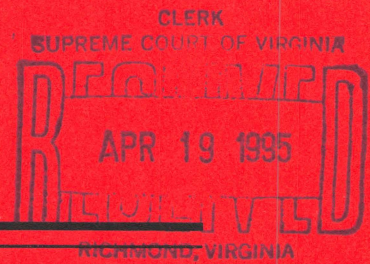


250 Va 290



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IN THE  
**Supreme Court of Virginia**

**AT RICHMOND**

**RECORD NO. 941926**

---

**CAPITAL PROPERTIES, INC.,**

*Appellant,*

**v.**

**VINA ENTERPRISES, INC.,**

*Appellee.*

---

**JOINT APPENDIX  
VOLUME ONE**

---

**Rodney F. Page  
Eric B. Bruce  
ARENT FOX KINTNER  
PLOTKIN & KAHN  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339  
(202) 857-6000**

*Counsel for Appellant*

**George H. Ragland, Jr.  
Mary Ellen Slugg  
RAGLAND AND KAWAMOTO, P.C.  
609 Park Avenue  
Falls Church, VA 22046-3273  
(703) 241-5573**

*Counsel for Appellee*



**TABLE OF CONTENTS**  
**VOLUME ONE**

	<b><u>Appendix Page</u></b>
<i>Motion for a Declaratory Judgment, filed February 17, 1994</i> .....	1
<i>Answer to Motion For a Declaratory Judgment, filed June 24, 1994</i> .....	7
<i>Final Judgment Order, entered September 12, 1994</i> .....	13
<i>Assignments of Error</i> .....	16
 <b><u>Transcript</u></b>	
<i>Excerpts of Transcript of Trial Proceedings before the Honorable William T. Newman, Jr., Judge, on August 2, 1994</i> .....	17
<i>Excerpts from Plaintiff's Opening Statement</i> .....	18
<i>Testimony of Gioan Nguyen</i> .....	19
<i>Direct Examination</i> .....	19
<i>Cross Examination</i> .....	67
<i>Redirect Examination</i> .....	157
<i>Recross Examination</i> .....	197
<i>Additional Evidence</i> .....	198
<i>Motion to Strike</i> .....	205
<i>Plaintiff's Response to Motion to Strike</i> .....	235
<i>Ruling by Court</i> .....	263

**TABLE OF CONTENTS**  
**VOLUME TWO**

**Appendix Page**

**Exhibits**

***Exhibits presented at Trial Proceedings before the Honorable  
William T. Newman, Jr., Judge, on August 2, 1994***

***Plaintiff's No.:***

<b><i>1-Lease Agreement, dated February 8, 1984, between Capital Properties, Inc. and Vina Enterprises, Inc. . . . .</i></b>	<b><i>268</i></b>
<b><i>2-Letter, dated August 14, 1984, from Donald M. Bloch . . . . .</i></b>	<b><i>301</i></b>
<b><i>3-Letter, dated August 9, 1993, from Gioan V. Nguyen . . . . .</i></b>	<b><i>302</i></b>
<b><i>4-Letter, dated October 5, 1993, from Norman Ebenstein . . . . .</i></b>	<b><i>305</i></b>
<b><i>5-Letter, dated October 5, 1993, from Darragh J. Davis . . . . .</i></b>	<b><i>307</i></b>
<b><i>6-Letter, dated October 5, 1993, from George H. Ragland, Jr. . . . .</i></b>	<b><i>308</i></b>
<b><i>7-Letter, dated October 8, 1993, from George H. Ragland, Jr. . . . .</i></b>	<b><i>310</i></b>
<b><i>8-Letter, dated October 13, 1993, from George H. Ragland, Jr. . . . .</i></b>	<b><i>312</i></b>
<b><i>9-Unlawful Detainer, Copy Teste . . . . .</i></b>	<b><i>318</i></b>
<b><i>10-Letter, dated December 1, 1993, from George H. Ragland, Jr. . . . .</i></b>	<b><i>320</i></b>
<b><i>11-Letter, dated December 20, 1993, from Norman Ebenstein . . . . .</i></b>	<b><i>322</i></b>
<b><i>12-Letter with enclosure, dated December 22, 1993, from George H. Ragland, Jr. . . . .</i></b>	<b><i>325</i></b>
<b><i>13-Letter, dated December 28, 1993, from Darragh J. Davis . . . . .</i></b>	<b><i>330</i></b>

<i>14-Series of correspondence in March, 1994, between George H. Ragland, Jr. and Darragh J. Davis . . . . .</i>	<i>331</i>
<i>15-Letter, dated January 3, 1994, from Gioan Nguyen . . . . .</i>	<i>338</i>
<i>16-Letter, dated January 27, 1994, from George H. Ragland, Jr. . . . .</i>	<i>341</i>
<i>19-Handwritten estimate of time spent in litigation . . . . .</i>	<i>342</i>
<i>20-Attorney's fee summary and affidavit with corresponding invoices . . . . .</i>	<i>344</i>
<i>21-Letter, dated January 26, 1990, from Norman Ebenstein . . . . .</i>	<i>376</i>
<i>22-Rent payments from Vina Enterprises . . . . .</i>	<i>377</i>
<i>23-Letter, dated March 22, 1994, from Norman Ebenstein . . . . .</i>	<i>402</i>
<i>24-Letter, dated March 30, 1994, from George H. Ragland, Jr. . . . .</i>	<i>403</i>
<i>25-Barbers License Transcript, Hoang Tho Van, July 27, 1994 . . . . .</i>	<i>407</i>
<i>26-Barbers License Transcript, Hoang Nam Quoc, July 27, 1994 . . . . .</i>	<i>408</i>
<i>27-Photographs . . . . .</i>	<i>409</i>
<i>28-Lease Agreement, dated May, 1985, between Vina Enterprises, Inc. and Frederick Mark . . . . .</i>	<i>411</i>
<i>29-Two Letters, dated October 22, 1985 and December 3, 1985, respectively, from George H. Ragland, Jr. . . . .</i>	<i>420</i>
<i>30-Letter, dated December 12, 1985, from Arthur L. Moshos . . . . .</i>	<i>422</i>
<i>31-Eden Shopping Center Advertisement . . . . .</i>	<i>424</i>
<i>32-Series of letters, dated March to April, 1994, from Gioan V. Nguyen . . . .</i>	<i>426</i>
<i>33-Series of letters, written in Vietnamese, from Gioan V. Nguyen . . . . .</i>	<i>468</i>



<b>34-Photographs</b>	<b>479</b>
<b>35-Letter, dated March 22, 1994, from Norman Ebenstein</b>	<b>481</b>
<b>36-Letter, dated April 6, 1994, from Norman Ebenstein</b>	<b>482</b>
<b>37-Defendant's Responses to Plaintiff's First Set of Requests for Admissions, dated July 15, 1994</b>	<b>484</b>
<b>38-Letter, dated June 26, 1994, from Darragh J. Davis</b>	<b>502</b>
<b>39-Letter, dated May 31, 1994, from George H. Ragland, Jr.</b>	<b>503</b>

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

VINA ENTERPRISES, INC.,  
a Virginia corporation,

Plaintiff,

v.

CAPITAL PROPERTIES, INC.,  
a Delaware corporation,  
A/K/A CAPITAL COMMERCIAL  
PROPERTIES, INC.,  
Serve: R/A Robert W. Bendall  
9253 Lee Avenue  
Manassas, Virginia 22110

Defendant.

At Law No.

94-192

FILED

FEB 17 1994

DAVID A. BELL, Clerk  
Circuit Court Arlington County, Va  
By Deputy Clerk

MOTION FOR A DECLARATORY JUDGMENT

COMES NOW the Plaintiff in the within matter and moves this Court for a declaratory judgment ascertaining the rights of the parties herein and in support thereof alleges and says as follows:

1) That on or about February 8, 1984, the Plaintiff as "Tenant" and the Defendant as "Landlord" did enter into a certain commercial lease for approximately 22,020 square feet of ground floor area located in the Plaza Seven Shopping Center located in the City of Falls Church and the judicial district of this Court; that a complete copy of the lease in question is attached hereto as Exhibit "1" and by this reference made a part; that subsequent thereto in accordance with paragraph number 2 of said lease, the parties did enter into a supplemental instrument setting forth the term of this lease, the commencement and the expiration dates and such other information as is necessary to constitute a Short Form



Lease; that a copy of said Short Form Lease is attached hereto as Exhibit "2" and by this reference made a part.

2) That by its terms, this 10 year lease will end on the 26<sup>th</sup> day of September, 1994 unless options to extend the lease are exercised pursuant to paragraph 34 (a) et seq. of the aforesaid lease.

3) That prior to October 5, 1993, the "Tenant" did give notice pursuant to paragraph 34 of the aforesaid lease of its intent to renew the lease under the terms and conditions therein set forth; that at the time of giving said notice, there was no notice of default then pending of any kind pertaining to this lease.

4) That on or about October 5, 1993, the Defendant herein did give notice to the Plaintiffs herein to cure certain alleged defaults within the time specified in the lease or to lose possession thereof; that a copy of said Notice to Quit is attached hereto as Exhibit "3" and by this reference made a part; that on the same day as the Notice to Quit, counsel for the Defendant herein gave notice in writing to the Plaintiff herein that the purported exercise of their option to renew issued on or about August 9, 1993 was not recognized as a valid exercise of the option due to the alleged defaults contained in the Notice to Cure or Quit, Exhibit "3"; that a copy of said letter is marked as Exhibit "4" and by this reference made a part.

5) That within the time specified in the original Notice, the Plaintiff herein did:

a) request a specific amount that it was demanded to pay, including an itemization thereof;

b) immediately issued a notice to the "Tenant" in possession, alleged to be practicing law, to cease and desist or quit.

That the following action was taken by the Plaintiff pursuant to the notice:

a) within 2 days of the receipt of a written itemization of the amount alleged to be due and owing, the Plaintiff did pay said funds, thus curing any alleged default with respect to payment;

b) within the time to cure other defaults, the Plaintiff did file an Unlawful Detainer requesting possession of the premises and eviction of its Subtenant alleged to be breaching the Defendant's lease; that at the trial of the Unlawful Detainer, the Plaintiff did obtain possession of the premises, thus removing from the premises the "Tenant" alleged to be practicing law.

6) That at all times relevant herein, the Defendant was notified of the actions of the "Tenant" to comply with the cure or quit notice, Exhibit "3", and possession was finally gained through court action; that the Defendant herein has never acknowledged in writing that the original notice of exercise of renewal option has



been accepted and that the lease was extended.

7) That on or about January 3, 1994, the "Tenant" did again give official notice of its intention to extend the lease under paragraph 34, that a copy of said Notice is attached hereto as Exhibit "5" and by this reference made a part; that subsequent to that date, the Defendant and his legal representative have been repeatedly requested to advise the "Tenant" whether his lease extension is considered by the Defendant properly and effectively made.

8) The lease provides that at the termination of the lease, that the "Tenant" will remove from the property and that if it fails to do so, that it will be deemed a "Tenant" at sufferance and will be required to pay double rent; that substantial and irreparable harm will occur to the "Tenant" if it cannot determine whether its lease is properly and timely extended.

9) That this Court has jurisdiction under Title 8.01-184 of the Code of Virginia of 1950 as amended, et seq., to issue a declaratory judgment declaring whether or not the lease of the Plaintiff herein has been pursuant to the lease extended, and whether the Plaintiff and Defendant are bound under the terms of the lease for an additional period of time as provided in paragraph number 34 of the lease.

10) Depending upon the court's ruling, the Plaintiff herein will either have to remove the various Subtenants having leases with it at the termination of the original lease or will want to extend the leases of his Subtenants should its renewal period be in


effect; that the removal of some of its Subtenants may in of itself require legal action which cannot be undertaken until such time as the Plaintiff has a declaratory judgment stating its and the Defendant's rights and liabilities.

11) That to the extent that declaratory judgment provisions provide for or allow an award of damages resulting from the Defendant's refusal to acknowledge a proper exercise of the option of the "Tenant", and to the extent that the Plaintiff prevails herein, the Plaintiff requests an award of all of its costs including its attorney's fees.

WHEREFORE the Plaintiff prays that the Court declare that the lease contained in Exhibit "1" pursuant to paragraph 34 of said lease has been properly extended for an additional period of 5 years commencing upon the expiration date of the original term and expiring 5 years after the commencement date; that the Court award such costs, including costs of bringing this action and attorney's fees, as will be proper and appropriate to reimburse the Plaintiff for all expenses associated with obtaining this relief, the said refusal to acknowledge the renewal being in the nature of a breach of contract entitling the Plaintiff to such an award, and for such other and further declarations and judgments as shall be appropriate to give full relief of the pleadings herein alleged.

VINA ENTERPRISES, INC.  
By Counsel


RAGLAND AND KAWAMOTO, P.C.

By:   
George H. Ragland, Jr., VSB #6238  
609 Park Avenue  
Falls Church, Virginia 22046  
(703) 241-5573  
Counsel for Plaintiff



**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a true copy of the foregoing Motion was mailed, first-class mail, postage prepaid, this the 15<sup>th</sup> day of February, 1994, to Robert W. Bendall, Registered Agent for Capital Properties, Inc., a/k/a Capital Commercial Properties, Inc., 9253 Lee Avenue, Manassas, Virginia 22110.

  
A handwritten signature in black ink, appearing to read "George H. Ragland, Jr.", is written over a horizontal line.

GEORGE H. RAGLAND, JR., ESQUIRE

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

VINA ENTERPRISES, INC.  
a Virginia Corporation,

Plaintiff,

v.

CAPITAL PROPERTIES, INC.,  
a Delaware Corporation  
A/K/A CAPITAL COMMERCIAL  
PROPERTIES, INC.

Serve: R/A Robert W. Bendall  
9253 Lee Avenue  
Manassas, Virginia 22110

Defendant.

At Law No. 94-192

**RECEIVED**

JUN 24 1994

DAVID A. BELL, CLERK  
Arlington County Circuit Court

By MR Deputy Clerk

ANSWER TO MOTION FOR A DECLARATORY JUDGMENT

COMES NOW the Defendant, Capital Commercial Properties, Inc., by counsel, and responds as follows to the Motion for a Declaratory Judgment filed herein:

1. Defendant admits that Landlord and Tenant entered into a Lease dated on or about February 8, 1984 for approximately 22,020 square feet of ground floor area located in the Plaza Seven Shopping Center in the City of Falls Church and the judicial district of this Court and that a partial copy of the lease referenced is attached to the Motion for Declaratory Judgement (some portions are omitted) as Exhibit 1 and that a Commencement Date was thereafter established. All other allegations of Paragraph 1 are denied.

2. The allegations of Paragraph 2 are denied.

3. Defendant admits that Tenant made an attempt to give notice of its intent to renew the Lease prior to October 5, 1993. All other allegations of Paragraph 3 are denied.



4. Defendants admits that it gave notice on or about October 5, 1993 of certain defaults and that a copy of that notice is attached to the Motion for Declaratory Judgement as Exhibit 3. Defendant affirmatively states that the notice speaks for itself. All other allegations of Paragraph 4 are denied.

5.(a) Defendant admits the allegations of 5(a).

5.(b) Defendant is without sufficient information to admit or deny the allegations of subparagraph (b), and therefore denies all such allegations with a demand for strict proof of these allegations.

5.(a) (sic in Motion for Declaratory Judgement.) Defendant admits that Plaintiff paid certain funds following receipt of a written itemization, but is without sufficient information to admit or deny the precise timing of the payment, and therefore, denies such allegations with a demand for strict proof thereof. Defendant denies all other allegations of the second subparagraph (a)

5.(b) (sic in Motion for Declaratory Judgement.) Defendant admits that Plaintiff advised Defendant that it had filed an unlawful detainer requesting possession of the premises and eviction of its Subtenant and that Plaintiff had obtained possession of the premises at the trial of the unlawful detainer, but Defendant's knowledge of those facts is based upon statements of the Plaintiff made prior to receipt of the Motion for a Declaratory Judgement. All other allegations of subparagraph 5(b) are denied.

6. Defendant admits the allegation of Paragraph 6 that it received notice of the action Plaintiff stated it was taking relevant to Exhibit 3, but is without sufficient information to admit or deny precisely how possession was finally gained, except through Plaintiff's prior statements. Plaintiff further admits that it did not acknowledge in writing that the original notice of exercise of renewal option had been accepted or that the Lease was extended. To the extent that Paragraph 6 contains any other allegations, they are denied.

7. Defendant admits that on or about January 3, 1994 Tenant purported to give another notice of its intention to extend the Lease, that a copy of the purported notice is attached to the Motion for Declaratory Judgment, and that Defendant and his legal representative have been asked on one occasion since that time whether the Lease extension was considered to be properly and effectively made. All other allegations of Paragraph 7 are denied.

8. The first clause of Paragraph 8 purports to summarize a Lease that speaks for itself and therefore no response is required. To extent that any response is deemed required to the first clause of Paragraph 8, it is denied as framed. All other allegations of Paragraph 8 denied.

9. Defendant admits that this Court has jurisdiction under VA CODE § 8.01-184 to issue a declaratory judgment per se, but denies all other allegations of Paragraph 9 including without limitation the alleged scope of the order the Court may enter.

10. Defendant is without sufficient information to admit or deny the Plaintiff's intentions with respect to its subtenants at this time, and Defendant is further without sufficient information to admit or deny whether any removal of some of the subtenants may require legal action. Therefore, all allegations of Paragraph 10 are denied and strict proof thereof demanded.

11. The allegations of Paragraph 11 are a conditional statement of conclusions of law to which no response is required. To the extent that any response is deemed required, all allegations of Paragraph 11 are denied.

#### **AFFIRMATIVE DEFENSES**

1. The Plaintiff's claims are barred by the doctrine of estoppel.

2. The Plaintiff's claims are barred by fraud.

3. The Plaintiff's claims are barred by failure of consideration.

4. The Plaintiff's claims are barred by the doctrine of release.

5. The Plaintiff's claims are barred by the doctrine of waiver.

6. The Plaintiff's claims are barred by its prior breaches of the lease and its having been in default at all times it attempted to exercise its option.

7. Defendant intends to rely upon any and all defenses as may become known later through discovery or evidence adduced at trial.

WHEREFORE the Defendant respectfully requests that this Court enter an order dismissing the Plaintiff's Motion for a Declaratory Judgement, declaring that there has been no valid exercise of an option, that the Lease will terminate and possession be surrendered on or about September 27, 1994 or at such later time as the parties may agree to place in the Order, and awarding to Defendant its costs and attorneys fees in this behalf expended.

Respectfully Submitted,

CAPITAL COMMERCIAL PROPERTIES, INC.

By Counsel

ARENT FOX KINTNER PLOTKIN & KAHN  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
(202) 857-6000

By: 

Rodney F. Page VSB #12402  
Darragh J. Davis, VSB #19992  
Brian D. Sullivan, VSB #35268

Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of June 1994,  
Plaintiff's Answer and Grounds of Defense was hand delivered via  
messenger to:

George H. Ragland, Jr.  
Ragland & Kawamoto, P.C.  
609 Park Avenue  
Falls Church, VA 22046-3273  
Counsel for Plaintiff

  
\_\_\_\_\_  
Darragh J. Davis



2/12/94

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

VINA ENTERPRISES, INC.,

Plaintiff,

v.

CAPITAL PROPERTIES, INC.  
a Delaware corporation,  
A/K/A CAPITAL COMMERCIAL  
PROPERTIES, INC.

Defendant.

At Law No. 94-192

ORDER

THIS MATTER came on to be heard on the Plaintiff's Motion for Declaratory Judgment, upon the Defendant's Answer and Affirmative Defenses filed herein, upon the evidence presented by the Plaintiff, the Defendant electing to present no evidence, and upon argument of Counsel.

WHEREUPON, after the Plaintiff presented all of its evidence in support of its Motion for Declaratory Judgment, the Defendant moved to strike the Plaintiff's case, and same was argued by Counsel; the Court being of the opinion that the Defendant's Motion ought to be denied; and

WHEREUPON, Defendant requested the Court to construe the lease based on the evidence before the Court and to make its decision with respect to the Declaratory Judgment, the Defendant electing to put on no evidence; and

IT APPEARING TO THE COURT that after construing the lease and considering the evidence presented herein, that the Plaintiff is

entitled to a Declaratory Judgment finding and declaring that the lease, the subject of this matter, is extended for an additional five year term, commencing on September 27, 1994 and ending September 26, 1999, unless further extended pursuant to the lease provisions; and

IT FURTHER APPEARING TO THE COURT that the Plaintiff is entitled to an award of attorney's fees from the Defendant in the amount of TWENTY SIX THOUSAND NINE HUNDRED SIXTY TWO AND 65/100 DOLLARS (\$26,962.65); it is therefore

ORDERED that the Motion to strike the Plaintiff's evidence and issue a summary judgment in favor of the Defendant be, and the same hereby is, denied; and it is further

ORDERED and declared by this Court that the lease dated February 8, 1984 for lease of commercial property entered into by and between the Plaintiff, as Tenant, and Defendant, as Landlord, for approximately 22,020 square feet of ground floor area, located in Plaza Seven Shopping Center in the City of Falls Church, has been, and by this Order, is declared to have been extended pursuant to the lease by and between the parties and as determined by the Court after hearing the evidence; that the extension shall become effective at the expiration of the initial lease, which shall be on September 27, 1994 and that the termination date of said lease, unless further extended pursuant to the lease agreement, shall be September 26, 1999; and it is further

ORDERED that the Plaintiff's attorney's fees in the amount of TWENTY SIX THOUSAND NINE HUNDRED SIXTY TWO AND 65/100 DOLLARS (\$26,962.65) be paid by the Defendant.

AND THERE BEING NOTHING FURTHER FOR THIS COURT TO DO HEREIN,  
THIS MATTER IS DECLARED ENDED.

ENTERED this 6th day of September, 1994.

William I Newman  
Judge

I ASK FOR THIS:

RAGLAND AND KAWAMOTO, P.C.

BY: Mary Ellen Slugg  
GEORGE H. RAGLAND, JR., VSB NO. 6238  
MARY ELLEN SLUGG, VSB NO. 28312  
609 Park Avenue  
Falls Church, Virginia 22046  
(703) 241-5573  
Counsel for Plaintiff

SEEN AND OBJECTED TO:

ARENT FOX KINTNER PLOTKIN & KAHN

BY: Rodney F. Page  
RODNEY F. PAGE, VSB NO. 12402  
1050 Connecticut Avenue, N.W.  
Seventh Floor  
Washington, D. C. 20036-5339  
(202) 857-6000  
Counsel for Defendant

### ASSIGNMENTS OF ERROR

The court below erred in holding that Vina Enterprises, Inc., a tenant in a shopping center owned by Capital Properties, Inc., had properly renewed its lease for an additional five year term, because the court relied on an incorrect reading of the lease, in that:

1. The court below held that the lease in this case was ambiguous, when it plainly is not;
2. The court below held that the lease in this case required that the landlord give prior notice of default to the tenant before relying upon its right to reject the tenant's option to renew, despite the absence of any provision for notice of default under these circumstances in the lease; and
3. The court below failed to enforce the non-waiver clause in the lease, which preserved the landlord's right to object to the renewal.

941926

ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT  
FOR THE COUNTY OF ARLINGTON

VINA ENTERPRISES, INC.,

Plaintiff,

vs.

CAPITAL PROPERTIES, INC.,  
a.k.a. CAPITAL COMMERCIAL PROPERTIES,  
INC.,

Defendant.

AT LAW NO. 94-192

CLERK  
SUPREME COURT OF VIRGINIA

RECEIVED  
DEC - 5 1994  
RICHMOND, VIRGINIA

Arlington, Virginia

Tuesday, August 2, 1994

The hearing commenced at 10:38 o'clock, a.m.

BEFORE:

The Honorable William T. Newman, Jr., Judge

APPEARANCES:

FOR THE PLAINTIFF:

GEORGE H. RAGLAND, JR., ESQ.  
MARY ELLEN SLUGG, ESQ.  
Of: Ragland and Kawamoto, P.C.  
609 Park Avenue  
Falls Church, Virginia 22046

Reported by: Hal G. Mann

LASER REPORTING  
(703) 471-7603  
46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165





On August 9, 1993, 13 months before the lease was ended, the facts will show that the tenant exercised its first option to extend. We will show that on that date, this is what the landlord knew.

The landlord knew that a law firm was operating there and knew that for some time prior to August 9. The landlord knew that there was a travel agency operating there and had known it for some time prior.



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Q. Would you please state for the Court your name and your connection with the plaintiff in this case?

A. Good morning, Your Honor. My name is Gioan Nguyen. I am the president of Vina Enterprises.

Q. Were you the president in 1984, when a lease was entered into by and between the parties?

A. Yes, I was.

Q. What was the purpose of Vina entering into a lease with the defendant, Capital Properties, Inc.?

A. Okay. We planned to subdivide the space

**LASER REPORTING**  
**(703) 471-7603**  
**46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165**

1 into small store, I mean, a mini-mall-type thing, to  
2 target the Indochinese customer in the metropolitan  
3 area.

4 Q. Does the lease in article 32 of your lease  
5 recognize the undertaking that you have just  
6 described?

7 A. Yes, it does.

8 Q. You have your set of the exhibits,  
9 correct?

10 A. Yes, I do.

11 MR. RAGLAND: This is exhibit one.

12 (The document referred to was  
13 previously marked as Plaintiff's  
14 Exhibit No. 1 for Identification.)

15 BY MR. RAGLAND:

16 Q. Would you turn to exhibit one and tell  
17 me -- okay.

18 MR. RAGLAND: Perhaps we can stipulate  
19 this. Do you stipulate this is the lease?

20 MR. PAGE: So stipulated, Your Honor.

21 MR. RAGLAND: All right.

22 MR. PAGE: The only point I would make,  
23 Your Honor -- I have not looked at this copy. A lot

1 of the copies we have been using -- this one looks  
2 pretty good -- have the lines chopped off here and  
3 there. And I would just call that to your attention.

4 Subject to that, I have no problem with  
5 this.

6 MR. RAGLAND: We tried to reduce it so  
7 that nothing got chopped off.

8 THE COURT: All right.

9 (The document marked Plaintiff's  
10 Exhibit No. 1 was received in  
11 Evidence.)

12 BY MR. RAGLAND:

13 Q. Did the lease provide that a commencement  
14 date would be delayed?

15 A. Yes, it did.

16 Q. And did it provide that a document would  
17 be signed after the lease had in fact been executed  
18 to identify when the commencement date was?

19 A. Yes, it does.

20 MR. RAGLAND: This is exhibit two.

21 (The document referred to was  
22 previously marked as Plaintiff's  
23 Exhibit No. 2 for Identification.)

1 BY MR. RAGLAND:

2 Q. Would you turn to exhibit two?

3 MR. RAGLAND: Do you stipulate that?

4 MR. PAGE: Well, I have no objection to  
5 its admissibility.

6 THE COURT: All right.

7 (The document marked Plaintiff's  
8 Exhibit No. 2 was received in  
9 Evidence.)

10 BU MR. RAGLAND:

11 Q. All right. Mr. Nguyen, are you looking at  
12 exhibit two?

13 A. Yes, I am.

14 Q. Can you tell this Court, based on what is  
15 written there, when the commencement date was?

16 A. Okay. This letter provided that the --

17 Q. No. Just tell the Court when the  
18 commencement date was.

19 A. The commencement date was September 27,  
20 1984.

21 Q. And, therefore, when will the termination  
22 date be, if the lease is not extended pursuant to  
23 your extension?



1           A.     It will be September 26, 1994.

2                     (The document referred to was  
3                     previously marked as Plaintiff's  
4                     Exhibit No. 3 for Identification.)

5           BY MR. RAGLAND:

6           Q.     I ask you to turn to exhibit three.

7           A.     (Witness complies.)

8           Q.     Are you there?

9           A.     Yes, I am.

10          Q.     Did there come a time when you, on behalf  
11     on Vina Enterprises, noticed the landlord of your  
12     intent to exercise the option?

13          A.     Yes, I did.

14          Q.     Do you recognize the document marked as  
15     exhibit three?

16          A.     Yes. That's my letter to the landlord.

17          Q.     Do you recognize the documents that are  
18     below the letter?

19          A.     Yes.

20          Q.     What are they?

21          A.     They are the certified mail receipts.

22          Q.     In addition to the landlord, who else did  
23     you send the notice to?

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1           A.    Okay.  I send the notice also to Mr.  
2   Donald Block (phonetic), the legal counsel for the  
3   landlord in Boston, Massachusetts.

4           Q.    How was he connected with this lease?

5           A.    He was the person who prepared the lease  
6   for the landlord.

7           Q.    And over the years, had you had  
8   correspondence with him, the landlord's attorney?

9           A.    Yes, I did, several times.

10          Q.    Did you draft the words of any of the  
11   paragraphs in the lease?

12          A.    No, I did not.

13          Q.    On August 9, 1993, when you exercised this  
14   option, were you in compliance, to your knowledge,  
15   with each and every paragraph of the lease?

