IN THE DISTRICT COURT FOR JOHNSON COUNTY, IOWA

ELYSE DE STEFANO

PLAINTIFF

820 E. Burlington St, Iowa City, IA

vs.

APTS. DOWNTOWN, INC.

DEFENDANT

414 Market St., Iowa City, IA

SMALL CLAIMS DIVISION

Case number: _____

PETITION for a MONEY JUDGMENT

COMES NOW, Plaintiff Elyse De Stefano, by and through her attorneys, Christine Boyer and Christopher Warnock, in support of her cause of action against the Defendant Apts. Downtown, Inc. (hereinafter referred to as "Landlord") stating to the Court as follows:

1. Plaintiff Elyse De Stefano (hereinafter referred to as "Tenant") was a residential tenant at 516 Bowery Street in Iowa City, Johnson County, Iowa, at a monthly rent of $1,635, from on or about July 2010 to on or about August of 2011 of Defendant Apts. Downtown, Inc., a corporation organized under the laws of Iowa, Iowa Secretary of State corporation #2846, doing business under the fictitious name "Apartments Downtown Iowa City" while acting as a property manager and maintaining an office at 414 E. Market Street, Iowa City, Johnson County, 52245.

2. At the termination of Plaintiff's tenancy Landlord provided the tenants at 516 Bowery Street with a Security Deposit Statement. Exhibit 1, attached. Plaintiff asserts:

(A) that the automatic carpet cleaning charge is illegal;

(B) that the cleaning charges and charges for screens, blinds and lawn service are excessive;

(C) that the charges for replacing a entry door damaged by a burglar and refrigerator gasket are illegal;

(D) that as a result of the illegal charge for replacing the entry door Landlord wrongly refused permission to sublet;

(E) that charging $40 an hour for cleaning, $70 an hour for weeding and charging tenants for a door broken by burglars are unconscionable;

(F) damages for wrongful withholding of a security deposit are appropriate;

(G) attorneys fees and the costs of this action are appropriately assessed against Landlord.

3. The tenants wrote to Landlord complaining about the excessive and illegal fees to which Landlord made a detailed written response of September 8, 2011, ("September 8th Response") attached here to as Exhibit 2.

(A) DEFENDANT'S AUTOMATIC CARPET CLEANING CHARGE IS ILLEGAL

1. Landlord deducted $191.00 for carpet cleaning. The Security Deposit Statement says, "Carpet Cleaning Refer to lease section 37-e maximum of $225 charge" Exhibit 1. On information and belief, Plaintiff's lease was Landlord's standard 2010-11 lease, attached hereto as Exhibit 3.[1] Section 37(e) states,

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

Exhibit 3, Apartments Downtown 2010-11 Standard Lease.

2. Landlord in its September 8th Response cites this lease language and states,

> Concerning the carpet cleaning this is an agreed-upon deduction set forth in the rental agreement…The carpets in your unit were professionally carpet cleaned by Cody's Carpet Care on July 27, 2011 at a cost of $191.00, which was correctly deducted from the security deposit.

Exhibit 2, Landlord's September 8th Response at 1.

3. Note that Landlord does not specify any damage nor assert that the carpet suffered extraordinary wear and tear. The only cited basis for the carpet cleaning charge is the lease provision that provides for automatic carpet cleaning at the termination of the tenancy.

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

> the tenant a written statement showing the *specific reason* for withholding of the rental deposit or any portion thereof. If the rental deposit or any portion of

[1] Landlord provided its standard 2010-11 lease to Plaintiff's counsel during discovery which was then made part of the record in *Conroy v. Apts Downtown*, LACV072840, currently pending in Johnson County District Court.

> the rental deposit is withheld for the restoration of the dwelling unit, the statement shall *specify the nature of the damages*.

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

4. In *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) the Ohio Court of Appeals, in construing Ohio's security deposit statute[2], substantially similar to Iowa's, held that landlords could not automatically deduct carpet cleaning fees from a security deposit, either using a lease or checkout provisions,

> It is well settled that a provision in a lease agreement as to payment for carpet cleaning that is inconsistent with R.C. 5321.16(B) is unenforceable. *Albreqt v. Chen* (1983), 17 Ohio App.3d 79, 80, 17 OBR 140, 140-141, 477 N.E.2d 1150, 1152-1153. Accordingly, a landlord may not unilaterally deduct the cost of carpet cleaning from a tenant's security deposit without an itemization setting forth the specific need for the deduction. Id. at 81, 17 OBR at 142, 477 N.E.2d at 1153-1155.

