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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

EATON PLACE ASSOCIATES, LLC, Plaintiff, v. NOVA WOMEN'S HEALTH CARE, INC., *et al.*, Defendants.	Case No. 356757V Next Event – Motion's Hearing Date – November 26, 2012 Trial – December 3–4, 2012

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MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS *IN LIMINE* AND REQUEST FOR HEARING

Plaintiff Eaton Place Associates, LLC ("Eaton Place" or "Landlord" or "Plaintiff"), by counsel, files this Memorandum in Opposition to the Motions *in Limine* of Defendants NOVA Women's Health Care, Inc. d/b/a NOVA Health Care ("NOVA") and Ms. Mi Young Kim ("Ms. Kim"),[1] and in support thereof sets forth as follows:

I. Introduction.

Defendants' Motions *in Limine* once again confirm that this matter ultimately can be narrowed to a basic dispute between landlord and tenant/guarantor in which landlord seeks to uphold the terms of the underlying Lease and tenant/guarantor seek to rewrite (or entirely ignore) those same terms. In nearly all respects, the evidence that Defendants seek to exclude from presentation at trial is undisputed, undeniable, and supported by both the clear and unambiguous Lease terms and the binding obligations of the parties. Unfortunately, the defense of this case has been clouded in inconsistent statements, revised sworn testimony, blatant witness coaching

[1] Defendants allege that both Defendants are erroneously named in the Plaintiff's Complaint. Defendants were named in accordance with the names used by Defendants in signing the underlying Lease documents and/or evidenced by government records as their legal names. Any allegation that Defendants are erroneously named is an admission that Defendants misled Plaintiff as to their accurate names in signing the Lease. It should be noted also that it does not appear that Defendants' are strangers to the use of inconsistent naming as a means to avoid liability.

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throughout depositions, repeated threats of sanction in an apparent attempt to compel a dismissal, needless efforts to conceal documents, concealment of witness contact information, and significant motions practice. Recent gamesmanship displayed by Defendants is detailed in the recently filed (and granted) Motion to Compel in which Plaintiff was forced to seek this Court's assistance in obtaining documents which should have been produced long ago and which prove Defendants' default under the Lease. The pending Motions *in Limine* for the most part, present arguments this Court has already addressed and rejected.

In terms of the facts of this case, imagine a work environment in which you pull into the parking lot of your office building to be met with pictures of mangled fetuses, gruesome pictures of unborn babies, crucifixes, protesters carrying bullhorns and screaming messages to those entering your building, protesters pleading with female employees and visitors of the building to not enter, patients and visitors of one particular tenant loitering in hallways, individuals vomiting in the bathrooms or common areas in and around the building, and female visitors carried from the building in an apparent state of unconscious. This is the reality for the tenants at 10400 Eaton Place, Fairfax, Virginia ("Property" or "Premises"). This is the reality created by NOVA. Now certainly, this Court must question on what basis does this scenario provide any right to relief (declaratory or otherwise) between a commercial landlord and tenant/guarantor. Of course, in the commercial context, the ultimate question of nearly any dispute as to rights, responsibilities, and obligations begins and ends with the written lease agreement. The analysis is no different in this case. The only dispute is that Plaintiff asks this Court to enforce that written lease agreement while Defendants ask this Court to rewrite (or selectively apply) the same agreement.

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I. Statement of Undisputed Facts.[2]

1. Protestors are at the Property on a daily basis to protest NOVA's use as an abortion clinic. *See* Exhibit 1, Deposition of D. Perkins, at 10:9–15; 13–14, 16–17; 21:9–11; 22:2–8.

2. The number of protesters at the Property range anywhere from 3 on a daily average to up to 45. *See* Exhibit 1, Deposition of D. Perkins, at 10:5–8; Exhibit 2, Deposition of J. Matthews, at 16–19.

3. Protestor's at the Property have been known to yell at tenants and visitors, including but not limited to yells of "baby killer." *See* Exhibit 1, Deposition of D. Perkins, at 10:5–8, 11–12; Exhibit 3, Deposition of J. Cini, at 52–56.

4. NOVA was so concerned about the protesters at the building that NOVA voluntarily hired an armed a security guard for the Property. *See* Exhibit 4, Deposition of NOVA, at 69–71.

