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**HILLSBOROUGH FIRE LITIGATION**

**Docket Nos.:**

**SOM-L-502-17**
**SOM-L-1330-17**
**SOM-L-1540-17**
**SOM-L-46-18**
**SOM-L-1297-17**
**SOM-L-175-18**
**SOM-L-298-18**
**SOM-L-145-18**
**SOM-L-498-18**
**SOM-L-499-18**
**SOM-L-666-18**
**SOL-L-956-18**
**SOM-L-998-18**
**SOM-L-257-20**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

CONSOLIDATED DOCKET NO.: L-502-17

**CIVIL ACTION**

**ORDER GRANTING DEFENDANTS/FOURTH PARTY PLAINTIFFS, SOMERVILLE BUSINESS PARK, LLC., IRG REALTY GROUP, LLC., INDUSTRIAL REALTY GROUP, INC., IRG REALTY ADVISORS, LLC AND QUADRELLE REALTY SERVICES, LLC's MOTION FOR SUMMARY JUDGEMENT**

**THIS MATTER** having been presented to the Court by Adam E. Levy, Esq., Attorney for Defendants, Somerville Business Park, LLC., IRG Realty Group, LLC., Industrial Realty Group, Inc., IRG Realty Advisors, LLC and Quadrelle Realty Services, LLC (hereinafter referred to as "Moving Defendants"); and the Court having reviewed Moving Defendants' moving papers, any opposition thereto, and oral argument, if granted;

**IT IS ON** this 4th day of February, 2022, **ORDERED** Defendants' motion for Summary Judgement be and hereby is **DENIED WITHOUT PREJUDICE** whereby

~~**IT IS ORDERED THAT** any and all claims against the Moving Defendants in the following Dockets be and hereby are dismissed with prejudice~~**:**

~~a. Sentinel Insurance Company Ltd.'s complaint filed as Docket SOM-L-1299-17;~~

~~b. Pretium Packaging, LLC.'s complaint filed as Docket SOM-L-498-18;~~

~~c. Great American Insurance Company of New York's complaint filed as Docket SOM-L-46-18, and~~

~~d. AGCS Marine Insurance Company complaint filed as Docket SOM-L-257-20~~, and

**IT IS FURTHER ORDERED** that a copy of this Order shall be served on all counsel via eCourts.

**Thomas C. Miller, A.J.S.C.**

Hon. Thomas C. Miller, J.S.C.

X Opposed

☐ Unopposed

SEE ATTACHED STATEMENT OF REASONS

Hillsborough Fire Litigation
Docket No. SOM-L-502-17
Defendant's Motion for Summary Judgment
OPPOSED
Plaintiffs' Cross Motion for Leave to Amend Complaint **(WITHDRAWN)**
OPPOSED
Returnable: February 4, 2022

## I. PARTIES AND RELIEF SOUGHT

Defendants/fourth party plaintiffs, Somerville Business Park, LLC ("Somerville" or SBP"), IRG Realty Group, LLC, Industrial Realty Group, Inc., IRG Realty Advisors, LLC and Quadrelle Realty Services, LLC ("Defendants" "Movants" or "IRG Defendants")(collectively "Moving Defendants") by and through their counsel, John H. Osorio, Esq. and Adam E. Levy, Esq. of Marshall Dennehey Warner Coleman & Goggin, move for summary judgment. Movants have filed a reply brief in support of their Motion for Summary Judgment and in opposition to Plaintiffs' Cross Motion for leave to amend complaint dated January 31, 2022 which has been considered by the Court.

Plaintiff, Great American Insurance Company of New York a/s/o Richard Coriell & Company ("American Insurance Plaintiff"), by and through their counsel, Nelson E. Canter, Esq. and Thomas Scappaticci, Jr., Esq. of McLaughlin & Stern LLP, oppose Defendants' Motion for Summary Judgment.

Plaintiff, Pretium Packaging, LLC ("Pretium Plaintiff") by and through its counsel, Robert B. Meola, Esq. of Finazzo Cossolini O'Leary Meola & Hager, LLC, opposes Defendants' Motion for Summary Judgment.

Plaintiff, AGCS Marine Insurance Co. ("AGCS Plaintiff") by and through its counsel, John J. Sullivan, Esq. of Hill Rivkins, LLP, cross move for leave to amend its Complaint and opposes Defendants' Motion for Summary Judgment. Plaintiff withdrew its Cross Motion during oral argument on February 4, 2022.

Plaintiffs, Sentinel Insurance and Hanover Insurance ("Sentinel/Hanover Plaintiffs") by and through their counsel, Stephen M. Winning, Esq. of Dugan Brinkmann Maginnis and Pace, opposes Defendants' Motion for Summary Judgment.

Plaintiffs, Great American Insurance Company, Pretium Packaging, LLC, AGCS Marine Insurance, Sentinel Insurance and Hanover Insurance are collectively referred to as "Tenants."

## II. SUMMARY OF THE MOVING DEFENDANTS' MOTION

This matter arises out of a fire that occurred in or about February 2016. The fire occurred at property located at 152 US Highway 206, Hillsborough, NJ (hereinafter referred to as "The Property"). The Property is owned by the United States Department of Veterans Affairs (hereinafter referred to as the "VA".) Pursuant to an "Enhanced-use Lease Agreement" (hereinafter referred to as the "EULA"), Moving Defendants leased the entirety of The Property from the VA. The Property is comprised of multiple buildings. The various buildings that make up the The Property were designated by building numbers. Each building in turn had multiple units that were sub-leased to tenants by Moving Defendants. The fire has led to the filing of fourteen (14) complaints that include, among others, Moving Defendants as direct defendants. All of these complaints have been consolidated under docket SOM-L-502-17.

The fire has been alleged by the plaintiffs to have originated in building 14, and more specifically in Unit C (hereinafter referred to as "14C".) At the time of the fire, the tenant in 14C was Richard Coriell & Co., Inc. d/b/a Central Moving Systems (hereinafter referred to as "CMS".) Moving Defendants have named CMS in each of the fourteen (14) complaints as a third-party defendant. In some of those lawsuits, plaintiffs have also named CMS as a direct defendant.

Several of the plaintiffs in the consolidated cases are insurance carriers that have filed subrogation claims. Most relevant to the instant motion, four (4) of these insurer's insureds were sub-tenants of Moving Defendants. All of these four plaintiff insurance carriers allege that fire damaged personal and/or business property owned by each of their respective insureds. These specific plaintiff insurers, and their sub-tenant insureds, are Sentinel Insurance Company Ltd. ("Sentinel") as insurer of Royal Cabinet ("Royal"), Factory Mutual Insurance ("FMI") as insurer of Pretium Packaging, LLC ("Pretium"), Great American Insurance Company of New York ("GAI") as insurer of CMS, and AGCS Marine Insurance Company ("AGCS") as insurer of Mid-States Packaging ("MSP".) The combined value of the first three of these four claims is in excess of $4 Million.

As to the fourth insurer (AGCS), MSP, which at the time of the fire occupied leaseholds in Building 15 in Units C, D, E, and F, warehoused property bailed to MSP by a variety of MSP customers. MSP's customers made claim to MSP for their property as bailed to MSP and lost to the fire. In turn, MSP made claim to its insurance carrier, AGCS, to cover MSP's customers' claims. Thereafter, AGCS paid to, or on behalf of, those MSP customers a total of $1,632,459.49.

In turn, AGCS filed docket SOM-257-20 (apparently the last suit filed in these consolidated cases) seeking damages from Moving Defendants in the aforementioned amount of $1,632,459.49.[1]

Each of the four insurance carriers' insureds had leases for their subject leaseholds at The Property which included identical "Waiver of Subrogation" provisions. That provision provides as follows:

> 13.4 Waiver of Subrogation. To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively.

The Moving Defendants assert that as each of the aforementioned insurer plaintiffs' complaints are subrogation actions. The Moving Defendants advocate that those actions, to the extent that they seek recovery from Moving Defendants, must be dismissed with prejudice.

## III. SUMMARY OF AMERICAN INSURANCE PLAINTIFF'S OPPOSITION

Great American notes that the Moving Defendants' First Motion for Summary Judgment was inexplicably withdrawn after each of the Plaintiffs with claims implicated by the First Motion filed their respective opposition papers.

In any event, Great American asserts that the Defendant's Motion "which essentially is a copy of the First Motion" has now been refiled in what they believe is an apparent effort by the Moving Defendants to draw a different Judge to obtain a more favorable reading of their papers, or improperly obtain more time to prepare their reply papers. According to Great American, counsel for Moving Defendants "knew Judge Miller was going to retire which is why the deadlines set by Judge Miller were so important." They note that Judge Miller advised counsel in the December conference call following Moving Defendants' abrupt withdrawal of the first motion, that he spent considerable time and judicial resources reviewing the papers, as Judge Miller knew all parties were eagerly awaiting a decision in preparation for mediation. As such, they request sanctions and costs given Defendant's withdrawal and refiling of the same motion; to the detriment of all parties who patiently waited for months for defendant to file his motion; only now for it to be withdrawn and refiled for a newly assigned Judge to decide it.

[1] MSP was also insured by Lloyds at the time of the fire. Lloyds filed suit under Docket SOM-L-145-18 only to later dismiss the action after it was consolidated with the other cases.

## IV. SUMMARY OF PRETIUM PLAINTIFF'S OPPOSITION

These consolidated actions arise from significant property damage losses resulting from a fire at a warehouse complex located at 152 U.S. Highway 206, Hillsborough, New Jersey on February 11, 2016 (the "Property"). At the time of the fire, the Property was leased by Defendant, Somerville Business Park, LLC ("Somerville") from the Department of Veterans Affairs pursuant to an Enhanced-Use Lease dated September 5, 2003. (See Certification of Adam Levy, Esq., in Support of Defendants' Motion for Summary Judgment ("Levy Cert."), Exhibit J). The Property consisted of four large buildings which were, in turn, leased to a number of commercial tenants, including Plaintiff, Pretium Packaging, Inc. ("Pretium"). Somerville initially leased the space to Pretium's predecessor, Tri-Delta Plastics, pursuant to a lease dated July 29, 2010. (See Levy Cert., Exhibits F and K).

Pretium Plaintiff charges that in an effort to escape culpability for its own gross negligence in failing to protect Pretium's employees and property from unreasonably dangerous conditions at the Property, Defendants Somerville, Industrial Realty Group, LLC, Industrial Realty Group, Inc. and IRG Realty Advisors, LLC ("IRG RA") attempt to expand the scope of a Waiver of Subrogation provision contained in the lease between Somerville and Pretium to obtain summary judgment.[2] Pretium Plaintiff acknowledges that while Waivers of Subrogation provisions are generally enforceable between commercial entities in New Jersey, Pretium argues that the exculpatory clause is rendered unenforceable in these consolidated actions because of Defendants' willful, wanton and reckless conduct in failing to maintain, repair and provide adequate fire protection systems and water supply systems at the Property prior to the fire.

Pretium Plaintiff offers that Somerville took possession of the Property in 2003. At the time Somerville took possession of the Property, the fire protection systems at the buildings were approximately 50 years old, antiquated and in a woeful state of disrepair. (See Certification of Robert B. Meola, Esq., in Opposition to Defendants' Motion for Summary Judgment ("Meola Cert."), Exhibit D). But Pretium Plaintiff charges that from 2003 to the date of the fire, Defendants "failed to heed the repeated advice and warnings from the local Hillsborough Township fire officials, including the warnings from three different fire protection specialists, allegedly imploring Defendants to update and repair known deficiencies with the fire protection and water supply systems to adequately combat a fire at the Property." (See Meola Cert., Exhibits D, E, F and G). In fact, Pretium Plaintiff contends that the Defendants ignored the numerous warnings,

[2] Although Defendant Quadrelle Realty Services, LLC also seeks the entry of summary judgment in these consolidated actions, Quadrelle is not a party in this action filed by Pretium.

while at the same time, continued to collect substantial rental payments from its commercial tenants in the face of clear and obvious life-safety issues at the Property. Pretium Plaintiff asserts that under these circumstances, when there is ample evidence to conclude that Defendants acted in a willful, wanton and reckless manner with complete disregard for the protection of its tenants and their property, exculpatory clauses are unenforceable in New Jersey to protect any party from its own gross negligence.

Moreover, Pretium Plaintiff submits that because the Waiver of Subrogation provision contained in the lease agreement between Somerville and Pretium expressly limits the application of the provision to only the Landlord (Somerville) and the Tenant (Pretium), under no circumstances can Defendants, Industrial Realty Group, LLC, Industrial Realty Group, Inc. and IRG RA (collectively the "IRG Defendants") expand the scope of the provision to bar this subrogation action when neither of those entities were parties to the lease agreement. Pretium Plaintiff offers that while the IRG Defendants also seek the entry of summary judgment, neither of those entities have presented any legal or factual basis in the pending motion contending that the Waiver of Subrogation equally applies to them.

Finally, Pretium Plaintiff argues that the Waiver of Subrogation could not possibly be applied to bar this subrogation action against IRG RA, the property management company for the Property at the time of the fire, because IRG RA did not come into existence until 2013 – more than three years **after** the lease was signed between Somerville and Pretium's predecessor, Tri-Delta Plastics in 2010.

## V. MOVING DEFENDANTS' STATEMENT OF MATERIAL FACTS OFFERED IN SUPPORT OF THEIR MOTION[3]

1. This matter arises out of a fire that occurred in or about February 2016. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

2. The fire occurred at property located at 152 US Highway 206, Hillsborough, NJ (hereinafter referred to as the "The Property".) Id.

3. The Property is owned by the United States Department of Veterans Affairs (hereinafter referred to as the "VA".)

4. Pursuant to an "Enhanced-use Lease Agreement" (hereinafter referred to as the "EULA"), Moving Defendants leased the entirety of The Property from the VA. See Exhibit J attached to the Certification of Counsel Adam E. Levy, Esq.

[3] Defendants' Statement of Material Facts is provided virtually verbatim for completeness of the record.