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

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

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

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

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

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

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

8. In *Uhlenhake v. Professional Property Management Inc.*, No. CL-82571 (D. Iowa 5th District, entered April 19, 2000) (attached as Exhibit 4) District Judge Michael Huppert invalidated a Polk County Iowa landlord's attempt to charge automatic carpet cleaning fees in its lease. Judge Huppert held that carpet cleaning charges could not be made for dirt or soiling due to ordinary wear and tear, citing *Southmark Management Corp v. Vick*, 692 S.W.2nd 157, 160 (Tex App. 1985) "[The tenant] could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security." *Uhlenhake* at 5. Judge Huppert further held that Iowa landlords could not charge automatic cleaning fees, "Otherwise, the lease would be used to circumvent [Iowa Code §562A.12(3)] in cases such as this one where there has been no showing of extraordinary wear and tear." *Uhlenhake* at 6.

9. The plain meaning of the lease language is made crystal clear by Landlord's own information form. The official Apartments Downtown Checkout and Inspection Checklist states, "Carpet Cleaning: As agreed upon in your lease, Landlord will *automatically* subtract $85-$195 out of the deposit for professional carpet cleaning." emphasis supplied, Exhibit 5, Apartments Downtown "Clean! Clean! Clean! Checkout and Inspection" at 1.[3]

10. Thus it is clear the automatic cleaning fee provision contained in Landlord's standard lease and enforced against Plaintiff is illegal under Iowa Code §562A.12.

(B) DEFENDANT'S CHARGES FOR CLEANING, FOR REPLACING SCREENS AND BLINDS AND WEEDING ARE EXCESSIVE

1. In the Security Deposit Statement Defendant states, "Cleaning Charges refer to lease section 37c-mininum $150" and charges $280. Exhibit 1. Lease §37c states,

> Tenants will be charged $40/hour per person (6-8 people on each cleaning crew) plus a $40 service charge for general cleaning if the rental unit is not cleaned to an "A" standard according to the "Clean, Clean, Clean" form and vacant of all belongings at the expiration of the lease. The minimum fee for cleaning by Landlord's crews starts at $150.

Exhibit 3, Apartments Downtown 2010-11 Standard Lease. Landlord's September 8th Response cites Lease §37c, lists the areas it claims were cleaned and states, "In this case, a total of 7 workers spent 1 hour preparing the unit for incoming tenants." Exhibit 2, Landlord's September 8th Response at 1. Therefore, Landlord claims seven hours cleaning tenants' unit at a cost of forty dollars an hour per worker.

[3] Landlord provided its Cleaning Checklist to Plaintiff's counsel during discovery which was then made part of the record in *Conroy v. Apts Downtown*, LACV072840, currently pending in Johnson County District Court.

2. With regard to window screens and blinds, on the Security Deposit Statement Defendant charged directly $75 each for 2 screens, for a total of $150 and $49.50 each for 2 blinds, for a total of $99.00. There was also a charge for 2 screens made on June 22. 2011, for $220. Exhibit 6, Annual Maintenance Tour 2011.

3. With regard to lawn care in general Landlord's standard lease states,

> House tenants are responsible for moving the lawn on a weekly basis. Yards must be neat and clear of trash and debris at all times. Vines, rubbish, trees & shrubs shall be maintained by the Tenant. Failure to comply may result in a minimum $150 charge each time a violation occurs.

Exhibit 3, Apartments Downtown 2010-11 Standard Lease.

4. Plaintiff was charged $210 for weeding done on July 18, 2011, see Exhibit 6 Weeding Bill. This appears on the Transaction Listing, Exhibit 7 and is mentioned in the September 8th Response at 2. The Weeding Bill states, "Maintenance called to Deweed side yard and back of house Labor 3 hours 1 Person $210" Weeding & Entry Door Bills, Exhibit 8. Therefore Landlord claims three hours weeding at a cost of seventy dollars an hour.

5. Landlord's charges present two issues. First, Plaintiff will present evidence at trial that the amount of cleaning that Landlord asserts was necessary was exaggerated. Secondly, Plaintiff asserts and will present further evidence in support, that Landlord is overcharging even for required cleaning and repair by charging tenants more than its actual costs.