16          A.    Yes, I did.

17          MR. RAGLAND:  Your Honor, I offer exhibit  
18   three.

19          MR. PAGE:  No objection.

20          THE COURT:  Three will be accepted.

21                   (The document marked Plaintiff's  
22                   Exhibit No. 3 was received in  
23                   evidence.)

1 BY MR. RAGLAND:

2 Q. Are you familiar with each of the  
3 paragraphs as part of the duties imposed upon you as  
4 a tenant?

5 A. Yes, I do.

6 Q. Are you familiar with the provisions in  
7 the lease that call for payments of rent?

8 A. Yes, I do.

9 Q. On August 9, was there any rent that was  
10 outstanding, that you know of?

11 A. No, there was not.

12 Q. Had you done a complete analysis of  
13 payments made by you over the past nine years prior  
14 to that time?

15 A. Yes, I did.

16 Q. Did you determine what, if any, amount  
17 either the landlord owed you, or you owed the  
18 landlord?

19 A. Yes, I did.

20 Q. What did you determine?

21 A. I determined that I overpaid the landlord  
22 \$11,000. And also, the landlord agreed with me that  
23 I overpaid for two checks, about \$28,000 that time.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 So in total, I have an overpayment of \$28,000 plus  
2 \$11,000 at that time.

3 Q. That was on August 9, 1993?

4 A. Yes, by that time.

5 Q. So as of that date, if in fact you owed  
6 any late fees, was there more money paid into the  
7 landlord than those late fees would require you to  
8 pay?

9 A. Yes. I overpay a lot. Yes.

10 Q. As of August 9, were you aware that  
11 extermination of all your restaurants was required?

12 A. Yes. I knew about that.

13 Q. And how many restaurants were in your  
14 mini-mall?

15 A. I have three restaurants.

16 Q. To your knowledge, were there monthly  
17 exterminations of each of those restaurants?

18 A. Yes. I knew about that.

19 Q. So as of that date, August 9, there was no  
20 instance where you were in default on August 9 of  
21 having monthly exterminations.

22 A. Yes. I know about it.

23 Q. When you first entered into this lease,

1 were you aware of an insurance requirement?

2 A. Yes, I did.

3 Q. And what did you do to fulfill that  
4 requirement?

5 A. We bought insurance policy to cover even  
6 more than the lease required. The lease required  
7 that I would buy \$1 million liability cover. I  
8 bought \$2 million.

9 And also -- okay. That's what the lease  
10 required, and --

11 Q. Did you require your insurance company to  
12 give a certificate proving your insurance to your  
13 landlord?

14 A. Yes. I did it from day one.

15 Q. From day one.

16 A. Yes, from the beginning of the lease.

17 Q. As of August 9, 1993, was there a policy  
18 in effect covering the property?

19 A. Yes. There was one.

20 Q. Had you received any notification from  
21 anyone that the required certificate was not in the  
22 landlord's possession?

23 A. No, I did not.

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1 Q. Did you, the tenant, in August or any time  
2 in that year, advertise as the tenant for the  
3 shopping center mini-mall that you had leased?

4 A. Yes, I did.

5 Q. When you advertised, did you include the  
6 words "Plaza Seven"?

7 A. Yes. I always did.

8 Q. On August 9, were you aware that any of  
9 the other tenants in the shopping center, or even  
10 your subtenants, had advertised to the contrary?

11 A. No, I did not.

12 Q. How many Vietnamese newspapers are there  
13 in this area?

14 A. There are about nine or ten.

15 Q. Prior to August 9, did you have a written  
16 waiver from the landlord, waiving the right to  
17 collect rent by the first of the month, as far the  
18 late fee is concerned?

19 A. Yes, I did.

20 Q. What did you have in your possession? Do  
21 you know? What written document did you have?

22 A. I have a letter from the landlord, sent  
23 out to everybody in the shopping center, allowed each



1       tenant to pay rent within ten days of this month.

2               Q.     Prior to June of 1992, did there come a  
3       time when the landlord asked or required you to pay  
4       on means other than regular check?

5               A.     Yes.   There was a different arrangement.

6               Q.     Why is that?

7               A.     Because sometimes -- one time, the check  
8       that I paid to the landlord was bounced, because many  
9       checks I receive from my tenants, my subtenants, was  
10      bounced.

11              So I talked to -- and the landlord gets  
12      really upset about that and have Mr. Davenport, the  
13      lawyer for the landlord, to send letter to me and ask  
14      for payment of the bounced check.

15              I did do that.   And, also, I brought the  
16      difficulty I have with my landlord, where many checks  
17      I receive from the tenant take at least a week to  
18      clear, and many checks was not clear.   And I asked  
19      him more time to send the check to the landlord.   He  
20      wanted to cash the check.

21              And I said, "I need more time to get  
22      cashed checks.   And to remedy that, I will" -- I  
23      suggested to him that, "Okay, we will send the cashed

1 check by express mail to you whenever the money clear  
2 from our bank."

3 And they say, "Okay. Try to do that, but  
4 no later than the 15th of each month."

5 And we did that for many, many years.

6 Q. Between June of 1992 and through August 9,  
7 1993, did you pay in accordance with the procedure  
8 that you just described?

9 A. Yes. I did exactly what I agreed.

10 Q. Who, if anyone, in the company said that  
11 that procedure was acceptable?

12 A. First I -- when I met Mr. Davenport, I  
13 talked to him. And then after that, I get  
14 confirmation and discuss with Daphne Shaw, who  
15 handled the bookkeeping and everything for the  
16 landlord.

17 Q. Do you know if she was an officer of the  
18 corporation?

19 A. Yes. By the letter, everything, she was  
20 the secretary of the corporation at that time.

21 Q. And for the entire time that you made  
22 these payments, did you ever receive any inquiry of  
23 the landlord about paying in that fashion?

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1           A.    No.  I did not get any objection or  
2 anything about that.

3           Q.    Did you believe that on the periods that  
4 we are discussing now, June of 1992 through August 9,  
5 1993, that you had permission to pay in that fashion?

6           A.    Yes, I believe so.

7           Q.    Are you aware that there are certain  
8 requirements in the lease for fire equipment in  
9 restaurants?

10          A.    Yes, I do.

11          Q.    Had you, prior to August 9, made any  
12 inquiries of the fire marshal of the City of Falls  
13 Church as to what their procedures and inspection  
14 policies were?

15          A.    Yes.  I met the fire marshal on several  
16 occasions.

17          Q.    Prior to August 9?

18          A.    Prior to, yes.

19          Q.    And as a result of that meeting, did you  
20 expect to receive notice of any violations, if in  
21 fact one occurred?

22          A.    Yes.  I did talk to the fire marshal.

23                "In case you find any violations, fire

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1 violations, please let me know. I'll work with you  
2 to, you know, take care of that."

3 Q. Prior to August 9, 1993, had you received  
4 any notice of violation of any of that equipment?

5 A. No, I did not.

6 Q. On August 9, was the roof in a good state  
7 of repair?

8 A. Yes, it was. No leaking.

9 Q. On August 9, were the uses that you were  
10 putting the subtenants to, in fact they were  
11 undertaking at the time, in violation of any of the  
12 prohibitions listed in the lease?

13 A. No, not that I know of. No.

14 Q. Have you in fact seen the landlord in the  
15 premises on numerous occasions over the term of this  
16 lease?

17 A. Yes, I did.

18 Q. In 1993, how many times was the landlord  
19 in there?

20 A. About three times.

21 Q. Were there any defaults under the lease,  
22 to your knowledge, on August 9, 1993?

23 A. No, there was not.

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1           Q.    Were there any uncured notices that you  
2           had received from the landlord, which required you to  
3           cure something within a specified period of time?

4           A.    No, there was not.

5           Q.    Was there any verbal or written complaints  
6           of nonperformance prior to August 9, 1993?

7           A.    No, there was not.

8           Q.    Would you tell the Court the makeup, if  
9           you know, of Capital Properties, Inc.? Who is  
10          involved in that company?

11          A.    I know for sure that Mr. and Mrs.  
12          Ebenstein. He's the father. He is the chairman of  
13          the board, and his wife is the president. And his  
14          son is the vice-president of the corporation. And  
15          some local representatives for the landlord.

16          Q.    Is that the total persons that you have  
17          dealt during the course of this?

18          A.    Yes.

19          Q.    Do they have an office anywhere that you  
20          know of?

21          A.    They have the main office in Florida, and  
22          some people living in this area.

23          Q.    Is the main office in Florida the home of

1 one of the principals?

2 A. Yes, he is.

3 Q. On average, how many times a year would  
4 the landlord himself visit the premises; that is, the  
5 premises that is the subject of your lease?

6 A. In 1993, I know there was three times.

7 Q. How about in prior years?

8 A. In prior years, at least twice a year.

9 Q. Can you recall the names of the persons  
10 who you said are the representatives of the landlord?

11 A. Okay. There is two gentlemen. Mr.  
12 Overton is one, and the other gentleman is Bob  
13 Martelli.

14 Q. Have they ever represented themselves to  
15 you as being a Capital Commercial Properties  
16 representative on site?

17 A. Yes. On several occasions, they did.

18 Q. Would that be prior to August 9, 1993?

19 A. Yes. It was prior to it.

20 Q. With what frequency over the term of the  
21 lease would you see Mr. Overton on your premises?

22 A. A couple years ago, until he told me that  
23 he was retiring, I saw him on most every day in the

1 mall, around the mall.

2 And after, I think, two years, when he  
3 retired, Bob Martelli took over his place to take  
4 care of the mall. I saw Bob Martelli on almost every  
5 day around the mall, whenever I was there.

6 Q. Was he in your premises on every occasion  
7 that you saw him?

8 A. Yes. I met him inside the mini-mall many  
9 times.

10 MR. RAGLAND: This is exhibit four.

11 (The document referred to was  
12 previously marked as Plaintiff's  
13 Exhibit No. 4 for Identification.)

14 BY MR. RAGLAND:

15 Q. On October 5, did you receive exhibit  
16 number four?

17 A. Yes. I saw that.

18 Q. You received it?

19 A. Yes. I received it.

20 Q. What is it?

21 A. It's a letter from the landlord. This  
22 would be for stating that I violate Article 32, and I  
23 owe the landlord some money, without specifying the

1 amount.

2 Q. Did you agree that having a law firm in  
3 the property was in violation of your lease?

4 A. No. It's not violation of the lease.

5 Q. Before you ever got this notice, had you  
6 already made a determination about what you were  
7 going to do about this tenant?

8 A. Yes, I did.

9 Q. What was your determination?

10 A. I decided this tenant had to leave,  
11 because they didn't have a lease with me. I  
12 shouldn't call them tenant.

13 Q. How did he come to be in the property?

14 A. He took over somebody else, a friend of  
15 his, lease.

16 Q. And did he have permission to do that from  
17 you, the landlord?

18 A. No.

19 MR. RAGLAND: Your Honor, I offer exhibit  
20 four.

21 MR. PAGE: No objection.

22 THE COURT: Four is received without  
23 objection.



1 (The document marked Plaintiff's  
2 Exhibit No. 4 was received in  
3 Evidence.)

4 MR. RAGLAND: I believe now all four of  
5 the first four are in.

6 THE COURT: The first four are all  
7 received without objection.

8 MR. RAGLAND: Thank you.

9 BY MR. RAGLAND:

10 Q. On that same day, did you receive anything  
11 else from anyone else concerning your lease or the  
12 exercise of your option?

13 A. Yes. On the same day, I receive a letter  
14 from Ms. Davis, the lawyer for the landlord at that  
15 particular time.

16 Q. Ms. Davis is the lady seated to the right  
17 of Mr. Page.

18 A. Yes, she is.

19 Q. All right. And you read its contents, is  
20 that correct?

21 A. Yes, I did.

22 MR. RAGLAND: Your Honor, I offer exhibit  
23 five.

1 MR. PAGE: No objection.

2 THE COURT: Five is received without  
3 objection.

4 (The document referred to was  
5 previously marked as Plaintiff's  
6 Exhibit No. 5 for Identification and  
7 received in Evidence.)

8 MR. RAGLAND: This is exhibit 6.

9 (The document referred to was  
10 previously marked as Plaintiff's  
11 Exhibit No. 6 for Identification.)

12 BY MR. RAGLAND:

13 Q. Now I ask you to turn to exhibit six.

14 A. Yes, I am.

15 Q. Are you there?

16 A. Yes.

17 Q. Did there come a time when you directed  
18 your counsel to take action?

19 A. The same day that I received the letter,  
20 the notice, I contacted my lawyer to write to the  
21 landlord. The rest of the -- the notice of default I  
22 received on October 5, on the same day.

23 Q. Have you read exhibit six?

1 A. Yes, I did.

2 Q. Was that the response that you directed be  
3 made?

4 A. Yes, it is.

5 MR. RAGLAND: I offer exhibit six, Your  
6 Honor.

7 MR. PAGE: No objection.

8 THE COURT: Six will be received without  
9 objection.

10 (The document marked Plaintiff's  
11 Exhibit No. 6 was received in  
12 Evidence.)

13 MR. RAGLAND: This is exhibit seven.

14 (The document referred to was  
15 previously marked as Plaintiff's  
16 Exhibit No. 7 for Identification.)

17 BY MR. RAGLAND:

18 Q. Would you turn to exhibit seven?

19 A. (Witness complies.)

20 Q. Did there come a time when you instructed  
21 your lawyer further with respect to the use violation  
22 notice?

23 A. Yes, I did.

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1 Q. And what did you instruct him to do?

2 A. To send the landlord a letter, to state  
3 that we took care of the alleged use violation, and  
4 we would request the landlord to let him know exactly  
5 what we owe, so that we will pay timely.

6 MR. RAGLAND: I offer exhibit seven.

7 MR. PAGE: No objection.

8 THE COURT: Seven is received.

9 (The document marked Plaintiff's  
10 Exhibit No. 7 was received in  
11 Evidence.)

12 MR. RAGLAND: Your Honor, in the event  
13 that the Court wishes to have the green card proof of  
14 receipt, I have those, but I have given the Court  
15 copies. If the Court needs the green cards, you have  
16 the copy under the letter, I believe.

17 THE COURT: Okay. They will be received  
18 without objection as part plaintiff's exhibit number  
19 seven.

20 MR. RAGLAND: That is true with exhibit  
21 six as well, Your Honor.

22 MR. PAGE: I have no objection to  
23 submitting copies of the green cards.

1 THE COURT: Okay. They will be received  
2 without objection.

3 BY MR. RAGLAND:

4 Q. Mr. Nguyen, did there come a time when you  
5 undertook an unlawful detainer action against this  
6 law firm individual?

7 A. Yes, I did.

8 MR. RAGLAND: This is exhibit eight.

9 (The document referred to was  
10 previously marked as Plaintiff's  
11 Exhibit No. 8 for Identification.)

12 BY MR. RAGLAND:

13 Q. Turn to exhibit eight and tell me if you  
14 can identify the contents of that exhibit and what  
15 your connection with it was.

16 A. The number eight, we have a letter to the  
17 landlord stating what we did.

18 Q. Were there attachments to that letter?

19 A. Yes. I have, also, the copy of the letter  
20 that we send to the tenant, the tenant to tell him to  
21 quit or vacate the property, and the receipt of the  
22 letter.

23 Q. What else is attached to there, if you

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1 know?

2 A. Attached is the copy of the unlawful  
3 detainer that was filed.

4 Q. Is there an official receipt from the City  
5 of Falls Church for the filing of some action?

6 A. Yes, there is.

7 MR. RAGLAND: Your Honor, I offer exhibit  
8 eight in its entirety.

9 MR. PAGE: No objection.

10 THE COURT: Exhibit eight is received  
11 without objection.

12 (The document marked Plaintiff's  
13 Exhibit No. 8 was received in  
14 Evidence.)

15 BY MR. RAGLAND:

16 Q. Did the tenant contest, that is the tenant  
17 that you had filed an unlawful detainer against, your  
18 right to gain possession?

19 A. Yes, they did.

20 Q. Was there a trial?

21 A. Yes, there was.

22 Q. Did you gain possession?

23 A. Yes, I did.

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1 Q. Did you testify?

2 A. Yes, I did.

3 MR. RAGLAND: Your Honor, I offer exhibit  
4 nine, which is a certified, true copy of the  
5 disposition of that proceeding.

6 MR. PAGE: I have no objection.

7 THE COURT: Nine is received.

8 (The document referred to was  
9 previously marked as Plaintiff's  
10 Exhibit No. 9 for Identification and  
11 received in Evidence.)

12 MR. RAGLAND: This is exhibit ten.

13 (The document referred to was  
14 previously marked as Plaintiff's  
15 Exhibit No. 10 for Identification.)

16 BY MR. RAGLAND:

17 Q. Would you turn to exhibit ten, please?

18 A. Yes, I am.

19 Q. Did there come a time when you directed  
20 your counsel to notify your landlord of the outcome  
21 of that proceeding?

22 A. Yes, we did, by December 1.

23 Q. Is this that letter? (Indicating)

1           A.    Yes, it is the letter.

2           MR. RAGLAND:  I offer exhibit ten.

3           MR. PAGE:  I have no objection.

4           THE COURT:  Ten is received.

5                   (The document marked Plaintiff's  
6                   Exhibit No. 10 was received in  
7                   Evidence.)

8           BY MR. RAGLAND:

9           Q.    Up until December 20, 1993, had you ever  
10           heard from the landlord again about the paying of  
11           additional rent?

12          A.    No, I did not.

13          Q.    On December 20, did you get a second  
14           letter with a specific demand made for an amount to  
15           be paid?

16          A.    Yes.  There was a letter dated December  
17           20, 1993.

18          Q.    Is that the letter in exhibit 11?

19          A.    Yes, it is.

20          MR. RAGLAND:  I offer that, Your Honor.

21          MR. PAGE:  No objection.

22          THE COURT:  Okay.  Just one second here.

23                   (Pause.)



1                   THE COURT:   Okay.   Eleven is received  
2                   without objection.

3                               (The document referred to was  
4                               previously marked as Plaintiff's  
5                               Exhibit No. 11 for Identification and  
6                               received in Evidence.)

7                   BY MR. RAGLAND:

8                   Q.   In response to that letter, what did you  
9                   do?

10                  A.   We sent a check to pay for that under  
11                  protest.

12                  Q.   Whom did you direct to send that check?

13                  A.   I met Mr. Ragland, my legal counsel, to  
14                  send a letter to the landlord with the check that I  
15                  pay under protest.

16                  MR. RAGLAND:   This is exhibit 12.

17                               (The document referred to was  
18                               previously marked as Plaintiff's  
19                               Exhibit No. 12 for Identification.)

20                  BY MR. RAGLAND:

21                  Q.   Have you reviewed exhibit number 12?

22                  A.   Yes, I did.

23                  Q.   Is this the letter with a photocopy of the

1 check that you directed be sent out?

2 A. Yes, it is.

3 Q. Now. Did there come a time when you saw a  
4 copy of a letter from counsel Darragh Davis  
5 responding to your payment?

6 A. Yes, there was.

7 MR. RAGLAND: This is exhibit 13.

8 (The document referred to was  
9 previously marked as Plaintiff's  
10 Exhibit No. 13 for Identification.)

11 BY MR. RAGLAND:

12 Q. Turn to exhibit 13.

13 A. (Witness complies.)

14 Q. Are you there?

15 A. Yes, I am.

16 Q. Is this the response to the payment of  
17 those funds?

18 A. Yes, it is.

19 Q. Were there late fees to be paid, not only  
20 with respect to Vina Enterprise, but also with  
21 respect to the Nguyen leases, three other leases at  
22 the same center?

23 A. Yes. Yes.

1 MR. RAGLAND: Your Honor, I offer 12 and  
2 13.

3 MR. PAGE: No objection.

4 THE COURT: Okay. Thirteen is received  
5 without objection.

6 (The document marked Plaintiff's  
7 Exhibit No. 13 was received in  
8 Evidence.)

9 BY MR. RAGLAND:

10 Q. Did the check that you forwarded in  
11 payment of the late fees ever get cashed?

12 A. No, it was not.

13 Q. Was it returned to you?

14 A. It was returned to me.

15 Q. Why, if you know?

16 A. Because the amount was not correct.

17 Q. In your letter of December 20, had you  
18 attached certain information to the letter,  
19 responding to the demand for payment?

20 A. Yes, I did.

21 Q. Had you attached the written notice that  
22 you testified to earlier to all tenants about the  
23 right to pay to the tenth of the month?

1           A.    Yes, I did.

2           MR. RAGLAND: Judge, can I interrupt your  
3 trend of thought? I offered 12 and 13, and you just  
4 said, "I admit 13."

5           THE COURT: I'm sorry. Twelve and  
6 thirteen are admitted without objection..

7           MR. RAGLAND: Thank you.

8           THE COURT: I am glad you are following  
9 this. But I meant to do both.

10                   (The document marked Plaintiff's  
11 Exhibit No. 12 was received in  
12 Evidence.)

13           BY MR. RAGLAND:

14           Q.    Did you ultimately get the check back and  
15 make a payment for a lower amount?

16           A.    By March 23, I received another letter  
17 advising me to pay \$4,200, which is less the amount  
18 of the original one.

19           Q.    What was the original amount?

20           A.    \$5,600.

21           Q.    Three months later, they sent your check  
22 back and asked for a lesser amount.

23           A.    Yes.

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1 Q. As of January 3, 1993, were you completely  
2 current on all rent?

3 A. Yes, I believe so. I overpaid to some  
4 extent.

5 Q. When you paid these late fees, did you pay  
6 them with any notation or direction or indication in  
7 letter or on the check?

8 A. Yes, we did.

9 Q. What was the notation that you affixed to  
10 the check?

11 A. You mean what we wrote?

12 Q. Yes. What did you wrote?

13 A. I wrote on the check for 6763 --

14 Q. No. What did your write, if anything, on  
15 the check, your position with respect to paying late  
16 fees?

17 A. Okay. We paid it under protest.

18 MR. RAGLAND: Your Honor, I offer exhibit  
19 14, which is the series of letters in payment of the  
20 \$4,200 just testified to.

21 MR. PAGE: No objection.

22 THE COURT: Okay. Exhibit 14 is admitted.

23 (The document referred to was

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1 previously marked as Plaintiff's  
2 Exhibit No. 14 for Identification and  
3 received in Evidence.)

4 BY MR. RAGLAND:

5 Q. On January 3, after having cleared the  
6 notice of default, did you file a second extension of  
7 your lease?

8 A. Yes, I did, on January 3.

9 MR. RAGLAND: This is exhibit 15.

10 (The document referred to was  
11 previously marked as Plaintiff's  
12 Exhibit No. 15 for Identification.)

13 BY MR. RAGLAND:

14 Q. Look at exhibit 15 and tell me if that is  
15 the document or a copy of the document.

16 A. Yes. This is a copy of the letter I sent  
17 to the landlord.

18 MR. RAGLAND: Your Honor, I offer that.

19 MR. PAGE: No objection.

20 THE COURT: Received without objection.

21 (The document marked Plaintiff's  
22 Exhibit No. 15 was received in  
23 Evidence.)

1 BY MR. RAGLAND:

2 Q. Did you receive a response to that  
3 extension?

4 A. No, I did not.

5 MR. RAGLAND: This is exhibit 16.

6 (The document referred to was  
7 previously marked as Plaintiff's  
8 Exhibit No. 16 for Identification.)

9 BY MR. RAGLAND:

10 Q. Would you turn to exhibit 16, please?

11 A. (Witness complies.)

12 Yes, I am here.

13 Q. What, if anything, did you direct your  
14 attorney to do on the 27th of January?

15 A. Okay. I talked to -- I directed my lawyer  
16 to send a letter to the landlord, regarding to my  
17 renew with the extension of my lease.

18 And we also stated in that that we cannot  
19 wait any longer, because time is running out. We  
20 might have to file a legal action to ask the  
21 assistance from the Court to determine whether we  
22 have right to extend our lease.

23 Q. Did you get a response to that letter?

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 A. No.

2 MR. RAGLAND: I offer 16.

3 MR. PAGE: No objection.

4 THE COURT: Sixteen is received without  
5 objection.

6 (The document marked Plaintiff's  
7 Exhibit No. 16 was received in  
8 Evidence.)

9 BY MR. RAGLAND:

10 Q. Did you, subsequent to that time, file a  
11 request for the Court to issue a declaratory  
12 judgment?

13 A. Yes, we did, on March 9, 1994.

14 Q. No. The declaratory judgment action.

15 A. Yes. We filed it on February 17, 1994.

16 Q. Okay. Counting six months back from  
17 September 26, when would your right to extend run out  
18 in the six-month period?

19 A. (No response.)

20 Q. Would it be in the month of March, sir?

21 A. In the month of March? The end of April.

22 MR. RAGLAND: This is exhibit 17.

23 (The document referred to was

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1 previously marked as Plaintiff's  
2 Exhibit No. 17 for Identification.)

3 BY MR. RAGLAND:

4 Q. Did you give a final extension notice?

5 A. Yes, I did.

6 Q. And is that what the document contained in  
7 exhibit 17?

8 A. Yes, it is.

9 MR. RAGLAND: I offer that, Your Honor.

10 MR. PAGE: I object. Your Honor, exhibit  
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12  
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5 THE COURT: The Court will take it under  
6 advisement whether to accept it in.

7 MR. RAGLAND: All right, Your Honor.

8 BY MR. RAGLAND:

9 Q. Does the lease have a provision in it that  
10 if you hold over, the rent will change?

11 A. Yes.

12 Q. What does it provide, please?

13 A. It provided that if I stayed after the  
14 lease expired, I had to pay double the rent that I  
15 pay for the last month.

16 Q. With respect to -- you have how many  
17 tenants that are your subtenants?

18 A. Right now, we have 22.

19 Q. If, in fact, the Court rules today that  
20 this lease has not been extended, what action do you  
21 have to take with respect to those tenants?

22 A. I have to tell the tenant to leave. If  
23 they don't or they cannot leave, I think we have to

1 take some legal action to vacate the property and  
2 return it to the landlord.

3 Q. Now, in 1992 and 1993, were you engaged  
4 with discussions with the landlord about rental of  
5 other space in the center?  
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BY MR. RAGLAND:

Q. In your pleading, did you ask for damages, including attorney's fees and costs to Vina of your services?

A. Yes, I did.

MR. RAGLAND: This is exhibit 19.

(The document referred to was previously marked as Plaintiff's Exhibit No. 19 for Identification.)

BY MR. RAGLAND:

Q. Will you turn to exhibit 19 and tell me if

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1 you can identify that document.

2 A. Yes, it is.

3 Q. What is that document?

4 A. This is my record to show the time that I  
5 spend directly to this legal matter.

6 Q. How much do you earn annually from Vina,  
7 as its principal? How much do you earn?

8 A. Okay. In total, I earn about 80 -- I'm  
9 sorry, about \$50,000 a year from Vina Enterprises.

10 Q. When you are not engaged in the struggle  
11 that you are now engaged in, how many hours a week do  
12 you put into serving Vina?

13 A. Okay. I put at least two hours a week --  
14 I mean, two hours a day.

15 Q. And how many days a week?

16 A. Five days a week.

17 Q. So the total is 500 hours per year.

18 A. Yes, around that.

19 Q. Have you compiled this list based on  
20 certain records and items?

21 A. Yes, I did.

22 Q. What have you compiled it from?

23 A. From my records, from the record form I

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1 get from your firm to show the time that we spend  
2 together relating to this particular legal matter.

3 Q. Have you also resorted to letters sent to  
4 you by your landlord?

5 A. Yes. Also letters I received by day and  
6 what action I took for certain days.

7 Q. How many total hours have you spent on  
8 behalf of Vina in connection with this matter of not  
9 extending your lease?

10 A. This is -- not including whatever time  
11 that I spent for the last week or two weeks and  
12 today, I spend about 80-and-a-half hours.

13 Q. Eighty-five-and-a-half hours?

14 A. Yes, 85-and-a-half.

15 Q. Is this document a true statement of the  
16 time you have been able to analyze and come up with?

17 A. Yes, it is.

18 Q. And is Vina Enterprises asking for an  
19 award of \$8,500 for your time?

20 A. Yes, I am.

21 Q. And how is the figure of \$100 per hour  
22 arrived at?

23 A. Okay. The \$50,000 I receive from Vina

1 Enterprises last year and every year divided by the  
2 total number of hours that I spend, that I would work  
3 for Vina a year, would be 500 hours. So \$100 an hour  
4 is what I arrived at.

5 Q. If Vina recoups this, will it be paid to  
6 you?

7 A. Yes, it will be.

8 Q. Are there any other people that work for  
9 Vina besides yourself?

10 A. No, just me.

11 MR. RAGLAND: I offer exhibit 19, Your  
12 Honor.

13 MR. PAGE: I object, Your Honor. I think,  
14 if I may, this is being offered pursuant to a  
15 provision in the lease that indicates that in the  
16 event of litigation, some damages may be recovered.  
17 And the provision that is relevant is paragraph 24B  
18 of the lease. It is on page 19.

