hold Harmless and Indemnify" states,

> To the extent permitted by, and not inconsistent with, applicable law, Landlord shall not be liable to Tenant, Tenant's family members, guests or invitees for any damages, injuries, or losses to person or property caused by defects, disrepair, or faulty construction of the Premises or loss from crime, theft, vandalism, fire, smoke, pollution (including second hand smoke), water, lightning, rain, flood, hurricane, water, leaks, hail, ice, snow, explosion, interruption of utilities, electrical shock, defect in any contents of the dwellings, latent defect, acts of nature, unexplained phenomena, acts of other residents, or any other cause unless the same is caused by the gross negligence or willful act or willful omission of the Landlord or its representatives, acting in the course and scope of employment. Tenant expressly acknowledges that Landlord has made no representations, agreements, promises or warranties regarding the security of the Premises or surrounding community. Landlord does not guarantee, warrant or assure Tenant's personal safety.

Lease, §21(a), Attachment One. The Hold Harmless and Indemnify section continues,

> (b) Tenant shall indemnity, defend and hold Landlord harmless from and against any and all claims for damages to the Premises or other property or personal injury (i) arising from Tenant's use or occupancy of the premises; (ii) form any activity, work, or thing done permitted or suffered by Tenant in or about the Premises; or (iii) from any activity, work or thing done or permitted by Landlord about the Premises, unless and to the extent the same is caused by the acts or omissions of Landlord.

Lease, §21(b), Attachment One.

Section 26, entitled "Abandonment" states,

> At the end of said fourteen (14) day period Tenant shall be deemed to have abandoned the property and the Landlord may dispose of the same in any manner the Landlord desires without any liability to the Tenant. Landlord shall not be responsible to Tenant for any loss or damage to Tenant's personal property.

Lease, §26, Attachment One.

The Parking Rules and Regulations, §1 states, "Any illegally parked vehicles or vehicles violating the regulations below or any applicable regulations or any unauthorized vehicles may be towed and the expense and sole risk of the owner of the vehicle." Parking Rules and Regulations, §9 states,

> You agree to defend, indemnity and hold harmless Condominium Management and Landlord from and against any and all manner of claims for damages or loss of property or personal injury suffered in, on or about the parking space (including contents of your vehicle)…Condominium Management and Landlord require do not insure the contents of the parking space or liability to you.

Parking Rules and Regulations, §9, Attachment One. Parking Rules and Regulations §19, second paragraph states,

> Acceptance of parking privileges (access card, special permits and hang-tags) constitutes an agreement between Tenant and the Landlord that the Landlord shall not be responsible for loss or damage to the vehicle or to persons, its accessories or contents, resulting from theft, fire, collision or any other cause.

Parking Rules and Regulations §19, second paragraph, Attachment One.

The Pest Control Addendum §h, second paragraph states, "We will not be responsible for any injuries or damages to you or any other person that results from a pest infestation and you agree for yourself and all other parties to release and indemnify us in accordance with the terms and conditions of the Lease."

As Judge Russell held in the *Staley* Remand,

> The Iowa Legislature has stated that a rental agreement shall not provide that the tenant or landlord agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith. The Iowa Supreme Court has held that a landlord owes a duty of care to protect tenants from reasonably foreseeable harm…the Court concludes that the challenged clauses of the standard lease agreement providing for exculpation and/or indemnification are provisions that shall not be included in landlord's standard lease.

Staley Remand at 9; see also Chief Judge Grady's almost identical ruling in *Walton v. Gaffey* at 7.

Lease §21(a) prefaces a long series of exculpatory provisions by stating that they are, "[t]o the extent permitted by, and not inconsistent with, applicable law…" At best this disclaimer applies only to §21(a) and not to the other liability shifting and indemnification provision in the lease and lease rules. However, even with regard to Lease §21(a), Landlord cannot mislead tenants or escape the specific statutory prohibition on illegal provisions by using a general disclaimer. See, eg. *Tradewinds Ford Sales, Inc. v. Paiz*, 662 S.W.2d 164 (Tex.App. 1983) (general disclaimer cannot save illegal specific provision in a contract).

In *Staley v. Barkalow*, the Court of Appeals analyzed the language and purpose of Iowa Code §562A.11 which specifically prohibits liability shifting and indemnification lease clauses. The *Staley* Court pointed out the negative effect that the presence of illegal lease provision had on tenants holding that,

> …the legislature recognized a landlord's willful inclusion of prohibited clauses can have "an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests . . . or fail to pursue their own lawful rights." See *Baierl*, 629 N.W.2d at 284; see also *Summers v. Crestview Apartments*, 236 P.3d 586, 593 (Mont. 2010) (stating damages for a tenant under Montana's Landlord and Tenant Act ("if a party purposefully uses a rental agreement containing provisions known by him to be prohibited") "would further counter the chilling effect" of prohibited lease provisions and "merely severing the prohibited rental provisions does not

> address the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights").