5. The Property is comprised of multiple buildings. Id.

6. The various buildings that make up the The Property were designated by building numbers. Id.

7. Each building in turn had multiple units that were sub-leased to tenants by Moving Defendants. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

8. The fire has led to the filing of fourteen (14) complaints that include, among others, Moving Defendants as direct defendants. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

9. The fire has been alleged by the plaintiffs to have originated in building 14, and more specifically in Unit C (hereinafter referred to as "14C".) Id.

10. At the time of the fire, the tenant in 14C was Richard Coriell & Co., Inc. d/b/a Central Moving Systems (hereinafter referred to as "CMS".) Id.

11. Moving Defendants have named CMS in each of the fourteen (14) complaints as a third-party defendant. See answers of Moving Defendants to each of the consolidated actions under docket SOM-L-502-17.

12. In some of those lawsuits, plaintiffs have also named CMS as a direct defendant. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

13. Several of the plaintiffs in the consolidated cases are insurance carriers that have filed subrogation claims. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

14. Four (4) of the aforementioned insurer's insured were sub-tenants of Moving Defendants. See Exhibits A, B, C, D, E, F, G, H & I attached to the Certification of Counsel Adam E. Levy, Esq., as well as the other complaints consolidated under docket SOM-L-502-17.

15. All of the leases attached to the Certification of Counsel Adam E. Levy, Esq., were amended multiple times to essentially extend the lease term a number of years.

16. All of these four plaintiff insurance carriers allege that fire damaged personal and/or business property owned by each of their respective insureds. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

17. These four insurers, and their sub-tenant insureds are:

a. Sentinel Insurance Company Ltd. ("Sentinel") as insurer of Royal Cabinet ("Royal") which filed its complaint as Docket SOM-L-1299-17;

b. Factory Mutual Insurance ("FMI") as insurer of Pretium Packaging, LLC ("Pretium") which filed its complaint as Docket SOM-L-498-181 1 FMI did not include itself in the caption of SOM-L-498-18 as a plaintiff in this complaint, instead filing solely in the name of its insured as a nominal plaintiff. However, Pretium's counsel has confirmed that the complaint is FMI's subrogation action.

c. Great American Insurance Company of New York ("GAI") as insurer of CMS which filed its complaint as Docket SOM-L-46-18, and

d. AGCS Marine Insurance Company ("AGCS") as insurer of Mid-States Packaging ("MSP") which filed its complaint as Docket SOM-L-257-20. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

18. Mid-States Packaging, Inc.'s predecessor to interest to the lease at issue was Giroux Bros. See Exhibit I attached to the Certification of Counsel Adam E. Levy, Esq.

19. Premium's predecessor to interest to the lease at issue was Tri-Delta Plastics. See Exhibit F and K (deposition transcript of former Tri-Delta Plastics and Pretium employee Paul Rolando at pages 24 through 34 describing his positions with the companies and Pretiums leasehold in the units previously rented by Pretiums predecessor in interest to the leases, Tri-delta Plastics) attached to the Certification of Counsel Adam E. Levy, Esq.

20. The combined value of the four aforementioned claims is in excess of $4 Million. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

21. At the time of the fire, MSP occupied leaseholds in Building 15 in Units C, D, E, and F of The Property. See Exhibits E & I attached to the Certification of Counsel Adam E. Levy, Esq.

22. At the time of the fire, MSP warehoused property bailed to MSP by a variety of MSP customers. See Exhibit D attached to the Certification of Counsel Adam E. Levy, Esq.

23. The aforementioned customers made claim to MSP for damage resulting from the subject fire to those customers' business property that MSP was storing in its leaseholds at The Property. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq.

24. In response to the aforementioned claims of its customers, MSP made claim to its insurance carrier, AGCS Marine Insurance Company ("AGCS") to cover MSP's customers' claims. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq.

25. Thereafter, AGCS paid to, or on behalf of, those MSP customers a total of $1,632,459.49. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq. and specifically Count I of same.

26. AGCS filed docket SOM-257-20 (the last suit filed in these consolidated cases) seeking damages from Moving Defendants in the aforementioned amount of $1,632,459.49. Id.

27. Each of the four aforementioned insurance carriers' insureds had leases for their subject leaseholds at The Property which included “Waiver of Subrogation” clauses. See Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq.

28. The aforementioned "Waiver of Subrogation" clauses each provided as follows:

> Waiver of Subrogation. To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively.

See Paragraph 13.4 in Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq.

29. None of the lease amendments/extensions referenced above changed the Waiver of Subrogation clauses.

30. The aforementioned leases required each of the aforementioned insurers’ insureds to carry insurance. See Paragraph 13.2 in Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq.

31. The aforementioned insurance requirements of the lease specifically provided, in pertinent part, as follows:

> Tenant's Insurance. Tenant agrees to take out and keep in force during the Term, without expense to Landlord, the policies of insurance as set forth below.
>
> A. Commercial general liability insurance, in the name of Tenant, insuring against any liability for injury to or death of persons resulting from any occurrence in or about the Buildings and for damage to property in such amounts as may from time to time be customary with respect to similar properties in the same area, but in any event not less than $5,000,000.00, per occurrence. The amounts of such insurance required hereunder shall be adjusted from time to time as requested by Landlord based upon Landlord's determination as to the amounts of such insurance generally required at such time for comparable premises and buildings in the general geographical area of the Premises. In addition, such policy of insurance shall include the ordinary and usual coverage for any additional liability as coverage for any potential liability arising out of or because of any construction, work of repair or alterations done on or about the Premises by or under the control or direction of Tenant;

> B. Causes of Loss — Special Form property insurance, in an amount not less than one hundred percent (100%) of replacement cost covering all tenant improvements and alterations permitted under this Lease, floor and wall coverings, and Tenant's office furniture, business and personal trade fixtures, equipment, furniture system and other personal property from time to time situated in the Premises. Such property insurance shall include a replacement cost endorsement, providing protection against any peril included within the classification fire and extended coverage, sprinkler damage, vandalism, malicious mischief, and such other additional perils as covered in a "cause of loss-special form" standard insurance policy. The proceeds of such insurance shall be used for the repair and replacement of the property so insured, except that if not so applied or if this Lease is terminated following a casualty, the proceeds applicable to the leasehold improvements shall be paid to Landlord and the proceeds applicable to Tenant's personal property shall be paid to Tenant.

Id.

32. None of the aforementioned lease amendments/extensions referenced above changed the requirement for the tenants to carry commercial general liability insurance in accordance with the Tenant Insurance section A requirement set out at length above.

33. None of the aforementioned lease amendments/extensions referenced above changed the requirement for the tenants to carry fire insurance in accordance with the Tenant Insurance section B requirement set out at length above.

34. At the time of the fire, the insurers' insureds had in place policies of insurance with the aforementioned insurers. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

35. The insurers' insureds made claim to each of their respective insurer plaintiffs for damages that the insureds alleged were as a result of the February 2016 fire at the property that is the subject of the consolidated actions. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

36. The insurers paid to, or on behalf of, their insureds the aforementioned claims. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

37. The insurers filed the various aforementioned subrogation actions. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

## VI. PLAINTIFF'S RESPONSE TO STATEMENT OF MATERIAL FACTS

1. ADMITTED.

2. ADMITTED.

3. ADMITTED.

4. DISPUTED. The Property was leased by only Somerville Business Park, LLC pursuant to the Enhanced-use Lease Agreement. The remainder of the Moving Defendants were not parties

to the Enhanced-use Lease Agreement. Exhibit J attached to the Certification of Counsel Adam E. Levy, Esq.

5. ADMITTED.

6. ADMITTED.

7. DISPUTED. The units were sub-leased to tenants by only Somerville Business Park, LLC. The remainder of the Moving Defendants were not named and were not parties to any of the sub-lease agreements relevant to this motion. Exhibits E, F, G, H, and I attached to the Certification of Counsel Adam E. Levy, Esq. Plaintiff Great American Insurance Company's complaint alleges breach of contract against only Defendant Somerville Business Park, LLC. Exhibit C attached to the Certification of Counsel Adam E. Levy, Esq.

8. ADMITTED

9. ADMITTED

10. ADMITTED

11. ADMITTED

12. ADMITTED

13. ADMITTED

14. DISPUTED. The units were sub-leased to tenants by only Somerville Business Park, LLC. The remainder of the Moving Defendants were not named and were not parties to any of the sub-lease agreements relevant to this motion. Exhibits E, F, G, H, and I attached to the Certification of Counsel Adam E. Levy, Esq. Plaintiff Great American Insurance Company's complaint alleges breach of contract against only Defendant Somerville Business Park, LLC. Exhibit C attached to the Certification of Counsel Adam E. Levy, Esq.

15. ADMITTED with respect to GAIC's insured.

16. ADMITTED with respect to GAIC.

17. ADMITTED

18. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

19. ADMITTED

20. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

21. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

22. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

23. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

24. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

25. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

26. GAIC has no knowledge to be able to admit or deny this proposed statement of fact

27. DISPUTED. The units were sub-leased to tenants by only Somerville Business Park, LLC. The remainder of the Moving Defendants were not named and were not parties to any of the sub-lease agreements relevant to this motion. The waiver of subrogation is between only the sub-lessor of each respective sub-lease and the "Landlord", which is defined in the sub-lease as Somerville Business Park, LLC. The remainder of the Moving Defendants were not named or included in the Waiver of Subrogation. Exhibits E, F, G, H, and I attached to the Certification of Counsel Adam E. Levy, Esq.

28. ADMITTED with respect to GAIC only.

29. ADMITTED with respect to GAIC only.

30. ADMITTED with respect to GAIC only.

31. ADMITTED with respect to GAIC only.

32. ADMITTED with respect to GAIC only.

33. ADMITTED with respect to GAIC only.

34. ADMITTED with respect to GAIC only.

35. ADMITTED with respect to GAIC only.

36. ADMITTED

37. ADMITTED.

## VII. PLAINTIFF'S COUNTER STATEMENT OF UNDISPUTED FACTS

1. This matter arises out of a fire that occurred in or about February 2016. Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq.

2. The fire occurred at property located at 152 US Highway 206, Hillsborough, NJ (hereinafter referred to as the "The Premises".) Id.

3. The Property is owned by the United States Department of Veterans Affairs (hereinafter referred to as the "VA".) Exhibit J attached to the Certification of Counsel Adam E. Levy, Esq

4. Pursuant to an "Enhanced-use Lease Agreement" (hereinafter referred to as the "EULA"), Defendant Somerville Business Park, LLC ("Somerville") leased the entirety of The Premises from the VA. Exhibit J attached to the Certification of Counsel Adam E. Levy, Esq

5. Defendant Quadrelle Realty Services, LLC was the management company for the Premises from the time Somerville entered into the EULA to approximately 2013. Deposition Transcript of Gary Greenstein attached as Exhibit A to the Certification of Nelson E. Canter, Esq., at 259:5–10.

6. Defendant IRG Realty Advisors, LLC was the management company for the Premises from approximately 2013 to the present. Exhibit A attached to the Certification of Nelson E. Canter, Esq., at 259:5-21.

7. Defendant IRG Realty Group, LLC is the parent company for IRG Realty Advisors, LLC. Deposition Transcript of Stuart Lichter attached as Exhibit "F" to the Certification of Nelson E. Canter, Esq., at 30:2–31:8, 119:20–23and Exhibit Licter-1

8. Plaintiff Great American Insurance Company of New York ("Plaintiff" or "GAIC") insured Richard Coriell & Company and by virtue of the payments made by GAIC to its Insured it is subrogated to its rights and interests. See Exhibit C attached to the Certification of Counsel Adam E. Levy, Esq.

9. On or about December 4, 2006 Richard Coriell & Company entered into a New Lease Agreement with Somerville (the "Coriell Lease"). Exhibit G attached to the Certification of Counsel Adam E. Levy, Esq.

10. Defendants, IRG Realty Group, LLC., Industrial Realty Group, Inc., IRG Realty Advisors, LLC and Quadrelle Realty Services, LLC were not parties to the Coreill Lease. Id.

11. The Coriell Lease contained a Waiver of Subrogation provision that provided in pertinent part as follows:

> 13.4 Waiver of Subrogation. To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively. (Emphasis Supplied). Id.

12. The term "Landlord" is defined in the Coriell Lease as "Somerville Business Park, LLC". Id.

13. Schedule 1 of the Coriell Lease provides "Landlord [Somerville Business Park, LLC] agrees to perform the following work at the Premises: . . . Upgrade Sprinkler System". Id. at Schedule 1.

14. R.L. Dehn & Sons Fire Protection, Inc. was retained by Somerville, or on behalf of Somerville by its management companies Quadrelle or IRG Realty Advisors, to provide necessary service to the First Suppression System. Deposition Transcript of Edward Barnes attached as Exhibit B to the Certification of Nelson E. Canter, Esq., at 38:3-5; 38:13-16

15. Specifically, Edward Barnes, the employee charged by Quadrelle and IRG Realty Advisors to be their representative to their "Tenants," including Richard Coriell & Company, testified as follows:

> Q Okay. Who -- who was hired to do this -- the improvement work that you're describing?
> A. R.L. Dehn.
>
> * * *
>
> Q. . . . I'm more just focused on the fire sprinkler system. So if it wasn't R.L. Dehn, it wasn't done?
> A. Right. Id.

16. Somerville, either directly or through its management companies, primarily through its on-site supervisors and managers Barnes and another employee, Gary Greenstein, was expressly advised that the water pressure servicing the Fire Suppression System was inadequate. Deposition Transcript of Frank W. Hogan attached as Exhibit C to the Certification of Nelson E. Canter, Esq., at 73:12-74:4.

17. Specifically, Frank W. "Chip" Hogan, President of R.L. Dehn testified:

> Q . . . Did you ever tell anyone at that the water supply and sprinklers at the Somerville Business Park were inadequate?
> MR. LEVY: Objection to form.
> A Our 2005 report stated that. And in subsequent discussions with Ed Barnes or Gary Greenstein, also [Fire Chief] Chris Weniger it was stated by all that there was a recognition of a problem with the water supply.
> Q That it was inadequate, correct?
> A Correct.
> Q And that was your opinion as well is that it was inadequate; is that right?
> A That was a conclusion that we reached and issued a report on. So yes, that was our conclusion. And my conclusion. Id.