19 Here is what it says. It is relatively  
20 short.

21 THE COURT: Hold on a second.

22 MR. PAGE: Okay. It is on page --

23 THE COURT: What paragraph number?

1 MR. PAGE: It is 24B on page 19.

2 THE COURT: Yes.

3 MR. PAGE: "If either party hereto shall  
4 commence legal proceedings against the other on  
5 account of a default in the performance or observance  
6 of any agreement or condition in this lease contended  
7 on the part of the other to be performed or observed,  
8 the party prevailing in such legal proceeding shall  
9 be reimbursed on demand for the cost and expenses,  
10 including but without limitation reasonable  
11 attorney's fees incurred by the prevailing party in  
12 connection with such proceedings."

13 I don't understand the testimony of this  
14 witness to be that these are costs and expenses of  
15 the prevailing party. He said he is paid a salary to  
16 perform his duties as president of Vina. Period.

17 And they have not incurred any additional  
18 expense with this man in order to have him do  
19 anything in connection with this litigation.

20 Costs and expenses are terms of art. What  
21 they mean is out-of-pocket expenses. Vina has had no  
22 out-of-pocket expenses, according to his own  
23 testimony, because of his services as president.



1           So these don't qualify. These are like  
2 internal overhead-type things, and that is not  
3 recoverable.

4           THE COURT: Mr. Ragland?

5           MR. RAGLAND: I believe the witness has  
6 stated that these hours were spent aside from his  
7 normal duties. So Vina has had costs in that its  
8 employee has been required to work additional periods  
9 of time, for which the corporation has an obligation.

10          And he has testified that he will be paid  
11 those costs when and if the Court awards them,  
12 because his time as an employee of the corporation  
13 has been spent over and above this \$500. He spent  
14 85-and-a-half hours undertaking this litigation.

15          Paragraph 24 is very broad-based. It is  
16 not limited --

17          THE COURT: Well, I think I am going to  
18 allow you to do is -- I mean, I don't know whether he  
19 is paid additional time or whatever. I mean, I will  
20 allow you to ask additional questions.

21          Maybe he is paid overtime to do things.  
22 Maybe he spends additional hours, but it does appear  
23 that it is a legitimate objection at this point. But

1 I will allow you to ask any additional questions that  
2 you may deem to be appropriate.

3 MR. RAGLAND: All right.

4 BY MR. RAGLAND:

5 Q. Mr. Nguyen, has the corporation made a  
6 determination yet about how to compensate you for  
7 these additional hours that you have put in over and  
8 above the 500 per year you normally put it?

9 A. The corporation will reimburse me, I mean  
10 pay me, for the time that I worked for the company  
11 other than my ordinary duties to run the corporation.

12 Q. Will you be paid by the corporation for  
13 the services performed October 24, 1993, through June  
14 22, 1994, of at least a sum of \$8,550, in addition to  
15 your regular income?

16 A. Yes, I would require.

17 Q. But for this litigation, would you have  
18 been engaged in this 85-and-a-half hours of extra  
19 work?

20 A. Yes, I did.

21 Q. Without this litigation, would you have  
22 put in this 85-and-a-half hours? If we were not  
23 involved --

1           A.    No.   That would be -- no.

2           MR. RAGLAND:   I again offer it, Your  
3   Honor.   I think he has now clarified that it is an  
4   obligation of the corporation to pay him for his  
5   extra time, and this is the method arrived at for his  
6   additional compensation.

7           THE COURT:   I will receive it over  
8   objection.

9                       (The document marked Plaintiff's  
10                      Exhibit No. 19 was received in  
11                      Evidence.)

12           MR. RAGLAND:   That is, of course, only if  
13   we prevail.

14           THE COURT:   I understand.   I am just  
15   receiving the exhibit.

16           MR. RAGLAND:   I understand.

17           THE COURT:   I am not making a ruling  
18   on --

19           MR. RAGLAND:   I understand you are not.

20           BY MR. RAGLAND:

21           Q.    Have you engaged the services of the firm  
22   of Ragland and Kawamoto to represent you in  
23   connection with these proceedings?

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1           A.    Yes, I did.

2           Q.    Has the representation of this firm been  
3 limited to representing you in connection with your  
4 extension of this lease?

5           A.    Yes, it is.

6           MR. RAGLAND: This is exhibit 20.

7                   (The document referred to was  
8                   previously marked as Plaintiff's  
9                   Exhibit No. 20 for Identification.)

10          BY MR. RAGLAND:

11          Q.    Have you reviewed the itemization of  
12 attorney's fees shown on exhibit 20?

13          A.    Yes, I did.

14          Q.    Have you either paid these bills or are in  
15 receipt of these bills and, in the due course of  
16 business, intend to pay same?

17          A.    Yes, I did.

18          Q.    I am glad to hear that. Now I have you  
19 saying you are going to pay my bills.

20                   Is the total amount of time reflected by  
21 the itemization?

22          A.    Yes.

23          MR. RAGLAND: Your Honor, I have attached

1 the attorney's affidavit, which is the normal and  
2 customary way to show attorney's fees and the  
3 itemization, and I would offer it at this time.

4 MR. PAGE: I have no objection.

5 THE COURT: Okay. Twenty is received  
6 without objection.

7 (The document marked Plaintiff's  
8 Exhibit No. 20 was received in  
9 Evidence.)

10 BY MR. RAGLAND:

11 Q. This shopping center is located in the  
12 City of Falls Church.

13 A. Yes, it is.

14 Q. And all of your subleases and subtenants  
15 are located in those premises located in the city.

16 A. Yes, they are.

17 Q. What are you asking this Court to do in  
18 connection with this case?

19 A. The primary request, I would like to ask  
20 the Court to declare that I have a valid extension of  
21 my lease for another five years, because I believe  
22 that is what I bargained for, and I'm entitled to it  
23 and that is my right.

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1           And also, the landlord would reimburse me  
2 for the costs I incurred, or that Vina Enterprises  
3 incurred, to file this legal action..

4           Q.    When you undertook this lease, what, if  
5 any, monies were expended to improve the landlord's  
6 premises for your purposes?

7           A.    We spend --

8           MR. PAGE:   Object, Your Honor.   That is  
9 irrelevant.

10          THE COURT:   Mr. Ragland?

11          MR. RAGLAND:   Your Honor, I think the  
12 Court is entitled to know the substantial investment  
13 involved here.   I realize the case does not turn on  
14 that, but it --

15          THE COURT:   Well, what is the relevance of  
16 it?

17          MR. RAGLAND:   The relevancy is, again, if  
18 the landlord can gain possession of these before they  
19 are fully depreciated out, he is going to have a  
20 windfall.   And that is another motivation on his part  
21 to want to declare this lease at an end.

22          THE COURT:   All right.   I will hear some  
23 evidence on this.

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1 BY MR. RAGLAND:

2 Q. How much did you --

3 THE COURT: It is overruled. I am going  
4 to overrule it.

5 BY MR. RAGLAND:

6 Q. How much did you spend to subdivide the  
7 premises?

8 A. We spent \$500,000 cash to subdivide it.

9 Q. And as of this date, approximately how  
10 much rent have you paid into the landlord?

11 A. You mean total?

12 Q. Just at Vina, not all your other leases.

13 A. Do you mean total or --

14 Q. Total rent,

15 A. I don't have it. I pay about \$240,000 a  
16 year, and it would be \$2 million, about \$2 million  
17 over the last ten years.

18

19

20

21 Q. Mr. Nguyen, on this last point that you  
22 just talked about with your counsel, you said that  
23 there are \$500,000 of tenant improvement to this

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 property, is that correct?

2 A. Yes, that's correct.

3 Q. Now, isn't it true, Mr. Nguyen, that you  
4 have collected most of that \$500,000 directly from  
5 the subtenants? Isn't that true?

6 A. I did collect about \$150,000 from  
7 subtenant for the improvement that will be directly  
8 benefit them. Yes, I did.

9 Q. In other words, when a subtenant comes to  
10 you and wants to take a specific space, he pays you  
11 in advance for the cost of putting up the walls and  
12 the plate glass and so forth, isn't that true?

13 A. Normally, yes. That will be the  
14 additional work.

15 Q. So that the outlay or the investment that  
16 Mr. Ragland asked you about is not your investment at  
17 all, isn't that true?

18 A. He asked me the total investment I put in.  
19 If you take a net of that, it will be, you know,  
20 minus \$150,000 I collected from other people.

21 But you also know that from the beginning,  
22 I took a lot of time to fill up the store. The  
23 landlord gave me only 60 days. Okay?



1                   So I have to pay a lot of rent for the  
2 empty space for a year. So that, you know, \$150,000  
3 I collected was wiped out. Okay? If you take into  
4 the cost, you know, I cost a lot more than that.

5                   Q. I understand. Now, Mr. Nguyen, the  
6 plaintiff company here is called Vina Enterprises,  
7 correct?

8                   A. Yes, it is.

9                   Q. That is a Virginia corporation, is that  
10 correct?

11                  A. Yes, it is.

12                  Q. You are the president of that corporation.

13                  A. Yes, I am.

14                  Q. And as I understand it, you are also the  
15 treasurer of that corporation.

16                  A. No, not me.

17                  Q. Who is the treasurer?

18                  A. That is -- at this time, it's my wife.

19                  Q. All right. And who is the secretary of  
20 the corporation?

21                  A. Myself is the -- I'm sorry. Let me put  
22 the other way. My wife is the secretary, and I am  
23 the treasurer and the president.

1 Q. All right. And your wife and you own the  
2 company, correct?

3 A. Yes, we are.

4 Q. Now, as I understand it, this is your  
5 full-time employment, correct?

6 A. What do you mean "full time"?

7 Q. Well, are you employed by any other  
8 entity?

9 A. No. This is my full time, as you call it.  
10 Yes, that's it. My employer is Vina Enterprises.

11 Q. So this is the only place you work, in  
12 other words.

13 A. If I have to work with somebody, yes.  
14 This is the only place at this time.

15 Q. All of your time is essentially devoted to  
16 managing this shopping center at this point, isn't  
17 that correct?

18 A. Yes.

19 Q. Now, Mr. Nguyen, as I understand it, you  
20 have a law degree from an American university, is  
21 that right?

22 A. No, that's not correct.

23 Q. You attended George Washington University

1 Law School, isn't that right?

2 A. Yes, I did.

3 Q. And you were there for four years.

4 A. Three years.

5 Q. And you obtained a degree, is that

6 correct?

7 A. Yes, I did.

8 Q. From George Washington University Law

9 School.

10 A. Yes.

11 Q. You are not practicing law at this time,  
12 are you?

13 A. No.

14 Q. Are you studying for the bar at this  
15 point?

16 A. No.

17 Q. All right. Now, you also attended law  
18 school in Vietnam, isn't that right?

19 A. Yes, I did. Different legal system.

20 Q. I understand that, but you did attend law  
21 school there, as well as in the United States,  
22 correct?

23 A. Yes, I did.

1 Q. You came to the United States in 1975, am  
2 I correct about that?

3 A. Yes, I did.

4 Q. When you came here in 1975, as I  
5 understand it, Mr. Nguyen, you worked as an  
6 accountant for a corporation in New Jersey, am I  
7 right?

8 A. Yes, I did.

9 Q. What was that company?

10 A. Crum and Foster Corporation.

11 Q. I'm sorry?

12 A. Crum and Foster, C-r-u-m and Foster --

13 Q. Crum and Foster.

14 A. -- Corporation.

15 Q. That is an insurance company, is it not?

16 A. Yes.

17 Q. And you worked there for approximately six  
18 years, is that right?

19 A. Yes, I did.

20 Q. As I understand it, you moved to Virginia  
21 in 1981.

22 A. Yes, I did.

23 Q. And at that time, you became a tax analyst

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1 for a company based here in Arlington, didn't you?

2 A. Yes, I did.

3 Q. That is CACI, or CACI, as some people call  
4 it.

5 A. Yes, it was.

6 Q. You were a tax analyst at that company, is  
7 that right?

8 A. I started as a tax analyst with the  
9 corporation.

10 Q. And how long did you work at CACI?

11 A. I worked there for 11 years.

12 MR. RAGLAND: Your Honor, I want to rise  
13 to say that what he is doing is -- and if he wants to  
14 make him his witness, fine, but this isn't cross  
15 examination of anything I asked him about. It is  
16 going into a whole lot of stuff that has never been  
17 brought up before.

18 THE COURT: It is clearly beyond the  
19 direct.

20 MR. PAGE: May I proffer it is not? Mr.  
21 Ragland made a statement in opening argument that  
22 this was the land he -- he said it in his brief, and  
23 I think he said it in his opening argument.

1 THE COURT: I understand. But in terms of  
2 what his direct examination of this witness has  
3 been --

4 MR. PAGE: And in the direct examination,  
5 he asked the witness, "Isn't it true the landlord  
6 wrote everything in this lease?"

7 The argument that he is going to make and  
8 has made in his opening statement and in the brief is  
9 that there is somehow some reason to interpret the  
10 lease in favor of the tenant because there is a  
11 comparative disadvantage in their bargaining  
12 positions or anything of that sort. This is directly  
13 on point to that issue.

14 And, incidently, I don't have any more,  
15 but I am trying to establish that in fact he is an  
16 experienced businessman in the United States, and he  
17 knows what he is doing.

18 THE COURT: Overruled. I will allow it to  
19 that. If he said that is the last question, I will  
20 allow the answer to this last question.

21 MR. RAGLAND: Okay.

22 THE COURT: But no further at this point.

23 MR. PAGE: All right. That's fine.

1 BY MR. PAGE:

2 Q. Now, Mr. Nguyen, under the lease, the  
3 tenant, Vina, is required to make its rent payments  
4 on the first of the month, isn't that correct?

5 A. Yes, it is.

6 Q. As I understand your direct testimony, you  
7 were unable to make payments on a regular basis on  
8 the first of the month, is that correct?

9 A. For the first many years -- we are in the  
10 lease for ten years now. Okay? For the first many  
11 years, we pay rent on time, no complaint from the  
12 landlord. We were -- no objection from the landlord.

13 Until 1990 or 1992, we have problem with  
14 the tenants where they dispute with us on the cost  
15 allocation, and they start paying rent late. They  
16 have a lawyer in D.C. to withheld the rent. That's  
17 when the checks stopped. I mean, our check was  
18 bounced.

19 Q. All right.

20 A. But before that, we pay on time, no  
21 objection from the landlord.

22 Q. Okay. There did come a point, though, in  
23 the late 1980s, when you found yourself unable to

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1 make the rent payments on time, isn't that correct?

2 A. No. We pay on time, but the check was  
3 bounced.

4 Q. All right. And as a result of that, you  
5 told the landlord that you could not pay on the first  
6 of the month, right?

7 A. I met the lawyer for the landlord. I  
8 told -- I presented him the difficulties that I had  
9 at that time, because many check I receive from my  
10 tenant was bounced.

11 And I asked them for something -- you  
12 know, I cannot make the check on time, if they want  
13 me to pay all the rent by cashier's check, which is  
14 not called for in the lease.

15 Q. And as a result of these problems, you  
16 started paying the rent on a regular basis later in  
17 the month, isn't that true?

18 A. No. They wanted me to pay by cashier's  
19 check. I say in order to pay by cashier's check, I  
20 had to wait to have -- for the checks I received from  
21 my tenants to be clear.

22 So I cannot pay on the first day of the  
23 month by cashier's check, which is not called for in



1 the lease.

2 Q. Now, you received -- one of the exhibits  
3 you looked at, your counsel had you look at, Mr.  
4 Nguyen, was a chart that showed you the late rent  
5 payments. Do you remember that?

6 A. Yes, it does. Yes.

7 Q. All right. Let me ask you to refer to  
8 that. And I think it is exhibit 11 in the  
9 plaintiff's exhibits, and specifically the third page  
10 of the exhibit. Do you have that in front of you,  
11 Mr. Nguyen?

12 A. Yes, I do.

13 Q. Now, Mr. Nguyen, isn't it true that in  
14 fact the chart is accurate as to the dates you paid  
15 your rent on each of the months listed?

16 A. Yes. They show the check date, showed the  
17 date the landlord received the money.

18 Q. You don't dispute those dates, do you?

19 A. No, I don't dispute the dates. These  
20 dates are correct. I mean, you know, to the best of  
21 my knowledge, they are.

22 Q. Now, you testified in direct examination  
23 that you were told you did not have to pay until the

1 15th of the month, is that true?

2 A. (No response.)

3 Q. Do I have your testimony correct from your  
4 direct examination, Mr. Nguyen?

5 A. Yes. No later than the 15th of the month.

6 Q. All right. Did you ever receive such an  
7 agreement in writing?

8 A. No, I did not, but I did not get any  
9 objection from the landlord either.

10 MR. PAGE: I just want to make sure I have  
11 copies of what I want to show him and have one for  
12 the Court.

13 This is exhibit 28.

14 (The document referred to was  
15 previously marked Defendant's Exhibit  
16 No. 28 for Identification.)

17 BY MR. PAGE:

18 Q. Mr. Nguyen, I want to hand you a document,  
19 which was marked as defendant's exhibit number 28.

20 MR. PAGE: If I may approach the witness,  
21 Your Honor?

22 THE COURT: Yes, sir. That is defendant's  
23 28?

1                   MR. RAGLAND: May I see what he is looking  
2 at?

3                   MR. PAGE: Defendant's 28. I am trying to  
4 get a copy here of the whole set for you.

5                   MR. RAGLAND: Before there is any  
6 testimony, I would just like to see it.

7                   MR. PAGE: One moment, Your Honor.

8                   THE COURT: That is okay. Take your time.

9                   (Pause.)

10                  BY MR. PAGE:

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Q. Mr. Nguyen, I showed the Court earlier a chart over here that roughly approximates the floor space. Does that appear to be an accurate representation of the floor space and how it is subdivided?

A. It's not accurate, but we can use that.

Q. Is it roughly accurate, approximately accurate?

A. No.

Q. No?

A. No.

Q. Okay. Sorry. The space is subdivided into smaller spaces, and there are about 20 or 22 of those spaces, isn't that right?

A. Yes.

Q. All right. Now, in those spaces, there are a number of walls that are glass walls, isn't that correct?

A. The front, yes. Not between the store.

1 The front of the store, they have glasses.

2 Q. Do you mean that the area facing the  
3 common area, or the hallway, is sometimes glass.

4 A. Yes.

5 Q. Right?

6 A. Yes.

7 Q. Now, isn't it true, Mr. Nguyen, that you  
8 had an obligation under this lease to carry insurance  
9 protecting the landlord with respect to all of those  
10 tenant improvements, including the plate glass?

11 A. Yes, I do.

12 Q. And that was true at the beginning of the  
13 lease and during the renewal period, and it is true  
14 today, isn't that right?

15 A. From the beginning of the lease, yes.

16 Q. And isn't it also true, Mr. Nguyen, that  
17 you have not had insurance covering that plate glass  
18 and those tenant improvements to the benefit of the  
19 landlord at any time during your lease?

20 A. It's false.

21 Q. All right. You do have insurance, then,  
22 to cover the tenant improvements.

23 A. Okay. Let me tell you a little --

1 Q. Is that your testimony?

2 A. Let me tell you a little bit about that.

3 Q. Okay.

4 A. For the first five years, we have the  
5 glass cover, I mean, plate glass cover, and \$2  
6 million liability cover for the shopping center, plus  
7 the improvement on it. And why -- for the first five  
8 years. We did for the first five year comply exactly  
9 to the lease.

10 But when we -- up to 1990 or 1991, we have  
11 a big argument with our subtenant regarding to the  
12 cost, where, you know, some people doesn't want to  
13 pay, some people -- you know, the cost was -- we  
14 dispute when we went to court here.

15 From that time, we decided Vina  
16 Enterprises did not buy the plate glass directly, but  
17 we ordered our tenant buy plate glass for their  
18 stores. And we did it from then until March.

19 And every time the insurance policy renew,  
20 I told my insurance agent to send a copy to the  
21 landlord.

22 And I did not hear anything from the  
23 landlord until March, late March, of 1994, about

1 that. And from that time, I been ordered to make  
2 sure that everybody have to have plate glass, and I  
3 have to cover that under my policy. So I put under  
4 our policy, and then we will bill the tenant later.

5 So for the first five years, we always  
6 bought it. And then we did not have it on the  
7 policies, but we ordered the tenant to buy it on  
8 their insurance policies. And they are required to  
9 buy the insurance policies to cover plate glasses.

10 Q. Now, Mr. Nguyen, those tenants, those  
11 subtenants, are not required by you to name the  
12 landlord, Capital Properties, as an insured under  
13 those policies.

14 A. No. They are binding by all the terms of  
15 the master lease with me.

16 Q. Now, that master lease provides that the  
17 landlord is to be a named insured for all the tenant  
18 improvement work. Do you agree with that? Do you  
19 want to look at the lease?

20 A. Yes, I do.

21 Q. Okay. Let me refer you, Mr. Nguyen, to  
22 paragraph 11 of the lease. And specifically, this is  
23 on page 10, and I think it is at the bottom of page

1 10, Mr. Nguyen.

2 A. (Examining document.)

3 Q. Have you found that paragraph, sir?

4 A. Which paragraph is that?

5 Q. It is paragraph 11B at the bottom of page  
6 10.

7 A. Yes. I see it.

8 Q. Let me refer you to this language. It is  
9 the sentence that starts at the end of the page. It  
10 is the third line up from the bottom.

11 It reads as follows: "Tenant shall keep  
12 all plate glass and all personal property of tenant  
13 and all leasehold improvements made by tenant" -- the  
14 page then turns -- "fully insured for 100 percent of  
15 replacement cost in well-rated insurance companies  
16 authorized to do business in the state in which the  
17 shopping center is located, naming landlord and  
18 tenant as insureds, as their interest may appear."

19 Do you see that?

20 A. Yes, I do.

21 Q. All right. Now, isn't it true, Mr.  
22 Nguyen, that you have not had the landlord named as  
23 an insured at any time for the tenant improvement

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1 work?

2 A. No. It was -- the landlord was named the  
3 second insured on the policies.

4 Q. Well, Mr. Nguyen, you were asked about  
5 this in your deposition. Do you remember that? Do  
6 you remember being asked about plate glass insurance  
7 in your deposition in this case?

8 A. Yes, I was.

9 Q. And do you remember telling us, in  
10 response to questions on this, that "We don't cover  
11 that. That's my glass. I don't cover that. If it's  
12 broken, I replace it"?

13 A. No. I mean, I misunderstand about that,  
14 because we're talking about the glass inside of each  
15 store, I mean inside of the store. That is the  
16 tenant glass.

17 But the glass at the front of the store,  
18 around it, we cover it. Maybe I misunderstand that  
19 or somehow at that time.

20 Q. So your testimony today is that the plate  
21 glass on the front of the stores --

22 A. Yes.

23 Q. -- is actually insured.

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1           A.    Yes.  Plate glass insured.  We don't say  
2   which plate glass.  On the plate glass of the store,  
3   insured.  But the one inside the store, maybe they  
4   have like jewelry cases, that's their problem.  You  
5   know, we don't cover that.

6           Q.    Let's leave that part aside.  I just want  
7   to talk about tenant improvement work.

8           A.    Yes.

9           Q.    This is part of the \$500,000 investment  
10   you talked about earlier, isn't it?

11          A.    Yes.

12          Q.    This is part of it.  This is the glass and  
13   the walls that were put up with that money, is that  
14   correct?

15          A.    Yes.

16          Q.    All right.  Now, let me ask you again.  If  
17   I understand your testimony correctly, you are saying  
18   that for five years or so, you did have insurance for  
19   the tenant improvement work, is that correct?

20          A.    Yes, we have it.

21          Q.    And then after that --

22          A.    No, no, no.

23          Q.    -- you stopped getting the insurance and

1 told your tenants they should get their own  
2 insurance.

3 A. No, no, no. You make it wrong here. Let  
4 me stop it. We are talking about plate glass. Okay?  
5 I always, from day one, I always bought liability  
6 insurance for the store, for the whole thing.

7 I only bought insurance for the content of  
8 the -- I mean, the leasehold improvement, from day  
9 one and up to now.

10 The question you raised is the plate  
11 glass. Sometime in the course of the lease, we  
12 changed it. From the first five years, I bought it  
13 under my policies. And then, when we had a dispute  
14 with the tenant, I say we decided to let the tenant  
15 have that.

16 And also they named our company as a  
17 second insurer. And they put plate glass on their  
18 store, but they had to pay for that, because the  
19 lease call for them also have insurance for their  
20 store, including the plate glass.

21 Q. So you transferred that responsibility to  
22 your subtenants. Would that be correct?

23 A. For that, yes.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 Q. And you told your subtenants, "Name Vina  
2 Enterprises as a named insurer." Would that be  
3 correct?

4 A. Yes, I did.

5 Q. But the landlord is not a named insured  
6 under those subtenant policies, is that right?

7 A. I don't know if they did that or not. I  
8 did not double check that.

9 Q. You have made no effort to find out,  
10 correct?

11 A. I did not -- I did not look at that.

12 Q. All right. You have provided no insurance  
13 certificates at any time in the last five years to  
14 the landlord, indicating compliance with this  
15 paragraph of the lease, isn't that correct?

16 A. I did. I did provide the insurance  
17 certificate to the landlord every single year for the  
18 last ten years.

19 Q. Excuse me, Mr. Nguyen. I know you did,  
20 but I am talking about a specific kind of insurance  
21 now, the insurance for the plate glass and tenant  
22 improvements, not the comprehensive liability policy.  
23 Do you understand what I am saying?

1           A.    Yes.

2           Q.    All right. Now, isn't it true, based on  
3 what you have testified today, that no insurance has  
4 been provided to the landlord, with respect to the  
5 tenant improvement work, for at least the last five  
6 years?

7           A.    That's wrong. I have that. You're  
8 talking about the content, different from plate  
9 glass. Plate glass is a piece of the improvement.  
10 Right?

11          Q.    Right.

12          A.    I always have a cover for the leasehold  
13 improvements, and the leasehold improvements  
14 including, I believe, all the glasses.

15                But in addition to that, because the  
16 lease -- we're talking about plate glasses? We cover  
17 that, plate glasses sometime, because the lease, as  
18 far as I remember -- as a tenant, we are required to  
19 restore any glass damages, if we don't buy insurance.  
20 We are liable for that. So why it become an issue  
21 here?

22          Q.    Now, at the time that you made your  
23 renewal notice in August of 1993, in fact at that

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1 point, you had received a notice from the landlord  
2 asking for insurance certificates that you had not  
3 provided, isn't that true?

4 A. No, I did not. I talked to my -- I  
5 changed the insurance carrier over the period of ten  
6 years. Some insurance company, they just close their  
7 shop and leave. They stayed.

8 So I had to go to a new insurance agent in  
9 1991, I believe. And from then on, I told them not  
10 only to make sure to put the landlord's name on the  
11 policies as another insured, but also I told him to  
12 put leasehold improvement cover.

13 I believe that cover the plate glasses.  
14 Okay? Our glasses and the landlord existing glasses  
15 there, we cover under the leasehold improvement  
16 cover.

17 Q. At the time that you made your notice of  
18 renewal, you actually had in your possession,  
19 however, a letter from the landlord indicating that  
20 he had not received the certificates and asking for  
21 them to be forwarded, isn't that true?

22 A. I don't remember exactly what time, but  
23 sometime I get a notice from the landlord about "I'm

1 missing your certificate of insurance."

2 The same day, I went to see my insurance  
3 agent and told him to send the landlord the copy. I  
4 think I have been taking care of that.

5 So at the time I sent in the notice to  
6 extend my lease, I did not know that I sort anything.

7 MR. PAGE: This is exhibit 36.

8 (The document referred to was  
9 previously marked as Defendant's  
10 Exhibit No. 36 for Identification.)

11 BY MR. PAGE:

12 Q. Let met show you a document, Mr. Nguyen,  
13 if I may. This is defendant's pre-marked exhibit 36.

14 MR. RAGLAND: Do I have that, 36?

15 MR. PAGE: Yes.

16 BY MR. PAGE:

17 Q. Do you recognize that, Mr. Nguyen?

18 A. What do you mean "recognize"? It's a  
19 letter.

20 Q. Well, you have seen this letter before.

21 A. No, I did not. I did not.

22 Q. Well, you see that this letter is cc.'d to  
23 you. Do you see that?

1           A.    Yes, I saw that.

2           Q.    And you are telling me you have never seen  
3 this letter before.

4           A.    No.

5           Q.    All right. You just testified that at  
6 some point you were aware there was a request for  
7 insurance policies, right?

8           A.    The landlord send me a letter sometime  
9 later, not this late, told me that "Please send me a  
10 copy of your insurance policy."

11                   And I checked with my insurance agent.

12                   She said, "I sent to them all the time."

13                   I said, "Please send them another copy,"  
14 and she did that, not related to this letter.

15                   I did not receive this letter. I did not  
16 remember that. In our file, I did not see it.  
17 Because I keep all the correspondence from the  
18 landlord in certain files, insurance file, tax file,  
19 hundred other files.