Staley v. Barkalow, 834 N.W.2d 873 at 15 (Table), 2013 WL 2368825 (Iowa App. 2013).

Staley quotes the decision of the Wisconsin Supreme Court in *Baierl v. McTaggart*, 629 N.W.2d 277 (Wis. 2001) which held,

> The Department also noted testimony from some landlords who explained that these objectionable provisions were not enforced, and therefore caused the tenant no serious problems. Id. at 62. The Department concluded that this fact, if true, merely aggravated the unfairness of these objectionable provisions: "If [these provisions are not actually enforced], however, there can be no explanation for the inclusion of the provisions in the rental agreement, unless they are intended solely for the purpose of intimidation. This purpose, far from legitimizing the provisions, merely compounds the alleged unfairness."

Baierl v. McTaggart, 629 N.W.2d 277 at ¶51-2. Similarly here, the fact that the lengthy exculpatory provisions are unenforceable, rather than unenforced, does not render them any less objectionable. A tenant reading these provisions would naturally assume their validity and act accordingly. This disclaimer is highly misleading. It says, "…to the extent permissible by law" when NO exculpation or liability shifting is allowed. The extent permissible by law is not at all. It is hard to imagine that a tenant would read this section and understand that it is entirely void. This disclaimer is equivalent to saying, "to the extent permitted by law, this is a hold up."

The key question in *Staley* was, "…whether tenants have a right to a legal lease, a lease free from prohibited provisions…" *Staley* at 2. This use of disclaimers should also be prohibited because it would allow landlords to include illegal provisions in their leases so long as they were prefaced with the phrase, "to the extent permitted by law." It would be highly ironic if making this false and misleading statement then permitted a landlord

to include otherwise illegal provisions. This Court should issue summary & declaratory judgment finding these clauses illegal under §562A.11(1)(d).

2. Attorney Fee Provisions

Landlords are specifically prohibited including provisions in their leases requiring the tenant to pay the landlord's attorney fees. Iowa Code §562A.11(1)(c). Landlord's lease §24 "Eviction" provides, "On retaining possession beyond the Term without consent of the Landlord, the Tenant shall be obligated to pay the Landlord's *attorneys' fees*, court costs and any ancillary damages due to holdover by the Tenant." Section 25(a) of "Landlord's Remedies" provides,

> In case of any default, re-entry, expiration and/or dispossession, eviction proceedings or otherwise, (i) the Rent shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration, together with such expenses as Landlord may incur for legal expenses, *attorneys' fees*…

Lease §25(a), Attachment One.

This Court should issue summary & declaratory judgment finding these clauses illegal under §562A.11(1)(c).

III. Class Certification Should be Granted

A. The Numerosity Requirement

Class certification is appropriate where the class, "..is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable." Iowa Rule of Civil Procedure 1.261(1). "Where the number of proposed class members exceeds forty, this is generally sufficient to show impracticality of joinder. *Martin v. Amana Refrigeration, Inc*., 435 N.W.2d 364, 368 (Iowa 1989). see also *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786 (Iowa 1994).

As noted, Landlord has a standard lease. The Iowa City Assessor's website shows that Landlord owns over 200 units on Hawkeye Court in Iowa City.[1] If after the required initial discovery conference required under Iowa R Civ P 1.507, Landlord is unwilling to stipulate to the number of tenants using its Lease, along with the Petition and the instant motion Tenant will serve a request for admission on Landlord which should end any lingering questions as to whether or not Landlord has used its standard lease for more than 50 tenants. If necessary, Tenant will move to stay consideration of the instant motion for class certification until discovery with regard to the number of tenants using Landlord's standard lease is completed.

B. Class Certification is Appropriate

The instant case is almost identical to the appeal in *Staley v. Barkalow*, 834 N.W.2d 873 (Table), 2013 WL 2368825 (Iowa App. 2013) where a class of tenants challenged their landlord's standard lease. As in the *Staley* Appeal, there is a common nucleus of operative facts: the same lease and the same injury and the knowing and willful inclusion of prohibited clauses,

> Under Iowa law, "[t]he appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints." *Amana*, 435 N.W.2d at 367. Therefore, "the existence of individual issues is not necessarily fatal to class certification." *Comes*, at 322 (quoting *Howe v. Microsoft Corp*., 656 N.W.2d 285, 289 (N.D. 2003)). Further, [The test for predominance] is a pragmatic one, which is in keeping with the basic objectives of the [class action rule]. When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis . . . . [C]ourts have held that a [class action] can be brought . . . even though there is not a complete identity of facts relating to all class members, as long as a "common nucleus of operative facts" is present. Id . (quoting *Luttenegger v. Conseco Fin Servicing Corp*., 671 N.W.2d 425, 437 (Iowa 2003)).