5. Patients' of NOVA are seen vomiting as they exit the building on a daily basis. *See* Exhibit 1, Deposition of D. Perkins, at 17–19.

6. Multiple tenants of the Property have left as a result of NOVA's infringement of the Property's right to quiet enjoyment. *See* Exhibit 2, Deposition of J. Matthews, at 42–46; Exhibit 3, Deposition of J. Cini, at 52–56.

7. Tenant testimony confirms that NOVA's use constitutes a violation of tenant's right to quiet enjoyment and an unreasonable annoyance. *See* Exhibit 2, Deposition of J. Matthews, at 42–46; Exhibit 3, Deposition of J. Cini, at 52–56, 82, 109–13.

[2] The Statement of Undisputed Facts will be cross-referenced as "SUF, ¶ ___."

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II. Argument.

a. Standard of Review.[3]

The exclusion of evidence pre-trial is an important tool in narrowing the issues for trial though also an extreme tool, particularly in the case of a bench trial. Maryland courts unanimously find that "Judges have discretion to defer a pre-trial ruling on a motion *in limine* and ordinarily do so where the issue can be better developed or achieve a better context based on what occurs at trial." *See, e.g., Clemons v. State*, 392 Md. 339, 347 n. 6, 896 A.2d 1059, 1064 n. 6 (2006). This is important as well because it allows the party to present its evidence and then its admissibility can be fully evaluated by the trial court, often then precluding successful appeal which may otherwise occur where a party is preemptively precluded from the presentation of its evidence. In the present case, this matter is scheduled for a bench trial such that there is no basis to exclude the referenced evidence pre-trial in that the evidence may be presented and its weight evaluated by the trial judge without concern of jury prejudice. Of course, any evidence is subject to evaluation of materiality and probative value. As identified in the "Statement of Undisputed Facts" the various facts which Defendants seek to exclude are, in fact, supported by the undisputed evidence, highly relevant and probative to the claims at issue. Moreover, it should be noted that nearly all of the same arguments were previously presented to this Court by way of a Motion for Summary Judgment and rejected in their entirety.

[3] The Lease in question provides for application of the law of the Commonwealth of Virginia as the governing law. *See* Amended Complaint, Exhibit A, at 21, § 40.7 ("This Lease is governed under the laws of the jurisdiction in which the Building is located."); *see also* Amended Complaint, Exhibit A, at 2, § 1.1 (stating that the address of the building is 10400 Eaton Place, Fairfax, Virginia). Of course, under applicable conflicts of law provisions, the procedural law of Maryland controls, with the substantive law of Virginia controlling in accordance with the Lease.

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b. Defendants' attempt to exclude the testimony of Mike Kuehn is based solely upon Plaintiff's choice not to depose Mr. Kuehn and upon Plaintiff's initial belief that Mr. Kuehn would "probably not" be a witness at trial.

In short, Defendants attempt to preemptively prohibit the testimony of Mr. Kuehn on the basis that: (1) neither party deposed Mr. Kuehn; (2) Plaintiff indicated that Mr. Kuehn would "probably not" be a witness at trial though not foreclosing the possibility of his testimony; and (3) Mr. Kuehn was listed in Plaintiff's Witness List provided to Defendants on September 21, 2012. As for the first two arguments, there is absolutely no support for the exclusion of a witness on either basis. Nothing prohibited Defendants from deposing Mr. Kuehn. Nothing foreclosed the possibility of Mr. Kuehn testifying at any trial. Mr. Kuehn was identified in discovery as a witness with relevant knowledge. Mr. Kuehn was scheduled to be out of the country for the September trial date. He was listed on Plaintiff's Witness List out of an abundance of caution in the event his availability changed. The representation to Defendants' counsel that he would "probably not" be called at trial was based upon this known unavailability. In the time since then, Defendant has obtained two continuances of the trial date such that Mr. Kuehn is presumably available for the December trial date and Defendants cite to no authority whatsoever to support his exclusion. Importantly, Defendants have made no effort whatsoever to depose Mr. Kuehn in the nearly two months since he was identified on Plaintiff's Witness List for trial or in the several months since he was disclosed in discovery as a witness with relevant knowledge. Moreover, as to the third basis for Defendants' Motion to exclude Mr. Kuehn, it is an ironic argument when the full facts are revealed. There is no scheduling order in this matter. Thus, Plaintiff has no obligation to provide a list of potential witnesses. Nevertheless, Plaintiff agreed to provide such a list of potential trial witnesses out of good faith and to ensure some order to the trial. The Plaintiff's Witness List expressly indicates that "Plaintiff **may** call the following witnesses at trial." (emphasis added). Defendants also agreed to provide a list of witnesses on the same date.