20           Q.    Now, Mr. Nguyen, as I understand your  
21 direct examination, you had to go to court with one  
22 of your subtenants during the option exercise period,  
23 correct?



1           A.    No, I did not. I never took my tenant to  
2 court just for the exercise of an option.

3           Q.    First of all, let me ask my question and  
4 make sure. During the period of the exercise, which  
5 was roughly from August -- you gave your first notice  
6 in August, correct?

7           A.    Yes, August 9.

8           Q.    And your testimony in direct examination  
9 was that the period ends six months before the  
10 expiration of the lease, right? Do you follow me on  
11 that?

12          A.    If you count from September 9 to the  
13 expiration date of the lease, I have eight -- I filed  
14 my notice thirteen months in advance.

15          Q.    All right. During the period in the fall  
16 of 1993, isn't it true that you were in litigation  
17 with one of your subtenants?

18          A.    Yes, I did.

19          Q.    All right. And that subtenant was a law  
20 firm, correct?

21          A.    Yes, it's correct.

22          Q.    And you testified on direct examination  
23 that you took them to court to get them evicted,

1     isn't that true?

2             A.     Yes, I did.

3             Q.     And the reason you evicted them, Mr.  
4     Nguyen, was because they were in violation of the  
5     landlord's lease, isn't that correct?

6             A.     No, it's not correct.

7             Q.     Well, isn't that what you told the Court,  
8     that you were having them evicted because it was a  
9     violation of your lease with the landlord for the  
10    whole premises?

11            A.     On the paper, I think my lawyer is stating  
12    that. But he was evicted because he didn't have a  
13    lease with us.

14            Q.     All right. Now, by the "paper," you are  
15    referring to the exhibit that was put into evidence,  
16    aren't you? You have it there in front of you, don't  
17    you? This is exhibit number --

18            A.     Yes. I remember I saw that.

19            Q.     Well, why don't you take a look? This is  
20    exhibit number nine of the plaintiff's. This is the  
21    one that Mr. Ragland showed you.

22            A.     Yes.

23            Q.     It is a certified copy of the General

1 District Court?

2 A. Yes.

3 Q. Do you see that?

4 A. Yes.

5 Q. And doesn't that recite on the face of it,  
6 Mr. Nguyen, that the tenant -- that means the law  
7 firm -- is in violation of sublease and over landlord  
8 lease?

9 A. Yes.

10 Q. All right. So the reason you sought the  
11 eviction was because it was a nonconforming use,  
12 isn't that correct?

13 A. We have to take this position, I mean, the  
14 landlord position, to put in our lawsuit to test to  
15 see if the landlord opposition would rebel.

16 But in our opinion, that tenant have the  
17 right to stay there, if we have a lease with them,  
18 because they was there openly and not hiding from  
19 anybody. And the landlord was there with me many  
20 times, even --

21 Q. Mr. Nguyen, I am not asking you to make an  
22 argument for your lawyer about how to interpret the  
23 lease.

1 I am just asking: Didn't you represent to  
2 the General District Court that there was a violation  
3 of the lease with Capital Commercial Properties?

4 MR. RAGLAND: Your Honor, I am going to  
5 object. I think counsel knows well that people can  
6 take alternate positions in lawsuits.

7 THE COURT: Well, in looking at this  
8 summons for unlawful detainer, it also does go on to  
9 read "and/or" --

10 MR. RAGLAND: -- "without benefit of  
11 lease."

12 THE COURT: -- "without benefit of lease."  
13 It doesn't just say one.



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Q. Now, Mr. Nguyen, isn't it true that you have filed -- that is to say, Vina has filed -- other unlawful detainer cases in the General District Court of the City of Falls Church?

A. Yes, we did.

Q. And you have done that within the last couple of months, in May and June, isn't that right?

A. Yes, I did.

Q. And you have filed those suits against some of the subtenants, who are located in this property, correct?

A. Yes.

Q. And one of those subtenants is the business that is operating as Liberty Travel Service, correct?

1 A. Yes, it is.

2 Q. And in the unlawful detainer, isn't it  
3 true that you have alleged, or Vina has alleged, that  
4 there is a violation of the lease because it is a  
5 prohibited use under the lease, isn't that true?

6 A. I think we took the landlord position to  
7 test in the court.

8 MR. PAGE: This is exhibit 54.

9 (The document referred to was  
10 previously marked as Defendant's  
11 Exhibit No. 54 for Identification.)

12 BY MR. PAGE:

13 Q. Let me show you defendant's exhibit number  
14 54. (Handing document to the witness.)

15 Have you seen that before, Mr. Nguyen?

16 MR. RAGLAND: Fifty-four?

17 MR. PAGE: Yes.

18 THE WITNESS: Okay. I see it. What is  
19 your question?

20 BY MR. PAGE:

21 Q. Have you see that before?

22 A. Yes, I did.

23 Q. Okay. This is a copy of the unlawful

1       detainer action, correct?

2               A.     Yes.

3               Q.     And it is against Liberty Travel Service.

4               A.     Yes.

5               Q.     It indicates that there is a prohibit use,  
6       the word you used.

7               A.     Okay. It looks like the article 1 and 17  
8       is the one provided in the sublease, not in the  
9       master lease between Vina and Capital Commercial  
10      Properties.

11              Q.     Your sublease incorporates the provisions  
12      of the master lease.

13              A.     Yes, but we started here -- article 1 and  
14      17. Okay. In that, we provide in the sublease that  
15      the tenant knew that there was the landlord, another  
16      master lease. And anything that might contradict to  
17      the master lease, the master lease is in control.

18              Q.     And that is what this case was about,  
19      correct?

20              A.     Yes.

21              Q.     All right. Now, that travel agency,  
22      Liberty, has been a subtenant for how many years on  
23      this property?

1 A. About three years.

2 Q. That means they were a tenant throughout  
3 the period of the option renewal, isn't that correct?

4 A. Yes.

5 Q. All right. They are still a tenant today,  
6 right?

7 A. Yes, they are.

8 MR. PAGE: This is exhibit 55.

9 (The document referred to was  
10 previously marked as Defendant's  
11 Exhibit No. 55 for Identification.)

12 BY MR. PAGE:

13 Q. Let me show you exhibit number 55.

14 (Handing document to the witness.)

15 That is also an unlawful detainer action,  
16 or a copy of one, isn't it, Mr. Nguyen?

17 A. Yes.

18 Q. And this is against a second travel agency  
19 called Blue Skies Travel Services, right?

20 A. Yes, it is.

21 Q. And the grounds for seeking eviction are  
22 specified on the front of the unlawful detainer,  
23 aren't they?



1 A. Yes.

2 Q. Does it not state that you are seeking to  
3 have this tenant removed and, it has been typed in,  
4 "failure to cure default after notice; that is,  
5 conducting a use prohibited by subtenant's landlord's  
6 master lease"?

7 A. Yes. Also, we took the position of the  
8 landlord, and we would like to seek the Court's  
9 decision on that. And that's still pending in court  
10 now.

11 Q. But by taking the position of the  
12 landlord, what you mean by that is that you are  
13 taking the landlord's, Capital Properties, position  
14 as to the interpretation of article --

15 A. Yes. Capital Commercial Properties  
16 alleges that we violate the lease. Okay. Paragraph  
17 32, we violate this and that and that. And we would  
18 like to take it to court, get the Court's decision.

19 Q. All right.

20 A. We cannot interpret the law by ourselves.  
21 You cannot -- the landlord cannot interpret the  
22 agreement by himself. We went to court.

23 Q. Now, Blue Skies Travel Agency is still in

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1 the premises, right?

2 A. Yes, at the premises now.

3 Q. They are located back on this hallway, is  
4 that correct? (Indicating)

5 A. Yes, over there.

6 Q. And they are still there today, right?

7 A. Yes.

8 Q. And they have been there for how many  
9 years?

10 A. About three years.

11 Q. And a travel agency is specifically  
12 prohibited under the master lease, isn't it?

13 A. No, absolutely no.

14 Q. Well, it is not listed as one of the  
15 authorized uses, is it?

16 A. It is an incidental business, with the  
17 freight forwarding business, provided under paragraph  
18 32A of the lease --

19 Q. All right. So that is your --

20 A. -- and not prohibited anywhere in the  
21 lease. That's our position. Yes.

22 Q. Okay. I understand.

23 MR. PAGE: This is exhibit 56.

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1 (The document referred to was  
2 previously marked as Defendant's  
3 Exhibit No. 56 for Identification.)

4 BY MR. PAGE:

5 Q. Let me show you defendant's exhibit 56.  
6 (Handing document to the witness.)

7 This is also a copy of an unlawful  
8 detainer action brought in the City of Falls Church,  
9 correct?

10 A. Yes, it is.

11 Q. And this is against a subtenant named  
12 Frederick Mark, correct?

13 A. Yes, it is.

14 Q. And the basis for seeking -- first of all,  
15 as the landlord of Frederick Mark, you are seeking to  
16 have him evicted, correct?

17 A. As a result of a notice from the landlord,  
18 yes, we did that.

19 Q. Okay. What you are trying to do is have  
20 him thrown out of the premises, right?

21 A. No, no. We would like to see if he has to  
22 go. I don't want to evict any of my tenants. I'm  
23 not that kind landlord. Okay?

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1           So I would like to seek the Court to  
2       decide if that landlord have to go, if that landlord  
3       violated their lease or my lease. Okay? If the  
4       Court say no, they will stay there. I don't want any  
5       of them to leave.

6           Q.     Okay. I understand. Now, this unlawful  
7       detainer alleges, does it not, that Frederick Mark is  
8       engaged in a -- this is a quote -- "prohibited use,  
9       to wit, operating a restaurant as a Chinese  
10      restaurant."

11          A.     As my recollection --

12          Q.     Isn't that what it says?

13          A.     -- this is what we stated exactly as the  
14      allegation that the landlord accused us, that we  
15      violate the lease, not our -- you know, we are in  
16      completely different position with the landlord.  
17      Okay? We have to say that to see if the Court will  
18      decide which way.

19          Q.     Now, Frederick Mark is operating a Chinese  
20      restaurant.

21          A.     Absolutely no. I checked them from day  
22      one until today.

23          Q.     Well, isn't the name of the restaurant

1 Mark's Peking Duck Restaurant?

2 A. Let me tell you a little bit story about  
3 this. Okay?

4 Q. Well, I asked --

5 A. The first they --

6 Q. No, no. I asked you a question. Isn't  
7 the name of the restaurant Mark's Peking Duck  
8 Restaurant?

9 A. No.

10 Q. Isn't it true, Mr. Nguyen, that the name  
11 of the restaurant, until a couple of months ago, was  
12 Mark's Peking Duck Restaurant?

13 A. No.

14 Q. And it has been changed recently to say  
15 Mark's Cho Lon (phonetic) Restaurant, isn't that  
16 true?

17 A. That's correct.

18 Q. But previously, it was Mark's Peking Duck  
19 Restaurant.

20 A. No.

21 Q. And isn't it true that through the option  
22 period, it was being known as Mark's Peking Duck  
23 Restaurant?

1 A. No.

2 Q. Well, you are aware, aren't you, that they  
3 advertised as Mark's Peking Duck Restaurant?

4 A. No.

5 Q. You haven't seen advertisements?

6 A. No.

7 Q. Are you aware that in the yellow pages,  
8 this restaurant is listed under Chinese restaurants,  
9 with the restaurant of your mini-mall, Mark's Peking  
10 Duck Restaurant?

11 A. Let me make it clear. They started the  
12 lease with us as a carry-out place to sell barbecue  
13 meat, things like that. And sometimes when they  
14 start the lease with us, they changed the name to  
15 Mark's Peking Duck, okay, in 1986.

16 I went to my lawyer, sent them a letter,  
17 said, "In no event, you stated you will run as a  
18 Chinese restaurant."

19 And our lawyer sent them a letter by hand  
20 delivery, myself did that, and by certified mail.

21 And after that, we have a meeting with  
22 their lawyer, sit down and go over. I told them  
23 exactly what our lease provide, which prohibit a

1 Chinese restaurant.

2 So they promised me that they will stay in  
3 carry-out business, and they changed the name. They  
4 take the name down, and they changed the name to  
5 Mark's Oriental Carry-out, from that day for many,  
6 many years.

7 Okay. Maybe in the yellow book you see  
8 something they initiated with, they started with. It  
9 was wrong, not acceptable. Okay. It might be listed  
10 in the yellow book. Whatever they list, I don't  
11 know.

12 Q. Well, have you looked at the yellow pages  
13 recently?

14 A. No. I did not look to see the address of  
15 my tenant, because I know where they are.

16 Q. Are you aware that as recently as December  
17 1993, this restaurant was listed as Mark's Peking  
18 Duck Restaurant at 6763 Wilson Boulevard?

19 A. No. I did not know about that. No,  
20 that's wrong. That's completely wrong.

21 MR. RAGLAND: Is that exhibit 19?

22 MR. PAGE: Yes. I'm sorry. There is an  
23 exhibit, which is a photocopy of that, and is exhibit

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(703) 471-7603  
46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 19. But I am showing the witness the actual --

2 THE WITNESS: That's wrong. Okay. You  
3 show me it is here, but that's wrong. It should not  
4 be there.

5 BY MR. PAGE:

6 Q. When you say it is wrong, what you mean is  
7 that --

8 A. That name is Mark's Peking Duck.

9 Q. It shouldn't be there is what you mean.

10 A. It shouldn't be like that.

11 Q. They do sell Peking duck there, right?

12 A. No.

13 Q. This is the --

14 A. You tell me what Peking duck means. Can  
15 you tell me? If you cannot, I will tell you what.

16 Q. I cannot tell you.

17 A. Okay. So what are you asking me?

18 Q. Now, you agree, don't you, Mr. Nguyen,  
19 that a Chinese restaurant is a use that is not listed  
20 as an authorized use in the lease, right?

21 A. I do know about that.

22 Q. And it is also further stated to be a  
23 specific prohibition in the lease to have a Chinese



1 restaurant, correct?

2 A. Yes. I know about that.

3 Q. Now, the lease also prohibits hairstyling,  
4 isn't that true?

5 A. No, that's not correct.

6 Q. Well, it is not an authorized use in the  
7 lease, is it, Mr. Nguyen?

8 A. Yes, I think so.

9 Q. You think it is an authorized use.

10 A. Yes. Barbering and hairstyling, they are  
11 authorized in the lease, not prohibited in the lease.

12 Q. All right.

13 A. What is prohibited is the beauty salon.

14 MR. PAGE: This is exhibit 58.

15 (The document referred to was  
16 previously marked as Defendant's  
17 Exhibit No. 58 for Identification.)

18 BY MR. PAGE:

19 Q. Let me show you a document which was  
20 marked as defendant's exhibit number 58. (Handing  
21 document to the witness.)

22 This is another unlawful detainer case  
23 filed against one of your subtenants, is it not?

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**46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165**

1 A. Yes, it is.

2 Q. And this is filed against an entity called  
3 Tan Son Nhut (phonetic).

4 A. Yes, it is.

5 Q. What business are they engaged in?

6 A. Their primary business is freight  
7 forwarding business.

8 Q. And they are also a travel agency, isn't  
9 that correct?

10 A. I believe, to my knowledge, they have no  
11 authority to do travel agent.

12 Q. They have a sign indicating that they do a  
13 travel agency business in their window, do they not?

14 A. Yes, they have that.

15 Q. Now, you have had -- in addition to these  
16 unlawful detainer cases, isn't it true that Mr.  
17 Ragland has been, on your behalf, writing letters to  
18 these subtenants, telling them to cease and desist  
19 these unauthorized uses.

20 A. Yes. That is in order to comply to the  
21 default notice that we received from the landlord.  
22 We did that, yes.

23 Q. And you have sent notices to the tenants

1 yourself, telling them to cease and desist, because  
2 there is a violation of the master lease, isn't that  
3 right?

4 A. Yes. We have to do that.

5 MR. PAGE: This is exhibit 52.

6 (The document referred to was  
7 previously marked as Defendant's  
8 Exhibit No. 52 for Identification.)

9 BY MR. PAGE:

10 Q. I am going to show you a letter that has  
11 your signature on it. It is exhibit number 52.

12 (Handing document to the witness.)

13 You wrote that letter, didn't you, Mr.  
14 Nguyen?

15 A. Yes, I did.

16 Q. That is a letter you wrote to Frederick  
17 Mark, the operate of the Chinese restaurant.

18 A. Yes, the letter I wrote to Frederick Mark,  
19 who operated a Vietnamese restaurant, but we had to  
20 do that over here again.

21 We took the landlord's, Capital Commercial  
22 Properties, position to remedy the landlord notices.  
23 But he is not operating a Vietnamese -- I mean, a

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 Chinese restaurant or a Vietnamese restaurant.

2 I feel very sorry about this, but I have  
3 to do it.

4 MR. PAGE: This is exhibit 45.

5 (The document referred to was  
6 previously marked as Defendant's  
7 Exhibit No. 45 for Identification.)

8 BY MR. PAGE:

9 Q. Now, I am going to show you a letter  
10 marked as exhibit number 45 and ask you if you have  
11 seen this letter. (Handing document to the witness.)

12 A. Yes, I did.

13 Q. This is a letter written by Mr. Ragland,  
14 is it not?

15 A. Yes, it is.

16 Q. And do you know who he is writing to?

17 A. He wrote it to the lawyer for one of the  
18 tenants that we -- the Tan Son Nhut, TSN, one of the  
19 tenants in our shopping center.

20 Q. And in that letter, isn't it true that  
21 Mr. Ragland informs the lawyer for Tan Son Nhut that  
22 the use of this subtenant is an unauthorized use?

23 A. For this particular tenant, I think that's

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 correct, because, you know, I never authorized them  
2 to do even travel. But they did it anyway.

3 So, you know, when we received the notice  
4 from the landlord, again we took the landlord's  
5 position, and we tell them to stop.

6 Q. How long have they been a tenant in the  
7 premises?

8 A. Ten years.

9 Q. And how long have they been engaged in the  
10 travel business?

11 A. Oh, about a couple years.

12 Q. And a travel business, again, is not one  
13 of the authorized uses in the lease, is it?

14 A. You mean which lease?

15 Q. In the master lease.

16 A. It's not prohibited under the master  
17 lease.

18 Q. It is not an authorized used. I am asking  
19 a specific question.

20 A. It is authorized use with incidental  
21 business, with a freight forwarding business.

22 Q. Well, let me ask you differently. Mr.  
23 Nguyen, the words "travel agency" or "travel

1 services" do not appear in paragraph 32A of the  
2 lease, isn't that right?

3 A. It's not in the -- it's an incidental  
4 business to the freight forwarding business.

5 Q. But it is incidental if you interpret it  
6 to mean incidental. Is that what you are saying?

7 A. Yes. I did that for many years, and  
8 landlord was there. He never say anything to  
9 objected to it. So I think we have -- it's okay.

10 Q. All right.

11 MR. PAGE: This is exhibit 41.

12 (The document referred to was  
13 previously marked as Defendant's  
14 Exhibit No. 41 for Identification.)

15 BY MR. PAGE:

16 Q. Let me hand you a letter marked as exhibit  
17 number 41 and ask you if you have seen this letter.  
18 (Handing document to the witness.)

19 A. Yes, I did.

20 Q. Again, this is a letter that Mr. Ragland  
21 wrote, correct?

22 A. Yes.

23 Q. Do you know who this letter is written to?

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1           A.    It was sent to the lawyer for Blue Sky  
2 Travel.

3           Q.    Blue Skies Travel contested your unlawful  
4 detainer, isn't that right?

5           A.    All of them protested. They've already  
6 contested.

7           Q.    And they contested on the grounds that you  
8 had not complained about their travel service before,  
9 is that correct?

10          A.    Yes. It looks like that was their  
11 position. Yes.

12          Q.    All right. Isn't it true that Mr.  
13 Ragland, on your behalf, has told them that the lease  
14 provides that there is no waiver of your position  
15 against this travel agency? Isn't that what he has  
16 told them?

17          A.    The way it's stated in here is the waiver  
18 was for the past. The future, if the landlord  
19 objected to it and the Court decided we have no right  
20 to conduct the travel business, they have to go.  
21 That's the future. We're talking about the future.

22          Q.    And isn't it true that this subtenant is  
23 trying to renew its sublease?

1 A. Yes.

2 Q. And you have told them that they cannot  
3 renew the sublease, correct?

4 A. Yes. And we're waiting for the result of  
5 the Court. If the Court say that I cannot evict  
6 them, they will stay there. I have to let them stay.  
7 I don't want to see any tenant must go.

8 Q. Isn't it true that you have told them they  
9 cannot renew because it would be a violation of your  
10 master lease for them to renew?

11 A. No. I said because I have problem with  
12 the landlord, so just wait and see. They are still  
13 there now.

14 If the Court decided that I have the right  
15 to conduct the travel business in my shopping place,  
16 I will let them stay as long as I am there.

17 MR. PAGE: These are exhibits one through  
18 eighteen.

19 (The documents referred to were  
20 previously marked as Defendant's  
21 Exhibit Nos. 1 through 18 for  
22 Identification.)

23 MR. PAGE: Your Honor, I would like to



1 show the witness a series of photographs. They were  
2 all marked as defendant's exhibits one through  
3 eighteen. I have an extra set.

4 I gave a set to Mr. Ragland, but I have an  
5 extra set that I can hand up to you, as well, if you  
6 would like to see them.

7 MR. RAGLAND: Your Honor, it would be  
8 inappropriate for you to have them until you accept  
9 them, I think.

10 MR. PAGE: That's true.

11 THE COURT: That's correct.

12 MR. PAGE: You don't have to look at them,  
13 I guess.

14 MR. RAGLAND: And I am assuming that all  
15 the exhibits that have been talked about, none have  
16 been offered yet.

17 MR. PAGE: That's true.

18 THE COURT: They have not.

19 MR. PAGE: I have not offered anything  
20 into evidence.

21 MR. RAGLAND: Okay. I just want to make  
22 sure.

23 BY MR. PAGE:

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 Q. Mr. Nguyen, I am going to show you --

2 THE COURT: They are marked as what?

3 MR. PAGE: Numbers one through eighteen,  
4 Your Honor. There are eighteen photographs.

5 BY MR. PAGE:

6 Q. Mr. Nguyen, the first picture, the one  
7 that is marked "number one" on the back, has the  
8 front of the shopping center and the word "Eden." Do  
9 you see that?

10 A. Yes, I do.

11 Q. Mr. Nguyen, is this a fair representation  
12 of the front of the property that is at issue in this  
13 lawsuit?

14 A. Yes, it is.

15 Q. And the word "Eden" is the name you use as  
16 a trade name, correct?

17 A. Yes, it is.

18 Q. Would you look at the second picture?

19 A. (Witness complies.)

20 Yes.

21 Q. Is that a fair representation of the  
22 parking lot in front of your space?

23 A. Parking lot, yes.

1 Q. The same with regard to number three. Is  
2 that a fair representation of the area directly in  
3 front of your space?

4 A. Yes, with a lot of trees.

5 Q. Now, beginning with number four, this is  
6 an interior shot of the premises, is that correct?

7 A. Yes, it is.

8 Q. And which subtenant is depicted in this  
9 photograph?

10 A. Okay. This is Blue Sky -- I'm sorry,  
11 Liberty Travel and Freight Forwarding.

12 Q. Is this a fair and accurate  
13 representation of what their store looks like?

14 A. The front glass, yes.

15 Q. And is that the way this has looked for  
16 the last year?

17 A. Yes.

18 Q. All right. I turn your attention to  
19 exhibit number five.

20 A. Okay. I'm here.

21 Q. And this is a picture of part of the  
22 interior space, and it shows another subtenant.

23 A. The same store. But the one that you see

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 on the first one, the one you just showed me, number  
2 four, that has a sign relating to the travel  
3 business.

4 This one is -- you know, the guy carry a  
5 lot of business, freight forwarding. This one is  
6 regarding to the freight forwarding business, the  
7 same tenant, the same store.

8 Q. Okay. And that is a fair representation  
9 of what his space looks like, correct?

10 A. Yes, it is.

11 Q. All right. Let's look at exhibit number  
12 six.

13 A. (Witness complies.)

14 Q. And this is a picture looking in through  
15 the glass window of one of the tenants, correct?

16 A. Yes, the same tenant and looking through  
17 the glass and the back wall.

18 Q. And on the back wall it says, "Liberty  
19 Travel and Services," correct?

20 A. That's correct.

21 Q. All right. That is a fair representation  
22 of what the space looks like today.

23 A. Yes.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 Q. And that is the way the space has looked  
2 for at least the last year, isn't that correct?

3 A. Yes.

4 Q. All right. I ask you to look at  
5 defendant's exhibit number seven.

6 A. Yes.

7 Q. This is also a picture of the front of the  
8 space of one of your tenants, correct?

9 A. Yes.

10 Q. This is a barbershop, is that correct?

11 A. Yes, it is.

12 Q. It also says in the window, does it not,  
13 "Perm, \$20," and "Color, \$10"? Do you see that?

14 A. Yes. It shows that.

15 Q. And do you see in the back of that  
16 photograph, there are pictures of women and their  
17 hairstyles on the wall? Do you see that?

18 A. Yes, I saw that.

19 Q. Now, that is the way this space has  
20 looked -- this is the way the space looks today,  
21 isn't that right?

22 A. No, it's different.

23 Q. Okay. What --

1           A.    Today -- I went over there a couple days  
2 ago. There was no "color," no "perm." It looks like  
3 this picture has been taken months ago. Okay. And I  
4 didn't see that. I have some pictures that show  
5 there was no "color" and "perm."

6           Q.    It doesn't show the "color" and "perm" and  
7 the women's pictures anymore?

8           A.    The one I took a couple days ago, there  
9 was not.

10          Q.    Did you tell them to take that down?

11          A.    I did.

12          Q.    Did somebody --

13          A.    No. I did tell them, yes, when I get the  
14 notice from the landlord, telling me that I could not  
15 have the right to have a barbershop in my shopping  
16 place. I looked at the lease, and it has barbershop  
17 in there. I don't know why.

18                But anyway, I talked to the tenant, "Take  
19 it down." You know, "Don't do anything. You stay in  
20 the barbershop business."

21          Q.    Right. You told him to take it down  
22 because that business, the perm and the color, is for  
23 a styling salon or a hair salon.

1           A.    No.  I told them to take down anything.  
2    "Just stay the barbershop.  You stay in barbershop."

3           Q.    This is the way that the premises has  
4    looked for the last several years, though, isn't it?

5           A.    No.  They did not start their business  
6    until March.  You know, the law firm before was  
7    there.  They moved out.  And this tenant came in in  
8    January, February and March.  They do the remodeling.  
9    That was a month or two vacancy there.

10                  And this tenant was the son of another  
11   barbershop in my place.  He went over.  He opened  
12   late in March.

13           Q.    Okay.  That is very helpful.  So this  
14   tenant in this space didn't start his business  
15   until --

16           A.    Late March.

17           Q.    -- the very end of the renewal period,  
18   correct?

19           A.    That's right.

20           Q.    All right.  And you have now told him he  
21   cannot do hairstyling, correct?

22           A.    No.  I told him to take the signs -- you  
23   make the store look ugly.  That's what I told him.

1 Q. Okay. Now, would you look at exhibit  
2 number eight?

3 A. (Witness complies.)

4 Q. This is also a photograph of the same  
5 premises, is that correct?

6 A. Yes.

7 Q. The same front door with "color" and  
8 "perm."

9 A. Yes.

10 Q. All right. Let's look at exhibit number  
11 nine.

12 A. (Witness complies.)

13 Q. Now, this is the other barbershop, is that  
14 correct?

15 A. Yes.

16 Q. Do you see the women's pictures in that  
17 barbershop?

18 A. Yes. I see one back on the wall.

19 Q. They do color and perm and hairstyling in  
20 that shop, too, don't they?

21 A. No, not that I know of.

22 Q. All right. Have you talked to them and  
23 told them to cease doing that kind of work?



1           A.    From day one, this place was a barbershop.  
2   And I know the man have barbershop license.  He  
3   cannot do anything else.

4                    That violates the Virginia code regarding  
5   to barber or hair salon, that type thing.  So I know  
6   that he is not doing anything other than barbering.

7           Q.    All right.  Look at exhibit ten, Mr.  
8   Nguyen.

9           A.    (Witness complies.)

10          Q.    Isn't exhibit ten the same barbershop that  
11   we were just talking about on exhibit nine?

12          A.    Yes.

13          Q.    And you see that all of the photographs on  
14   the wall of sample hairstyles are women, isn't that  
15   correct?

16          A.    I see some women's picture, but I would  
17   like to make it clear here.  Can I say that now?

18          Q.    Go ahead.

19          A.    Okay.  Number one, you go back to exhibit  
20   number nine, you see the man sitting in the chair.  
21   He having a haircut.

22                   His wife is looking to make sure that the  
23   barber will do the right thing for her husband.

1     Okay? In my country, the lady care for the man like  
2     that.

3             Anyway, another culture in my country is,  
4     you know, the barber place would be a place for men.  
5     Very rare you see a lady into it. So because the  
6     place is almost exclusively for the man, so the owner  
7     would have one kind of really ladies' picture in the  
8     wall.