18. These inadequacies were memorialized in an August 2005 Report by R.L. Dehn and a December 2008 report by Brinjac Engineering, both of which were provided to Somerset and its Management Companies. Exhibit A to the Certification of Nelson E. Canter, Esq., at 249:22–250:6, 247:3-248:11, and Exhibits Greenstein 19 and Greenstein 20

19. At the time of the fire, no upgrades or corrections had been made to the water supply to the Fire Suppression System at the Premises despite the warnings contained in these reports that date back to 2005. Deposition Transcript of Frank W. Hogan attached as Exhibit C to the Certification of Nelson E. Canter, Esq., at 73:12-74:4

20. Specifically, Chip Hogan testified:

> Q Do you have an opinion as to whether or not the conclusions you draw in the August 12, 20 2005 report were at any way addressed or corrected at any time up to the time of the fire?
> MR. LEVY: Objection to form.

A Nothing was done on the water supply end. So to answer your question, nothing happened as to the water supply. Id. at 95:18-25

* * *

Q So the water supply issues that existed in 2005 still existed at the time of the fire, correct?
MR. LEVY: Objection to form.
A I believe, yes.

Id. at 183:1-5

21. Although representatives of Somerville purported to spend "millions" upgrading the Fire Suppression System, Exhibit A attached to the Certification of Nelson E. Canter, Esq., at 100:19-101:7, without fixing the water supply, no amount of work within the Premises would provide any benefit to the system. Exhibit C attached to the Certification of Nelson E. Canter, Esq., at 182:10-22

22. Specifically, Chip Hogan of R.L. Dehn testified:

Q R.L. Dehn tested the water supply in 2005, correct?
A We flowed a hydrant in front of the building 15.
Q At any point after R.L. Dehn performed that test did anyone from Somerville Business Park solicit any quotes or bids from R.L. Dehn to remediate that deficiency?
A I believe we gave some ballpark estimates of what a new system would cost. But everything started with the water supply. And until the water supply was fixed or remedied, no amount of work within the complex would accomplish anything. Id.

23. Somerville and its management Companies were also notified numerous times in writing by Fire Chief Christopher Weniger of the inadequacies of the water supply to the Fire Protection System. Deposition Transcript of Christopher Weniger and Exhibits attached as Exhibit D to the Certification of Nelson E. Canter, Esq., at 79:4-81:23, 82:2-85:13; 85:16-88:24; 145:14-148:1; 182:22-183:19; 186:2-187:13; 187:18-188:10; 192:5-18; 193:20-195:11; 200:10-201:6, and Exhibits Weniger-2, Weniger-3, Weniger-4, Weniger-8, Weniger-16, Weniger-17, Weniger-18, Weniger-20, Weniger-21, and Weniger-24

24. Specifically, Fire Chief Weinger testified with respect to Deposition Exhibit Weniger-2, a letter dated January 21, 2009 and addressed to Edward Barnes regarding the Brinjac Engineering report as follows:

Q. Did you read a report authored by someone from Brinjac Engineer?
A. Yes, I did.
Q. And then you conveyed that information to Veterans Industrial, correct?
MR. LEVY: Objection to the form.
THE WITNESS: Based on the request of this letter, yes, that is what we referenced.
BY MR. WINNING:
Q. Do you know whether or not this 2000 GPM at 20 PSI was present on February 11, 2016?
MR. LEVY: Objection to the form.
THE WITNESS: It was not.

Exhibit D to the Certification of Nelson E. Canter, Esq., at 80:19–81:15 and Weniger-2

25. Fire Chief Weinger further testified with respect to Deposition Exhibit Weniger-3, an e-mail addressed to Gary Greenstein in or about 2012 as follows:

> Q. See in the second full paragraph, the second sentence reads it has been approximately seven years and there does not appear to be any evidence that this problem is being addressed. What does this problem refer to?
> A. This problem refers to the paragraph above where we talk about their water system and the commodities that are within the buildings.
> Q. What do you mean by water system?
> A. In our opinion, they had inadequate water supply or inadequate water pressure and volume for the commodities within the site -- being stored in the site.
> Q. Did you feel the sprinkler system needed an upgrade?
> A. Yes.
> MR. LEVY: Objection to the form.
> THE WITNESS: Yes, I did.
> Id. at 83:13-84:2 and Weniger-3
>
> * * *
>
> Q. Further down in that last paragraph, second to last sentence begins I'm very concerned that -- and you express your concerns in that sentence, correct?
> A. Yes, I do.
> MR. MEOLA:· Can you read that sentence for us?
> MR. WINNING:· I am very concerned that if a fire occurs in one of these occupancies, the sprinkler system will not control the fire and the water used to supply the fire department will not be adequate. Did I read that correctly?
> THE WITNESS: Yes.
> BY MR. WINNING:
> Q. Did those concerns come to fruition on February 11, 2016?
> MR. LEVY: Objection to the form.
> THE WITNESS: Yes, they did.
>
> Id. at 84:22-85:1 3and Weniger-3

26. Fire Chief Weinger further testified with respect to Deposition Exhibit Weniger-4, an e-mail addressed to Dave at Quadrelle Reality as follows:

> Q. Second full paragraph, I'm going to read the first sentence and just let me know if I do that correctly. It says the current sprinkler system will not contain, control or extinguish a fire in most of the warehouses. Do you see that sentence?
> A. Yes.
> Q. Was that a concern that you had with respect to the sprinkler system at this property?
> MR. LEVY: Objection to the form.
> THE WITNESS: Yes.
> BY MR. WINNING:
> Q. Was that concern alleviated at any time prior to the fire of February 11, 2016?
> MR. LEVY: Objection to the form.
> THE WITNESS: No, it was not.
> Id. at 86:21-87:11 and Weniger-4
>
> * * *

Q. Chief, moving down to paragraph six of that letter, the paragraph reads, the water supply to the onsite fire hydrant is not sufficient for the suppression of a fire within the warehouses. Do you remember expressing that concern?
A. Yes, I do.
Q. Was that concern alleviated or addressed in any fashion prior to the fire of February 11, 2016?
MR. LEVY: Objection to the form.
THE WITNESS:· No, it was not.

Id. at 88:15-24 and Weniger-4

27. Fire Chief Weinger further testified with respect to Weniger-16, an e-mail addressed to Edward Barnes dated October 30, 2008:

Q. Tell me what you're setting forth in that letter.
A. This e-mail came after our 2008 annual fire inspection where there was a number of items that were sited, and I'm following up with Mr. Barnes to find out the state of those repairs or corrections.
Q. Last paragraph, I need an update and timeline on the plan to improve water supply to the site. Was that ever done?
A. No, it was not.
Q. Next line, there are still significant sprinkler density issues in several tenant spaces including the AML Logistics tenant. Were those ever addressed?
MR. LEVY: Objection to the form.
MR. MEOLA:· Prior to the fire?
MR. LEVY: Same objection.
THE WITNESS:· No, they were not.

Id. at 183:1-19 and Weniger-16

28. Fire Chief Weniger further testified with respect to Weniger-19, an e-mail addressed to Edward Barnes dated January 5, 2009:

Q. In the first paragraph you're indicating that to Mr. Barnes you received a copy of the report from the engineer regarding the water pressure issue, the problem had clearly been identified, I need a documented plan and timetable to correct the problem. This dates back to 2006. Here we are in 2009, three years later, still haven't addressed the issue?
MR. LEVY: Objection to the form.
THE WITNESS: That is correct.

Id. at 188:2-10 and Weniger-19

29. Fire Chief Weniger further testified with respect to Weniger-20, an e-mail addressed to Edward Barnes dated January 30, 2009:

Q. Can you identify that document for us?

A. This is an e-mail I sent to Ed Barnes letting him know that I had spoken with their sprinkler contractor regarding the reports that we had been asking for and that they were unable to provide those reports because of the sprinkler systems current condition.

Q. And specifically that the sprinkler systems were not in compliance. Is that correct?

MR. LEVY: Objection to form.

THE WITNESS: Yes.

Id. at 192:9-18 and Weniger-20

30. Fire Chief Weniger further testified with respect to Weniger-21, a letter addressed to Gary Greenstein, incorrectly addressed as "Alan", dated May 16, 2009:

Q. In the letter it's indicating to Mr. Greenstein -- presumably, you're talking about Gary Greenstein?
A. Yes. Q. Instead of Alan?
A. I believe that is typo.
Q. We do know an Alan though?
A. Yes, that's why I think that is typo.
Q. We would also appreciate an update on your progress to improve the water supply and bring your sprinkler system into compliance. Did they ever respond to that?
MR. LEVY: Objection to the form.
THE WITNESS: No, they did not.

Id. at 194:23-195:11 and Weniger-21

31. Fire Chief Weniger further testified with respect to Weniger-24, an email addressed to Edward Barnes in or about October 2012:

Q. . . . can you tell us the purpose of that e-mail?
A. Again, this was reiterating the fact we had open fire code violations or open issues onsite both generally and with a specific tenant, Royal Cabinet. It had been almost a year since we conducted that last inspection, and we did not have compliance.
Q. Did they ever give you a reason as to why they ignored all your prior requests to address these issues?
MR. LEVY:· Objection to the form.
THE WITNESS:· No.
BY MR. MEOLA:
Q. And if you look in the e-mail, it talks about it's now October, and you're conducting 2012 inspections of the site this month.· Is it fair to say that we are talking -- this letter would have been sent to Mr. Greenstein and Mr. Barnes in the 2012 timeframe, October 2012?
A. Yes, it would.

Id. at 200:12-201:6 and Weniger-24

32. Somerset and its Management Companies further failed to make any of the necessary upgrades to the water supply to the Fire Protection System despite the warnings of Fire Chief Christopher Weniger of the dangerous consequences of the inadequacies of the water supply. Deposition Transcript of Christopher Weniger and Exhibits attached as Exhibit D to the Certification of Nelson E. Canter, Esq., at 79:4-81:23, 82:2-85:13; 85:16-88:24; 145:14-148:1; 182:22-183:19; 186:2-187:13; 187:18-188:10; 192:5-18; 193:20-195:11; 200:10-201:6; and Exhibits Weniger-2, Weniger- 3, Weniger-4, Weniger-8, Weniger-16, Weniger-17, Weniger-18, Weniger-20, Weniger-21, and Weniger-24

33. Furthermore, had Richard Coriell & Company known of the IRG Defendants intention to deliberately not upgrade the sprinkler system, they would have not extended the Coriell Lease. Deposition Transcript of Richard Coriell attached as Exhibit E to the Certification of Nelson E. Canter, Esq., at 112:12-25 and the Deposition Transcript of James Lewis attached as Exhibit G to the Certification of Nelson E. Canter, Esq., at 80:1-81:19

34. Specifically, Brian Coriell testified:

> Q. Had you known of the lack of adequate water pressure, would you have extended the lease?
> MR. LEVY: Objection to form.
> BY MR. CANTER:
> Q. You can answer.
> A. I don't believe so.
> Q. Had you known of a defect in the fire suppression system, would you have extended the lease?
> MR. LEVY: Objection to form.
> BY MR. CANTER:
> Q. You can answer.
> A. Not unless it was corrected.
>
> Deposition Transcript of Richard Coriell attached as Exhibit E to the Certification of Nelson E. Canter, Esq., at 112:12-25

35. Furthermore, James Lewis, Chief Operating Officer at Richard Coriell & Co., testified

> Q. Did you rely on the landlord, Somerville in this instance, on them complying with this lease?
> MR. SANDERS: Objection to form.
> THE WITNESS: Yes.
> BY MR. CANTER:
> Q. Do you, sir, have any specific knowledge on the design of the sprinkler system?
> A. No.
> Q. On the diameter of the pipes of the sprinkler system?
> A. No.
> Q. Of the types of heads on the sprinkler system?
> A. No.
> Q. On the pressure required for the effective use of the sprinkler system?
> MR. LEVY: Objection to form.
> MR. CANTER: Okay.
> BY MR. CANTER:
> Q. So to the extent that any pressure is required in a sprinkler system. I'll clarify that. Had you known that the landlord willfully and wantonly ignored their responsibility to upgrade the sprinkler system accordingly, would you have recommended to Coriell not to execute the lease?
> MR. LEVY: Objection to form.
> MR. CANTER: You can answer it.
> MR. LEVY: Same objection.
> * * *
> THE WITNESS: Absolutely, yes. BY MR. CANTER:
> Q. And did you rely upon the landlord to upgrade the sprinkler system?
> A. Yes.

> Q. Were you ever made aware by the landlord of communications made to them with respect to the inadequacies of the sprinkler system?
> A. No.
>
> Deposition Transcript of James Lewis attached as Exhibit G to the Certification of Nelson E. Canter, Esq., at 80:1-81:19

## VIII. PRETIUM PLAINTIFF'S STATEMENT OF FACTS[4]

A. In General

The claims in these consolidated actions arise from significant property damage caused by a fire on February 11, 2016 at a warehouse complex leased by Somerville and located in Hillsborough, New Jersey. The Property, which consisted of four large commercial buildings, was leased by Somerville in September 2003. (See Levy Cert., Exhibit J). At the time the Property was leased, the fire protection systems in the buildings were approximately fifty years old and in need of significant maintenance and repairs. (See Meola Cert., Exhibit D). From 2003 to 2013, Quadrelle was the property management company at the Property responsible for maintenance and repairs. During his employment with Quadrelle, Gary Greenstein ("Greenstein") was the person most knowledgeable and responsible for the daily operations at the Property.

From 2003 when the Property was leased by Somerville to the date of the fire, the Hillsborough Township fire officials conducted annual inspections of each of the buildings at the warehouse complex. As a result of those inspections, the fire officials rendered reports to Quadrelle and Greenstein identifying various fire hazards and code violations at the Property which needed to be addressed. According to sworn deposition testimony and related documents exchanged in these consolidated actions, Quadrelle and Greenstein were made aware of numerous fire safety issues at the Property by the Hillsborough Township fire officials as early as 2004, including significant deficiencies with existing fire protection systems in the buildings and inadequate water supply systems at the Property. (See Meola Cert., Exhibit G).