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While Plaintiff followed through and provided a list of potential trial witnesses, no such list was ever provided by Defendants and to date no list has been provided. In essence then, Defendants argue that: (1) they decided not to depose a disclosed relevant witness and their own failure to depose an identified witness should somehow preclude his testimony; (2) Plaintiff indicated that Mr. Kuehn "probably" would not be called though never guaranteed or certified such a declaration to foreclose his testimony and in fact identified him as a possible trial witness in a written Witness List; and (3) despite the fact that Plaintiff provided a Witness List and Defendants did not, contrary to the agreement between counsel, Plaintiff should be punished for its good faith compliance and Defendants should be rewarded for the bad faith non-compliance. There is no merit to Defendants' Motion and it should be denied.

c. Defendants' Motion to exclude testimony of protesters and/or evidence of NOVA's patients loitering and vomiting as they exit the subject property is similarly meritless and should be denied.

First and most importantly, Defendants attempted to obtain the exact same relief presented in its Motion *in Limine* on this issue through a prior Motion for Summary Judgment. Judge Savage of this Court rejected Defendants initial attempt to exclude this evidence and the same result should occur with regard to Defendants' attempt to recycle the argument under different heading in an effort to engage in improper judge-shopping.

As stated, this matter revolves around a tenant/guarantor seeking to avoid the express terms of a written lease agreement. For example, Paragraph 6.1 of the Lease in question governs the use of the Premises and specifies that: "Tenant will not use or occupy the Premises for any disorderly, unlawful, or extra hazardous purposes, or for **any purpose** that will constitute waste, nuisance or **unreasonable annoyance to Landlord or other tenants of the Building**, or for any purpose prohibited in the rules and regulations promulgated by Landlord." *See* Amended Complaint, Exhibit A, Lease, ¶ 6.1. Paragraph 6.1 of the Lease goes on to expressly provide that

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"a use that on a regular basis attracts a large number of people would cause unreasonable annoyance to Landlord and other tenants of the Building." The undisputed testimony is that large numbers of people ranging in number anywhere from a handful to up to 45 are at the Property on a daily basis as a result of NOVA's acknowledged use. This is a direct and undeniable violation of the agreed provision of the Lease intended to protect the rights and safety of co-tenants of the building and also protect the landlord.[4] Defendants' efforts to mislead the Court from that simple undeniable reality must be ignored.[5]

Just recently, a religious rally at the Property known as "40 days for life" concluded in which groups of protesters organized outside the building in force to protest NOVA and its business practice. This group of protestors refers to themselves as "prayer warriors" and they maintain a website for this specific Property evidencing the exact type of conduct alleged in the Complaint and supported by the undisputed witness testimony.[6] *See, e.g.,* http://www.40daysforlife.com/fairfax/. Even during the limited time since Defendants filed their

[4] Testimony at trial will confirm that landlord has been harmed as a result of NOVA's contentious use of the Premises and specifically by the protestors who are found outside of the building on a daily basis displaying often gruesome signage and espousing extreme religious views. One can only imagine the thought process of a prospective tenant or even a tenant considering whether to remain as a tenant in the Property upon seeing this sort of conduct at a professional commercial building. This does not even include the inevitable safety concerns considered by prospective and current tenants as the political environment grows more hostile and activists become increasingly extreme. The simple fact remains that this case is to protect other tenants and protect the landlord from the fallout surrounding NOVA's use of the Property.

[5] Plaintiff's claim also involves an unauthorized sale/assignment in violation of the Lease. *See* Amended Complaint, Exhibit A, § 13.1.