6. Landlord's leases contain a large number of liquidated damages clauses, indicating the specific or minimum amount that tenants are liable for particular breaches of the lease provisions. It must determined whether these represent the actual costs incurred by Landlord. As the Iowa Court of Appeals has held,

> A party seeking to recover for breach of contract is entitled only to be placed in as good a position as the party would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics*, 579 N.W.2d 823, 831 (Iowa 1998). A party is not entitled to use the breach to better its position by recovering damages not actually suffered.

Grunwald v. Quad City Quality Service, Inc., 662 N.W.2d 370 at ¶ 31 (Iowa App. 2003)

7. Liquidated damages are not penalties if they are set at an amount reasonable in light of the anticipated or actual loss caused by the breach. *Grunwald,,* 662 N.W.2d 370 at ¶ 32.

Similarly as the Iowa Supreme Court held,

> The principle underlying our system of jurisprudence is that of compensation with the ultimate purpose being to put, if possible, the injured party in as favorable a position as though the contract had been performed. To this end they may agree upon a sum as will fairly compensate for the breach. When, however, they agree, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensation, then such agreement is deemed to be in the nature of a penalty and cannot be enforced. *Kelly v. Fejervary*, 111 Iowa 693, 83 N.W. 791; *State ex rel. Switzer v. Overturff*, 239 Iowa 1039, 33 N.W.2d 405, 4 A.L.R.2d 1343.

Huntsman v. Eldon Miller, Inc., 251 Iowa 478, 101 N.W.2d 531 at ¶ 24 (Iowa 1960).

8. Landlord's lease is replete with charges, fees, and penalties that appear to be grossly in excess of the actual cost to Landlord. For example, it is highly questionable that Landlord pays its cleaning staff forty dollars an hour and it beggars belief that it pays seventy dollars an hour for weed pulling. Landlord is required to prove by a preponderance of the evidence its basis for withholding from a security deposit, Iowa Code §562A.12(3)(c), and cannot justify its charges for cleaning and repair merely by pointing to liquidated damage provisions in its lease. Instead it must provide evidence of its actual costs, for example, the actual wages paid to its workers and the actual cost of the replacement screens and blinds.

(C) DEFENDANT'S CHARGES FOR REPLACING AN ENTRY DOOR DAMAGED BY A BURGLAR AND FOR A REFRIGERATOR GASKET PLUS ASSOCIATED LATE FEES ARE ILLEGAL

1. As the evidence at trial will show, in October of 2010 Plaintiff and her roommates suffered a break-in and burglary in their rented house. The door to their house was damaged. The burglary was reported to the Iowa City Police Department. Upon being informed of the burglary, Landlord charged the tenants $598.46 to replace the door. Weeding & Entry Door Bills, Exhibit 8. Landlord also charged $129.99 for "Refrigerator gasket replaced" on June 22, 2011. Exhibit 6, Annual Maintenance Tour 2011.

2. There are several possible provisions of Landlord's leases that could be used to charge tenants for the broken door. The first is the common area damage provision, §30 of the lease. In this situation common area damages are not caused by the tenants themselves or damages for which tenants are responsible due to their own action or negligence or the actions of their guests, but vandalism by unknown parties and damages of unknown origin,

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

Page 3 of Exhibit 9, Apartment Downtown Lease Signing information.[4]

3. Landlord's 2010-11 standard leases states,

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

[4] Landlord provided its Lease Signing information form to Plaintiff's counsel during discovery which was then made part of the record in *Conroy v. Apts Downtown*, LACV072840, currently pending in Johnson County District Court.

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

§30 in Exhibit 3, Apartments Downtown Standard Lease 2010-11.

4. Landlord's common area damage lease provisions and rules directly contravene Chapter 562A which states, "The *landlord* shall…Keep all common areas of the premises in a clean and safe condition." Emphasis supplied, Iowa Code §562A.15(1)(c).

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

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

Iowa Code §562A.17

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

7. The other possible lease provision that Landlord could use to charge tenants for damage to the door by a burglar is §33, which states,

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

§33(a) in Exhibit 3, Apartments Downtown Standard Lease 2010-11.

8. This lease provision violates Iowa Code §562A.15, entitled, "Landlord to maintain fit premises" which requires,

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

Iowa Code §562A.15(1).