In a veiled effort to give the appearance that it intended to remedy the glaring deficiencies with the fire protection and water supply systems at the Property, Greenstein retained three different fire protection specialists between 2005 to 2008 – R. L. Dehn & Sons Fire Protection, Inc. (2005), Shields Fire Protection (2006) and Brinjac Engineering (2008) - to inspect the systems and provide recommendations and options to address the deficient systems at the Property. All three fire protection experts provided detailed reports to Quadrelle and Greenstein with

[4] Pretium's Statement of Facts is provided virtually verbatim for completeness of the record.

recommendations for upgrades to the fire protection systems and water supply issues to meet code requirements. (See Meola Cert., Exhibits D, E and F).

In 2013, Quadrelle merged with another property management company to become IRG RA. Greenstein immediately joined IRG RA and remained the person most responsible for the maintenance and repairs at the Property from 2013 up to the date of the fire. (See Meola Cert., Exhibit A, Mase Dep. at 65:25 - 66:2). In addition, Ed Barnes ("Barnes") was the on-site manager at the Property assisting Greenstein with the day-to-day operations of the Property since 2003. (See Meola Cert., Exhibit A, Mase Dep. at 36:8-13).

For more than twelve years, Hillsborough Township Fire Chief Weniger repeatedly urged Greenstein and Barnes of the need to address the deficiencies of the fire protection and water supply systems because of obvious life-safety issues at stake. (See Meola Cert., Exhibits G and I). Specifically, Greenstein and Barnes were both warned numerous times that the fire protection systems at the Property were incapable on containing, controlling or extinguishing a fire placing its tenants and their property at significant risk. Despite the numerous warnings, it is undisputed that neither of the Defendants ever performed any of the recommended and necessary upgrades to the fire protection or water supply systems at the Property. Instead, Defendants continued to collect significant rent payments from its commercial tenants at the Property, including Pretium, while exposing all tenants and their property to unreasonably dangerous conditions and risks of loss. Deposition testimony of upper management for the IRG entities confirmed that Greenstein never sought to obtain the necessary funding needed to upgrade the fire protection or water supply systems at the Property either through the collection of rents, a refinance of the Property or a simple application directly to the parent companies which were available to him. (See Meola Cert., Exhibit A, Mase Dep. at 52:5 - 53:25).

B. The Pretium Lease

Somerville entered into a lease agreement with Tri-Delta Plastics, the predecessor to Pretium, for space at the Property in July 2010. Tri-Delta Plastics was succeeded by Pretium in December 2014. At the time of the fire, Pretium occupied and operated a portion of its business in buildings Nos. 14A and 14B – directly adjacent to building No. 14C where the fire originated. Deposition testimony has confirmed that none of the Defendants ever advised Pretium that the fire protection system in its occupied space was deficient or that there were significant water flow and water pressure issues at the Property or that the sprinkler systems at the property were in desperate need of upgrades. (See Meola Cert., Exhibit L, Rolando Dep. at 97:21 - 98:14).

Now, Defendants collectively move for summary judgment which the Pretium Plaintiff characterizes as a "desperate attempt" to avoid responsibility for their own gross negligence in allowing the fire to destroy Pretium's property by attempting to enforce a Waiver of Subrogation provision in the Pretium lease agreement. The Pretium Plaintiff urges that the Motion should be denied for several reasons.

First, exculpatory clauses in New Jersey are unenforceable where a party acts with a willful, wanton and reckless disregard for the rights and property of others as Defendants have done here. An exculpatory clause, such as the Waiver of Subrogation, cannot protect Defendants from their own acts of gross negligence as such acts would supersede any contractual limitation of liability. There is no dispute that there is overwhelming evidence in this action for a jury to easily conclude that Defendants acted in a grossly negligent manner with complete disregard for the safety and protection of the tenants at the Property, including Pretium. Pretium Plaintiff posits that whether Defendants' actions rise to the level of gross negligence is a jury question which cannot be decided on a motion for summary judgment. See Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 367 (2016) (New Jersey Supreme Court concluded that trial court and Appellate Division erred in granting summary judgment on gross negligence claim which was a jury question).

Second, the Waiver of Subrogation in the lease states at Paragraph 13.4 as follows:

> Waiver of Subrogation. To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively.

(See Levy Certification, Exhibit F at Paragraph 13.4). Pretium Plaintiff asserts that notwithstanding that the provision is unenforceable because of Defendants' gross negligence, the scope of the waiver is limited to only Somerville (as the Landlord in the Lease) and Pretium (as the Tenant in the Lease) by its express and unambiguous language. Pretium Plaintiff submits that the waiver is not applicable to any of the IRG Defendants who are not parties to the lease, nor can the scope of the waiver be expanded to relieve those IRG Defendants of their culpability for the property damage caused by the fire. The law regarding contract interpretation in New Jersey is well established. When the terms of the contract are clear and unambiguous, it is the function of the court to enforce the contract as written and not to make a better contract for either of the parties. Hartford Fire Ins. Co. v. Riefolo Const. Co., 161 N.J. Super. 99, 114-15 (App. Div. 1978), aff'd, 81 N.J. 514 (1980).

Finally, Pretium Plaintiff asserts that with respect to Defendant IRG RA, the entity responsible for maintenance and repairs at the Property from 2013 to the date of the fire, deposition testimony has confirmed that IRG RA did not come into existence until 2013 – more than three years after Somerville and Pretium's predecessor Tri-Delta Plastics entered into the lease agreement. Thus, Pretium Plaintiff postulates that it is beyond dispute that Pretium could not have possibly waived subrogation rights against IRG RA when that entity did not even exist at the time the lease was signed. Most important, the IRG Defendants do not present any factual or legal basis in the pending motion attempting to somehow expand the scope of the waiver provision.

## IX. PRETIUM PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS[5]

1. This matter arises out of a fire that occurred in or about February 2016. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Admitted.

2. The fire occurred at property located at 152 US Highway 206, Hillsborough, NJ (hereinafter referred to as the "The Property".) Id. Response: Admitted.

3. The Property is owned by the United States Department of Veterans Affairs (hereinafter referred to as the "VA".) Response: Admitted.

4. Pursuant to an "Enhanced-use Lease Agreement" (hereinafter referred to as the "EULA"), Moving Defendants leased the entirety of The Property from the VA. (See Exhibit J attached to the Certification of Counsel Adam E. Levy, Esq.) Response: Denied – the Property was only leased by defendant, Somerville Business Park, LLC (See Levy Cert., Exhibit J).

5. The Property is comprised of multiple buildings. Id. Response: Admitted.

6. The various buildings that make up the Property were designated by building numbers. Id. Response: Admitted.

7. Each building in turn had multiple units that were sub-leased to tenants by Moving Defendants. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Denied - Pretium only sub-leased a portion of the Property from Somerville Business Park, LLC. (See Levy Cert., Exhibit F).

8. The fire has led to the filing of fourteen (14) complaints that include, among others, Moving Defendants as direct defendants. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-

[5] Pretium's Response to the Defendants' Statement of Material Facts is also provided virtually verbatim for completeness of the record.

L-502-17. Response: Denied – Quadrelle Realty Services, LLC is not a party in this action filed by Pretium.

9. The fire has been alleged by the plaintiffs to have originated in building 14, and more specifically in Unit C (hereinafter referred to as "14C".) Id. Response: Admitted.

10. At the time of the fire, the tenant in 14C was Richard Coriell & Co., Inc. d/b/a Central Moving Systems (hereinafter referred to as "CMS".) Id. Response: Admitted.

11. Moving Defendants have named CMS in each of the fourteen (14) complaints as a third party defendant. See answers of Moving Defendants to each of the consolidated actions under docket SOM-L-502-17. Response: Admitted.

12. In some of those lawsuits, plaintiffs have also named CMS as a direct defendant. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17. Response: Admitted.

13. Several of the plaintiffs in the consolidated cases are insurance carriers that have filed subrogation claims. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L502-17. Response: Admitted, however, Pretium is not an insurance company.

14. Four (4) of the aforementioned insurer's insured were sub-tenants of Moving Defendants. See Exhibits A, B, C, D, E, F, G, H & I attached to the Certification of Counsel Adam E. Levy, Esq., as well as the other complaints consolidated under docket SOM-L-502-17. Response: Denied - Pretium was only a sub-tenant of Defendant, Somerville Business Park, LLC (See Levy Cert., Exhibit F).

15. All of the leases attached to the Certification of Counsel Adam E. Levy, Esq., were amended multiple times to essentially extend the lease term a number of years. Response: Denied.

16. All of these four plaintiff insurance carriers allege that fire damaged personal and/or business property owned by each of their respective insureds. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17. Response: Denied, but admitted that Pretium incurred significant property damage as a result of the fire.

17. These four insurers, and their sub-tenant insureds are:

a. Sentinel Insurance Company Ltd. ("Sentinel") as insurer of Royal Cabinet ("Royal") which filed its complaint as Docket SOM-L-1299-17;

b. Factory Mutual Insurance ("FMI") as insurer of Pretium Packaging, LLC ("Pretium") which filed its complaint as Docket SOM-L-498-18

c. Great American Insurance Company of New York ("GAI") as insurer of CMS which filed its complaint as Docket SOM-L-46-18, and

d. AGCS Marine Insurance Company ("AGCS") as insurer of Mid-States Packaging ("MSP") which filed its complaint as Docket SOM-L-257-20. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. as well as the other complaints consolidated under docket SOM-L-502-17.

Response: Denied – Factory Mutual Insurance Company is not a named party in this action filed by Pretium.

18. Mid-States Packaging, Inc.'s predecessor to interest to the lease at issue was Giroux Bros. See Exhibit I attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

19. Premium's predecessor to interest to the lease at issue was Tri-Delta Plastics. See Exhibit F and K (deposition transcript of former Tri-Delta Plastics and Pretium employee Paul Rolando at pages 24 through 34 describing his positions with the companies and Pretiums leasehold in the units previously rented by Pretiums predecessor in interest to the leases, Tri-delta Plastics) attached to the Certification of Counsel Adam E. Levy, Esq. Response: Admitted.

20. The combined value of the four aforementioned claims is in excess of $4 Million. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

21. At the time of the fire, MSP occupied leaseholds in Building 15 in Units C, D, E, and F of The Property. See Exhibits E & I attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

22. At the time of the fire, MSP warehoused property bailed to MSP by a variety of MSP customers. See Exhibit D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

23. The aforementioned customers made claim to MSP for damage resulting from the subject fire to those customers' business property that MSP was storing in its leaseholds at The Property. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

24. In response to the aforementioned claims of its customers, MSP made claim to its insurance carrier, AGCS Marine Insurance Company ("AGCS") to cover MSP's customers' claims. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

25. Thereafter, AGCS paid to, or on behalf of, those MSP customers a total of $1,632,459.49. See Exhibits D attached to the Certification of Counsel Adam E. Levy, Esq. and specifically Count I of same. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

26. AGCS filed docket SOM-257-20 (the last suit filed in these consolidated cases) seeking damages from Moving Defendants in the aforementioned amount of $1,632,459.49. Id. Response: Pretium has no knowledge to be able to admit or deny this proposed statement of fact.

27. Each of the four aforementioned insurance carriers' insureds had leases for their subject leaseholds at The Property which included “Waiver of Subrogation” clauses. See Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq. Response: Admitted that Pretium’s sub-lease with Somerville Business Park, LLC contained a Waiver of Subrogation provision.

28. The aforementioned "Waiver of Subrogation" clauses each provided as follows:

> Waiver of Subrogation. To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively. See Paragraph 13.4 in Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq.

Response: Admitted with respect to Pretium only.

29. None of the lease amendments/extensions referenced above changed the Waiver of Subrogation clauses. Response: Admitted with respect to Pretium only.

30. The aforementioned leases required each of the aforementioned insurers’ insureds to carry insurance. See Paragraph 13.2 in Exhibits E, F, G & H attached to the Certification of Counsel Adam E. Levy, Esq. Response: Admitted with respect to Pretium only.

31. The aforementioned insurance requirements of the lease specifically provided, in pertinent part, as follows:

> Tenant's Insurance. Tenant agrees to take out and keep in force during the Term, without expense to Landlord, the policies of insurance as set forth below.
>
> A. Commercial general liability insurance, in the name of Tenant, insuring against any liability for injury to or death of persons resulting from any occurrence in or about the Buildings and for damage to property in such amounts as may from time to time be customary with respect to similar properties in the same area, but in any event not less than $5,000,000.00, per occurrence. The amounts of such insurance required hereunder shall be adjusted from time to time as requested by Landlord based upon Landlord's determination as to the amounts of such insurance generally required at such time for comparable

> premises and buildings in the general geographical area of the Premises. In addition, such policy of insurance shall include the ordinary and usual coverage for any additional liability as coverage for any potential liability arising out of or because of any construction, work of repair or alterations done on or about the Premises by or under the control or direction of Tenant;
>
> B. Causes of Loss — Special Form property insurance, in an amount not less than one hundred percent (100%) of replacement cost covering all tenant improvements and alterations permitted under this Lease, floor and wall coverings, and Tenant's office furniture, business and personal trade fixtures, equipment, furniture system and other personal property from time to time situated in the Premises. Such property insurance shall include a replacement cost endorsement, providing protection against any peril included within the classification fire and extended coverage, sprinkler damage, vandalism, malicious mischief, and such other additional perils as covered in a "cause of loss-special form" standard insurance policy. The proceeds of such insurance shall be used for the repair and replacement of the property so insured, except that if not so applied or if this Lease is terminated following a casualty, the proceeds applicable to the leasehold improvements shall be paid to Landlord and the proceeds applicable to Tenant's personal property shall be paid to Tenant.

Id.

Response: Admitted with respect to Pretium only.

32. None of the aforementioned lease amendments/extensions referenced above changed the requirement for the tenants to carry commercial general liability insurance in accordance with the Tenant Insurance Section A requirement set out at length above. Response: Admitted with respect to Pretium only.

33. None of the aforementioned lease amendments/extensions referenced above changed the requirement for the tenants to carry fire insurance in accordance with the Tenant Insurance section B requirement set out at length above. Response: Admitted with respect to Pretium only.