[6] For example, in addition to the often gruesome photos displayed by the protesters detailed through witness testimony, online video verifies the witness testimony and evidences current protesters displaying signs which include:

1. "Take my hand, not my life"
2. "Abortion – The ultimate child abuse"
3. "Children are a gift from god"
4. "Babies are killed here"
5. "Pray to end abortion"
6. "3,500 babies killed here every year"

See, e.g., http://www.40daysforlife.com/fairfax/.

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Motions *in Limine*, there have not only been daily rallies at the Property from protesters but the Plaintiff has been forced to retain its own security guard for the building upon tenant demands and concerns of tenant safety.[7] Moreover, and perhaps most importantly, witness testimony in deposition unanimously confirms that the protesters of NOVA are at the Property **every single day** and instances of NOVA patient's vomiting outside and around the building occurs **every single day**. *See* SUF, ¶¶ 12, 13, 16. The same witness testimony details that NOVA is the only known abortion clinic or medical office in the building and that the patients are known to be NOVA patients because they exit wrapped in blankets known to be provided by doctor's offices and/or carrying vomit bags of the type received from a doctor's office. Witnesses for Plaintiff will also testify at trial that NOVA has acknowledged the problem of its patient's vomiting in and around the building and they have acknowledged that they will provide patients with vomit bags prior to leaving NOVA's offices. This testimony is indisputable and uncontradicted.[8] The basis of Plaintiff's claim relies largely, if not entirely, upon the unanimous testimony of the tenants certifying to the daily presence of protestors and daily incidents of NOVA patient's vomiting in and around the building common areas. Clearly this evidence and witness testimony is relevant and Defendants' selective presentation of witness testimony, and its attempt to recycle an

[7] Plaintiff's claim includes certain violations of the Lease involving NOVA patient's loitering in the hallways and vomiting in the common areas in and around the building.

[8] A large part of Defendants' argument appears to be based upon the fact that the witness testimony does not include names of protesters or NOVA's patients. There is nothing in the law that would require such detail for either direct or circumstantial evidence. Moreover, it is unreasonable to expect such evidence to have been possible in any event. A central basis of this lawsuit involves tenant and landlord concerns with protesters and NOVA's patients. One cannot possibly expect that a tenant would approach a protester and ask his name and see his identification. The same would be impossible and unreasonable with respect to NOVA's patients. While the evidence identifying the patient's with NOVA may be circumstantial, as Judge Savage noted, it is not inflammatory or prejudicial, it has been admitted (in whole or in part) by Defendants, and it constitutes a direct violation of the Lease.

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argument previously rejected by Judge Savage indicates an attempt to not only judge-shop but also an attempt to mislead and/or misdirect this Court in the face of known facts to the contrary.

III. Conclusion.

Quite simply, there is no authority for the selective argument presented by Defendants. Defendants cite no relevant authority and instead rely upon a misleading presentation of deposition testimony which selectively omits dispositive facts known to Defendants. Moreover, Defendants' argument entirely ignores the express wording of the Lease which provides "Tenant will not use or occupy the Premises for any disorderly, unlawful, or extra hazardous purposes, or for **any purpose** that will constitute waste, nuisance or **unreasonable annoyance to Landlord or other tenants of the Building**, or for any purpose prohibited in the rules and regulations promulgated by Landlord." *See* Amended Complaint, Exhibit A, Lease, ¶ 6.1. Paragraph 6.1 of the Lease goes on to expressly provide that "a use that on a regular basis attracts a large number of people would cause unreasonable annoyance to Landlord and other tenants of the Building." *See, e.g., Marina Shore, Ltd. v. Cohn-Phillips, Ltd.*, 246 Va. 222, 225, 435 S.E.2d 136, 138 (1993) (stating that "[t]he parties' contract becomes the law" between the parties) (citing *Winn v. Aleda Const. Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984)).[9] Moreover, Exhibit A to the Lease also sets forth certain rules to which NOVA agreed and paragraph 1 thereof provides that "Tenant shall not permit the visit to the Premises of persons in such numbers or under such conditions as to unreasonably interfere with the use and enjoyment of the entrances, corridors, elevators and other public portions or facilities of the Building by other tenants." *See* Amended

[9] While Defendants cite to certain case law indicating that there is no common law duty of a private person that would impose liability for the criminal acts of a third party, the Defendants are certainly responsible for the breach of contractual obligations and the duty created by contract. As stated throughout this Opposition and throughout the First Amended Complaint, Defendants are in breach of a number of provisions of the Lease, many of which expressly protect against the undisputed conduct Defendants now seek to shield from the trial court. The Lease, of course, is the law between the parties.