9             And also in the ceiling sometimes, they  
10    put the Playboy picture in the ceiling. So when the  
11    guy have a hair shave, he can look at that and enjoy  
12    it. Okay?

13            So the picture I see here doesn't mean  
14    anything. Okay?

15            Q. I admit there are cultural differences.

16            A. It's just a good-looking or really movie  
17    star. Let me tell you what. In the beauty salon  
18    things, you go in there if you want to see the style  
19    of the hair that you want to cut, it's in album, in a  
20    book.

21            They cannot on the wall. Okay? The  
22    picture on the wall is just for relaxing when the guy  
23    have a haircut. If you want a hairstyle, you have to

1 look at a book, which is changing every year, every  
2 day. That's why.

3 You might never go to a hairstylist, but  
4 go to one and you'll see.

5 Q. All right. I understand. Let's move on.  
6 Let me ask you to look at exhibit number 11. This is  
7 a picture of Mark's Duck House, correct?

8 A. Yes.

9 Q. And it shows the sign above the door.

10 A. Yes, it does.

11 Q. All right. And the same with the next  
12 exhibit, number 12.

13 A. Yes, it does. It's the same.

14 Q. Now, exhibit number 13 also shows the Duck  
15 House, but also shows part of the hallway, correct?

16 A. Yes.

17 Q. And this is a fair and accurate  
18 representation of what the space looks like today.

19 A. Yes.

20 Q. And this is what the space has looked like  
21 for the last year, correct?

22 A. Actually, the name -- you know, he added  
23 it, because I told him that because the landlord,

1 when he looked at a bunch of Chinese characters on  
2 the top, he thought that everything inside Chinese.

3 And I told him to write it down, make it  
4 clear to everybody, including his customers, that he  
5 is a Vietnamese restaurant, which he did it. And we  
6 have another picture recently. Okay?

7 So this one is no longer like that. But  
8 in any even, the Cho Lon is a place in my country, in  
9 Vietnam, not in China.

10 Q. Now, would you look at exhibit number 14?

11 A. (Witness complies.)

12 Q. And that again shows in the hallway, some  
13 of the signs that are in the premises, correct?

14 A. Yes, but one of the -- the one for Mark's,  
15 that is outdated. We have a better picture of that.  
16 I show you later.

17 Q. Okay. Fine. Exhibit number 15, this is a  
18 picture of TSN Travel, is it not?

19 A. Yes, it is.

20 Q. Okay. This is what the store premises  
21 looks like today, is that correct?

22 A. Yes, it is.

23 Q. And it is what it has looked like for the

1 last year or so.

2 A. Yes, it is.

3 Q. And it has a sign on the front that says  
4 "TSN Travel."

5 A. Yes. I saw that.

6 Q. And exhibit number 16 also shows the same  
7 premises.

8 A. Yes.

9 Q. It shows an even larger sign above the  
10 doorway, saying "TSN Travel," correct?

11 A. Yes, it is.

12 Q. All right. And exhibit number 17, this is  
13 a picture of Blue Skies Travel, is that correct?

14 A. Yes, it is.

15 Q. It has a sign that is in neon that says  
16 "Blue Skies Travel Company," right?

17 A. Yes, it is.

18 Q. And the same with picture number 18. It  
19 shows the same Blue Skies Travel, correct?

20 A. Yes it is.

21 Q. These pictures show the way the premises  
22 for Blue Skies looks today, isn't that right?

23 A. Yes. It looks like that for the last many

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1 years, three years, and today. Yes.

2 Q. Now, just for identification purposes,  
3 Mr. Nguyen, I want to put up a revision of this chart  
4 and show you, if you can read it, how the tenant uses  
5 are broken down for this space. Can you see it from  
6 over there, sir?

7 A. Yes, I can.

8 Q. All right. If you would take a minute, I  
9 just want to have you look at this and tell me if  
10 there are any inaccuracies in how we have located  
11 your subtenants in the space.

12 A. (Witness complies.)  
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Q. Mr. Nguyen, shortly before we broke, I asked you if you would look at this chart and tell me if it was accurate, insofar as placing the tenants in the space.

A. Yes, that could be useable.

MR. PAGE: These are exhibits 33, 34, and 35.

(The documents referred to were previously marked as Defendant's Exhibit Nos. 33, 34 and 35 for Identification.)

BY MR. PAGE:

Q. Let me show you what was marked previously as defendant's exhibits 33, 34 and 35. And copies of these were given to Mr. Ragland earlier. Mr. Nguyen, do you recognize those documents?

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1 A. Yes, I do.

2 Q. You prepared those, didn't you?

3 A. Yes, I did.

4 Q. Those are lists of the subtenants at three  
5 different dates, is that correct?

6 A. Yes, it is.

7 Q. One is in August of 1993, correct?

8 A. Yes.

9 Q. One is in January of 1994, is that right?

10 A. Yes, it is.

11 Q. And the last one, number 35, is in March  
12 of 1994.

13 A. Yes, that's correct.

14 Q. And this is a list of the tenants that you  
15 had in the location at each of those dates, correct?

16 A. Yes.

17 Q. On the first list, you have the law office  
18 listed, right?

19 A. Yes.

20 Q. But that tenant then disappears from the  
21 later list, correct?

22 A. That's correct.

23 Q. Because you had evicted that tenant,



1 right?

2 A. Right. That's correct.

3 Q. But otherwise, that would represent the  
4 tenants in the space during the renewal option  
5 period, correct?

6 A. Yes, that's correct.

7 Q. All right. Now, one of the tenants in the  
8 space is a tenant whose name is Tan Khac La. Am I  
9 pronouncing that correctly?

10 A. Yes.

11 Q. Which tenant is that? What business do  
12 they operate?

13 A. May I take a look at the lease that we're  
14 talking about?

15 Q. Sure.

16 MR. PAGE: This is exhibit 20.

17 (The document referred to was  
18 previously marked as Defendant's  
19 Exhibit No. 20 for Identification.)

20 MR. PAGE: I am going to hand the witness  
21 a lease, sublease, that was marked as defendant's  
22 exhibit 20. (Handing document to the witness.)

23 MR. RAGLAND: Can you identify which one

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1 you are talking about? I didn't catch the name.

2 MR. PAGE: I am going to show the witness  
3 exhibit number 20.

4 BY MR. PAGE:

5 Q. That is one of the subtenants, right?

6 A. Yes. It is the China Herb Store.

7 Q. This is a sublease. The document I have  
8 handed you is a sublease for the Chinese Herb Store,  
9 is that right?

10 A. China Herb, yes.

11 Q. Now, isn't it true that this sublease  
12 allows this tenant to provide for retail sales of  
13 Chinese herbs, is that right?

14 A. Yes, it is.

15 Q. That is a use that is specifically  
16 provided in the lease, is it not?

17 A. Yes, it is.

18 Q. But this lease also provides, does it not,  
19 that the tenant may manufacture herbal compounds on  
20 the premises, is that correct?

21 A. Literally, word by word here, it show  
22 manufacture of herbal compounds. I think this is  
23 wrong. I can explain it later. But to answer your

1 question, there was something stated to that effect.

2 Q. And you know, don't you, that under the  
3 lease that you have with Capital Commercial  
4 Properties, manufacturing is a prohibited use?

5 A. No. I mean, manufacturing --

6 Q. You know that manufacturing is not  
7 permitted in these premises, and only retail sales is  
8 permitted. Don't you know that?

9 A. Yes, I do.

10 Q. All right. So if manufacturing is  
11 occurring with this tenant, that would be a violation  
12 of your lease with Capital Commercial Properties.

13 A. Okay. I would like to make it clear this  
14 is wrong in the way -- you know, we come here. We  
15 have some problem with English. Back to ten years  
16 ago, my English was not good enough.

17 So I put in here what I really mean now, I  
18 mean the way I look at that, we mean at that time was  
19 to compounding different kind of herbs together to  
20 make a Chinese medicine or something like that.

21 No way we can have a manufacturing  
22 facility there for a store of 522 square feet. And  
23 we cannot get manufacturing license anyway. So, you

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1 know, this is a no-no. I mean, it doesn't mean  
2 anything. This wrongly use of the language.

3 Q. Now, Mr. Nguyen, the landlord was not  
4 provided with a copy of this lease that you signed  
5 with this Chinese herb store, isn't that right?

6 A. What do you mean "provided"?

7 Q. Excuse me. Let me rephrase that.

8 Prior to the litigation that we are  
9 engaged in now, you did not give a copy of this  
10 sublease to Capital Commercial Properties, did you?

11 A. No. That is not correct. I know time to  
12 times, the landlord have his business representative  
13 to walk around my mall.

14 Q. I didn't ask you that. I'm sorry.

15 A. And get the lease. I did not provide it.

16 Q. That is all I asked. You did not provide  
17 a copy of the lease.

18 A. But the landlord know many leases. I  
19 don't know which one he has.

20 Q. Mr. Nguyen, I just want to -- I am not  
21 asking you about walking around. I just want to  
22 know: Did you provide copies of this sublease to the  
23 landlord, Capital Commercial Properties?

1 A. Yes, I did. Under the court order, I did.

2 Q. Under the court order that occurred last  
3 week, right?

4 A. Yes.

5 Q. All right. Prior to that time, the  
6 landlord, as far as you know, never saw this lease,  
7 isn't that right?

8 A. I don't know for sure about that.

9 Q. All right. But you didn't give him a  
10 copy, in any event.

11 A. No, I did not. But other leases, I did  
12 not provide the landlord, but he had anyway. So I  
13 don't know exactly, to answer your question, to that  
14 one.

15 MR. PAGE: This is exhibit 21.

16 (The document referred to was  
17 previously marked as Defendant's  
18 Exhibit No. 21 for Identification.)

19 BY MR. PAGE:

20 Q. I am going to hand you exhibit number 21  
21 now. (Handing document to the witness.)

22 Twenty-one is a letter that has attached  
23 to it another sublease. Exhibit 21 is a sublease

1 with another one of the tenants in this space, isn't  
2 that correct?

3 A. Yes, that's correct.

4 Q. Now, Mr. Nguyen, I'm sorry, but I really  
5 cannot pronounce the name of this subtenant. How do  
6 you pronounce it?

7 A. Do you mean the tenant?

8 Q. Yes, the subtenant.

9 A. Hoan Dung Hoa Tien.

10 Q. Okay. And what kind of business are they  
11 engaged in?

12 A. They're engaged to selling the wedding  
13 cards.

14 Q. Yes. Which store is the store that this  
15 subtenant occupies?

16 A. You don't show it there.

17 Q. Oh. Where is it?

18 A. It's missing from that chart.

19 Q. Okay. Where is it?

20 A. It's missing. Outside. It outside the  
21 chart that you have.

22 Q. Is it under this lease, under the Vina  
23 lease?

1 A. Yes.

2 Q. All right. And it is --

3 A. It might be outside.

4 Q. It is outside what is shown here.

5 A. Yes, near the window.

6 Q. All right. Now, this lease provides that  
7 this tenant will be engaged in wedding card sales,  
8 correct?

9 A. Yes.

10 Q. And doesn't the lease also provide that  
11 this tenant will be selling Oriental furniture?

12 A. Yes. The lease show that, but this tenant  
13 never sell any Oriental furniture. The store size is  
14 400 square feet. So, you know, she never did  
15 anything, I mean, selling Oriental furniture. That  
16 should be deleted.

17 Q. All right.

18 A. On some of the leases, I also provided  
19 that I can give this service, that service, to  
20 certain tenants. However, if they -- if the tenant  
21 did not do the business within six months, that  
22 service will be out of the lease automatically.

23 Q. Mr. Nguyen, the sale of furniture is one

1 of the uses that is prohibited in this space, isn't  
2 that true?

3 A. No, it's not prohibited. It's not  
4 prohibited in the lease.

5 Q. It is not authorized by the lease, is it?  
6 Does the word "furniture" appear in paragraph 32?

7 A. Hold it.

8 MR. RAGLAND: Give him a chance to look.

9 BY MR. PAGE:

10 Q. Yes. Go ahead and take a look at the  
11 lease, which is exhibit one.

12 A. (Examining document.)

13 I think that would be under "appliance."

14 Q. Okay. I want to draw your attention in  
15 paragraph 32 to paragraph 32B. Do you see that?

16 A. Yes.

17 Q. I am going to read it, and I ask you to  
18 follow along with me.

19 Paragraph 32B starts, "Without in any way  
20 enlarging upon the purposes described in section A  
21 hereof, it is understood and agreed that neither the  
22 demised premises nor any part thereof shall be used  
23 for any of the following purposes" -- now I ask you



1 to skip to the little Roman numeral five, which is a  
2 "v" -- "for the sale or display for sale of  
3 appliances and/or furniture."

4 Do you see that?

5 A. Yes.

6 Q. So furniture is a prohibited use, isn't  
7 that correct?

8 A. (No response.)

9 Q. The sale of furniture is prohibited under  
10 this lease, isn't that right, Mr. Nguyen?

11 A. Yes, it shows that.

12 Q. Now, in addition to that, it is not listed  
13 in "A" as a permitted use, correct?

14 A. That's correct.

15 Q. So entering into this lease in 1988, you  
16 are authorizing a subtenant to engage in a prohibited  
17 activity, isn't that right?

18 A. You know, as I understand at that time,  
19 the landlord have a big tenant in the basement, who  
20 is selling furniture, used furniture, office  
21 furniture. The name of it is Economy Office  
22 Furniture.

23 And the one I allow the -- one of my

1 tenants here is Oriental furniture, I mean, household  
2 furniture, the one that's used in the house. You can  
3 go in any office, you find Oriental furniture in it.

4 The furniture we had in mind at this time  
5 here would be chairs and tables, you know, just for  
6 family use. But in any event, this tenant never have  
7 Oriental business in the store. So this is  
8 irrelevant.

9 Q. This tenant has been in this space since  
10 1988, correct?

11 A. 1988, but they never sell any Oriental  
12 furniture. You can go over there right. They don't  
13 have any Oriental furniture.

14 MR. PAGE: This is exhibit 22.

15 (The document referred to was  
16 previously marked as Defendant's  
17 Exhibit No. 22 for Identification.)

18 BY MR. PAGE:

19 Q. I am going to show you now a sublease that  
20 is marked as exhibit number 22. (Handing document to  
21 the witness.)

22 And again, I am going to apologize. I  
23 cannot pronounce the subtenant. Would you please do

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1 so?

2 A. You want me to pronounce?

3 Q. Yes. Would you, please?

4 A. Okay. Mr. Hao Mau Ngo.

5 Q. Okay. Where is this tenant located?

6 A. That tenant located in the corner, near  
7 the hallway, on the right, under "Toys."

8 Q. That is the space on the chart here that  
9 says "Toys," is that correct?

10 A. Yes. Right.

11 Q. Now, this lease actually says that you  
12 have leased space that is not to be used for any  
13 retail purpose, isn't that correct?

14 A. Yes. I mean, he cannot display the  
15 merchandise in the store and sell it from the store,  
16 what I mean retailing. But that would be competing  
17 with other stores, retail stores, in the mall.

18 Q. Other stores within your mini-mall,  
19 correct?

20 A. Yes.

21 Q. So you put a restriction on him that he  
22 could only engage in trading and wholesale  
23 activities, correct?

1           A.    I think, again, the English problem here.  
2   What we allow him to do was to be order the things  
3   around the world for the merchants in the area.  He  
4   have a desk and a chair.

5                You go back to page one, the guy, the  
6   gentleman has only 400 square feet store.  That is a  
7   tiny store.

8                So what he did was he ordered merchandise  
9   on behalf of some of the merchants and then sell it  
10  to the merchant place of business outside the center.

11               So actually, he has nothing to display or  
12  sell from the store.  And another thing is he was in  
13  business with us for a few years, and then he too  
14  old.

15               He retired, and now the store is run by  
16  his son, who is selling toys and shoes and things  
17  that list under secondary business, number B, under  
18  the 3B.

19           Q.   All right.  So this tenant is no longer  
20  engaged in that business, is that right?

21           A.   Absolutely no.

22           Q.   Okay.  When did that change take place?

23           A.   Oh, about four or five years ago.  Before

1 I remember that, because when we have argument back  
2 and forth on the cost, he left at that time.

3 Q. Okay. That's fine.

4 I want to show you two more leases. And  
5 we have already discussed these, I think. Actually,  
6 there are three leases, so I will do them as a group.

7 MR. PAGE: This is exhibits 23, 24 25.

8 (The documents referred to were  
9 previously marked as Defendant's  
10 Exhibit Nos. 23, 24 and 25 for  
11 Identification.)

12 BY MR. PAGE:

13 Q. I want to ask you if these are also  
14 subleases you have with tenants?

15 A. Yes, they are.

16 Q. Now, each of these leases is with a travel  
17 service, isn't that correct?

18 A. No. The first lease I have here, under  
19 exhibit 23, that is a grocery store.

20 Q. All right. Would you please look at the  
21 uses that are described in that lease as being  
22 permitted, your sublease?

23 A. Yes. I see it here. Main business and

1 secondary business, they are all permitted, not  
2 prohibited in the lease. And most of them are  
3 incidental business to a grocery store, per se.

4 Q. Okay. So you are telling me that this is  
5 a grocery store with incidental business, correct?  
6 Is that right, Mr. Nguyen?

7 A. Yes. I allow him to do the incidental  
8 business, yes.

9 Q. And travel services is listed specifically  
10 as one of the permitted incidental uses, is that  
11 right?

12 A. Okay. This particular tenant requests  
13 that, but he never conduct a travel business in his  
14 store for two reasons.

15 Number one, there was no traveling allowed  
16 back to that time, between this country and Vietnam.  
17 So it was nothing to be done at that time.

18 And then later on, when the trade embargo  
19 was listed, he have no room for any travel services,  
20 which required a separate license, things like that.  
21 He cannot use his grocery license to do travel  
22 business. So he never did anything regarding to the  
23 travel services that's in the lease.

1 Q. But you have authorized him to do that, is  
2 that right?

3 A. Yes. I think that is not prohibited in  
4 the lease, and that is incidental business in the  
5 freight forwarding business we have in the lease.

6 Q. You think that anything that is incidental  
7 is allowed, is that correct?

8 A. Yes, that's what I see.

9 Q. Now, look at number 24. This is a lease  
10 for Blue Skies Travel Services, isn't it?

11 A. Yes.

12 Q. And Blue Skies is listed on the chart as  
13 Blue Skies Travel, correct?

14 A. Yes, she is.

15 Q. They are engaged in a travel business and  
16 have been since 1991 in this space, isn't that right?

17 A. That's correct.

18 Q. Okay. And number 25 is a lease with whom?

19 A. Phuong Tan Huynh.

20 Q. Which business are they?

21 A. Travel and -- freight forwarding and  
22 travel business.

23 Q. Okay. And in the authorized uses, you

1 have -- in your sublease, you have written in "Main  
2 business: traveling services," correct?

3 A. Yes.

4 Q. And none of these leases were provided by  
5 you to the landlord prior to this litigation, is that  
6 right?

7 A. The same answer. The landlord might have  
8 it, but, you know, I provided all the leases a couple  
9 weeks ago.

10 Q. Now, one thing that I just want to clear  
11 up for the Court, would you just describe to me what  
12 other businesses are in this shopping center outside  
13 of the Eden space?

14 A. You mean other uses?

15 Q. Yes.

16 A. Can you tell me what time you would like  
17 me to tell you?

18 Q. Let's talk about today.

19 A. Today?

20 Q. What other -- first of all, let me do it  
21 this way. It is true in this shopping center that  
22 there is an anchor tenant at the end of the shopping  
23 center, right?



1 A. What do you mean "anchor tenant"?

2 Q. A large tenant.

3 A. Large in terms of rent payment, or large  
4 in terms of a big store? It depends. You see, you  
5 know, I pay rent more, so I would be considered an  
6 anchor tenant there.

7 Q. Okay.

8 A. The other store is big, but they pay cheap  
9 rent. So in terms of rent, I am the anchor tenant.

10 Q. Okay.

11 A. It is true that there is a much larger  
12 store at the end of the mall, correct?

13 A. Yes.

14 Q. And that is the Ames Department Store,  
15 right?

16 A. Yes. The one that went bankrupt before,  
17 yes.

18 Q. It is still in business today, though,  
19 right?

20 A. Under court protection, whatever it is,  
21 yes.

22 Q. Now, in addition to your mini-mall, there  
23 are other similar Vietnamese mini-malls within this

1 shopping center, correct?

2 A. That's the other one run by -- under my  
3 wife's name.

4 Q. There is a place called Eden East.

5 A. Yes.

6 Q. That has subtenants within it, correct?

7 A. Yes. The same operation, yes.

8 Q. There is a place called the Rex Mini-mall.

9 A. Yes, another one in between.

10 Q. That is not operated by you, though.

11 A. No.

12 Q. That is operated by some other tenant of  
13 Capital Commercial Properties, right?

14 A. Yes.

15 Q. And it also is a mini-mall with Vietnamese  
16 stores.

17 A. Excuse me?

18 Q. It is a mini-mall with Vietnamese-operated  
19 stores, isn't that right?

20 A. You mean the other one?

21 Q. Yes, Res.

22 A. That's the only one. The only other mini-  
23 mall is run by another Vietnamese man.

1 Q. And then beyond your store -- first of  
2 all, this is an "L-shaped" shopping center, would  
3 that be correct?

4 A. "U-shaped" or "L."

5 Q. Okay. "U-shaped," right.

6 A. Yes.

7 Q. There are two arms to the shopping center.

8 A. Yes.

9 Q. And your mini-mall is on one arm, correct?

10 A. Yes.

11 Q. With the Ames store at the end.

12 A. Yes.

13 Q. Isn't it true that except for the Ames  
14 store, every other tenant in the "U" is also a store  
15 operated a Vietnamese or an Indochinese?

16 A. Yes, that's correct.

17 Q. This entire mall has become a center for  
18 Vietnamese businessmen, isn't that correct?

19 A. That's correct. I started with and then  
20 now, because you're talking about now. But in the  
21 past, back a couple years ago, there was half non-  
22 Vietnamese and half Vietnamese.

23 And as I started my idea, I developed it.

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1 Now it's 100 percent, I can say, run by Vietnamese,  
2 except Ames, run by Ames Company.

3 Q. Now, the lease provided that there were  
4 certain restrictions on the advertising you could do  
5 for this center, isn't that true?

6 A. What do you mean "restrictions"? I think  
7 the lease provided that what I have to do. Yes,  
8 there is something that relates to the Plaza Seven  
9 advertising. Yes.

10 Q. In fact, again, this is in paragraph 32 of  
11 the lease, isn't it?

12 A. Yes, it is.

13 Q. It is in paragraph 32C of the lease, isn't  
14 that right?

15 A. Yes, it is.

16 Q. And doesn't the lease provide that you  
17 must include the name of the overall shopping center  
18 in the advertising you have with the center?

19 A. That's correct.

20 Q. And the name of the overall center is  
21 Plaza Seven Shopping Center, correct?

22 A. Yes, it is.

23 Q. Now, as I understand it, Mr. Nguyen, when

1 you talked about this on direct examination, you said  
2 that you have tried to comply with that provision,  
3 isn't that true?

4 A. I do believe, yes.

5 Q. So Vina, in your view, has been able to  
6 comply with that provision by always including the  
7 Plaza Seven name, isn't that your testimony?

8 A. Yes, that is.

9 Q. But it is also true, is it not, that you  
10 have an obligation with your subtenants to enforce  
11 that same restriction on them?

12 A. Are you talking about the master lease or  
13 the sublease?

14 Q. Isn't it true that you have made the  
15 master lease applicable to all your subtenants?

16 A. Yes, we do.

17 Q. Isn't it true that your lease with Capital  
18 Commercial Properties requires you to enforce your  
19 subtenants to do the same as you are doing with the  
20 advertising?

21 A. Yes, it does.

22 Q. And it is true, is it not, Mr. Nguyen,  
23 that your subtenants have not always complied with

1 that advertising?

2 A. No, it's not correct.

3 Q. Well, you know that many of them have  
4 advertised without using the name of the overall  
5 center.

6 A. Not I know of, until the landlord bring it  
7 up. Let me tell you the reason why.

8 Q. No. Stop right there. I just want to ask  
9 you, before you explain, you know that they have not  
10 been doing it, isn't that right?

11 A. No, I did not know. I did not know.

12 Q. You know today that they have not been  
13 doing it.

14 A. Today, they are doing it. Absolutely,  
15 yes. Today, they are doing it.

16 Q. You knew, when the matter arose with the  
17 landlord, that these subtenants were not doing it.  
18 You knew that then, didn't you?

19 A. No. When the landlord brought it up, I  
20 found one or two tenants who advertised at that time.  
21 Okay?

22 And I took all necessary measures to  
23 enforce it, because the tenant at the time advertised

1 time to times, issues to issues. Some tenants never  
2 advertise. Okay?

3 So it is really difficult to keep track to  
4 see every single tenant advertise. I admit that, you  
5 know, sometime some of them might missing something.  
6 But every single advertising that I did, I have Plaza  
7 Seven Shopping Center in there.

8 Q. Now, you have written to your tenants,  
9 your subtenants, about this provision, isn't that  
10 true?

11 A. Yes, I did.

12 Q. You sent certified letters to them, isn't  
13 that right?

14 A. I hand delivered to them, and they read  
15 and signed it.

16 Q. And you did send such a letter on March  
17 28, 1994, didn't you?

18 A. Yes, I did, to remind them.

19 Q. Mr. Nguyen, I am going to read you a  
20 paragraph and ask you: Isn't this the letter you  
21 sent? (Indicating)

22 You said, "Many of you, as well as Vina  
23 Enterprises, Inc., have been in compliance with the

1 above-mentioned obligation" --

2 A. That's exactly true, yes.

3 Q. -- "during the last ten years."

4 A. That's right.

5 Q. "Some stores, due to inadvertent omission,  
6 however, have not done so. This omission is a  
7 default under lease with Vina Enterprises, which in  
8 turn defaults under the lease with Capital Commercial  
9 Properties, Inc."

10 A. That's right.

11 Q. Isn't that what you told your tenants?

12 A. That's what I told them. Yes.

13 Q. In fact, haven't you given default notices  
14 to several of your tenants, based on their failure to  
15 comply with the advertising?

16 A. I did after I get an objection from the  
17 landlord.

18 Q. Right.

19 A. Okay. Before that, the landlord never say  
20 anything. I did not -- you know, I did not know that  
21 there were any omissions at that time.



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BY MR. RAGLAND:

Q. You were asked at the beginning of your testimony on cross about your educational background and the fact that you were lawyer and so forth.

In 1984, when you negotiated this lease, had you graduated from law school?

A. No. I start going to law school.

Q. How long had you been in this country?

A. At that time, I was in this country about eight years.

Q. And was your English better, the same or less than today?

A. It's better today.

Q. Had you ever done this kind of work before, operated a mall or been involved in a commercial lease before?

1           A.    No.  This is the first venture that I  
2  took.

3           Q.    And what was your idea with respect to  
4  this particular mall?

5           A.    Okay.  I came here in '75.  Okay.  We have  
6  problems looking for jobs and doing business.  So I  
7  live in New Jersey for five years, and then I moved  
8  down here, because the job required me to move.

9                   And on the side -- I mean, I worked full  
10 time for CACI.  But on a part-time basis, I held a  
11 helped a lot of Vietnamese merchants to do the  
12 bookkeeping and tax compliances.

13                   And I know many of them in Wilson  
14 Boulevard here, their place of business was going to  
15 be demolished for a high-rise building to be built  
16 there.

17                   And many of them came to me and asked me  
18 if I can help them to find another place where they  
19 can move their business, because they have problems  
20 to look for a place to open their business.

21                   Because when many of the landlord, when  
22 they see the name that they cannot read, they would  
23 throw the application of that person to the trash

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1 can.

2 And also, many of my clients at that time  
3 did not have any equity. They cannot speak English.  
4 They cannot find any space to rent to open their  
5 business.

6 So I came up with the idea that I can  
7 speak English, and I found a place in Plaza Seven.  
8 The place at that time was a closed Grand Union  
9 store. The whole mall was run down and empty.  
10 That's the place where the Vietnamese merchants can  
11 get a foot in.

12 I have to give all of my net worth,  
13 liability. I used everything to open the place ten  
14 years ago. That's why I came up with the idea, and  
15 that becomes a success now.

16 Q. It was suggested to you in cross  
17 examination that you negotiated the words that are in  
18 this lease.

19 A. No. That lease, I received from the  
20 landlord. That's a technical, legal type of thing,  
21 you know, and we accepted that, plus some  
22 modification that we typed on the edge of the page or  
23 something like that later. But the whole lease have

1 been prepared by the landlord's attorney, I believe.