34. At the time of the fire, the insurers' insureds had in place policies of insurance with the aforementioned insurers. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Admitted that Pretium had a property policy of insurance with Factory Mutual Insurance Company at the time of the fire.

35. The insurers' insureds made claim to each of their respective insurer plaintiffs for damages that the insureds alleged were as a result of the February 2016 fire at the property that is the subject of the consolidated actions. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Denied, but admitted that Pretium submitted a claim to Factory Mutual Insurance Company for its property damage resulting from the fire.

36. The insurers paid to, or on behalf of, their insureds the aforementioned claims. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response:

Admitted that Factory Mutual Insurance Company made a payment to Pretium for its property damage resulting from the fire.

37. The insurers filed the various aforementioned subrogation actions. See Exhibits A, B, C, & D attached to the Certification of Counsel Adam E. Levy, Esq. Response: Denied - Factory Mutual Insurance Company is not a named party in this action filed by Pretium.

## X. PRETIUM'S COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS[6]

1. Defendant, Somerville Business Park, LLC ("Somerville") leased the subject property located at 152 U.S. Highway 206, Hillsborough, New Jersey from the Department of Veterans Affairs on or about September 5, 2003. (the "Property"). (See Levy Cert., Exhibit J).

2. Pretium filed this action against Defendants seeking to recover for property damage resulting from the fire under several theories of liability, including allegations of gross negligence. (See Levy Cert., Exhibit B).

3. Defendant, Industrial Realty Group, LLC is a nationwide management company that brings in other managers to provide property management services at its portfolio of properties located throughout the country. (See Exhibit A, Mase Dep. at 26:7-10).

4. Defendant, IRG Realty Advisors, LLC ("IRG RA") has a common ownership interest with Industrial Realty Group, LLC. (See Exhibit A, Mase Dep. at 26:11-15).

5. IRG RA was the entity providing property management services at the Property at the time of the fire. (See Exhibit A, Mase Dep. at 26:11-15).

6. IRG RA provided property management services at the Property from 2013 to the date of the fire. (See Exhibit B, Greenstein Dep. at 147:21-25).

7. Somerville, Industrial Realty Group, LLC, Industrial Realty Group, Inc., and IRG RA are separate and distinct entities.

8. From 2003 to 2013, Quadrelle Realty Services, LLC. ("Quadrelle") provided property management services at the Property, including necessary maintenance and repairs. (See Exhibit B, Greenstein Dep. at 147:7-20 and Exhibit A, Mase Dep. at 58:9-11).

9. In 2013, Quadrelle ceased operations when it merged with another management company to become IRG RA. (See Exhibit B, Greenstein Dep. at 28:19-23).

10. From 2013 to the date of the fire, Quadrelle was replaced by IRG RA to provide property management services at the Property, including responsibility for maintenance and repairs. (See Exhibit A, Mase Dep. at 58:9-11 and Exhibit B, Greenstein Dep., at 147:7-20).

[6] Pretium's Counter Statement of Undisputed Material Facts is also provided virtually verbatim for completeness of the record.

11. Gary Greenstein ("Greenstein") was the Senior Property Manager for the Property from 2003 through 2013 during his employment with Quadrelle.

12. Greenstein was the Senior Property Manager for the Property from 2013 up to the date of the fire during his employment with IRG RA. (See Exhibit A, Mase Dep. at 65:25 - 66:2).

13. Ed Barnes ("Barnes") was hired by Greenstein as the on-site manager for the Property in 2001-2002. (See Exhibit M, Barnes Dep. at 15:24 – 16:3 and 16:20-22).

14. From 2003 to the date of the fire, Christopher Weniger ("Weniger") was the Chief Fire Marshal for Hillsborough Township, New Jersey. (See Exhibit C, Weniger Dep. at 17:20- 24).

15. Weniger was responsible for code enforcement at the Property. (See Exhibit C, Weniger Dep. at 22:6-12).

16. The Hillsborough Township Fire Department conducted annual fire inspections of the buildings at the Property and issued reports which were provided to the property managers, including Greenstein and Barnes, identifying any deficiencies with the fire protection systems. (See Exhibit C, Weniger Dep. at 101:6 - 102-1).

17. In August 2005, Greenstein and Barnes retained R.L. Dehn & Sons Fire Protection, Inc. ("Dehn"), to inspect and determine the status of the existing fire sprinkler systems at the four warehouse buildings at the Property. (See Exhibit D).

18. On August 12, 2005, Dehn issued a report to Greenstein and Barnes indicating that the existing sprinkler systems at the four buildings at the Property 'fall well short of compliance' with current NFPA standards. (See Exhibit D, p. 1).

19. The Dehn report also identified water flow and water pressure issues with the fire protection system at the Property. (See Exhibit D, pp. 1-3).

20. Finally, the Dehn report states that "because of the age (approximately 50 years) of the sprinkler systems and the interior piping corrosion buildup", the contractor was unable to confirm that the existing piping could provide the usual water flow characteristics of new piping. (See Exhibit D, p. 2).

21. None of the options suggested by Dehn to address the water flow and water pressure issues at the Property were ever performed by the Defendants prior to the fire.

22. In March 2006, Greenstein and Barnes retained Shields Fire Protection, ("Shields") to inspect the existing fire sprinkler systems at the Property and provide suggested options needed to upgrade and improve the level of fire protection at all of the buildings at the Property. (See Exhibit E).

23. On or about March 9, 2006, Shields issued a report to Greenstein and Barnes providing various options to upgrade the level of fire protection at the Property to address the fire protection issues and related deficiencies. (See Exhibit E).

24. None of the options suggested by Shields to address the water flow and water pressure issues at the Property were ever performed by the Defendants prior to the fire.

25. In December 2008, Greenstein and Barnes retained Brinjac Engineering, a fire protection company, to inspect and make recommendations to develop, design and install water main upgrades at the Property to address and improve the deficient water flow and water pressure issues. (See Exhibit F).

26. On December 16, 2008, Brinjac issued a report to Greenstein and Barnes detailing options to address the water flow and water pressure issues at the Property. (See Exhibit F).

27. None of the options suggested by Brinjac to address the water flow and water pressure issues at the Property were ever performed by the Defendants prior to the fire.

28. In 2011, Greenstein and Barnes were notified by Weniger again of the need to improve and upgrade the water supply and sprinkler systems at the Property. (See Exhibit G).

29. Weniger again reminded Greenstein and Barnes of the inadequate water supply and sprinkler systems issues which existed at the Property since 2004. (See Exhibit G).

30. Weniger expressed concern to Greenstein and Barnes that the fire suppression upgrades were discussed between them and approximately seven years had passed with no improvements. (See Exhibit G).

31. Weniger further expressed his concerns to Greenstein and Barnes that in the event a fire occurred at one of the buildings at the Property, the sprinkler systems and lack of an adequate water supply would be unable to control a fire. (See Exhibit G).

32. On January 11, 2012, Greenstein sent an email to Bruce Haas of Industrial Realty Group, LLC indicating that there were a lack of funds and budgetary issues to address the recommendations of the Hillsborough Township Fire Department to increase fire suppression and water pressure throughout the Property. (See Exhibit H).

33. Greenstein testified at his deposition that the suggested repairs to the existing fire protection system at the Property were cost prohibitive. (See Exhibit B, Greenstein Dep. at 66:3-16).

34. Greenstein had at least three (3) options available to finance repairs to the fire protection systems at the Property: (1) funds from rents collected at the Property; (2) a re-finance of the

Property; or (3) a request of funds from upper management to make the necessary repairs or upgrades (See Exhibit A, Mase Dep. at 52:13 - 53:25).

35. Greenstein did not pursue any of the several options available to him to obtain the funding to make the necessary repairs to upgrade the fire protection systems or address the water supply issues at the Property prior to the fire.

36. On June 4, 2012, Weniger wrote to Greenstein requesting "documentation that the numerous deficiencies identified in the sprinkler reports had been corrected." (See Exhibit I

37. In an email from Weniger prior to the fire, he expressed significant concern regarding the deficiencies with the fire suppression systems at the Property stating the following: - THE CURRENT SPRINKLER SYSTEMS WILL NOT CONTAIN, CONTROL OR EXTINGUISH A FIRE IN MOST OF THE WAREHOUSES. THE AMOUNT AND TYPES OF STORAGE WITHIN THE WAREHOUSE BUILDINGS AND IN THE LOADING DOCK AREAS WILL EASILY OVER TAKE THE SPRINKLER SYSTEM. - SEVERAL OF THE FIRE HYDRANTS HAVE BEEN HIT BY VEHICLES AND ARE DAMAGED. - THE WATER SUPPLY TO THE ON SITE FIRE HYDRANTS IS NOT SUFFICIENT FOR THE SUPPRESSION OF A FIRE WITHIN THE WAREHOUSES. - The conditions listed above are serious and pose a threat to the occupants and responding firefighters. A fire within these buildings is likely to be catastrophic; these issues require immediate attention. (See Exhibit J).

38. On December 28, 2016, Dehn sent an email to Greenstein and Barnes, among others, summarizing the previous findings from the various fire protection consultants/specialists which 'clearly established' the inadequacies of the water supply and sprinkler systems at the Property prior to the fire, as well as the need for 'significant modifications/replacements' in order for the fire protection systems to meet Code requirements. (See Exhibit K).

## XI. PLAINTIFF SENTINEL'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Admitted
2. Admitted
3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted
8. Admitted

9. Admitted

10. Admitted

11. Admitted

12. Admitted

13. Admitted

14. Admitted

15. Admitted

16. Admitted

17. Admitted

18. Admitted

19. Admitted

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted

## XII. COURT'S DECISION

### A. STANDARD OF REVIEW

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court held that, pursuant to Rule 4:46-2, a court should grant summary judgment when

"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The Brill Court stated that, "[b]y its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Id. at 529.

That means, therefore, "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. at 540. A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party. Id.

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Brill, 142 N.J. at 540 (internal citations omitted). Accordingly, when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. (internal citations omitted).

Summary judgment is appropriate under New Jersey Court Rule 4:46-2. This Rule provides for the granting of summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Summary judgment is "designed to provide a prompt, businesslike, and inexpensive method of disposing of any case in which a discriminating search of the merits in the above-mentioned documents, which have been submitted on the motion, clearly show not to present any genuine issue of material fact requiring disposition at trial." Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954).

The summary judgment rule was comprehensively amended in 1995 by the Supreme Court case of Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Based on Brill, R. 4:46-2(c) was amended to provide clarification as to when an issue of material fact is genuine. Pursuant to R. 4:46-2(c), "an issue of fact is genuine only if, considering the burden of persuasion

at trial, the evidence submitted by the parties on the motion, together will all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." According to Brill, the motion judge is required to "consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill at 540. The Supreme Court further observed, "if there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." (Citations omitted). The import of our holding is that when the evidence is "so one-sided that one party must prevail as a matter of law, . . . the trial court should not hesitate to grant summary judgment." Id.

Importantly, the Appellate Division has indicated that a motion for summary judgment can be defeated only with a genuine issue of material fact. Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 178 (App. Div. 1990). "An opponent to a summary judgment motion cannot defeat the motion by raising a misguided subjective belief, without more, to create the existence of a genuine issue of material fact." Id. In Swarts, plaintiff attempted to defeat summary judgment by asserting in an affidavit that he did not intend to waive his age discrimination rights when he signed a release. The Appellate Division held that Plaintiffs' subjective beliefs were inappropriate and insufficient to defeat summary judgment. The court stated, "Applying the totality of the circumstances standard in the context of the undisputed facts, we are satisfied the trial judge correctly concluded plaintiff voluntarily and knowingly waived any age discrimination claim he had." Id. See also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) ("…bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment."). Accord Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2001). ("self-serving assertion…insufficient to create a question of material fact for purposes of a summary judgment motion."). See also MEMO v. Sun National Bank, 374 N.J. Super. 556, 563 (App. Div.) cert. granted 183 N.J. 592 (2005) (summary judgment cannot be resisted by speculation or "fanciful arguments nor disputes as to irrelevant facts…"). See also Herman v. Coastal Corp., 348 N.J. Super. 1, 19 (App. Div.) ("bare conclusions in the pleadings will not defeat a meritorious application for summary judgment"), cert. denied 174 N.J. 363 (2002); Lepis v. Lepis, 83 N.J. 139, 159 (1980) (conclusory allegations of parties should be disregarded when deciding whether material fact is in dispute). Competent opposition requires "competent evidential material" beyond mere "speculation" and "fanciful arguments." Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), cert. granted, 183 N.J. 592 (2005);

O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-07 (App. Div.) (opponent must do more than establish abstract doubt regarding material facts), cert. denied, 169 N.J. 606 (2001). See also James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 443 (App. Div. 1964) (noting that "[m]ere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand a motion for summary judgment"). Aetna Ins. Co. v. Trans American Trucking Service, Inc., 261 N.J. Super. 316, 330 (App. Div. 1993) ("speculation and supposition…do not raise a genuine issue of material fact.")

Additionally, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill, Id. at 540. [internal citation omitted.] Moreover, "when the evidence 'is so one-sided that one party must prevail as a matter of law'… the trial court should not hesitate to grant summary judgment." Id. [internal citation omitted.]

In this Motion, the Moving Defendants assert that there are no genuine issues of material fact that would prevent the Court from ordering Summary Judgment in favor of them. The Moving Defendants indicate that the facts of this case show that they contracted via sub-leases with the various subrogating plaintiffs insureds. The leases included clauses which required the sub-tenants to "…waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise…". The Moving Defendants submit that the parties to these commercial leases, by way of these "waiver of subrogation" clauses agreed to shift the risk of loss to their respective insurance carriers. The Moving Defendants posit that long held in the law is that a carrier's rights in subrogation can arise no higher than that of its insureds. See Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 171 (1954).