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

> A. Maintenance Of Structure:
> 3. Doors: Every door, door hinge, door latch, door lock or any associated door hardware shall be maintained in good and functional condition, and every door, when closed, shall fit well within its frame

Iowa City Housing Code §17-5-19(A)(3).

10. The requirement that tenants pay for *all* damage to doors is clearly illegal. Landlord is generally responsible for repairs and specifically responsible for repairing and maintaining doors under the Housing Code and lacking a working door clearly implicates safety concerns, thus incorporating this Housing Code requirement into the requirements of §562A.15. Since the damage was vandalism caused by an unknown third party and not by the tenants, it is illegal to charge the tenants for replacement of their door.

11. Similarly with regard to the charge for the refrigerator gasket which Landlord charged $129.99 for on June 22, 2011. Exhibit 6, Annual Maintenance Tour 2011. The refrigerator gasket appears to be the rubber or plastic seal on the door of the refrigerator, which wears out over time and requires replacement. Exhibit 10, "How to Replace a Refrigerator Door Gasket"[5] Under §562A.15 the landlord is required to,

> Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.

Iowa Code §56A.15(1)(d). Since this sort of routine maintenance is the responsibility of the landlord, tenants cannot be required to pay for it.

[5] http://www.familyhandyman.com/DIY-Projects/Home-Repair/Appliance-Repair/how-to-replace-a-refrigerator-door-gasket

(D) AS A RESULT OF THE ILLEGAL CHARGE FOR REPLACING THE ENTRY DOOR LANDLORD WRONGLY REFUSED PERMISSION TO SUBLET

1. On information and belief Landlord routinely permits subleasing. Landlord has extensive requirements set forth in its lease regarding subleasing. See §§56-61, in Exhibit 3, Apartments Downtown Standard Lease 2010-11. In particular the lease states, "Only apartments whose rental accounts are in good standing may sublease. All rent/fees on the account must be paid before Landlord consents to a sublease." §57(c) in Exhibit 3, Apartments Downtown Standard Lease 2010-11.

2. Tenants wished to sublease their rental unit during the Summer and sought permission from Landlord to do so. Landlord were willing to permit the sublease if tenants agreed to pay for the replacement of the entry door and late fees as a result of the failing to pay for the door. See Exhibit 11, Proposed Damage Waiver Letter.[6] Tenants found subtenants who were willing to sublease and pay the complete rent due. But due to tenants' refusal to pay the illegal charges for the door and attendant late fees they were unable to sublease.

3. Because these charges were illegal, Landlord wrongfully withheld permission to sublease. Under Iowa law a wrongful failure to permit a tenant to sublease is a breach of the lease. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174 (2010). As the Iowa Supreme Court held in determining damages for breach of a lease,

> when a contract has been breached the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed….see also Restatement (Second) of Contracts § 344(a) (1979); 22 Am.Jur.2d Damages § 43 (1988). This type of damages is sometimes referred to as the injured party's "expectation interest" or "benefit of the bargain" damages…citing 22 Am.Jur.2d Damages § 45).

[6] Note, this letter was prepared by Landlord, but Tenants refused to pay for the door damage and the agreement was never signed or agreed to.

Midland Mutal Life Ins. v. Mercy Clinics, 579 N.W.2d 823 at ¶55 (Iowa 1998).

4. As Tenant had subleasees willing to pay the entire monthly rent of 1,635 dollars for the last 2 weeks of May, June & July, but instead had to pay that amount themselves due to Landlord's wrongful refusal to consent to subleasing, they are entitled to $4,087.50 damages.

(E) CHARGING $40 AN HOUR FOR CLEANING, $70 AN HOUR FOR WEEDING AND CHARGING TENANTS FOR A DOOR BROKEN BY BURGLARS IS UNCONSCIONABLE

1. Iowa Code §562A.7, entitled "Unconscionability" states,

> If the court, as a matter of law, finds that: a. A rental agreement or any provision of it was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of an unconscionable provision to avoid an unconscionable result.

Iowa Code §562A.7(1)(a). The Iowa Supreme Court has held that,

> A bargain is said to be unconscionable at law if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." See *Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 136, 33 L.Ed. 393, 396 (1889).

Casey v. Lupkes, 286 N.W.2d 204 at ¶28 (Iowa 1979).