2 Q. You mentioned that your wife has several  
3 other leases in the same shopping center.

4 A. Yes. After we have this project --

5 Q. Just yes or no.

6 A. Yes, another one.

7 Q. How many? How many leases?

8 A. Three stores, three more leases.

9 Q. Over the last period of time when all  
10 those leases were in effect, has the landlord  
11 administered the payments and the records as one set  
12 of records?

13 A. Yes. The landlord, the way he handled it,  
14 he combined everything together.

15 Q. Back in 1990, did you get a letter from  
16 the landlord that specifically reminded you that you  
17 had until the tenth day of the month to make a  
18 payment?

19 A. Yes, I did.

20 MR. RAGLAND: May I approach the witness?

21 THE COURT: Sure.

22 BY MR. RAGLAND:

23 Q. IS that the letter? (Indicating)

1 A. Yes, it is.

2 Q. Did there come a time, between 1990 and  
3 June of 1992, that you made this arrangement that you  
4 testified to earlier about making the payments by  
5 cashier's check?

6 A. Yes, I did.

7 Q. All right. Let me show you a group of  
8 exhibits, which have been -- do you recognize those,  
9 sir?

10 A. Yes.

11 Q. What are those?

12 A. These the cover letter, a copy of the  
13 cover letter that I sent the rent payment every  
14 month, and a copy of all the cashier's checks I pay  
15 for my rent, and then the copy of the Federal Express  
16 mail that I send the rent to the landlord every month  
17 for the last, I think, 12 June, from June 1992 to  
18 June 1993.

19 Q. Is that payment history the same period of  
20 time that the landlord later, on October 5, claimed  
21 that you owed late charges?

22 A. Yes. This is exactly the same time period  
23 that the landlord charged me for the late charges.

1 MR. RAGLAND: Your Honor, I have marked  
2 the letters, if I may approach, as 21. And I have  
3 marked the group of checks and Federal Expresses as  
4 exhibit 22 and offer them both.

5 MR. PAGE: No objection, Your Honor.

6 THE COURT: They will be received without  
7 objection.

8 (The documents referred to were  
9 previously marked as Plaintiff's  
10 Exhibit Nos. 21 and 22 for  
11 Identification and received in  
12 Evidence.)

13 BY MR. RAGLAND:

14 Q. Now, you mentioned on cross  
15 examination --

16 THE COURT: One second, Counsel. Just a  
17 moment.

18 (Pause.)

19 MR. RAGLAND: It is the last paragraph,  
20 Your Honor.

21 THE COURT: I am looking at it now.

22 (Pause.)

23 THE COURT: Okay.

1 BY MR. RAGLAND:

2 Q. In addition, you had notice that was sent  
3 to all tenants in the shopping center, which gave  
4 them permission to pay without a late fee, is that  
5 correct?

6 A. Yes, I did receive it.

7 Q. Was that attached to your exhibit that was  
8 the December 22 payment of the late fee?

9 A. Yes. It was attached to it.

10 Q. So that would be -- what exhibit is that?  
11 That would be exhibit 12.. Attached to exhibit 12 is  
12 the general notice given to all tenants in the  
13 shopping center.

14 A. Yes, it is.

15 Q. Now, on cross you were asked if you ever  
16 got a letter from the landlord talking about not  
17 having proper information about the certificates of  
18 insurance.

19 And you said, "Yes, I did get one."

20 Do you know in what year you got that  
21 letter?

22 A. I got that letter around March 1994, this  
23 year.

1 MR. RAGLAND: This is exhibit 23.

2 (The document referred to was  
3 previously marked as Plaintiff's  
4 Exhibit No. 23 for Identification.)

5 BY MR. RAGLAND:

6 Q. Is this the letter that you got from the  
7 landlord talking about certificates of insurance?  
8 (Handing document to the witness.)

9 A. Yes, it is.

10 Q. Is that the first letter you have ever  
11 received from the landlord about certificates?

12 A. Yes, it is.

13 Q. Was that after your lawsuit was filed?

14 A. Yes, it was.

15 Q. Does it complain of the lack of plate  
16 glass insurance in the certificate?

17 A. No.

18 Q. What does it complain of?

19 A. Do you mean in this letter?

20 Q. Yes, sir.

21 A. It complains about the 30-day prior notice  
22 to the landlord. That letter complains about that.

23 MR. RAGLAND: I offer that letter, Your

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165



1 Honor.

2 COURT REPORTER: What number is that, Your  
3 Honor?

4 MR. RAGLAND: Twenty-three.

5 THE COURT: Twenty-three.

6 COURT REPORTER: Thank you, Judge.

7 MR. PAGE: No objection.

8 MR. RAGLAND: It is a letter of March 22.

9 BY MR. RAGLAND:

10 Q. Did you, in response to that letter, get a  
11 certificate that showed not only that there was a 30-  
12 day notice, but also that there was plate glass  
13 insurance?

14 A. Yes, I did.

15 Q. And did you direct your attorney to send  
16 such to the landlord?

17 A. Yes, I did.

18 MR. RAGLAND: This is exhibit 24.

19 (The document referred to was  
20 previously marked as Plaintiff's  
21 Exhibit No. 24 for Identification.)

22 BY MR. RAGLAND:

23 Q. I show you what has been marked as exhibit

1 24. Is that the letter forwarding the certificate?  
2 (Handing document to the witness.)

3 A. Yes. That's the letter and the  
4 certificate. That shows plate glass over everything.

5 Q. At a later time, did you get additional  
6 communication from the landlord, questioning you  
7 about whether there was a subjugation provision in  
8 the lease?

9 A. Yes, there was one, another lease, about  
10 the subrogation.

11 Q. Did you thereafter send a complete copy of  
12 your policy to the landlord?

13 A. Yes, through my legal counsel. We did  
14 send a full package of policy that shows everything.

15 Q. And so at all times, while this lease was  
16 in effect, did you have insurance that met the  
17 obligation of the lease?

18 A. Yes, I did.

19 Q. And up until 1994, had you ever been told  
20 by the landlord that their files did not show a  
21 certificate on file?

22 A. No, I did not.

23 Q. You were shown a series of pictures,

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 especially of the barbershop, is that correct?

2 A. Yes.

3 Mr. Ragland, should I hand it to the  
4 judge?

5 Q. Yes.

6 MR. RAGLAND: Your Honor, I offer number  
7 24.

8 MR. PAGE: No objection.

9 BY MR. RAGLAND:

10 Q. Do you know when that barbershop opened?

11 THE COURT: Twenty-four is received and,  
12 if I didn't say so, 23 as well.

13 (The documents marked Plaintiff's  
14 Exhibit Nos. 23 and 24 were received  
15 in Evidence.)

16 BY MR. RAGLAND:

17 Q. Do you know when that barbershop was  
18 opened, that had the picture of the "perm" and the  
19 "color" in the window?

20 A. That barbershop late in March 1994, this  
21 year.

22 Q. So that was not in existence when you  
23 exercised your option on August of 1993, was it?

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1           A.    No, it was not there at that time.

2           Q.    It was not in existence when you exercised  
3 your option in January of 1994, was it?

4           A.    No, it was not there.

5           Q.    Did there come a time when the landlord,  
6 after you filed your lawsuit, gave you a notice and  
7 said that there was a problem with a hairstylist in  
8 your shopping mini-mall?

9           A.    Yes. It was a little bit confusing.  
10 Sometimes the landlord stated that I was not allowed  
11 to have a barbershop in my place.

12                   And then in some other paper, it's saying  
13 that I was not allowed to have hairstylist in the  
14 place. You know, it was two different things and  
15 confusing. I don't know which one you're talking  
16 about.

17           Q.    Did you go into each barbershop and see  
18 what kind of licenses were exhibited on the walls?

19           A.    As a matter of fact, I checked it from the  
20 first day they opened for business ten years ago, and  
21 I checked again when the second barbershop opened.  
22 And I saw their license on the wall.

23           Q.    What kind of license is on the wall?

1 A. They have barber license.

2 Q. There are two barbershops, right?

3 A. Two, yes.

4 Q. How many barbers work in the two  
5 barbershops?

6 A. I know there is one in each store.

7 Q. A father in one and his son in the other  
8 one?

9 A. Yes.

10 Q. Do you know their names?

11 A. Yes, I do.

12 Q. Is Hoang Tho Van one of them?

13 A. That's the father.

14 Q. Is Hoang Nam Q-u-o-c the other one?

15 A. Yes. That is the son, the one opening in  
16 March.

17 MR. RAGLAND: Your Honor, at this time, I  
18 am going to offer from the Commonwealth of Virginia,  
19 certified copies of their barber's licenses, exhibits  
20 25 and 26. And I will give a copy to opposing  
21 counsel.

22 THE COURT: Mr. Page?

23 MR. PAGE: No objection, Your Honor.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1           THE COURT: These are marked as 25 and --  
2 Hoang Tho Van is 25, and the other is 26. Received  
3 without objection.

4                   (The documents referred to were  
5 previously marked Plaintiff's Exhibit  
6 Nos. 25 and 26 for Identification and  
7 received in Evidence.)

8           BY MR. RAGLAND:

9           Q. You were asked about a lease for that  
10 newest barber, the son.

11          A. Yes.

12          Q. How did the word "hairstylist" come to be  
13 in the lease, "barber/hairstylist"?

14          A. Because back to my country, the father and  
15 also the son, they have a chain of barbershops in my  
16 country for many, many years.

17               And the way that we -- the barber in my  
18 country, and we do the same thing here, is -- a lot  
19 of Vietnamese have the hair straight up. That's why  
20 you see many, like, Korean or Chinese, they have  
21 their cut like a Marine. Okay? That's the normal  
22 way.

23               But a lot of people, they don't want to

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1 have -- they don't want to look martial arts man.  
2 They wouldn't have -- they would like to have their  
3 hair not permed, but something like that, to put  
4 their hair down, you know, in order.

5 And, also, many Vietnamese or Oriental  
6 man, when they getting old, they have gray hair.  
7 They didn't want to show gray hair. So they would  
8 dye the hair or color the hair to black. We cannot  
9 color it to anything else. That's all they want. So  
10 that's what they normally will do.

11 Q. When you got a complaint from the landlord  
12 that they didn't like the word "hairstylist"  
13 appearing anywhere in the mall, did you take any  
14 action?

15 A. Yes. Even I disagree completely with the  
16 landlord about that, but I had to take it down,  
17 because the landlord hit me on so many things. So I  
18 told him to take down all the signs that show, you  
19 know, other things.

20 Q. Did you require the son to remove the word  
21 "color" and a price and "perm" and a price from the  
22 window of the shop?

23 A. Yes. And he told me that that was his

1 advertisement for grand opening. And it was outdated  
2 anyway, so he took it down.

3 MR. RAGLAND: This is exhibit 27.

4 (The document referred to was  
5 previously marked as Plaintiff's  
6 Exhibit No. 27 for Identification.)

7 BY MR. RAGLAND:

8 Q. I show you the pictures that you are  
9 looking at now. Does that portray what the shop  
10 looks like immediately after the notice that you got  
11 from the landlord?

12 A. Yes, it is.

13 MR. RAGLAND: I offer that as number 27,  
14 Your Honor. I think I do have a copy to give you.

15 THE COURT: Mr. Page?

16 MR. PAGE: I have no objection.

17 THE COURT: Okay. It is received without  
18 objection.

19 (The document marked Plaintiff's  
20 Exhibit No. 27 was received in  
21 Evidence.)

22 BY MR. RAGLAND:

23 Q. Now, there are a total of three tenants in



1 the mall who in some fashion are actually providing  
2 some form of travel services.

3 A. Yes, they are.

4 Q. Of those three, how many of them have in  
5 their lease the right to do so?

6 A. We have two of them.

7 Q. And which two are they?

8 A. The Blue Sky and the Liberty Travel.

9 Q. TSN Travel, the one with the prominent  
10 sign --

11 A. Yes.

12 Q. -- have you specifically prohibited them  
13 from performing travel services in the mall?

14 A. Yes, I did.

15 Q. What is the main occupation of Tan Son  
16 Nhut, TSN?

17 A. He conducted freight forwarding and  
18 selling gifts, like something -- flowers and  
19 umbrellas and some fashion jewelry.

20 Q. Has the landlord been in front of all  
21 three of these stores with you at one time or another  
22 during the course of this lease?

23 A. Yes, several occasions.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 Q. Was it prior to August 9?

2 A. Yes, before that, in March and one in May.

3 Q. Anywhere in the lease, does it  
4 specifically say that you cannot have a travel  
5 service?

6 A. No.

7 Q. Is it one of the 12 prohibited uses?

8 A. No.

9 Q. Now, after you got a notice concerning  
10 travel services, an allegation of a Chinese  
11 restaurant, and, I think, the providing of financial  
12 services, did you take any action to comply with the  
13 landlord's notice?

14 A. Yes, I did.

15 Q. What did you do?

16 A. First of all, we send out the seven-day  
17 notice to tell them that they have to stop to do the  
18 traveling business, because our landlord objected to  
19 it.

20 Q. And are you prepared to take this matter  
21 to court to find out how the court might interpret  
22 that section?

23 A. Yes. Many of them, all of them, objected

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 to it, and we have to take it to the court to seek  
2 the court judgment.

3 Q. There is language in each sublease that  
4 says if there is a conflict between the sublease and  
5 the master lease, the master lease will control.

6 A. Yes. That's under paragraph -- first  
7 paragraph of the sublease, at the bottom of it.

8 Q. Are there other reasons that you want Blue  
9 Sky evicted from the property, other than the fact  
10 that they might be violating the use provision?

11 A. Blue Sky Travel has been not paying rent  
12 on time. Many months, they did not pay me rent. So  
13 I planned that we want them to go.

14 Q. On August 9, 1993, January 3, 1994, and  
15 March 9, 1994, was the tenant with the last name La,  
16 L-a, the one that you said --

17 A. China Herb.

18 Q. -- was the manufacturer of herb compounds.  
19 Were they engaged in the manufacture of herbs?

20 A. No. They never did that.

21 Q. Okay. Were they selling Chinese medicine?

22 A. Yes. Chinese herbs and some like over-  
23 the-counter medicine. That's allowed by U.S. law.

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1 Q. If there was manufacturing going on within  
2 this space, would you be able to see it?

3 A. I know it right away. But they don't have  
4 license to do it, anyway.

5 Q. Is it your testimony that in all the dates  
6 that I mentioned there was no such manufacturing  
7 going on?

8 A. No. That's a problem with the English we  
9 have.

10 Q. To your knowledge, has the lady who sells  
11 wedding cards ever sold Oriental furniture?

12 A. No, they never did that.

13 Q. Is there room in the store for her to do  
14 that?

15 A. No.

16 Q. On all the three dates I previously  
17 mentioned, was she doing that?

18 A. No, she never did.

19 Q. The man with the last name N-g-o, exhibit  
20 22, did he ever sell merchandise wholesale through a  
21 store in the mini-mall?

22 A. No, he never did that.

23 Q. And he has not been a tenant for how long?

1 A. About for four years.

2 Q. His son is there in the store now.

3 A. Yes, he is.

4 Q. What actual use is he putting to the 400  
5 square feet?

6 A. He's selling toys, shoes, children's  
7 clothing, children's shoes, I think.

8 Q. They put "toys" on this chart. Is that  
9 basically what he does there, toys?

10 A. Not really. He sells children's clothing  
11 and shoes for children and some toys, incidental  
12 business to attract children.

13 Q. The tenant with the last name Trang,  
14 exhibit 23, the tenant that has the grocery store, is  
15 that the big grocery store that says "supermarket"?

16 A. Yes. He have about 4,000 square feet  
17 store.

18 Q. And on the three dates I mentioned, was he  
19 performing any travel services?

20 A. No, not at all.

21 Q. Blue Skies. Would you explain to His  
22 Honor what, when you entered into this lease with  
23 Blue Skies, if you know, what was intended to be

1 their business?

2 The language says "Traveling and related  
3 services. No tax and accounting service. No storage  
4 room."

5 What was the Blue Skies intended uses?

6 A. Okay. When the -- not the -- there was  
7 some restriction lifted regarding to the traveling  
8 between U.S. and Vietnam was lifted three or four  
9 years ago.

10 So a lot of people who came here would  
11 like to go back and see their elderly parents before  
12 the parents died. So a lot of people was allowed for  
13 humanitarian purposes to go back to see the family  
14 there.

15 And when they go, they bring some gifts  
16 and medicine to give the family. That's what we  
17 targeted. Because a lot of people, the customers of  
18 the mall, would go back to Vietnam to visit the  
19 family after 15 years without seeing them.

20 Q. Was that the primary business, to your  
21 knowledge, of Blue Skies?

22 A. Yes, that is primary business.

23 Q. Under what portion of the lease do you

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 believe that that service that you just described is  
2 permitted?

3 A. Under paragraph two, the part for awarding  
4 business.

5 Q. With respect to exhibit 25, the Ngo lease,  
6 which the uses there were traveling service  
7 administration services. Would your answer be the  
8 same for this tenant?

9 A. Yes, it would be the same.

10 Q. Have you ever been to a Chinese  
11 restaurant?

12 A. Yes, on several occasions.

13 Q. Have you ever ordered what on the menu is  
14 called Peking duck?

15 A. Yes, I did.

16 Q. Have you ever ordered duck served in  
17 Mark's Duck House?

18 A. Yes, I did on several occasions.

19 Q. Is there any difference in the  
20 presentation or style in which it is either prepared  
21 or served?

22 A. Yes. There is a lot of differences,  
23 completely different between Peking duck, how to sell

1 and serve, and the barbecue duck. That's completely  
2 different.

3 MR. RAGLAND: This is exhibits 28 and 29.

4 (The document referred to was  
5 previously marked as Plaintiff's  
6 Exhibit Nos. 28 and 29 for  
7 Identification.)

8 BY MR. RAGLAND:

9 Q. I show you a lease and ask you if you can  
10 identify that lease.

11 A. Yes. This lease is signed with Frederick  
12 Mark.

13 Q. What are the uses that are authorized in  
14 that lease?

15 A. Under paragraph three of the addendum, let  
16 me read it out there.

17 "The main business is to be carry-out of  
18 roasted pig, duck, chicken or any roast pig, duck,  
19 and chicken combination platters. They are strictly  
20 Vietnamese food, Ton Tho Tuong, Siam style."

21 The secondary --

22 Q. Is that a street in Saigon, the street  
23 that you read?



1           A.    Yes.  In my country, in Ceylon, they have  
2           a street that sell just barbecue meat, and it very  
3           famous.  When we're talking about that, they know  
4           what we offer as far as roasted meat.

5           Q.    After that lease was entered into, did you  
6           have occasion retain counsel to notify the  
7           landlord -- did you, as landlord, have occasion to  
8           retain counsel to notify this tenant that he was  
9           violating the lease?

10          A.    I remember that.  Back to 1986 or 1985,  
11          the tenant name the restaurant like Mark's Peking  
12          Duck.

13          Q.    Okay.

14          A.    He marked it Mark's Peking Duck.

15          Q.    Is this a true copy of the letter you  
16          directed counsel --

17          A.    I directed the counsel to tell him that in  
18          no way he can have a Chinese-style restaurant in his  
19          store, because that store is too small, just enough  
20          for carry-out.

21          Q.    And it is also a violation of the lease,  
22          is it not?

23          A.    Yes.  That's a violation of the lease.

1 MR. RAGLAND: I offer 28, which is the  
2 lease that counsel is reviewing, and 29, which is the  
3 letter.

4 MR. PAGE: I have no objection, Your  
5 Honor.

6 THE COURT: Okay. They will both be  
7 received without objection.

8 (The documents marked Plaintiff's  
9 Exhibit Nos. 28 and 29 were received  
10 in Evidence.)

11 MR. RAGLAND: This is exhibit 30.

12 (The document referred to was  
13 previously marked as Plaintiff's  
14 Exhibit No. 30 for Identification.)

15 BY MR. RAGLAND:

16 Q. Did you receive an agreement from the  
17 tenant's attorney not to, in the future, violate the  
18 lease?

19 A. Yes. We came up with agreement with the  
20 tenant's lawyer, where it agree that they will not  
21 selling any Chinese food. And, also, the name of the  
22 store must be changed. Originally, they start with  
23 Mark's Peking Duck.

1 I said, "Forget it. You're going to  
2 change that one."

3 That's why the Peking Duck is floating  
4 around the yellow book. And in the letter here, they  
5 agree that they will have the name, their place, will  
6 be Mark's Oriental Carry-out, specializing in duck.

7 Q. Is that the sign that went up and the  
8 practice that went forward from 1985 forward?

9 A. Yes, from December 1985.

10 Q. And on the three dates I have mentioned  
11 over and over -- I don't want to say them again --  
12 the August, January and March dates, was Mark's Duck  
13 House serving what is described in there as Oriental  
14 food, specializing in duck?

15 A. Yes, and the same name, Mark's Oriental  
16 Carry-out.

17 Q. Does the lease authorize you to have any  
18 form of restaurant other than the Chinese and certain  
19 other ethnic prohibits?

20 A. Yes, that's correct.

21 MR. RAGLAND: I offer that as exhibit 30,  
22 Your Honor, and you have a copy of that.

23 THE COURT: Mr. Page?

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 MR. PAGE: No objection.

2 THE COURT: Thirty will be received.

3 (The document marked Plaintiff's  
4 Exhibit No. 30 was received in  
5 Evidence.)

6 BY MR. RAGLAND:

7 Q. You were asked if you, the tenant, always  
8 advertised using the Plaza Seven name, is that  
9 correct?

10 A. Yes. I am required by the lease.

11 Q. Did you go through your records and find  
12 copies of any advertisements that you had on file  
13 during the whole period of time?

14 A. Yes, I did.

15 MR. RAGLAND: These are exhibits 31 and  
16 32.

17 (The documents referred to were  
18 previously marked as Plaintiff's  
19 Exhibit Nos. 31 and 32 for  
20 Identification.)

21 BY MR. RAGLAND:

22 Q. Are these true copies of ads that you ran,  
23 both at the inception of the lease and the last ad,

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1 to your knowledge, you ran?

2 A. Yes. They're from the beginning of the  
3 lease back to 1984. This is my ad up here in the  
4 newspaper, in the poster that we handed to  
5 prospective tenants.

6 And the second copy is the ad that we run  
7 after that, 1985/1986. Normally, we will run it be  
8 New Years, Christmas time, to attract customers for  
9 the center.

10 Q. The first notice that you ever received  
11 from the landlord during the entire approximately ten  
12 years of the lease that he had uncovered a possible  
13 violation, was that in March of this year?

14 A. Yes, it was in March.

15 Q. As a result of receiving that, did you  
16 send out a notice to every single subtenant, the  
17 notices that were referred to earlier by Mr. Page?

18 A. Yes, I did.

19 Q. Is this a true copy of all of the notices  
20 you sent to all of the tenants?

21 A. Yes.

22 Q. Up until you got the notice --

23 MR. RAGLAND: I offer exhibits 31 and 32.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 THE COURT: Mr. Page?

2 MR. PAGE: No objection.

3 THE COURT: They will be received.

4 (The documents marked Plaintiff's  
5 Exhibit Nos. 31 and 32 were received  
6 in Evidence.)

7 BY MR. RAGLAND:

8 Q. Up until the notice, did you ever observe  
9 any subtenant violating that provision; that is,  
10 failing to put "Plaza Seven" in the advertisement?

11 A. No, I did not.

12 Q. How many Vietnamese newspapers did you say  
13 there were?

14 A. There were right now about ten, nine to  
15 ten, newspapers, weekly newspapers, in the area.

16 MR. RAGLAND: This is exhibit 33.

17 (The document referred to was  
18 previously marked as Plaintiff's  
19 Exhibit No. 33 for Identification.)

20 BY MR. RAGLAND:

21 Q. Did you write each one of them a letter in  
22 Vietnamese, asking them not to accept ads from your  
23 subtenants that did not "Plaza Seven"?

1           A.    Yes.  I did send them a letter and follow-  
2 up letters to remind them to make sure that all the  
3 ads would have "Plaza Seven Shopping Center."

4           Q.    Have you, in writing, asked the landlord  
5 to repair the sign that allegedly shows or identifies  
6 the shopping center as Plaza Seven?

7           A.    Yes, because many of my tenants, when I  
8 told them about "Plaza Seven Shopping Center" must be  
9 included, then they don't even know where the sign  
10 is, because the sign was too small, needs repair, and  
11 covered by trees.

12                   And they say that they have no problem to  
13 have "Plaza Seven," as they should do, or they did  
14 do, but also we request the landlord to have the sign  
15 repairs so that it will be visible to the customers  
16 when they go by the mall.

17           MR. RAGLAND:  Your Honor, I offer 33, the  
18 Vietnamese letters.  I am only offering the letters,  
19 so far.

20           MR. PAGE:  I don't think I have an  
21 objection, Your Honor.  I can't read them.

22           THE COURT:  You can't read this?  
23 (Indicating)

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1 MR. PAGE: No, sir. But I have no  
2 objection.

3 THE COURT: It will be received.

4 (The document marked Plaintiff's  
5 Exhibit No. 33 was received in  
6 Evidence.)

7 MR. RAGLAND: This is exhibit 34.

8 (The document referred to was  
9 previously marked as Plaintiff's  
10 Exhibit No. 34 for Identification.)

11 BY MR. RAGLAND:

12 Q. Can you describe the pictures you are  
13 looking at, please?

14 A. Okay. The first picture is the picture of  
15 the sign for the whole 200,000 square feet shopping  
16 mall.

17 And the second picture is a picture of the  
18 entrances. There's two entrances to the shopping  
19 center, one from Arlington and one you go from Falls  
20 Church.

21 Q. Is the sign completely obliterated from  
22 either direction?

23 A. No.

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1           Q.    Do you understand the question?  Can you  
2   see the sign from the road?

3           A.    Yes, I do.

4           Q.    If you are coming from Arlington, can you  
5   see the sign from Wilson Boulevard?

6           A.    No.  The trees cover it.

7           Q.    Can you see the sign coming from Seven  
8   Corners?

9           A.    No.  The trees cover it.

10          MR. RAGLAND:  I offer this, Your Honor.

11          MR. PAGE:  I don't think it is relevant,  
12   Your Honor.  The lease does not say anything about  
13   the sign, and there is no obligation on the part of  
14   the landlord to have a sign.

15                But the lease says that if you are going  
16   to advertise the shopping center, you have to use the  
17   name "Plaza Seven."  This is totally irrelevant.

18          THE COURT:  Well, I am not sure that it is  
19   or it isn't, but I will receive it and give it due  
20   weight for what it is worth.

21                   (The document marked Plaintiff's  
22                   Exhibit No. 34 was received in  
23                   Evidence.)

1 BY MR. RAGLAND:

2 Q. On August 9, are you aware of any tenant  
3 that had run an ad in violation of this lease?

4 A. No, I did not.

5 Q. On January 3, do you know of any subtenant  
6 that ran an ad that violated the lease?

7 A. No.

8 Q. On March 9, are you aware of any subtenant  
9 who ran an ad in violation of this lease?

10 A. No, not that I know of.

11 Q. Is the first notice that you got of any  
12 advertisement after all those dates that I just  
13 mentioned?

14 A. Yes, it was.

15 Q. Have you, since the first time you  
16 exercised your option, on more than one occasion,  
17 asked the landlord, either verbally or in writing, to  
18 advise you of any claims that he had against you?

19 A. Yes, I did.

20 MR. RAGLAND: This is exhibit 35.

21 (The document referred to was  
22 previously marked as Plaintiff's  
23 Exhibit No. 35 for Identification.)

1 BY MR. RAGLAND:

2 Q. I would like to direct your attention to  
3 March 22 and ask you if you got a letter from the  
4 landlord on or about that date, wherein he advised  
5 you that he refused to tell you about any defaults.

6 A. Yes.

7 MR. RAGLAND: Your Honor, I offer that as  
8 exhibit 35.

9 MR. PAGE: Well, I don't object to the  
10 letter. The characterization by counsel, I object  
11 to, but the letter speaks for itself, and I have no  
12 objection to the admission of the letter.

13 THE COURT: All right. Just give me a  
14 second, please.

15 (Examining document.)

16 THE COURT: Okay. Thirty-five is  
17 received.

18 (The document marked Plaintiff's  
19 Exhibit No. 35 was received in  
20 Evidence.)

21 MR. RAGLAND: This is exhibit 36.

22 (The document referred to was  
23 previously marked as Plaintiff's

Exhibit No. 36 for Identification.)

BY MR. RAGLAND:

Q. Shortly after your ability to extend the lease expired, did you there after get a letter from the landlord stating he would tell you now what all your defaults were?

A. Yes, I did.

Q. I show you this letter and ask you if this is the letter you are referring to. (Handing document to the witness.)

A. Yes, it is.

MR. RAGLAND: I offer exhibit 36, Your Honor.

MR. PAGE: I object, Your Honor. That is not what this letter is at all.

MR. RAGLAND: The Court can decide what it is.

MR. PAGE: Your Honor, on its face, it is another settlement letter, and it is not anything like what Mr. Ragland characterize it as being.

And I really object to the way he is characterizing the letter. I object to this letter, and I don't think it is admissible on the grounds

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1 that it deals with another settlement offer. And you  
2 are free to look at it.