**B. ARE THE SUBROGATION WAIVERS IN COMMERCIAL LEASES VALID AND ENFORCEABLE WHEREBY THE CLAIMS OF THE SUBROGATING INSURANCE CARRIERS WHOSE INSUREDS HAD A LEASE WITH THE MOVING DEFENDANTS SHOULD BE DISMISSED WITH PREJUDICE?**

1) General Statement of the Applicable Law

Generally, exculpatory clauses allocating the risk of loss between landlord and tenant are closely scrutinized as same tend to favor landlords, at least in residential settings. See Kuzmiak v. Brookchester, 33 N.J. Super. 575, 111 (App. Div. 1955), Freddi-Gail v. Royal Holding Co., 34 N.J. Super. 142 (App.Div.1955); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 125 (App. Div. 1956), affirmed, 24 N.J. 139, (1957). However, when the lease involved is a commercial lease entered into between businessmen the lease should be construed to accord with

the understanding of reasonable businessmen. See Mortgage Co. of New Jersey v. Manhattan Savings Bank, 71 N.J. Super. 489, 497 (Law Div.1962.)

All of the parties to this Motion acknowledge that while courts will generally enforce exculpatory clauses in commercial agreements, they are disfavored and will be strictly construed. Marcinczyk v. N.J. Police Training Comm'n, 203 N.J. 586, 593 (2010); Abel Holding Co. v. Am. Dist. Tel. Co., 138 N.J. Super. 137, 146 (Law Div.1975, aff'd o.b., 147 N.J. Super. 263 (App.Div.1977).

Subrogation is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. See Skulskie v. Ceponis, 404 N.J. Super. 510, 513 (App. Div. 2009) The right of subrogation may arise by operation of law or by contract. Perreira v. Rediger, 169 N.J. 399, 412 (2001). Thus, an insurer who indemnifies its insured for a loss caused by a third party is subrogated to whatever rights the insured may have had against that same third party. Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 171 (1954). The right to subrogation is not absolute, and parties may agree to waive or limit it. See Shuskie, 404 N.J. Super. at 513.

As reasoned by the court in Mayfair Fabrics v. Henley, 97 N.J. Super. 116 (1967), when people in business agree in

> … plain and unmistakable mutually… language… that each would insure his own property against loss by fire at his own expense… [t]heir agreement, and in harmony with the modern judicial view that provisions in leases and other commercial agreements such as that here involved, whether couched in language of indemnity or exculpation or imposing obligations with respect to obtaining insurance, are to be viewed realistically as normal, common-sense efforts by businessmen to allocate between them the cost or expense of risks of property damage. They contemplate that such risks will be covered by insurance, and the only practical feature of such bargains ordinarily is the decision as to who is to bear the cost of insurance. Buscaglia v. Owens-Corning Fiberglas, 68 N.J. Super. 508 (App. Div. 1961), affirmed 36 N.J. 532, (1962); Cozzi v. Owens Corning Fiber Glass Corp., 63 N.J. Super. 117, (App.Div.1960); Midland Carpet Corp. v. Franklin Assoc. Properties, 90 N.J. Super. 42 (App. Div. 1966.)

Mayfair Fabrics, Id., at 124.

The Mayfair Fabrics decision was certified to the Supreme Court before argument at the appellate division while it was on appeal from a denial for summary judgment filed in the trial court by the defendant, a commercial landlord. In Mayfair Fabrics v. Henley, 48 NJ 483 (1967), the Supreme Court reversed the trial court decision ruling in favor of the landlord. All of the parties to this motion appear to also recognize that the decisions in the Mayfair case remains the law of the State of New Jersey some fifty-five (55) years after it decision, having been cited in hundreds of cases. In the Supreme Court case of Mayfield Fabrics, The Court reasoned that

> As in *Midland*, the parties here were not in unequal bargaining positions. They deliberately distributed the risks and designated who was to obtain the necessary insurance… [p]aragraph 28 was patently designed to place responsibility for fire damage to the tenant's property entirely on the tenant who was to carry fire insurance thereon. The responsibility for the building was that of the landlords who were to insure it against loss by fire, with a privilege to declare the lease void if they could not obtain fire insurance at standard rates because of the hazards of the tenant's business. The distribution of the risks entailed no elements of injustice and did not conflict with the public interest. It was a private contractual arrangement fairly and freely entered into and which the common law would sympathetically carry out in accordance with the contemplation of the parties.'

Id. at 488.

In this matter, the parties to the subject leases were commercial business people. As such, the level of scrutiny necessary in residential leases – to use a jaundice eye towards the landlord - is not called for. Instead, as in Mayfair Fabrics and the cases cited within it, the level of scrutiny is instead a level playing field as the contracting parties were in equal bargaining positions in a commercial setting.

2) The Lease Clauses "In Issue" Here

The clause at issue, clearly entitled "Waiver of Subrogation", provides as follows:

> To the extent of any and all insurance maintained, or required to be maintained, by either Landlord or Tenant in any way connected with the Premises, Landlord and Tenant hereby waive on behalf of their respective insurance carriers any right of subrogation that may exist or arise as against the other party to this Lease. Landlord and Tenant shall cause the insurance companies issuing their insurance policies with respect to the Premises to waive any subrogation rights that the companies may have against Tenant and Landlord, respectively.

The leases also required that the tenants obtain insurance to protect against, among other things, fire:

> Tenant's Insurance. Tenant agrees to take out and keep in force during the Term, without expense to Landlord, the policies of insurance as set forth below.
>
> A. Commercial general liability insurance, in the name of Tenant, insuring against any liability for injury to or death of persons resulting from any occurrence in or about the Buildings and for damage to property in such amounts as may from time to time be customary with respect to similar properties in the same area, but in any event not less than $5,000,000.00, per occurrence. The amounts of such insurance required hereunder shall be adjusted from time to time as requested by Landlord based upon Landlord's determination as to the amounts of such insurance generally required at such time for comparable premises and buildings in the general geographical area of the Premises. In addition, such policy of insurance shall include the ordinary and usual coverage for any additional liability as coverage for any potential liability arising out of or because of any construction, work of repair or alterations done on or about the Premises by or under the control or direction of Tenant;

> B. Causes of Loss — Special Form property insurance, in an amount not less than one hundred percent (100%) of replacement cost covering all tenant improvements and alterations permitted under this Lease, floor and wall coverings, and Tenant's office furniture, business and personal trade fixtures, equipment, furniture system and other personal property from time to time situated in the Premises. Such property insurance shall include a replacement cost endorsement, providing protection against any peril included within the classification fire and extended coverage, sprinkler damage, vandalism, malicious mischief, and such other additional perils as covered in a "cause of loss-special form" standard insurance policy. The proceeds of such insurance shall be used for the repair and replacement of the property so insured, except that if not so applied or if this Lease is terminated following a casualty, the proceeds applicable to the leasehold improvements shall be paid to Landlord and the proceeds applicable to Tenant's personal property shall be paid to Tenant.

3) Regarding the Argument that Only Somerville is a Party to the Lease Containing the Subrogation Provision at Issue, and Only Somerville can Seek to Enforce it

New Jersey law, to be sure, will enforce a lease clause exculpating a tenant from liability to his landlord for damages resulting from fire See, e.g., Mayfair Fabrics v. Henley, 48 N.J. 483 (1967). However, the provisions of an exculpatory clause with not exculpate from liability a third-party who was not directly a party to the agreement. See Abel Holding Co. v. Am. Dist. Tel. Co., 138 N.J. Super. 137, 163 (Law. Div. 1975), aff'd, 147 N.J. Super. 263 (App. Div. 1977).

In New Jersey a "lease is a contract between [the lessor and lessee] which sets forth their rights and obligations to each other in connection with [the lessor's] temporary grant of possession of its property to [the lessee]." Haftell v. Busch, 2017 WL 1077045, at *2 (App. Div. Mar. 22, 2017) (quoting Town of Kearny v. Disc. City of Old Bridge, Inc., 205 N.J. 386, 411 (2011) (emphasis added). Furthermore, "unless the parties to a contract intend that a third-party should receive a benefit which might be enforced in the courts, a non-party having no privity of contract has no cause of action based on the contract." Reider Cmtys, Inc. v. Twp. of N. Brunswick, 227 N.J. Super. 214, 222 (App. Div. 1988).

Haftell illustrates this point. In Haftell, an insurer brought a subrogation claim on behalf of its insured who was a tenant in an apartment complex that had been damaged by a fire. The fire was caused by a co-tenant who carelessly discarded a cigarette on his balcony. 2017 WL 1077045, at *1. After his insurer paid the insured's claim, the insurer brought a subrogation claim against the co-tenant, who immediately filed for summary judgment prior to any discovery being exchanged based upon a clause in the lease which barred subrogation claims by tenants. Id. The defendant was subsequently granted summary judgment by the trial court, and the insurer appealed. Id.

On appeal, the insurer argued, among other things, that the trial court should not have applied the waiver of subrogation clause to a co-tenant, a non-signatory to the lease. The Appellate Division noted initially that a lease is a contract between the lessee and lessor that generally sets forth the "rights and obligations to each other in connection with the [the lessor's] temporary grant of possession of its property to [the lessee]." Id. at *2 (citing Town of Kearny, 205 N.J. at 411). Therefore, since the co-tenant was not a party to the lease, the court found that he could not enforce the waiver of subrogation clause contained therein.

The Court recognizes that the Moving Defendants urge that the only sensible and reasonable construction of these contractual commercial lease provisions is that each of the plaintiffs' insureds accepted that it would obtain adequate insurance against a fire loss, agreed to look to that insurance alone to recoup any loss, and waived on behalf of its insurer (the plaintiffs in the instant actions) any subrogation rights. While founded in antiquity, subrogation rights are not absolute:

> The action against the tenant is clearly a subrogation action being prosecuted for the sole benefit of the fire insurance company. Although the right of an insurance company to enforce subrogation rights in appropriate cases has long been well settled, it is also clear that subrogation is not applicable when its enforcement would be inconsistent with the terms of a contract or where the contract, either expressly or by implication, forbids its application. Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162 (1954); Ganger v. Moffett, 8 N.J. 73 (1951).

Mayfair Fabrics v. Henley, 97 N.J. Super. 116, 125 (1967.)

As such, the Court recognizes that, in this Motion, the Moving Defendants argue that to allow the insurance carriers to maintain their subrogation actions would undermine the long upheld law of the State of New Jersey as provided through the Supreme Court opinion of Mayfield Fabrics, Id. As such, the Moving Defendants submit that the claims contained in plaintiffs complaints as directed at the Moving Parties should dismissed with prejudice.

However, here, there is no question of fact that Industrial Realty Group, LLC., Industrial Realty Group, Inc., Quadrelle Realty Services, LLC, and IRG Realty Advisors, LLC are "not parties" to the Lease Agreement containing the Waiver of Subrogation. The Lease Agreements that are applicable here, which was entered by the various Plaintiff's Insureds were made between the various Plaintiffs and Somerville only. As such, only Somerville is allowed to avail itself to the provisions of the Waiver of Subrogation provision.

In this circumstance, it is clear that IRG Realty Advisors, LLC and Quadrelle Realty Service, LLC were both management companies for the Premises. They operated under separate management agreements with Somerville Business Park and were completely independent entities.

The same can be said for Industrial Realty Group, LLC, which is the parent company of IRG Realty Advisors, LLC that was involved at the Premises in providing authorization for funding, but was similarly an entity completely independent from the Lease Agreement. Although Industrial Realty Group, Inc.'s involvement at the Premises is unclear to the Court, that subject is not the subject of this Motion. The only real subject of the Motion, however, is whether Industrial Realty Group, Inc. can claim the benefit of the Waiver of Subrogation. The Court finds that clearly it cannot.

In this matter, the lease agreement between Somerville and the Tenants sets forth an agreement which is solely limited to those two parties. As clearly and unambiguously stated in the Waiver of Subrogation, the Court finds that provision is only applicable and limits the potential subrogation rights between Somerville (as the Landlord) and the various parties who oppose the Defendants' Motion, including Pretium, American Insurance, AGCS and Sentinel/Hanover (as Tenants). By its express language, none of the IRG Defendants seeking summary judgment can expand the scope of the waiver to include any parties other than Somerville and the Tenants. Nor do any of the IRG Defendants attempt to advance any such argument in the pending motion. Again, it has been routinely held that unambiguous contracts will be enforced as written and courts should not make a better contract for either of the parties. Red Roof Franchising LLC, Inc. v. AA Hosp. Northshore, LLC, 937 F. Supp. 2d. 537, 551 (D.N.J. 2013), aff'd sub nom., Red Roof Franchising, LLC v. Patel, 564 Fed. Appx. 685 (3d Cir. 2014). Accordingly, even if it is determined at trial that the acts of Defendants did not rise to the level of gross negligence in this matter[7], the Court finds that none of the IRG Defendants are entitled to summary judgment based upon the Waiver of Subrogation in the Pretium lease. In fact, in their reply the IRG Defendants acknowledged that the subrogation provision only applies to one of the IRG entities, namely Somerville. As such, summary judgment must be denied with respect to the IRG Defendants against each of the "Tenants" who have opposed this motion.

As such, the Court finds that considering the express inapplicability of the Waiver of Subrogation to Defendants Industrial Realty Group, LLC., Industrial Realty Group, Inc., Quadrelle Realty Services, LLC, the Moving Defendants' Motion for Summary Judgment be denied for those reasons.

[7] See Point XVI(B)(4) below.

4) Is the only Moving Defendant that is a Signatory to the Lease Quadrelle Realty?

The defendants move for summary judgment based on a lease signed by the tenants and Quadrelle Realty Services, LLC. The IRG companies, the actual managers of the Somerville Business Park when the fire occurred, have not had an ownership interest in Quadrelle since the mid-1980s. (Mase, p. 16 line 16- p. 17 line 4). Even if the waiver is applicable to Quadrelle, there is no evidence in the record as to why or how the contractual provision would apply to the IRG Defendants. They are not signatories or parties to the lease.

5) Does the Waiver of Subrogation Protect Somerville Business Park from its Gross Negligence or its Willful and Wanton Conduct in Failing to Upgrade the Sprinkler System and is Such a Claim Viable Here?

In this Motion, the Tenants also argue that the waiver of subrogation provision does not protect Somerville from any conduct that is determined to be gross negligence or willful and wanton conduct and that a claim that such a level of conduct exists here is viable and supported by the facts that are part of the record.