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Complaint, Exhibit A, Lease, Ex. A, ¶ 1. Clearly, Plaintiff's allegations and the supporting evidence presented thus far support the relevance and admissibility of testimony regarding protesters and NOVA's patients.

While Defendants desperately attempt to recast, rewrite, and/or entirely avoid the language of the Lease, the reality is that the Lease is clear, unambiguous, and binding upon Defendants. A reading of the Contract and application of basic principles of contract interpretation leads to the unavoidable conclusion that Defendants are in breach of the Lease and associated Guaranty. *See Jones v. Harrison*, 250 Va. 64, 68, 458 S.E.2d 766, 769 (1995) (stating that a court may "not rewrite contracts to insert provisions that have been omitted by the parties").[10] The mere fact that Defendants may regret the Lease they signed is no excuse to side-step their responsibilities, obligations, and liabilities thereunder.[11]

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[10] This principle is equally applicable under Maryland law. *Fultz v. Shaffer*, 111 Md. App. 278, 298, 681 A.2d 568, 578 (1996) ("The court may not rewrite the terms of the contract or draw a new one when the terms of the disputed contract are clear and unambiguous, merely to avoid hardship or because one party has become dissatisfied with its provisions."); *Kasten Const. Co., Inc. v. Rod Enterprises, Inc.*, 268 Md. 318, 330, 301 A.2d 12, 19 (1973) ("the Court may not, under the guise of construction, rewrite the contract made by the parties.")

[11] Ms. Kim stated in her deposition that she did not bother to read the Lease prior to signing. *See* Exhibit 5, Deposition of Ms. Kim, at 69–72. To the extent she intends to raise this as a defense, case law in both Virginia and Maryland is consistent in rejecting such a defense. *See, e.g., State Farm Mut. Ins. Co. v. Miller*, 194 Va. 589, 595 (1953) (concluding that one cannot avoid the terms of a contract he failed to read.); *Holloman v. Circuit City Stores,* 391 Md. 580, 595, 894 A.2d 547, 556 (2006) citing *Walther v. Sovereign Bank,* 386 Md. 412, 444, 872 A.2d 735 (2005) ("If petitioners did not [read the agreement] before they signed the agreement, they have no persons to blame but themselves. . . . we are loathe to rescind a conspicuous arbitration agreement that was signed by a party who now, for whatever reason, does not desire to fulfill that agreement."); *Binder v. Benson,* 225 Md. 456, 461, 171 A.2d 248, 250 (1961) ("[T]he usual rule is that if there is no fraud, duress or mutual mistake, one who has the capacity to understand a written document who reads and signs it, or without reading it or having it read to him, signs it, is bound by his signature as to all of its terms.") (citations omitted); *McGrath v. Peterson,* 127 Md. 412, 416, 96 A. 551, 553 (1916) ("It would lead to startling results if a person, who executes *without coercion or undue persuasion,* a solemn release under seal, can subsequently impeach it on the ground of his own carelessness though at the very time of its execution he might, had he seen fit, had advised himself fully as to the nature and legal effect of the act he was doing.'" (quoting *Spitze v. Baltimore & Ohio R.R. Co.,* 75 Md. 162, 23 A. 307 (1892)).

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WHEREFORE, in consideration of the foregoing, Plaintiff Eaton Place Associates, LLC, requests that this Court deny the Defendants' Motions *in Limine*, and such other and further relief as deemed appropriate by this Court.

REQUEST FOR HEARING

In accordance with Maryland Rule 2-311(f), and as otherwise allowed by the Rules of this Court, Plaintiff respectfully requests a hearing on this matter.

Dated: November 7, 2012

Respectfully submitted,

EATON PLACE ASSOCIATES, LLC
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 7, 2012 a copy of the foregoing was sent via first-class mail and electronic mail to:

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