3 MR. RAGLAND: I think it does say what I  
4 said it says in the second paragraph.

5 THE COURT: Let me -- with regard to any  
6 settlement issues, obviously -- but I will look at it  
7 and then make a judgment as to whether the Court will  
8 receive it or not.

9 Anything further?

10 MR. RAGLAND: Yes, sir.

11 BY MR. RAGLAND:

12 Q. After you filed the lawsuit --

13 THE COURT: No. Anything further with  
14 regards to this?

15 MR. RAGLAND: Oh, I'm sorry. You have  
16 read it.

17 THE COURT: I have read it.

18 MR. RAGLAND: I think, if you will let me  
19 ask him some questions, as a result of that  
20 letter --

21 THE COURT: All right.

22 MR. RAGLAND: -- you will see how it ties  
23 in.

1 THE COURT: All right.

2 BY MR. RAGLAND:

3 Q. After receiving that letter, did you begin  
4 to receive from the landlord a whole group of claims  
5 of violations of the lease entitled "Notices"?

6 A. Yes. I did receive several.

7 Q. Did you receive some from their attorney  
8 in Boston, Massachusetts, Mr. Block?

9 A. Yes, I did.

10 Q. Did you receive some from Norman  
11 Ebenstein?

12 A. Yes, I did.

13 Q. He is the chief operating officer of  
14 Capital Commercial Properties.

15 A. Yes, I did.

16 Q. And up until about March 22, had you  
17 received any notices or any claims of violations of  
18 your lease?

19 A. No, I did not.

20 Q. And after that date, did you begin  
21 receiving all of these notices?

22 A. Yes, I did.

23 Q. That was inside of the six-month time

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1 period that you had to make the exercise of your  
2 option, was it not?

3 A. Yes, it is.

4 MR. RAGLAND: That, Your Honor, is why  
5 that letter is relevant, because they waited -- my  
6 argument is they waited after the tenant had  
7 repeatedly asked them, "Tell us what your position  
8 is."

9 They waited until it was too late for the  
10 tenant to exercise not a privilege, a right granted  
11 to him and that he bargained for, to tell him, "Here  
12 are all the things we have known about and know  
13 about."

14 And that shows they waited, and then they  
15 told us.

16 MR. PAGE: Your Honor, the very first  
17 sentence of this letter says, "I have received a  
18 letter from your counsel, Mr. Ragland, expressing  
19 some negative reactions to various notices of  
20 default."

21 That clearly is at odds with what Mr.  
22 Ragland just told you, that all the notices were  
23 received after this letter. What he has presented is

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 what he would like the facts to be. They are not  
2 that way. This is a settlement letter.

3 He has already told you what his theory of  
4 the case is. I mean, it is argument. But this  
5 specific letter, it seems to me, is not relevant to  
6 the case. It is a settlement offer, and it should be  
7 excluded.

8 MR. RAGLAND: I think the judge has to  
9 decide what the letter shows, not me, not Mr. Page.  
10 I can argue what it means, but you are going to  
11 decide. You are the trier of fact here.

12 MR. PAGE: What he is doing is not  
13 presenting evidence, Your Honor. He is just arguing  
14 about an interpretation of the facts.

15 THE COURT: What the Court is doing is  
16 reviewing also plaintiff's exhibit 35 and reading  
17 that and then reading also this one, in terms of  
18 trying to see whether there is some sort of direct  
19 flow as to what was going back and forth.

20 I mean, obviously, everything that was  
21 going back and forth is not before the Court at this  
22 time.

23 I will receive it. Again, I am not sure,

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165



1 but I will say this: I am receiving it, but  
2 basically with regards to the second paragraph. I do  
3 understand that much of this does talk about  
4 settlement issues. But with regards to the second  
5 paragraph, the Court will receive it.

6 (The document marked Plaintiff's  
7 Exhibit No. 36 was received in  
8 evidence.)

9 MR. RAGLAND: That completes the questions  
10 on redirect that I had, Your Honor.

11 MR. PAGE: I have just one or two  
12 questions, but I think the documents are ones I gave  
13 the witness. If I could just look?

14 THE COURT: Certainly.

15 MR. PAGE: These are all the documents  
16 that I have not moved into evidence. What I am going  
17 to do is just take them all back with me now, because  
18 they were not in evidence.

19 RECROSS EXAMINATION

20 BY MR. PAGE:

21 Q. Well, I thought there was a letter that I  
22 had shown you physically, but let me ask you: In May  
23 of this year, 1994, you have given new notices to

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1 Frederick Mark that he is in violation of his lease  
2 for operating a Chinese restaurant, isn't that true?

3 A. Excuse me. In May?

4 Q. In May 1994.

5 A. May I see the letter?

6 Q. Do you recall giving a notice to Frederick  
7 Mark in May of 1994, alleging that he is operating a  
8 Chinese restaurant?

9 A. Something I did, and I took the landlord's  
10 position to tell him. And he had to defend in court  
11 otherwise.

12 MR. PAGE: No further questions, Your  
13 Honor.

14 THE COURT: Okay. You may step down, sir.

15 THE WITNESS: Thank you.

16 (Witness excused.)

17 MR. RAGLAND: This is exhibit 37.

18 (The document referred to was  
19 previously marked as Plaintiff's  
20 Exhibit No. 37 for Identification.)

21 MR. RAGLAND: Your Honor, the next bit of  
22 evidence that I have is I want to offer the requests  
23 and answers for admissions from the defendant.

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1           And then what I would do, Your Honor, if I  
2 might, since I don't want you to have to read every  
3 one of them -- there are only certain ones that are  
4 relevant to what we are going to try to show -- I  
5 would ask the Court to turn to number 19.

6           I asked did they admit knowledge of  
7 certain operations prior to the first exercise, which  
8 was August 9. Their answer was the law firm, they  
9 knew about before August 9, and the one or more  
10 travel agents, they knew about. They denied the  
11 others.

12           With respect to number 20, we asked  
13 them -- not 20, excuse me. I asked them, number 21,  
14 "Do you admit that as of August 9, you had not  
15 asserted any claim for accrued late fees dating back  
16 to June of 1992?" And they admitted that, Your  
17 Honor.

18           On number 22, I asked them if they had  
19 required regular monthly exterminations of pest  
20 control, one of the things that the client he had  
21 always done. They admitted that they had never asked  
22 for records prior to August 9, 1993.

23           Number 29 is the next one, Your Honor. I

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1 asked them if they admit that the letter from Darragh  
2 Davis, which is the letter of October 5 -- I believe  
3 it is our exhibit five -- was the first response to  
4 the purported exercise of option, and they admitted  
5 it.

6 THE COURT: All right. Let me just look  
7 at it.

8 (Examining document.)

9 THE COURT: Yes.

10 MR. RAGLAND: I asked them in question  
11 number 33, which is on page 11, "If you admit that  
12 the notice to pay or quit did not have a figure to  
13 pay," and they admit it.

14 I asked them on number 34 if, on more than  
15 one occasion, they were asked to give us the amount.  
16 They admit that.

17 I asked them in question number 35 if the  
18 letter of December 5, which was our -- excuse me,  
19 December 20 -- which was our exhibit number 11 in the  
20 trial, was their first request identifying an amount  
21 of money to be paid in connection with that notice of  
22 October 5, and they admitted it.

23 I asked them if they admitted that the

1 letter of December 20 incorrectly demanded money that  
2 was not due. They admitted it and stated that they  
3 had returned the uncashed check.

4 I asked them in number 39, Your Honor, if  
5 they admitted that the unlawful detainer prosecuted  
6 against the law firm was successfully prosecuted, and  
7 they admitted that.

8 I asked them if they received the letter,  
9 our exhibit 16, January 27, which has been admitted  
10 into evidence here, Your Honor, and they admitted  
11 that in number 46. That is the letter of January 27  
12 that we wrote, asking the landlord's position.

13 I asked them in number 47 if they admitted  
14 that on February 17, they had not yet responded to  
15 that letter, and they admitted it.

16 The most telling one of all, Your Honor,  
17 is the final question, number 50. I asked them that  
18 if on each of the dates specified in the question,  
19 which August 9 is the first exercise -- December 1 is  
20 my letter telling them that the option has been  
21 exercised -- the letter of January 3 and March 9, I  
22 asked them if they admit on each of those days, they  
23 were aware of one or more of the defaults under the

1 lease for which, as of the date below specified, they  
2 had not given a notice and opportunity to cure. And  
3 they admitted that.

4 Those, Your Honor, are the requests for  
5 admissions that are relevant, I think, to our case.  
6 And so I would offer the ones I have just read into  
7 evidence.

8 MR. PAGE: I have no objection.

9 THE COURT: Okay. They are admitted.

10 (The document marked Plaintiff's  
11 Exhibit No. 37 was received in  
12 Evidence.)

13 MR. RAGLAND: All right. Your Honor, I  
14 will offer exhibit 38, which I would say is an  
15 admission of the defendant that all of the uses in  
16 the center were evident from the first day of their  
17 use. And I offer that at this time. It is a letter  
18 from counsel, which agrees with my statement.

19 And I will have to find my letter, because  
20 they say that they have no objection for me using  
21 this if I introduce my letter of May 31. So let me  
22 find it. It might take me awhile, but I will find  
23 it.

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1 (Pause.)

2 MR. RAGLAND: I will offer that in  
3 conjunction with my letter of May 31, which will be  
4 exhibit 39.

5 MR. PAGE: Are the two of them 39.

6 THE COURT: One is 38, the letter from Ms.  
7 Davis of June 26.

8 MR. RAGLAND: Well, I got a letter from  
9 your firm saying if I would introduce that into  
10 evidence --

11 MR. PAGE: I asked you if you had a copy.

12 MR. RAGLAND: I do.

13 MR. PAGE: Your Honor, we did make an  
14 agreement, at the request of Mr. Ragland, that the  
15 two letters together could be used. I think they are  
16 basically argument of counsel back and forth.

17 But if Mr. Ragland thinks they are  
18 important, we agreed he could put the exchange of the  
19 two letters in. It doesn't add anything, in our  
20 view, to the facts.

21 THE COURT: Okay.

22 (The documents referred to were  
23 previously marked as Plaintiff's

1 Exhibit Nos. 38 and 39 for  
2 Identification and received in  
3 Evidence.)

4 MR. RAGLAND: Your Honor, that is all the  
5 evidence I have at this time.

6 MR. PAGE: Are you resting, then?

7 MR. RAGLAND: Yes.

8 MR. PAGE: Your Honor, if you are willing  
9 to do so now, I would like to make a motion, if you  
10 are willing to hear argument, to strike.





1  
2  
3  
4 move to strike the evidence of the plaintiff and to  
5 enter judgment for the defendant.

6 The grounds for my motion are that, as a  
7 matter of law and as a matter of interpretation of  
8 this lease, given the evidence presented by the  
9 plaintiff, the plaintiff cannot establish that Vina  
10 Enterprises is entitled to renew the lease.

11 And I will quickly to try review what I  
12 believe are the key points for the Court and the key  
13 decisions that the Court must make with respect to  
14 the evidence and the lease.

15 Your Honor, the inquiry here must begin  
16 with the lease. Paragraph 34 specifies that the  
17 tenant, Vina, is entitled to exercise a renewal, to  
18 obtain another five-year option under this lease.

19 The very first sentence of paragraph 34A  
20 states, "Provided tenant shall not then be in default  
21 under any of the agreements and conditions in this  
22 lease contained." Then it goes on to say, "Tenant  
23 shall have the right," et cetera.

1           There is not dispute about what happens  
2 later in the paragraph; that is, whether it was  
3 timely or anything of that sort.

4           The question is, the very first phrase,  
5 "Provided tenant shall not then be in default."

6           That is a condition precedent to the  
7 exercise of the option.

8           Now, the entire case that the plaintiff  
9 has presented is premised, as we see it, on two  
10 notions. The first is the plaintiff asserts -- well,  
11 it is really one notion.

12           It is premised on the notion that there is  
13 no default, because you define a default as being a  
14 condition that exists after a notice of default has  
15 been given and after the tenant has not cured.

16           It is our argument that in fact that is  
17 not the definition of default, that a default is a  
18 violation of a provision or an agreement in the  
19 lease, and that no notice is required before that  
20 condition ripens into a default or becomes a default.

21           Now, one of the principal reasons we say  
22 that is an interpretation of the other provisions in  
23 the lease itself.

1           That is, to aid in the interpretation of  
2 paragraph 34, we looked to the other provisions of  
3 the lease, and there are several very relevant  
4 provisions.

5           The first is article 15. Article 15 is a  
6 remedy for the landlord whereby the landlord can  
7 evict the tenant for default. And paragraph 15, in  
8 order to be exercised or utilized by the landlord,  
9 does indeed require that a notice be given.

10           In fact, it is very specific that a  
11 certain kind of notice must be given for a monetary  
12 default, and a certain kind of notice for a non-  
13 monetary default.

14           And the landlord is precluded from taking  
15 any action to evict the tenant or to obtain  
16 possession of the premises unless first that notice  
17 is given and the opportunity to cure has lapsed  
18 without action by the tenant.

19           This case is not an action under paragraph  
20 15, and we are not even pretending that we sent  
21 notice under paragraph 15. Again, I pointed out to  
22 the Court in opening argument, paragraph 24 contains  
23 another remedy provision on the part of the landlord.

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1 Paragraph 24 says that the landlord may  
2 cure certain kinds of defaults by stepping into the  
3 shoes, as it were, of the tenant and curing the  
4 defect and paying for it and then charging the tenant  
5 extra rent for whatever it costs.

6 I am summarizing what the lease actually  
7 says. But again, paragraph 24 is premised as a  
8 remedy upon the existence of a notice and an  
9 opportunity to cure and a failure on the part of a  
10 tenant.

11 It is our contention that under paragraph  
12 34, with respect to the option, by contrast there is  
13 no notice provision.

14 And what this entire case on the part of  
15 the plaintiff is about is an attempt to have the  
16 Court write in to paragraph 34 a notice provision  
17 that does not exist. And we say that that is not  
18 permissible.

19 We further point, Your Honor, to paragraph  
20 20 of the lease, which we think is directly relevant  
21 here.

22 Paragraph 20 is, again, what we call the  
23 no-waiver provision, and paragraph 20 makes it clear

1       that the landlord has reserved to itself all of the  
2       remedies that it has, and that the landlord is  
3       permitted to act or not act, as it sees fit, in its  
4       best business judgment as to which remedies it may  
5       pursue or not pursue.

6               And the provision states that "Failure of  
7       the landlord to complain of any act or omission on  
8       the part of the tenant, no matter how long the same  
9       may continue, shall not be deemed a waiver by the  
10      landlord of its rights," of any of its rights,  
11      "hereunder." It goes on, and it is more specific.  
12      But it is a non-waiver provision.

13              It is our view that the proper  
14      interpretation of this lease is that when a default  
15      occurs -- and there is no definition of a default  
16      such that notice is required.

17              That is a key point to listen for, because  
18      I think the plaintiff's counsel has repeatedly talked  
19      about defaults as if they are defined by notice, and  
20      they are not. But if a default occurs, the landlord  
21      has an opportunity and an option, if you will, of  
22      what remedy to pursue.

23              Now, Your Honor, we submitted case law

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1 that we think is squarely on point and which we think  
2 supports our interpretation of this lease. And I  
3 refer specifically to two cases. They are fairly  
4 recent.

5 One is from the State of Maine, another  
6 from the State of Washington. They refer, in turn,  
7 to other cases. They both cite cases from other  
8 jurisdictions, some five or six cases from around the  
9 country, that we have found.

10 I will represent to the Court that I have  
11 found no law to the contrary. I don't know of any  
12 law in Virginia directly on point, but these cases,  
13 we submit, are reasonable interpretations of similar  
14 leases.

15 What they say is that the landlord has  
16 cumulative remedies. In fact, one of the cases  
17 points specifically to a similar non-waiver  
18 provision -- this is the Hindquarter case from the  
19 State of Washington -- and says that is an example of  
20 how the landlord has reserved unto itself an  
21 opportunity to decide which remedy it wants.

22 Those cases specifically hold that no  
23 notice is required with respect to a renewal

1 provision, unless the lease actually says that. One  
2 of the cases, at least one, maybe both, are actually  
3 declaratory judgment cases, just like this one, where  
4 the tenant has sought to exercise.

5 The landlord has said, "Wait a minute. We  
6 think you're in default."

7 The tenant has sued for declaratory  
8 judgment and said, "Well, you didn't give us a  
9 default notice."

10 And the Court here held, "Well, notice is  
11 not required unless the lease says so."

12 We think as a matter of law that is a  
13 proper interpretation of the lease. And if we are  
14 right about that, then the question in this case  
15 becomes: Were there any defaults?

16 That is, has the evidence shown, as even  
17 presented by the plaintiff himself, has the evidence  
18 shown that they were in default up to and including  
19 the entire period during which the exercise of the  
20 option could have been made?

21 And I am going to address that next, but I  
22 think the legal issue for the Court is whether notice  
23 is required.

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1           If notice is required, then it seems to me  
2 the burden would be on the landlord to show that  
3 notice. But we say that that is not the case, and  
4 that the tenant here did not bargain for that notice.

5           This lease is not totally unique.  
6 Obviously, there are cases that interpret similar  
7 leases like this. It could have been a provision  
8 that was bargained for. It was not.

9           And the Court, we submit, does not have  
10 the authority, nor should it intervene to rewrite the  
11 bargain of this lease.

12           We don't think this is unfair to Mr.  
13 Nguyen, as much as he has put into this business. He  
14 got a ten-year lease with options to renew based on  
15 certain conditions. The ten years is now up. He got  
16 what he bargained for, and essentially he has not  
17 complied with the lease.

18           Now, is there a default under the lease?  
19 Let me address that next. Your Honor, as to the  
20 defaults under the lease, the plaintiff's argument,  
21 or the plaintiff's interpretation of the lease, seems  
22 to be that the tenant really doesn't have to comply  
23 with the lease unless the landlord objections.

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*



1           In other words, repeatedly the evidence  
2       from the plaintiff in this case has been: well, we  
3       do X, or we have allowed this practice to go on, or  
4       we have done this or not done this.

5           But the landlord never complained about  
6       it, so it was okay. And all we have done is comply  
7       with whatever the landlord wanted.

8           That is not really what the lease says.  
9       The lease contains a number of specific obligations  
10      on the part of the tenant, and the tenant is  
11      obligated to do these things without any prodding  
12      from the landlord.

13          When a tenant signs a commercial lease of  
14      this sort, as actually as indicated over a term of  
15      years, \$2.5 million or so worth of rent payments, it  
16      is a serious business obligation. It is his  
17      obligation to perform the lease.

18          We submit that there are a number of ways  
19      in which he did not, and that these defaults existed  
20      into the option period.

21          There was first, Your Honor, a failure to  
22      pay the rent on time repeatedly and no late payments.  
23      Now this is essentially admitted by Mr. Nguyen in his

1 testimony.

2           There was an exhibit put into evidence by  
3 Mr. Ragland. It was a letter that was received from  
4 the landlord, and attached to it was a chart. I  
5 think it is exhibit 11, if I recall correctly.

6           There was a chart attached that showed  
7 late payments, and it had the list of dates of the  
8 rent checks being made to the landlord. I asked Mr.  
9 Nguyen on cross examination if it was accurate. He  
10 said it was. That is when the rent was paid.

11           And then on redirect, Mr. Ragland actually  
12 put into evidence, as one of the exhibits, copies of  
13 the checks that are the subject of that chart. What  
14 they show is that the rent was always being paid  
15 late.

16           Now, we concede that there was a written  
17 instruction to this tenant that he did not have to  
18 pay until the tenth. The lease says the first. We  
19 concede that it was backed up to the tenth.

20           And what that chart shows and what his own  
21 letters show is that he repeatedly paid after the  
22 tenth of the month and paid no late fees with it.

23           The dates on the checks submitted by

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 Mr. Ragland are dates which are beyond the tenth of  
2 the month, and all you have to do is look at the  
3 exhibit that was submitted, that has those canceled  
4 checks, or rather those copies of checks, and you  
5 will see that in fact the rent was repeatedly being  
6 paid late.

7 As a result, there was a late fee owed.  
8 It was not paid. There was a letter sent. We  
9 demanded those late fees, and it was paid in December  
10 of 1993.

11 There is no question about it being paid  
12 eventually. \$4,200 was paid. But at the time of the  
13 exercise on August 9, it had not been paid. We had  
14 to send the letter.

15 His testimony was, "I didn't know what  
16 they were talking about. I didn't know how much  
17 money."

18 But actually, it was clear that his own  
19 checks were being written after the date that he  
20 conceded was the amended date for sending in those  
21 checks.

22 So it is clear that up through December of  
23 1993, he was in default, because he was not paying

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 his rent on time, and he owed late charges. So I  
2 think that much is admitted by the evidence.

3 The major problem here with the defaults  
4 is the question of unauthorized uses. And it is our  
5 contention that throughout a substantial portion of  
6 the term of this lease, this tenant violated  
7 paragraph 32.

8 And he violated actually all sections of  
9 paragraph 32, A, B and C, by engaging in activity at  
10 that shopping that was not permitted.

11 I think basically it is uncontested, and  
12 it is admitted, not only by the conduct of the  
13 plaintiff and his counsel, but by the actions they  
14 have done trying to repair the damage, as they go  
15 around trying to evict tenants and so forth to get  
16 them out.

17 First, with respect to unauthorized uses,  
18 there is the law firm. The law firm is not an  
19 authorized use. Paragraph 32 perhaps requires just a  
20 minute of explanation, in order to see how these  
21 unauthorized uses fit into it.

22 In paragraph 32A, there is a statement to  
23 the effect that the premises may be used for certain

1 purposes.

2 The provisions of paragraph 32A are, "The  
3 demised premised shall be used as," and then there is  
4 a list of what we call the permitted uses, a store  
5 selling groceries, like the supermarket, Chinese  
6 herbs -- there is a Chinese herb store -- meat,  
7 produce, frozen foods, clothing, fabrics. I am not  
8 going to try to read the whole list.

9 These lists are the permitted uses. It is  
10 our contention that only these uses are permitted in  
11 the shopping center. This landlord turn over this  
12 space to be used for any purpose.

13 There were specific subtenants that Mr.  
14 Nguyen wanted to put in there, and he listed the  
15 businesses. And here they are.

16 Now, the same paragraph 32A goes on to put  
17 some restrictions on these uses, and it says that no  
18 matter what, it is understood that no more than 5,000  
19 square feet will be used for the sale of clothing, et  
20 cetera. In order words, there are other restrictions  
21 on how these things are to be used.

22 And at the end of paragraph 32A, there is  
23 a further specific prohibition with respect to

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(703) 471-7603  
46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 certain kinds of uses.

2 And what is listed here, and is relevant  
3 to the case, are a couple of prohibited uses: An  
4 Italian-style restaurant, an ice cream shop, a  
5 Chinese restaurant, a Mexican restaurant, a buffet-  
6 style restaurant, or any combination of those kinds  
7 of restaurants.

8 In other words, restaurants were a  
9 permitted use in general, but not these kinds of  
10 restaurants.

11 It is our contention that this provision  
12 has been violated. Before I come back to this,  
13 though, I want to look at paragraph B. B also  
14 includes specific prohibitions on use. I referred to  
15 one of them in cross examination. Furniture is  
16 listed as a prohibited use under B.

17 Paragraph C -- incidently, paragraph B  
18 talks about industrial purposes and a beauty shop,  
19 and there are some operations that are described on  
20 page 23.

21 Paragraph C, that is subparagraph C of  
22 paragraph 32, also contains some obligations on the  
23 part of this tenant with respect to his conduct of

1 the retail business.

2 And the relevant item here is that the  
3 advertising for this mini-mall was to include  
4 advertising for the entire shopping center. And that  
5 is referred to in paragraph 32C.

6 Now, we believe that the evidence admitted  
7 and in fact introduce by the plaintiff actually shows  
8 violations of these use provisions.

9 First, the law firm, the law firm is not a  
10 permitted use. And it was clear, we think,  
11 immediately to Mr. Nguyen that when he tried to renew  
12 the lease, this was a problem. The law firm was  
13 called to his attention, and he filed an unlawful  
14 detainer case, and he evicted them by December 31.

15 And the unlawful detainer action that he  
16 filed said, and he represented to the Court, that he  
17 was evicting them because they were a prohibited use.  
18 Now, that unlawful detainer also said he was also  
19 evicting them because there were other reasons.

20 He didn't have a sublease with them and so  
21 forth. But he took that action in order to comply  
22 with the landlord's statement that there was a  
23 default.

LASER REPORTING  
(703) 471-7603  
46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1           And it is clear that he represented to the  
2 Court that it was a prohibited use, and he admits  
3 that. His own motion for judgment in this case talks  
4 about the law firm and the prohibited use and how he  
5 tried to cure it. His evidence is not that it didn't  
6 happen.

7           His evidence is that "I fixed it."

8           So I think it is clear that he admits the  
9 unauthorized use, again, up until December 31, 1993.  
10 So those things clearly exist.

11           Now, what other unauthorized uses were  
12 there? Well, the major one, and the one that stands  
13 out, is the travel agencies, which are not listed  
14 here as an authorized use.

15           Mr. Nguyen's explanation is that he views  
16 them -- he said this repeatedly during cross  
17 examination -- as an incidental business to other  
18 businesses that are listed here.

19           We submit that that is unreasonable, and  
20 you should not interpret the lease to say that these  
21 words, which are specifically chosen carefully among  
22 various retail uses, can be expanded to include  
23 anything that he thinks is incidental.

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*



1           Again, his own conduct indicates that he  
2       feels they must be prohibited uses, because there are  
3       now pending in the General District Court for the  
4       City of Falls Church unlawful detainer actions  
5       against those very travel agencies.

6           And in each case, the unlawful detainer  
7       action says, and Mr. Ragland has written to their  
8       lawyers and said, "You are in violation of the lease.  
9       You are in violation of our master lease, because it  
10      is a prohibited use."

11          And I guess in Mr. Nguyen's mind, he can  
12      rationalize this by saying, "I'm only doing it  
13      because I'm trying to satisfy the landlord."

14          But what he is doing is this: He is  
15      making a admission, we submit, a judicial admission  
16      against his own interest by going to court and suing  
17      these subtenants and claiming they are prohibited  
18      uses.

19          In each case, he has admitted that they  
20      have been there for a couple of years at least. The  
21      starting time period is not particularly relevant,  
22      except that it goes back beyond the period when he  
23      first tried to exercise the renewal of the lease.

1           So that it is clear that during the entire  
2 period of time that he was trying to exercise renewal  
3 of the lease, up to and including today, if you went  
4 out the center, you would see in operation out there  
5 the travel agencies, Blue Skies and Liberty.

6           And TSN, he says, one of the three, is not  
7 actually doing it -- or excuse me, that was the  
8 supermarket, that he also gave a right to do that in  
9 the lease.

10           But he says they are not actually doing  
11 it. But in any event, there are two travel agencies,  
12 at a minimum, who are out there doing it.

13           Now, the last letter that went into  
14 evidence was Ms. Davis's exchange of correspondence  
15 with Mr. Ragland.

16           I don't think it is particularly relevant,  
17 but it was an exchange between the lawyers at a point  
18 where we didn't know what all the uses were. In  
19 other words, we didn't get the subleases. They were  
20 never turned over to the landlord until discovery.

21           And upon going into the subleases, there  
22 are other uses that have been authorized in this  
23 space, which we didn't know about.

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 I mentioned the Oriental furniture. It  
2 has been authorized by this tenant. He says they  
3 have never done it, but he entered into a sublease  
4 that is directly in violation.

5 And there are others. So that beyond  
6 these uses that we could walk around and look at and  
7 perhaps make a conscious or unconscious decision not  
8 to do anything about at that time, there are other  
9 uses we knew nothing about until we got the  
10 subleases.

11 And we went through those in the cross  
12 examination with Mr. Nguyen. In general, his  
13 testimony is that yes, he authorized those uses, but  
14 he doesn't think that they are actually engaged in  
15 those businesses at this point.

16 The one business that we had quite a bit  
17 of back and forth about was the Chinese carry-out or  
18 the Chinese restaurant. It is a restaurant that is,  
19 if it is in operation, a direct prohibited use.

20 In other words, it is -- there are two  
21 categories of uses here. One is permitted uses, and  
22 then, by implication, some other things are excluded.

23 And then there is specifically prohibited

1 uses, and as the lease says, "No matter what, you  
2 cannot do these things."

3 And an Italian restaurant, a Chinese  
4 restaurant and so forth would fall under that  
5 category.

6 Mr. Nguyen's testimony, as I understand  
7 it, is that he thinks Mark's Duck House is not a  
8 Chinese restaurant. He has eaten there, and he  
9 doesn't think it is Chinese food. Yet his own  
10 actions belie that.

11 His own lawyer put into evidence that in  
12 1985, they wrote to this tenant, threatened him with  
13 a lawsuit, got in negotiations with his lawyer,  
14 accused him of selling Chinese food and operating a  
15 Chinese restaurant, in violation of the lease.