The New Jersey Supreme Court has defined subrogation as "a device of equity to compel the ultimate discharge by the one who in good conscience ought to pay for it." Standard Accident Ins. Co. v. Pellechia, 15 N.J. 162 (1954). Under New Jersey law, "a carrier paying an insurance loss is entitled to subrogation against the tortfeasor" responsible for any damage to the insured. Continental Ins. Co. v. Boraie, 288 N.J. Super. 347, 351 (App. Div. 1995). Parties may also by agreement waive or limit this right of subrogation Pellechia, supra, 15 N.J. at 172; Boraie, supra, 288 N.J. Super. at 351 (holding that an insurer's subrogation rights are not applicable when enforcement is inconsistent with the terms of a contract). "Although the right of an insurance company to enforce subrogation rights in appropriate cases has long been well settled, it is also clear that subrogation is not applicable when its enforcement would be inconsistent with the terms of a contract, or where the contract, either expressly or by implication, forbids its application." Id. (citing Mayfair Fabrics v. Henley, 48 N.J. 483 (1967)). Under New Jersey law, "business people have the right to determine that the risks of a transaction shall be borne by insurance." Id. at 352.

An exculpatory clause may expressly excuse or limit liability for negligent contract performance, but such a clause does not operate to bar a claim of willful and wanton misconduct. Tessler & Son, Inc. v. Sonitrol Sec. Sys. of N. New Jersey, Inc., 203 N.J. Super. 477, 484 (App. Div. 1985). Willful and wanton misconduct is different in kind from negligence. "[I]t must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that

injury will probably or likely result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970) Thus, a contract clause that bars suit for negligent failure to perform contract responsibilities does not bar suit for willful and wanton misconduct. Tessler & Son, Inc., 203 N.J. Super. at 484.

Although all of the parties to this Motion recognize that New Jersey courts have held that waivers of subrogation and other exculpatory clauses in commercial leases or contracts are generally enforceable in a commercial setting, there are exceptions to that rule. Moving Br., at 7. As explained by the court in Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 580 (App. Div. 1955):

> Generally, the law does not favor a contract exempting a person from liability for his own negligence, as it induces a want of care. Although in disfavor, a promise not to sue for future damage caused by simple negligence may be valid; but an attempted exemption from liability for future intentional tort or willful act or gross negligence is generally declared to be void.

(citing 6 Williston on Contracts (rev. ed.), § 1751(b), p. 4964; 6 Corbin on Contracts, § 1472, p. 872; 12 Am. Jur., Contracts, § 183, p. 683; 17 C.J.S., Contracts, § 262, p. 644).

Although "[e]xculpatory clauses are more commonly upheld in the commercial context . . . [t]he clause cannot protect a party from its gross negligence nor can it be unconscionable . . .." Asch Webhosting, Inc. v. Adelphia Bus. Sols. Inv., LLC, 2007 WL 2122044, at *2 (D.N.J. July 23, 2007), aff'd, 362 Fed. Appx. 310 (3d Cir. 2010) (quotations omitted).[8] "Where the actions of the Defendant amount to gross negligence or an intentional tort, that single fact would supersede any contractual limitation on liability." Id. (quotations omitted) (emphasis added). In fact, courts in New Jersey have consistently upheld this notion that provisions in a contract cannot protect parties from their gross negligence. Morgan Home Fashions, Inc. v. UTI U.S., Inc., 2004 WL 1950370 (D.N.J. Feb. 9, 2004) (holding that an exculpatory clause cannot protect a party from its gross negligence, and where the actions of the defendant amount to gross negligence or an intentional tort, that single fact would supersede any contractual limitation of liability); Stelluti v. Casapenn Enterprises, LLC, 408 N.J. Super. 435 (App. Div. 2009) (holding that the exculpatory agreement does not and should not insulate dangerous conduct that is more culpable than ordinary negligence or carelessness); Ultimate Computer Services, Inc. v. Biltmore Reality Co., Inc., 183

[8] Copies of all of the unpublished opinions cited in the Memorandum were attached as Exhibit N to the Meola Cert.

N.J. Super. 144 (App. Div. 1982) (holding that the exculpatory clause in the contract excluding liability for damage or injury resulting from carelessness or negligence or improper conduct of the landlord or others, did not preclude liability against the landlord for damages alleged to have been caused by a defectively designed roof, and that exculpatory clauses should be strictly construed against a landlord that attempts to insulate itself from liability for its own fault); Hagan v. Pajet, 1991 WL 246944 (D.N.J. Nov. 4, 1991) (ruling that courts in New Jersey will not enforce an exculpatory clause when the parties to an agreement have unequal bargaining power, when it attempts to exculpate a party for its willful and wanton misconduct or an intentional tort, or when the cause is contrary to public policy); Carbone v. Cortland Realty Corp., 58 N.J. 366, 368 (1971) (holding that an exculpatory clause in a commercial lease should not be construed to exculpate a landlord for his negligence unless the clause expressly so states).

In the present matter, the Tenants allege that the Defendants ignored repeated warnings from the Hillsborough Township fire officials, and the recommendations from three different fire protection specialists strongly advising that the fire protection and water supply systems at the Property were "woefully deficient" and incapable of combating a fire thereby placing the tenants and property directly in harm's way. While the IRG Defendants dispute those assertions, there are issues of fact that exist so that the Court must accept Tenants' version of the facts and the arguments that flow therefrom at face value for the purpose of this motion.

The Tenants therefore argue that based on the above, including the undisputed facts set forth in their various Statements of Material Facts submitted in opposition to this motion, that "it is hard to imagine a more egregious set of circumstances to support a claim for gross negligence against Defendants than presented here." As such, the Tenants contend that the law in New Jersey effectively bars Defendants from seeking to enforce an exculpatory clause in an attempt to insulate themselves from obvious liability under the circumstances in these consolidated actions.

The Tenants assert that the inactions of Somerville Business Park in upgrading the Fire Suppression System, and specifically addressing the inadequacy in the water pressure to the system, amounted to willful and wanton conduct and/or gross negligence. In fact, the Defendants point out that Schedule 1 Lease agreement specifically contemplates an "upgrade [to the] sprinkler system". The Tenants submit that while Somerville Business Park may argue that it spent "millions" upgrading the sprinkler system at the Premises, they also claim that it knew full well that any of these "upgrades" were completely ineffectual without an increase in the Water Pressure supplying the Fire Suppression System. The Tenants also posit that it is well established that Somerville Business Park had full knowledge of the inadequacy of the Water Pressure suppling

the Fire Protection System having been advised on numerous occasions by the local Fire Marshal and its own Fire Protection Contractor, R.L. Dehn & Sons Fire Protection, Inc. American Insurance Plaintiff charges that instead of devising a solution to the inadequate Water Pressure, Somerville Business Park elected to intentionally ignore the inadequacies of the system with reckless disregard of the clearly likely injurious results of its conduct. Instead, they indicate that Somerville Business Park made completely ineffectual "upgrades" to the Fire Suppression System that had no practical effect on the adequacy of the Fire Protection System in the absence of an increase in Water Pressure.

The Tenants also argue that "a contract that releases liability from a statutorily-imposed duty" violates public policy. Hojnowski v. Vans Skate Park, 187 N.J. 323, 333 (2006). See also Chem. Bank of N.J. Nat'l Ass'n v. Bailey, 296 N.J. Super 515, 527 (App.Div.1997). ("Courts, however, will not enforce an exculpatory clause if the party benefiting from exculpation is subject to a positive duty imposed by law…").

The Tenants posit that the New Jersey Uniform Fire Safety Act incorporates the Uniform Fore Code. The subject building was inspected by Fire official John Yanko on September 10, 2014, and a Violation Notice was issued (Notice attached as Exhibit D). The Violation sheet notes violations with the Fire Alarm System, the Sprinkler system, and the Fire Hydrant. Consistent with their behavior in connection with the fire suppression system at this location since 2004, the defendants did nothing to correct these violations. The Tenants indicate that here, there is ample evidence, and certainly a question of fact to be decided by a jury, that the defendants failed to maintain the fire suppression system at the Somerville Business Park.

It is well-settled law that, when reviewing a motion for summary judgment, the court must "consider whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged dispute at issue in favor of the non-moving party." Brill v. The Guardian Life Ins. Co. of Amer., 142 N.J. 520, 540 (1995). Summary judgment is not appropriate if, even after evaluating the evidence in such light, there remains any genuine dispute which "would require submission of the issue" to the trier of fact. Id. at 536. The presence of a material fact dispute which could reasonably be resolved in more than one way by a jury is fatal to any motion for summary judgment.

In the present matter, the Court finds that there is adequate and viable evidence upon which a jury could easily conclude that Defendants acted with gross negligence or in a willful and wanton manner in causing Tenants' property damage in the fire. In the Court's view, whether the Moving

Defendants' actions rise to the level of gross negligence is a jury question which cannot be decided in a motion for summary judgment. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 367 (2016). The IRG Defendants argue that the subrogation clause that it seeks to enforce is not an "exculpatory type provision" so that the theory on which the Tenants base their argument is not applicable. The Court disagrees. The subrogation clause acts as an exculpatory clause in that it is designed to prevent one party from holding another party responsible for damages. As such, the law that is applicable to exculpatory clauses should also be applicable here.

Also, the IRG Defendants argue that if the Tenants did not have insurance, they would not be burdened by the subrogation provision and they would be able to sue the IRG parties based upon the theories espoused here without impediment. However, the subrogor insurance companies should be able to step into the shoes of their subrogee tenants and assert the same claims and defenses that their tenants could have raised. The IRG Defendants arguments in that regard are rejected. If the factfinder determines that the IRG Defendants acted recklessly or in an unlawful or wanton manner, in the Court's view, it would be inequitable and improper for the Moving Defendants to also be able to seek enforcement of the subrogation clause limitations. (See Point C Below)

As a result, Defendants' motion for summary judgment will be denied on that basis as well.

**C. DOES THE IRG DEFENDANTS' FAILURE TO DISCLOSE THE MATERIAL FACTS AS TO THE EXTRAORDINARY AND LONGSTANDING DEFICIENCIES IN FIRE PROTECTION AND SUPPRESSION AT THE PROPERTY VITIATE THE WAIVER OF SUBROGATION?**

In this Motion, the Tenants also argue that the IRG Defendants' failure to disclose the material facts concerning what it describes as "extraordinary and longstanding deficiencies in fire protection and suppression" cause a circumstance that should vitiate the waiver of the subrogation provision in the lease. The Court will analyze the Tenants' argument below.

1. Is the Waiver Rescinded Based on Intentional Failure to Disclose?

The Tenants also argue that material misrepresentations were made that the sprinkler system would be upgraded, and the extent to which the sprinkler system was deficient in its ability to protect the Premises. The various insureds of the Tenants allege that their insured relied upon those representations as well as the carrier who underwrote the risk to their detriment. See Certification of Nelson E. Canter, Esq. at ¶¶ 34-35. Moreover, they assert that their insureds were unaware of the clear deficiencies in the system, and had they been aware of these issues, would have not entered or renewed the lease agreement with Sommerville. See, id. Further, the Tenants

charge that Gary Greenstein had actual knowledge of the deficiencies in the sprinkler system as early as 2005, which, for instance, preceded even the initial 2006 lease agreement between GAIC's insured and Sommerville. See Certification of Nelson E. Canter, Esq. at ¶¶16-19, 23-31. Further, they posit that Gary Greenstein was an employee of IRG RA and therefore an agent of Somerville Business Park . It is axiomatic therefore that such knowledge is imputed to Somerville.

As a result, the Tenants submit that Somerville had a duty to GAIC's insured to properly manage and protect the property as promised in the lease and failed to do so and to have disclosed the material fact that it had grossly failed in performing that duty. The Tenants postulate that under the circumstances the Moving Defendants should not be permitted to use the Waiver of Subrogation in the Lease as a shield to protect it from liability. As such, the Tenants' position that the Waiver of Subrogation in the Lease should be rescinded based upon a material misrepresentations of material facts which GAIC's Insured relied upon to their detriment.

The Court finds that although the Tenants have raised colorable claims or arguments in this regard, this is certainly not an issue that can or should be decided by the Court in the context of this Motion. On the other hand, the issue is a viable issue and could possibly rise to the level of potentially vitiating the Waiver of Subrogation provisions.

As such, the argument raised by the Tenant presents another reason for the Court to deny summary judgment.

2. Because the Failure to Disclose Relates to Material Facts, the Waiver Should be Rescinded Even If Somerville Did Not Intend to Defraud Coriell or the Other Tenants?

The Tenants also advocate that, in addition, a misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). American Insurance, on behalf of Coriell, posits that the elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud. Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 625 (1981) Thus, the American Insurance Plaintiff advocates that whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther and includes instances of fraudulent misrepresentations which do not exist in the law. See id. (quotation omitted). The Tenants hypothesize that even if the "landlord" did not intentionally fail to disclose the long-standing deficiencies in the sprinkler system, as documented in the reports of their consultant and

the citations of the local Fire Chief, their actions are sufficiently material to warrant equitable relief. Thus, the American Insurance Plaintiff and the other Tenants urge that the Court find that in this instance, rescission of the Waiver of Subrogation would therefore bar its enforcement and require denial of the present Motion.

The Court finds that the Tenants again in this section have raised a colorable argument that, once all of the facts are presented, rise to the level espoused by the Tenants. The Court finds that this argument also rises to the level and presents a basis to deny the Plaintiff's Motion for summary Judgment.

**D. SHOULD DEFENDANT IRG RA'S MOTION FOR SUMMARY JUDGMENT BE DENIED BECAUSE THAT ENTITY DID NOT EXIST AT THE TIME OF CONTRACTING?**

In this action, extensive discovery and sworn deposition testimony has confirmed that Defendant IRG RA only came into existence as a result of a merger between Quadrelle and another property management company in 2013. (See Meola Cert., Exhibit B, Greenstein Dep. at 28:19 - 23 and 147:7-20). The lease between Pretium and Somerville containing the Waiver of Subrogation which Defendants seek to enforce was signed in 2010. (See Levy Cert., Exhibits F and K). Moreover, Defendants readily acknowledge that there were no 'lease amendments or extensions' which changed the Waiver of Subrogation clause set forth in the Pretium lease. (See Defendants' Statement of Material Facts, No. 29). Thus, Pretium argues that it is beyond dispute that Defendant IRG RA is not entitled to summary judgment under any circumstances against it because that entity did not exist at the time the Pretium lease was signed.