[1] http://iowacity.iowaassessors.com

Staley Appeal at 17.

As in the instant case, looking at a potential class of tenants who also challenged their landlord's standard lease, the *Staley* Appeal Court held,

> Accordingly, when we consider the "substantially similar leases" and the "use/inclusion" factors, we conclude the district court abused its discretion because a common issue of liability under Iowa Code section 562A.11 predominates: whether TSB "willfully uses a rental agreement" with eighty tenants containing provisions known by TSB to be prohibited. See *Vignaroli v. Blue Cross*, 360 N.W.2d 741, 744-45 (Iowa 1985) (holding plaintiffs' reliance on employment manual's written provisions constituted the "gist of their claim"). Common issues of fact and law support the use of a class action procedure on the issue of TSB's liability under the commonality requirement of rule 1.261(2). Second, tenants seek damages common to all class members — actual damages, three months' rent, and reasonable attorney fees. See id. Damages for three months' rent are based on the actual rent amounts and damages for attorney fees would be identical for the tenant class. We recognize the actual damages incurred could be individualized, but the fact a "potential class action involves individual damage claims does not preclude certification when liability issues are common to the class." *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994).

Staley Appeal at 18.

The *Staley* Appeal Court held that a class action would provide a fair and efficient means of adjudication, particularly for claims, both in the *Staley* Appeal as in the instant case, that were predominately small claims and that the class representatives would properly represent the class. *Staley* Appeal at 19-23.

Amor v. Houser, CVCV 75753 (April 24, 2014 6th District) is another recent Johnson County District Court case in which class certification was granted under very similar facts. Plaintiffs in *Amor v. Houser* had challenged Defendants' standard lease which also included liability shifting and attorney fee provisions. Judge Turner certified a class finding that,

IT IS FURTHER ORDERED that this class certification pursuant to Rule

> 1.264(1) of the Iowa Rules of Civil Procedure establishes a class which shall consist of all of the Defendants' tenants with the same or substantially similar standard leases and lease rules; the class representatives shall be Philip and Brittany Amor; counsel for the class shall be Christopher Warnock and Christine Boyer; the requested relief of the class shall, at this time, consist of a declaratory judgment, actual and punitive damages, injunction relief and attorney fees; and that the issues to be dealt with in the context of the class action shall be: (1) Did the landlords' lease violate the Iowa Uniform Residential Landlord Tenant Act (Chapter 562A, Code of Iowa)? And (2) Did the landlord knowingly and willfully use a rental agreement containing prohibited provisions?

Class Certification Order, *Amor v. Houser*, Attachment Five. The landlord in *Amor* appealed and Court of Appeals held,

> The Amors point out that we rejected a very similar challenge in *Staley v. Barkalow*, No. 12-1031, 2013 WL 2368825, at *8 (Iowa Ct. App. May 30, 2013) (holding tenants may show harm from a landlord's willful and knowing inclusion of illegal lease provisions even without enforcement by the landlord). Finding the district court correctly certified the class based on our analysis in *Staley*, we affirm without opinion.

Amor v. Houser, 14-0866 at 2 (Iowa Ct App. 2015).

Similarly under almost identical facts and also citing *Staley* in both *Walton v. Gaffey* at 10 and *Kline v. Southgate Properly Management* at 12, Chief Judge Grady ordered class certification.

The precedent of *Staley, Amor, Walton* and *Kline* are highly persuasive and facts in the instant case almost identical. This Court should grant class certification in the instant case.

WHEREFORE, Plaintiffs request declaratory judgment and ask that the instant action be certified as a class action; with the class consisting of all of the Defendants' tenants with the same or substantially similar standard leases and lease rules; and ask that they be Class Representatives; that the counsel for the class be Christopher Warnock; that the requested relief of the class shall, at this time, consist of a declaratory judgment, actual and punitive damages, injunction relief and attorney fees; and that the issues to be dealt with in the context of the class action shall be: (1) Did the landlords' lease violate the Iowa Uniform Residential Landlord Tenant Act (Chapter 562A, Code of Iowa)? and (2) Did the landlord knowingly and willfully use a rental agreement containing prohibited provisions?

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ATTACHMENTS

Attachment One - Plaintiff's Lease & Lease Rules with BBCS-Hawkeye
Attachment Two - Judge Russell's Ruling on remand of *Staley v. Barkalow*
Attachment Three - Chief Judge Grady's Ruling in *Walton v. Gaffey*
Attachment Four - Chief Judge Grady's Ruling in *Kline v. Southgate*
Attachment Five - Judge Turner's Class Certification Order in *Amor v. Houser*