2. Landlord's standard leases are lengthy, with these clauses buried in the proverbial fine print, see *C & J Fert., Inc. v. Allied Mut. Ins. Co*., 227 NW 2d 169 (Iowa, 1975) in a contract of adhesion. As the Iowa Supreme Court has stated,

> A contract of adhesion is described as one that is "drafted unilaterally by the dominant party and then presented on a `take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." Restatement (Second) of Conflict of Laws § 187 cmt. b, at 135 (Rev. 1988);

Pennsylvania Life Ins, Co. v. Simoni, 641 N.W.2d 807 at ¶47(2002). Furthermore,

> "Standardized contracts . . . drafted by powerful commercial units and put before individuals on the `accept this or get nothing' basis, are carefully scrutinized by the courts for the purpose of avoiding enforcement of `unconscionable' clauses." *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co*., 227 N.W.2d 169, 180 (Iowa 1975) (quoting 6 A. Corbin, Corbin on Contracts § 1376, at 21 (1963)).

Hofmeyer v. Iowa Dist. Court for Fayette County, 640 N.W.2d 225 at ¶40 (Iowa 2001).

3. The Landlord is a very large corporate landlord with over 1,000 tenants. It has a very lengthy, complex, fine print lease that is extremely favorable to it and extremely unfavorable to its tenants. In particular, Plaintiff asserts that that charging $40 an hour for cleaning and definitely charging $70 an hour for weeding are so fair above the reasonable and fair market value of these services and so far above the actual cost to Landlord as to be unconscionable. Furthermore, Landlord's lease provisions making tenants liable for damage done by unrelated third parties are similarly unconscionable because they impose collective responsibility and collective punishment, which is repugnant to the common law. Making tenants pay for a door that a burglar broke simply shocks the conscience and should not be permitted by this Court.

(F) PLAINTIFF IS ENTITLED TO DAMAGES FOR WRONGFUL WITHHOLDING OF A SECURITY DEPOSIT

1. Iowa Code §562A.12, regulating security deposits states,

> The bad faith retention of a deposit by a landlord, or any portion of the rental deposit, in violation of this section shall subject the landlord to punitive damages not to exceed two hundred dollars in addition to actual damages.

Iowa Code §562A.12(7).

2. The Iowa Supreme Court has held that with regard to §562A.12(7) that if the tenant asserts bad faith on the part of the landlord that it is the tenant's burden to show

bad faith, but that "Bad faith or good faith, of course, being a state of mind, may be established by substantial circumstantial evidence as well as by substantial direct evidence. 29 Am.Jur.2d Evidence §§ 358, 365 (1967); 31A C.J.S. Evidence §§ 174, 175 (1964)." *Roeder v. Nolan*, 321 N.W.2d 1 at ¶41 (Iowa 1982).

3. In construing their own analogous landlord tenant statute which also provides a statutory penalty for bad faith withholding of a security deposit the Texas Court of Appeals held,

> We conclude that in this context "bad faith" implies an intention to deprive the tenant of the refund lawfully due. This interpretation is supported by *Citizens Bridge Co. v. Guerra*, 152 Tex. 361, 258 S.W.2d 64, 69-70 (1953), in which the test of "bad faith" was said to be whether the person in question "acted in dishonest disregard" of the rights of the other person concerned.

Wilson v. O'Connor, 555 S.W.2d 776 at ¶28-9 (Tex. Civ. App.—Dallas 1977)

4. Similarly in construing the analogous Illinois landlord tenant statute, providing for a statutory penalty for the bad faith withholding of a security deposit the Illinois Court of Appeals held,

> In determining whether a party has acted in bad faith, courts consider whether the party engaged in vexatious, unreasonable, or outrageous conduct. *Country Mutual Insurance Co. v. Anderson*, 257 Ill. App. 3d 73, 78 (1993).

Ikari v. Mason Properties, 731 N.E.2d 975 at ¶28 (Ill.App. 2000).

5. Under §562A12, "The landlord may withhold from the rental deposit only such amounts as are *reasonably necessary*" to restore the unit, ordinary wear and tear excepted or for rent due or charges pursuant to the rental agreement. Emphasis supplied. Iowa Code §562A12(3)(a). Similarly, as we have seen, under contract law, liquidated damages that are reasonable in light of the anticipated or actual loss caused by the breach. *Grunwald,,* 662 N.W.2d 370 at ¶ 32.

6. Charging forty dollars an hour for cleaning and seventy dollars an hour for weeding, particularly when these are not the actual costs to Landlord, are clearly unreasonable, as well as vexatious and yes, seventy dollars an hour is flat out outrageous.