Pretium cites to the case of 760 New Brunswick Urban Renewal LLC v. Navigators Specialty Ins. Co., 2021 WL 287876 (D.N.J. Jan. 28, 2021) which it avers is particularly instructive to this matter. 760 New Brunswick involved a breach of contract dispute surrounding an insurance policy where the plaintiff sought to enforce the contract as a third-party beneficiary. Id. However, the insurer argued that the plaintiff could not possibly be a beneficiary to the policy because it did not exist at the time the policy was negotiated and issued. Id. at *4 (emphasis added). In agreeing with the insurer, the court found that when attempting to establish "status as a third party beneficiary" that party "must show that the benefit to [that party] was a consequence which the [contracting] parties affirmatively sought." Id. Consequently, in dismissing the claims, the court found that "at the time the [policy] was issued [the parties] could not possibly have intended that [the plaintiff] – a non-existent entity – be an intended beneficiary to that policy." Id. at *5.

The Court finds that here, because it is undisputed that IRG RA did not exist at the time the Pretium lease was signed, neither Pretium nor Somerville could have possibly intended for the lease to extend to IRG RA as an intended beneficiary. 760 New Brunswick Urban Renewal, LLC, supra. For that reason as well the Court will DENY IRG RA's motion for summary judgment.

**E. IS AGCS ENTITILED TO INDEMNIFICATION FROM IRG REGARDLESS OF ANY SUBROGATION WAIVER IN THE LEASE BETWEEN MSP AND SBP?**

In this Motion, AGCS also claims that it is entitled to indemnification from IRG regardless of any subrogation waiver in the lease between MSP and SBP (Somerville).

The waiver of subrogation in the lease between MSP and SBP does not bar claims for indemnification against IRG. AGCS argues that, to the contrary, the lease expressly recognizes each party's respective rights to seek indemnification from the other and contemplated that the actively negligent party would indemnify the other for liability claims asserted by third parties. AGCS theorizes that because AGCS seeks indemnification from IRG in this case solely for settlements of third-party liability claims (rather than for any first party losses of its insured), the waiver of subrogation and exculpation provisions are inapplicable to AGCS.

A commercial lease, like any contract, must be construed as a whole and the intentions of the parties gleaned from the entire agreement. Davanne Realty Co. v. Dial Corp., 2017 N.J. Super. Unpub. LEXIS 1549, at *7 (App. Div. June 23, 2017); D.H.M. Indus., Inc. v. Central Port Warehouses, Inc., 127 N.J. Super. 499, 505 (App. Div. 1973). The parties in a commercial lease are at liberty to allocate potential tort liability against them, even regardless of fault. Stier v. Shop Rite of Manalapan, 201 N.J. Super. 142, 150 (App. Div. 1985).

As a general rule, New Jersey law recognizes the enforceability of indemnification provisions in commercial leases, whether broad or restrictive indemnification provisions. Id. at 151. Whereas a "broad" indemnification provision provides for indemnification for any damage or injury that may occur during the parties' performance under their agreement, a "restrictive" indemnification provision typically contains specific reference to the indemnitor's fault or negligence and to the type of injury resulting from the indemnitor's acts or omissions for which indemnity is sought. Id. at 151-52. Ultimately, the court should seek to determine "the reasonably certain meaning of the language used, taken as an entirety, considering the situation of the parties and the operative usages and practices coupled with the objects the parties were striving to achieve". Id. at 151.

The lease between MSP and SBP contains what can be construed, at first blush, to be contradictory provisions. The lease contains detailed allocations of liability between them, as permitted by New Jersey law. Sections 14.3 and 14.4 contain mutual indemnity provisions, whereby the tenant and landlord each agree to indemnify the other for liability claims asserted by third parties resulting from their respective negligent acts or omissions. It is in this context that the Court must consider IRG's contention that the subrogation waiver provision in the lease bars the claim of AGCS. IRG points out that the provisions in issue are found in different paragraphs or sections of the lease and thus may not relate in any way to each other. However, the court must read the lease as whole and weigh the purposes of detailed indemnification provisions against the subrogation waiver. The Appellate Division concluded in Mayfair Fabrics v. Henley (on which IRG bases its motion), that the intent of a subrogation waiver and exculpation provision in favor of a landlord would be as follows:

> the sensible and reasonable construction of paragraph 28 is that each of the parties to the lease undertook at his own expense to secure adequate insurance against loss to his property from fire and, as between them, agreed to look to that insurance alone to recoup any loss and to relieve the other from liability for such loss even though caused by negligence, regardless of whether that liability should be asserted by the party for his own benefit or by his insurer seeking to enforce subrogation rights.

97 N.J. Super. 116, 124 (N.J. Super. 1967).

AGCS argues that applying the same rationale to the lease in effect between MSP and IRG, the subrogation waiver and exculpatory provision operate to place all risk and responsibility for loss or damage to MSP's property, as well as any consequential damages such as loss of income, upon MSP and its insurers. In accordance with this proposition, AGCS posits that MSP's complaint against IRG has not sought any recovery for the loss or damage to property suffered by MSP. In that sense, AGCS and MSP has given meaning to and is in accord with the Waiver of Subrogation provision. In fact, AGCS have asserted a claim in subrogation for the losses suffered by MSP to its property and business revenue *only against* co-Defendant Richard Coriell & Co., Inc., which is set out in the Second Count in its Complaint.

AGCS theorizes, however, that where MSP, as tenant, is exposed to liability to third parties on account of the negligent acts or omissions of SBP and/or the other IRG entities, the indemnity provisions in the lease apply rather than the waiver of subrogation and exculpatory provisions. Accordingly, they theorize that IRG is obligated "to indemnify, defend … reimburse, protect and hold harmless Tenant and all [persons and entities claiming through Tenant] from and against all

third party claims" arising from the landlord's negligence.[9] AGCS claims as the liability insurer of MSP, and therefore "through [the] Tenant" within in the meaning of the lease. Thus, AGCS posits that according to the plain language of the indemnity provision, the lease contemplated that the Tenant and parties claiming through the Tenant would have a direct right of indemnification from the landlord for liability claims asserted by third parties such as the customers of the tenant.

The courts of New Jersey and other jurisdictions have recognized the different scope of subrogation waivers and indemnity provisions in the same contract, where the subrogation waiver applies to a contracting party's own first party property loss, while the indemnity provision applies to the party's liability to third parties. See, e.g., Federal Ins. Co. v. Hartz Mountain Assoc., 2013 N.J. Super. Unpub. LEXIS 2924, at *11 (App. Div. 2013); see, also, Tokio Marine & Fire Ins Co. v. Employer's Ins. of Wausau, 786 F.2d 101, 105 (2d Cir. 1986); Trump-Equitable Fifth Ave. Co. v. H.R.H. Constr. Corp., 485 N.Y.S.2d 65, 67-68 (N.Y.A.D.), aff'd 488 N.E.2d 115, (N.Y. 1985). The Appellate Division in Federal Ins. Co. concluded that the waiver of subrogation rather than the indemnification provision governed, because the subrogated insurer was seeking to recover for the property damage loss of its insured, rather than for liability claims asserted by third parties, and because the lease at issue only provided for indemnification by the tenant against the landlord. 2013 N.J. Super. Unpub. LEXIS 2924, at *4-5, &*11. ACGS argues, however, that in this case, the lease contains mutual indemnification provisions, which requires the negligent party to indemnify the other for its liability to third parties. According to AGCS, it is that indemnification covenant for which it seeks recovery in this case.

The Court must interpret the lease contract provisions in a manner that gives meaning to the document as a whole without focusing on only one provision or part of a provision. In this case, the Plaintiffs ask the Court to focus on the Waiver of Subrogation provision which, if taken alone, would seem to preclude AGCS from pursuing any subrogation related claim. The Moving Defendants would have the Court ignore the indemnification provision and thereby give it no meaning as if it were excised from the agreement.

In fact, the logical extension of the Moving Defendants' argument would effectively emasculate the indemnification provision by giving it no meaning at all. Contract interpretations

[9] The exculpatory provision in the lease does not excuse the landlord's express indemnity obligation, especially where a commercial lease will not be construed to exculpate a landlord for its negligence unless the lease expressly so states. Carbone v. Cortlandt Realty Corp., 58 N.J. 366, 368 (1971). The exculpatory provision does not state that the landlord is excused for its own negligence, and the indemnity provision specifically requires it to indemnify the tenant for this party claims arising from the landlord's negligence.

principles require the Court to consider the contract document as a whole so that the terms are construed together, or in pari materia. Since these two types of provisions can be construed in a manner that gives each meaning, the Court is constrained to adopt such an interpretation. In fact, that is exactly what the Courts in the Federal Ins. Co. v. Hartz Mountain Assoc. case, cited above, found (as well as in the other cases cited above). AGCS Marine's claim is not for property damage sustained by its insured and instead is for claims of third party customers for damage to their goods and thus, in the Court's view, are not claims precluded by the subrogation provision. As such, the Court finds that the Waiver of Subrogation provision does not preclude AGCS's claim for indemnification against IRG.

Beyond the lease's express indemnification provision, AGCS asserts that it also has a common law right to indemnity that is not precluded by the subrogation waiver. Common law indemnity can apply where parties have a special relationship through which the actively negligent party must indemnify the party that is only vicariously liable. Among the relationships deemed "special" to support such common law indemnification are bailee/bailor, lessee/lessor, and insurer/insured. Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 189 (1986). In this case, insurer AGCS avers that it was obligated to indemnify its insured, MSP, for MSP's liability as bailee to its bailor-customers. As lessor, IRG similarly is obligated to indemnify its lessee and its lessee's insurer for liability payment to such bailor-customers.

In addition, when parties are not bound by express contractual provisions, it is possible for an aggrieved party to seek relief under a theory of common law indemnification. In that regard, it is well-settled that to establish a claim for common law indemnification, one must demonstrate that he was free of fault in the causing injury. Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 566, (1980); See also Adler's Quality Bakery, Inc. v. Gaseteria Inc., 32 N.J. 55, (1960).

Thus, as a general principle, indemnity may not ordinarily be obtained by a party who has been at fault. The general rule is set forth in Restatement, Restitution §96 at 418(1937): A person who, *without* personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability. This principle has been accepted in New Jersey. See Adler's Quality Bakery, Inc. v. Gaseteria, 32 N.J. 55, (1960); Daily v. Somberg, 28 N.J. at 385; Schramm v. Arsenal Esso Station, 124 N.J. Super. 135, 138, (App.Div.1973). However, it would be inequitable to permit an active wrongdoer in the absence of a contractual understanding between the parties to obtain indemnity from another wrongdoer and thus escape any responsibility. Cartel Capital Corp., supra, 81 N.J. 548 at 566.

The Court finds that AGCS is still also able to maintain a common law indemnification claim in this matter so long as they can reach the required level of poofs. The Waiver of Subrogation provision does not preclude AGCS's ability to continue with that part of its cause of action.

**F. SHOULD THE MOVING DEFENDANTS' MOTION BE DENIED BECAUSE IT IS SUBMITTED IN BAD FAITH?**

Great American submits that "This motion, the substance of which is a carbon copy of the prior Motion for Summary Judgment filed by the Moving Defendants previously returnable December 10, 2021, should be denied because it is filed in bad faith. They note that the First Motion was "inexplicably withdrawn" after each of the Plaintiffs with claims implicated by the Motion filed their respective opposition papers.[10] This Motion has now been refiled in an apparent effort by the Moving Defendants to either draw a different Judge to obtain a more favorable reading of their papers, or improperly obtain more time to prepare their reply papers.

Clearly, counsel for Moving Defendants knew that this Court was scheduled to retire, as the Court stated in a December conference following Moving Defendants' abrupt withdrawal of the first motion, and that this Court spent considerable time and judicial resources reviewing the papers, as he knew all parties were eagerly awaiting a decision in preparation for mediation. What the Moving Defendants were not aware of was that subsequently this Court was designated to return on a limited recall basis to handle matters like this one.

Great American argues that while not a technical violation of the Rules of Procedure, the Moving Defendants have made unfair use of the rules to the potential prejudice of the Plaintiffs should not be permitted by the Court and this Motion should be denied in its entirety.[11]

However, it is not clear to the Court whether the Moving Defendants withdrew their original Motion for the reasons that have been offered by AGCS. The IRG Defendants claim that they withdrew the motion for internal tactical reasons and not for reasons motivated by forum shopping and for the avoidance of this Court from hearing the matter. In any event, if that forum

[10] The Court must take judicial notice of its own docket in this respect. N.J.R.Evid. 201(b)(4) and (d).

[11] This Court would clearly have the "inherent power" to sanction the Moving Defendants for their machinations in this regard given the added burden and expense on the Court and opposing parties as a result. We leave that to the Court's discretion. See generally, Wolfe v. Malberg, 334 N.J. Super. 630 (App. Div. 2000). We further note that the withdrawal of the prior Motion occurred following the submission of the Opposition papers and as of the deadline for submission of Reply papers. This raises the strong inference that the Moving Defendants could not have adequately responded to the Opposition in a manner consistent with R. 1:4-8(a). The latter suggests that the present Motion is similarly frivolous and worthy of monetary or other sanctions. When all is said and done, the best sanction would be to deny the Motion outright.

shopping was the reason for the withdrawal, certainly the strategy failed. The Court finds that there would be minimal prejudice to AGCS and/or any of the other Tenants by simply having to refile the response papers again for this matter.

Therefore, the Motion to find the IRG Defendants in bad faith or to establish fees or costs are DENIED without prejudice.

## CONCLUSION

For the reasons set forth in the Court's opinion, the Defendants' Motion for Summary Judgment is DENIED WITHOUT PREJUDICE.

The Motion to find the IRG Defendants in bad faith or to establish fees or costs is DENIED WITHOUT PREJUDICE.

Plaintiff's Cross Motion for leave to amend its Complaint was WITHDRAWN during oral argument.