7. Similarly charging a tenant for a door kicked in by a burglar is also simply outrageous. Landlord is not a "mom and pop" operation, renting out their upstairs bedroom. Landlord is hands down the largest landlord in Iowa City, with over 1,000 tenants, clearly among the largest landlords in the state with a large, organized, sophisticated operation. Landlord has its own lengthy, fine print standardized leases which it carefully reviews and frequently changes. Landlord may argue that its common area damage and other repair shifting provisions were checked by counsel thus negating bad faith. In fact, this only aggravates its bad conduct because it clearly knowingly added these clauses to its leases. Furthermore, Landlord is clearly on notice that its common area damage and repair shifting clauses were illegal because a class action, *Conroy v. Apts Downtown*, LACV072840 was filed against it in December of 2011. In *Conroy*, plaintiffs, also represented by Plaintiff's Counsel in the instant case, filed a petition, plus multiple motions for class certification, summary judgment and declaratory judgment, laying out in great detail the illegality of Landlord's common area damage and repair shifting lease provisions.

8. The illegality of Landlord's lease provisions are apparent on their face, but Landlord had the additional notice of having a lawsuit filed against alleging in great detail the illegality of these provisions. If this Court also finds these provisions to be illegal it cannot be any surprise to Landlord.

9. Clearly Landlord's actions were in bad faith and Plaintiff is entitled to damages for wrongful withholding of a security deposit.

(G) PLAINTIFF IS ENTITLED TO ATTORNEY FEES AND COSTS

1. Iowa Code §562A.12, regulating security deposits states, "The court may, in any action on a rental agreement, award reasonable attorney fees to the prevailing party." Iowa Code §562A.12(8). However in the only reported decision dealing with §562A.12(8) *Severson v. Peterson*, 364 N.W.2d 212 (Iowa 1985) the Supreme Court held that the plaintiffs had not filed their claim as a landlord tenant action relying on Chapter 562A, thus giving no guidance for the standard for awarding attorney fees under this section.

However, Iowa Code §562A.21 provides,

> Except as provided in this chapter, the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or section 562A.15 unless the landlord demonstrates affirmatively that the landlord has exercised due diligence and effort to remedy any noncompliance, and that any failure by the landlord to remedy any noncompliance was due to circumstances reasonably beyond the control of the landlord. *If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees*.

Emphasis supplied. Iowa Code §562A.21(2).

2. There are two other statutory provisions that provide that a court may award reasonable attorney fees to the prevailing party. Iowa Code §572.32, entitled, "Attorney fees — remedies" provides,

> 1. In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees.

> 2. In a court action to challenge a mechanic's lien filed on an owner-occupied dwelling, if the person challenging the lien prevails, the court may award reasonable attorney fees and actual damages. If the court determines that the mechanic's lien was filed in bad faith or the supporting affidavit was materially false, the court shall award the owner reasonable attorney fees plus an amount not less than five hundred dollars or the amount of the lien, whichever is less.

Iowa Code §572.32. See also *Krapfl v. Hawk Developers, LLC*, No. 4-845 / 04-0249 (Iowa App. 2005).

3. Similarly, with regard to dissolution of marriage, "…the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code §598.36. The standards a court uses in awarding attorney fees in a dissolution of marriage are (1) whether the party prevailed; (2) what the relative financial positions of the parties are, in particular, whether the non-prevailing party has the means to pay attorney fees. *In re Marriage of Maher*, 596 N.W.2d 561 at ¶65 (Iowa 1999); see also *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa App. 1995).

4. In the instant case Landlord is a very large property management company with other 1,000 tenants while Plaintiff is a student, proceeding *in forma pauperis*. Landlord certainly can easily afford to pay attorney fees, while Plaintiff clearly cannot. In this case Landlord's charge for the broken door and overcharges for the screens and blinds are clearly willful and furthermore, made in bad faith, thus justifying attorney fees.

5. Under Iowa Code §625.1 "Costs shall be recovered by the successful against the losing party." See also *Woody v. Machin*, 380 N.W.2d 727 at ¶ 21 (Iowa 1986)

WHEREFORE, Plaintiffs seek actual damages, plus damages for wrongful withholding of security deposit pursuant to Iowa Code § 562A.12(7), attorneys fees and the costs of this action.

Respectfully submitted,

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