16 Again, in this year, 1994, the same thing  
17 has happened. That is, in the redirect examination,  
18 Mr. Nguyen admitted he has given new notices of  
19 default to the Chinese restaurant.

20 And during the cross examination, the  
21 witness looked at the yellow pages, showing the  
22 advertisement for this operation being advertised as  
23 Mark's Peking Duck House, and he says that that is

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 wrong. That is, he knows they are not supposed to do  
2 it, but they are doing it.

3 Now, he may have taken some steps to try  
4 to stop this, but the truth is that this restaurant  
5 has continued to operate. He left them in there. It  
6 is a Chinese restaurant. It was in 1985. Today, he  
7 is giving notice to them and going after them, trying  
8 to stop them.

9 We submit that that shows an open, clear  
10 violation of this prohibited use, and it is one that  
11 has existed throughout the option period. That one,  
12 we think is quite clear.

13 Now, there was also testimony, Your  
14 Honor -- I am not going to go into all the details on  
15 every use. There was testimony about the  
16 hairstyling/barbering salon. This lease clearly  
17 permits barbering. It does not permit a hair salon  
18 or a beauty salon.

19 The question is: What are they doing in  
20 there? There is some evidence, it would appear, that  
21 women are being catered to. He says they are not.  
22 That testimony may be in dispute at this point.

23 We cross examined the witness about the

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**(703) 471-7603**  
**46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165**

1 insurance. And it seemed to us, Your Honor, that he  
2 conceded, during the discussion about insurance, that  
3 for a period of time, he had failed to provide  
4 insurance that insured this landlord for the last  
5 five years, and turned it over instead to his  
6 subtenants and asked them to make him the insured.  
7 That was his testimony.

8 And when I asked him had he done that for  
9 the landlord, he said no. That is a requirement.  
10 Rather, the landlord is required to be a named  
11 insured under paragraph 11 of this lease. It is  
12 another violation.

13 It seems to us, Your Honor, that there are  
14 numerous and cumulative defaults under this lease, a  
15 default being a state where the tenant is not acting  
16 in compliance with the lease. They are numerous.  
17 They are continuing.

18 It is true, as Mr. Ragland said earlier  
19 and he is going to say again, I am sure, that they  
20 are open and notorious.

21 That is all true. We submit that if we  
22 are correct about whether notice is required under  
23 that lease -- and we think as a matter of law it is

1 not -- it doesn't matter that they are open and  
2 notorious. It would matter if we were trying to  
3 evict the tenant.

4 If we were in here on an unlawful  
5 detainer, we believe the Court would have every right  
6 to say, "Look. You saw this. You didn't do anything  
7 about it. I am not going to let you evict, because  
8 you did not give them notice and an opportunity to  
9 cure."

10 But we are not in here on an unlawful  
11 detainer.

12 THE COURT: Well, what about what position  
13 do you take with regards to the fact that they asked  
14 specifically if they -- when they wanted to exercise  
15 the option, they said, "Look. We want to exercise  
16 the option. If we are in default, tell us what's  
17 wrong so we can cure it."

18 What about a specific request to do it, so  
19 they can then exercise the option?

20 MR. PAGE: Well, I think that the letter  
21 from Ms. Davis on October 5 stated that there were  
22 grounds with respect to use.

23 There also was a notice given to them with

1 respect to the late fees, and they did try to pay  
2 those. I think that --

3 THE COURT: Which letter are you referring  
4 to?

5 MR. PAGE: It is exhibit five, I believe,  
6 of the plaintiffs. Okay? Wait a minute.

7 MR. PAGE: It just says that they are  
8 there, but they didn't say what.

9 MR. PAGE: Well, excuse me, Your Honor.  
10 It is exhibit four.

11 THE COURT: Well, okay. Yes. But this  
12 was the one that they were told that the rent had not  
13 been paid, and the fees were not paid, but there was  
14 no amount given.

15 MR. PAGE: That's right. And later there  
16 was, and they did cure. And we are not asserting --  
17 after that, we are not asserting that those late  
18 charges a default. They were through December 31 of  
19 1993.

20 It does seem to us, Your Honor, that the  
21 landlord is not obligated to go out and look for each  
22 default.

23 THE COURT: Well, I would concede that

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*



1       that is true, but my question goes to this: If they  
2       are saying, "We are ready. We want to exercise the  
3       option. We don't think there are any defaults. If  
4       you say there are, let us know, so we can take care  
5       of them, so we can do this."

6               And you say, "Well, I am not telling you,  
7       but we think that there may be."

8               What about that? I mean, you are saying  
9       that there may be, we think that there are, but you  
10      are not saying what they are.

11              MR. PAGE: Well, Your Honor, let me say  
12      this: I think there are some situations where a  
13      landlord may create an estoppel with respect to a  
14      tenant.

15              This is not that kind of situation. First  
16      of all, there is a lot of correspondence back and  
17      forth between counsel and between the parties.

18              And I think part of what we were doing  
19      here today was telling you that we didn't know about  
20      all the uses in the space until we got the subleases.  
21      And I made that point earlier.

22              That is why Mr. Ragland was objecting  
23      about the supplemental interrogatory answer. There

1 was -- we submit that we could not have known all the  
2 uses.

3 But Mr. Ragland has put into evidence a  
4 letter from Ms. Davis. I mean, this is something he  
5 put into evidence that says that Capital Commercial  
6 Properties has not had on-site management of this  
7 property. He has tried to get us to admit that,  
8 state that it is true. It is not true.

9 And he has put into evidence our counter  
10 to him on this, which said, "There is no on-site  
11 management by the landlord."

12 And, in addition, the statement that  
13 Mr. Ebenstein "comes by here and personally visited  
14 the site often" is also inaccurate.

15 I mean, this is something the plaintiff  
16 put into evidence.

17 We submit that under these circumstances,  
18 where the landlord is not there every day, the  
19 landlord is not required to specify every kind of  
20 default.

21 We knew that there were some defaults. We  
22 knew that there were use problems. We knew at a  
23 minimum, and we admit it, he put into evidence that

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 we knew in advance of the law firm and the travel  
2 agencies, and that we had not given a default notice  
3 about the late payments. We knew that. We knew all  
4 those things.

5 It was clear to us, we submit, that we  
6 were in default, that he was in default, and we were  
7 asserting that all along. We submit we are not  
8 required as a matter of law to provide him every  
9 possible default.

10 Moreover -- this goes back a little bit to  
11 the burden of proof issue. I am not the plaintiff  
12 here.

13 I mean, he did come to this Court and say,  
14 "I am not in default."

15 And he has the burden of proving he is not  
16 in default. I don't think his evidence does that.  
17 It shows the opposite.

18 But it seems to us that we are not  
19 required to do that. And again, the cases that we  
20 submitted, we think, are on all fours on this point,  
21 that the landlord is not required to do that.

22 I think if we had tricked him, that's  
23 different. We didn't do that. If we had -- I think

1 there can be some estoppel against a landlord if a  
2 landlord does something that is trickery or somehow  
3 tries to trap a tenant into doing something. That is  
4 not what happened here.

5 And in addition to that, the lease itself  
6 is very clear. In effect, this tenant had notice on  
7 these provisions, because they are in the lease. On  
8 the use provisions, he knows at the beginning that  
9 there are prohibited uses and there are permitted  
10 uses, and he violated those.

11 And it is our view that we are basically  
12 permitted by this lease to wait until the renewal  
13 period has come about and to say, "You have been in  
14 default. We are not going to allow you to renew."

15 We are not required to come in early and  
16 take on the burden of trying to evict him. That is  
17 an option the landlord has, but to do that, the  
18 landlord has to make a business judgment that he  
19 wants to get rid of the tenant.

20 He is ready to incur the expense of  
21 litigation. He is ready to put the space on the  
22 market at that time, et cetera.

23 And that is why the lease is written the

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*(703) 471-7603*  
*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 way it is. It gives the landlord cumulative  
2 remedies, and it gives him options as to what remedy  
3 he is going to use.

4 We think a landlord is entitled to know  
5 about -- for example, we think the landlord is  
6 entitled to know about those travel agencies, to know  
7 they are there, to view them as defaults, and not to  
8 give any notice.

9 But when it comes to renewal time, to say  
10 to the tenant, "You can't do that. The lease  
11 prohibited it. It is a default and has been since you  
12 started it. And what we are going to do is tell you  
13 that we don't want you as a tenant anymore."

14 That is one thing we are permitted to do  
15 by this lease. And again, that is specifically what  
16 the cases that we have relied upon say is how you are  
17 supposed to interpret a lease like this.

18 They could have written this lease  
19 differently. I mean, there are commercial leases  
20 that would define a default as being something that  
21 happens only after the notice.

22 That is not this kind of lease. And it  
23 seems to me that where you have this kind of lease,

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(703) 471-7603  
46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 that essentially you are left with the landlord  
2 having cumulative remedies and having the option to  
3 wait.

4 And unless we engaged in some behavior  
5 that is, I would say, dishonest, with respect to this  
6 tenant, which I don't the evidence even suggests  
7 that, I don't think that there is anything that we  
8 have to do.

9 And I don't think that that is a harsh  
10 result. I mean, this is a business lease. This has  
11 been a lucrative situation for this tenant for ten  
12 years, and I don't think there is anything unfair  
13 about making him live up to the letter of the law  
14 with respect to this.

15 That is all we are asking. And I think  
16 basically with the evidence that you have in front of  
17 you, you really have the guts of the case. You can  
18 make a decision.

19 You can make a decision based on an  
20 interpretation of the lease and whether a default  
21 existed. We submit they admit the existence of the  
22 defaults, and it is really just a question of the  
23 interpretation of the lease.

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MR. RAGLAND: To begin with, when a motion to strike is made, all the evidence that is in is looked at, so to speak, in the light most favorable to the plaintiff.

Interestingly enough, the defendants have put no evidence in whatsoever. They didn't even put any of their exhibits in that they showed to him. They just questioned him about them, withdrew them, and took them back to the table.

So they have no evidence in. So what we need to do, I think, to begin with is look whether he has made a case. He has said that he exercised the option, and there is nobody to say otherwise.

He did it three different times. One of them you have under advisement. That is the March 9 one. But he said he exercised it three times.

He has testified that under the terms of this lease, that he was not in violation of any of its provisions. And I specifically questioned him about each thing.

I asked him if he thought that he had overpaid under his lease on August 9, and he said he

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1 thinks he has a \$39,000 credit as of that date.

2 Well, if that is true, and no one has said  
3 otherwise yet, then there cannot be any fees due from  
4 him, late fees, even if he later paid them under  
5 protest, which he did.

6 So the claim that there is any money due  
7 and owing is without any evidence before the Court.  
8 It is exactly the opposite.

9 With respect to each and every other  
10 thing, with respect to each use, they say that you  
11 cannot create an estoppel situation unless there is  
12 dishonesty. That is not the only situation that will  
13 create an estoppel on the landlord to raise a claim.

14 First, we are going -- in a minute, I am  
15 going to talk about what I think this lease says and  
16 what the rights are, but first, the estoppel that can  
17 be created, if a landlord permits something to go on  
18 for ten years or eight years or seven years of a  
19 lease, when it is plain to be seen -- and you now  
20 have before you the admission of counsel that those  
21 uses, the ones that were complained about and that  
22 are in evidence, were obvious from day one. That is  
23 what Ms. Davis's admission says on behalf of her

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165



1 client.

2 So if they are obvious from day one, the  
3 landlord has as much responsibility under the lease  
4 to know what is permitted and what is not as does the  
5 tenant.

6 And is it -- does it create a surprise to  
7 the tenant if, for eight years, the landlord sees it  
8 and says nothing, but after it is too late for him to  
9 exercise his option, the landlord says, "All these  
10 are violations of the lease"?

11 Is it a surprise when he has written  
12 letters throughout the whole period that we have  
13 discussed here today saying, "Look. I want to be  
14 straight with you guys. Tell me what it is that I  
15 need to do, and I will cure it"?

16 There is always the implied good faith  
17 dealing.

18 The landlord does not have a legal right  
19 to sit and be silent when he is asked to speak, and  
20 then say, "I have that right. I don't have to tell  
21 you. You have to guess what is in my mind."

22 I would argue here today that hairstylists  
23 versus a barber is a subjective decision made by the

1 landlord. The State of Virginia defines barbering to  
2 include hairstyling. I have the statute here, and I  
3 would offer it. It is 54.1700. I will hand it up in  
4 a minute, when I am to it.

5 Will you hand it up?

6 (Pause.)

7 MR. RAGLAND: That defines barbering, and  
8 it is not limited to the old-fashioned scissors and a  
9 comb. You can dye hair. You can cut hair with a  
10 razor.

11 You can do all the things that we come to  
12 believe is hairstyling. Hairstyling is not a  
13 cosmetology and is not a beauty salon. It is  
14 barbering.

15 The landlord said he could do barbering.  
16 The people in the shops have barber licenses, not  
17 cosmetology licenses. So is it a surprise to this  
18 tenant that now that it is too late to exercise the  
19 option, and he says, "Hairstyling is not permitted"?

20 Let's go for a minute, if we can, Your  
21 Honor, to paragraph 15A of the lease. Do you have  
22 the sheet I gave you as a trial guide at the  
23 beginning? Can you find that?

1 THE COURT: Yes.

2 MR. RAGLAND: I think my client bargained  
3 for a notice from the landlord any time the landlord  
4 wanted to claim a forfeiture, whether it was an  
5 immediate forfeiture, meaning an unlawful detainer  
6 and you are out of here, or if the landlord in the  
7 future, at some time in the future, wanted to gain  
8 possession as a result of that default, because it  
9 says in the lease -- and we didn't write this  
10 lease -- "If the landlord wishes lawfully to enter  
11 immediately or at any time thereafter," what does  
12 that imply, Your Honor?

13 That implies that if the landlord knows of  
14 a default and wants to use that default to enter at  
15 any time to take possession back, then he has to tell  
16 this man, so this man can cure. That is why I have  
17 argued all day here that a notice is required.

18 But even if you decide, based on the  
19 evidence so far, that a notice is not required by  
20 this lease, certainly the estoppel works when the  
21 landlord knows that there are things going on that he  
22 now says are not permitted by the lease and does  
23 nothing for the first eight years of the lease.

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1           He cannot sit on his rights and then  
2   assert them for some reason wholly unrelated to the  
3   lease. He is talking here about this landlord as a  
4   businessman.

5           This is a business deal, and he doesn't  
6   have to have a tenant, if he doesn't want him. They  
7   talk like they gave away an option, like it is a  
8   privilege.

9           That is not a privilege. That is a right  
10   that was granted to him. And if they take the right  
11   away from him, isn't that a forfeiture of a right  
12   that was granted in the lease?

13          The reason I pointed out article 22 of the  
14   lease, again which we did not write -- when they  
15   wanted to talk about situations that were more  
16   encompassing than a default, in article 22, they  
17   promised my client, "You will have quiet legal  
18   title."

19          That is the theory that Mr. Page was  
20   saying that quiet enjoyment is.

21          "You will have the legal right to be in  
22   here, as long as you perform under the lease."

23          Here, they didn't say "as long as you are

1 not under default."

2 So if they intended, when they wrote  
3 paragraph 34, to be something other than the same  
4 default we talked about in paragraph 15, why did they  
5 not use the word "perform," as opposed to default?

6 Mr. Page has argued that paragraph 24 is  
7 just another cumulative remedy. All that is is a  
8 right in the landlord to pay some bill the tenant  
9 doesn't, to avoid a harm, and to either throw him out  
10 for not paying it or to later collect the money from  
11 him.

12 That is not a cumulative remedy, and it  
13 certainly doesn't prove anything with respect to  
14 whether 15 is applicable to 34. I think my client  
15 had every right on August 9 to know if the landlord  
16 thought something was in default.

17 There are two theories of waiver in place  
18 here today, or estoppel, not one. The first one is  
19 the waiver up to August 9 of the right to enforce a  
20 remedy, because the landlord knew certain things and  
21 didn't do it.

22 The second waiver is the waiver of the  
23 landlord's right to deny the renewal because of his

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1 failure to require performance of a thing he now says  
2 is required to be performed.

3 Mr. Page represented to you that he  
4 searched all over the place to find all the law there  
5 was to be found. In the very case that he cited and  
6 gave you a copy of, he cited a Florida case which  
7 holds exactly the opposite of the case he gave you.

8 In that case, the tenant sought to renew.  
9 The landlord denied him the right to renew.

10 The Florida court ruled as follows, "While  
11 the landlord alleged that the tenant failed to show,  
12 at the time they exercised the option to renew, that  
13 they had not defaulted under any of the terms of the  
14 lease, the landlord failed to complain of any of the  
15 alleged defaults within a reasonable time, and  
16 therefore waived strict performance."

17 And they found that that tenant, like this  
18 tenant, was not in trouble.

19 This is a case from Florida, which I will  
20 offer you, which was cited in the case they gave. So  
21 there are -- you can run around the United States, I  
22 guess, and find a holding for everything there is.  
23 Virginia holds as follows: They abhor a forfeiture

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1 where one can occur.

2 Unless there is a plain agreement in the  
3 document that there will be a forfeiture, the Court  
4 will do almost anything legally within its means to  
5 avoid a forfeiture.

6 I say that my client bargained for the  
7 right not to forfeit a right he had, and what he  
8 bargained for is a right to cure it.

9 He had a right before he exercised the  
10 option to know that the landlord was unhappy with him  
11 and to cure it.

12 He had a right after he exercised it to be  
13 told when he specifically said, "Tell us."

14 I think it is very clear that if they had  
15 meant to simply say, "If there is any evidence that  
16 you have not performed, you can't renew," then they  
17 should have used the word "performance" instead of  
18 default, because the tenant has a right to interpret  
19 this lease the way that the lease does interpret  
20 default.

21 It requires a notice before anything can  
22 be done to effectuate that. The law in Virginia also  
23 provides -- and my memorandum that I submitted to

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1 you, have you had an opportunity to read it, my  
2 memorandum?

3 THE COURT: Yes, I have.

4 MR. RAGLAND: Okay. The memorandum that I  
5 submitted to you says the law in Virginia favors  
6 construing a lease against the landlord and in favor  
7 of the tenant, since the landlord has the right to  
8 put anything they want in the lease.

9 If the landlord had meant to say that the  
10 notice provision is not required in exercising the  
11 renewal option, why is it not specifically excluded  
12 somewhere in the lease? It is not. So the landlord  
13 failed, if he now says that this is not included in  
14 the lease.

15 The landlord did provide a way, if this  
16 lease is extended, to protect himself. He can give a  
17 notice. If there is not a performance under the  
18 notice within the time specified, he can evict a  
19 tenant.

20 I agree that this is not an unlawful  
21 detainer. But, Your Honor, the case before this case  
22 is to construe the parties' lease and the conduct of  
23 the parties.



1 I don't think there has been good faith on  
2 the part of the tenant -- excuse me, the landlord --  
3 in not telling the tenant anything that he is  
4 requested to be told.

5 You were told that paragraph 20 has just  
6 one provision in it, the landlord, for however long  
7 he wants, can ignore something, and that that is not  
8 a waiver hereunder. But read the next sentence in  
9 that paragraph.

10 It does recognize that there can be  
11 instances where the landlord will waive by express  
12 action or implied action an enforcement. And all  
13 that means is: Just because I waive this time  
14 doesn't mean the next time you do the same thing,  
15 that you can get away with it.

16 So this lease recognizes that the landlord  
17 can, in fact, overlook the performance of something  
18 and permit it to go on, and that particular use or  
19 that particular item will go on.

20 The only evidence before this Court about  
21 uses are the following: That on August 9, there was  
22 a tenant in the property who had no right to be  
23 there, who was a lawyer.

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1           This tenant was not violating the lease in  
2           that he did not authorize this tenant to be in there.  
3           He told you under oath that he had already decided,  
4           before he got the notice, to put the man out.  
5           Obviously, the notice hastened him to take action on  
6           that.

7           Regardless of whether that is or is not an  
8           issue, that was remedied before the second notice  
9           went in. So that was gone. Regardless of whether  
10          you find that late fees is or isn't an issue, that  
11          was gone.

12          It is not by coincidence that the letter  
13          from Attorney Davis on October 5 and the notice to  
14          quit to my client on October 5 came the same day.  
15          She was referring to the notices we had been noticed  
16          of, and the notices were the complement to the notice  
17          we got that "we don't recognize your exercise."

18          There were no more defaults in the  
19          landlord's mind as of that date, and they are stuck  
20          with that.

21          Now, they have argued, "Well, we can sit  
22          some defaults over here in a little pile, and we can  
23          accumulate them and save them to talk about later,

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1 when they try to extend."

2 But they blew their argument, Your Honor,  
3 when they sent a notice to us on October 5, because  
4 now they are trying to put us out of possession.  
5 They are trying to get the property back from us not  
6 later, but now.

7 So now they have an obligation to  
8 affirmatively tell us about every single default that  
9 they know about.

10 Let's look at the things you heard from  
11 the witness stand. The certificate of insurance.  
12 Who, besides the landlord, would know if what he has  
13 in his file is acceptable to him?

14 Certainly not my client. He didn't send  
15 it out. His insurance company did. The first time  
16 he ever heard there was a problem about that is long  
17 after we filed this lawsuit.

18 Travel agencies. He knew about them  
19 before August 9, but they were not a problem until  
20 after we tried to extend our lease and after we filed  
21 this suit. Suddenly, they are a major problem. Get  
22 them out.

23 I don't think it is an admission for us to

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1 file an unlawful detainer to test in court whether  
2 the landlord is right or not right. If the landlord  
3 is right, then he gets the remedy that he bargained  
4 for.

5 He gets that use out of the center. If he  
6 is wrong, if a court rules that this use is not  
7 prohibited, then the landlord is wrong.

8 So the judicial system is going to test  
9 this lease with respect to that. But as far as  
10 extending this lease, on August 9, travel agents  
11 were -- them being in there, being a violation, was  
12 knowingly waived by the landlord right up through  
13 until the time we filed this.

14 With respect to all of the leases that  
15 were handed, he has explained that not a single one  
16 of those people are in fact doing any of the  
17 unauthorized uses that they were afraid they were  
18 doing.

19 He has explained that due to some language  
20 difficulties ten years ago, when he wrote the lease,  
21 he put words in there that he should not have, such  
22 as "manufacturing herbs."

23 He knows that they don't make the herbs

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1 there. They mix them up and make Chinese medicine.

2 Misfortune of words in a lease is not a  
3 violation of the use. Not a single one of the leases  
4 that they have brought up today are in fact being  
5 used against the terms of the lease.

6 They have made a big argument here today  
7 that this lease is open and shut, and paragraph A  
8 says, "This is what you can do," and paragraph B  
9 says, "This is what you can't do."

10 I would argue to the Court and to them:  
11 If this is what you can do, why do you have to have  
12 "This is what you can't do"?

13 If this is all you can do, why do you have  
14 to have the specific prohibitions down here about  
15 what you can't do? Because the landlord, for  
16 whatever reason, wanted to put him on absolute notice  
17 that you cannot have a beauty shop, you cannot have a  
18 Chinese restaurant, you cannot have this, that and  
19 the other thing.

20 There is a gray area in there where what  
21 he says makes a whole lot of sense. If a freight  
22 forwarding company, that specializes in Vietnamese  
23 immigrants, wants to arrange for them to go back, to

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 accompany their gifts, to see their relatives, that  
2 is an incidental service.

3 Just like in a grocery store, you sell  
4 lottery tickets. That is not a gambling joint; it is  
5 a grocery store where you can buy a lottery ticket.

6 So I think that what he said makes a lot  
7 of sense. What the landlord has taken a position of  
8 is simply to get him out of the center, because he  
9 wants to take over the center.

10 If, in fact, the landlord had intended not  
11 to permit travel agent, not to intend to permit  
12 hairstyling, and on and on, then he should have put  
13 in there that these are the uses that we authorize,  
14 and everything else is prohibited. He didn't do  
15 that. He specifically itemized what is prohibited.

16 Maybe he had lease obligations to other  
17 people. Maybe he didn't want them to have a bank in  
18 there or those sorts of things.

19 Now, let's talk about the advertising.  
20 The tenant has never violated the lease. Is it a  
21 violation of his lease if, unbeknownst to him, one of  
22 his subtenants fails one time, at a remote time from  
23 August or January or March, to advertise?

1           The only evidence before this Court is  
2           that sometime in 1994, a tenant apparently  
3           advertised -- a subtenant, that is -- in violation of  
4           the lease. And he remedied that. That doesn't prove  
5           on August 9 that there was a violation or January 3  
6           or March 9.

7           They have said that me filing unlawful  
8           detainers constitutes an admission. That doesn't  
9           constitute anything except testing out what it is  
10          they say and giving them the remedy that 15A gives  
11          them. Cure an unauthorized use, if in fact the Court  
12          rules it is.

13          They raise some issues about the -- saying  
14          that he didn't have plate glass insurance. He has  
15          testified under oath that he had leasehold insurance,  
16          which he believes covers plate glass and everything  
17          else that he put in the center, and there has been  
18          nobody to counter that.

19          To have satisfied the landlord's demand,  
20          he made his insurance company put in the certificate,  
21          that he just recently sent them, plate glass, so that  
22          there is no argument about. But he believes he has  
23          covered it the whole ten years of the lease.

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1           In addition, he has required every  
2 subtenant to carry insurance that said "plate glass."  
3 Leasehold improvements includes plate glass, because  
4 he is the one that put most, if not all, of the plate  
5 glass in there.

6           So when we narrow it down to its essence,  
7 Your Honor, what we get is this: We get a landlord  
8 who says, "Look. I don't have a duty to tell you  
9 anything, no matter whether you ask me or not. I  
10 don't have to advise you about anything. I can sit  
11 on my rights and assert them when you go before a  
12 Court or go before wherever you go and try to extend  
13 your lease."

14           That is not the law in Virginia. You have  
15 to deal honestly and in good faith. He says his  
16 client has not been dishonest. His client has not  
17 been dishonest; he has not been forthcoming.

18           He has known for some time what these  
19 alleged violations are. He waited, and the letters,  
20 the last two letters I put in, show that he waited  
21 until it was too late for us to do anything. And  
22 then the floodgates opened up with all these notices.

23           If, in fact, he was simply going to wait

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1     until September 26 to say, "Now you have to leave,"  
2     why did he give us a cure or quit notice from March  
3     on for all these things that really weren't -- he  
4     wasn't interested in before, except for the purpose  
5     of keeping us from renewing the lease?

6             The two cases that they cited in their  
7     brief, I want to point out the distinctions.

8             The one from Maine, the Homestead case,  
9     the Court in that case basically said that "You  
10    waited till the last minute to exercise your option.  
11    And up until that time, the landlord was not seeking  
12    possession. You never asked them anything before.  
13    The landlord did tell you why, after you exercised  
14    your option, why your lease was not being renewed and  
15    what you had violated. But now, due to your own  
16    fault, it is too late for you to exercise it again."

17            That is not the case here.

18            In the second case that they quoted, which  
19    is, I think he called it, the Hindquarter case, the  
20    landlord specifically wrote a letter to the tenant  
21    before the lease exercise was attempted and said,  
22    "We're taking a new posture with you. We're tired of  
23    your late payments. We are going to hold you

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*46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165*

1 strictly to the lease. If you don't pay these lease  
2 payments on time, it's going to be a default under  
3 lease."

4 The guy kept on paying late, right on  
5 through his renewal, and then went to the Court, like  
6 he said, on a declaratory judgement, "I want to renew  
7 my lease, and they didn't give me a notice."

8 Well, they did give him a notice. They  
9 just didn't ask for possession. They told him  
10 specifically what he had to do to be in good stead  
11 with them, and he didn't do it. That is not the case  
12 here.

13 I have one Virginia case about uses that,  
14 while it is quite old, I think is very relevant to  
15 this argument about the gray areas. And I have  
16 attached it to my brief, Your Honor. It is Stonegap  
17 Colliery Company versus Kelly and Vequeras (phonetic)  
18 and it goes back to 1913.

19 The lease provided for coal mining, and  
20 that's all. That was the only use permitted in  
21 there. The tenant of that lease built a bunch of  
22 houses on the property and rented them out, not to  
23 its employees but to just people off the street.

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 But they did state, "Eventually, we'll put  
2 our employees in here, and that's why we built them.  
3 But now we're just doing it for a venture."

4 The landlord came in and said, "You  
5 weren't authorized to build house and lease property  
6 to people. You were authorized to do coal mining."

7 The Court said that the lease didn't  
8 prohibit it. And while it didn't grant it, it didn't  
9 prohibit it. It is a permitted use. The Court  
10 also -- and that is where I said that they construe  
11 against the landlord.

12 The Court construed the lease and said,  
13 "If you wanted them not to do anything other than  
14 coal mining, then you should have specifically  
15 prohibited anything else. All you did is say, 'I'm  
16 leasing you this property for coal mining purposes,  
17 and they went out and did something else, and you  
18 don't like it.'"

19 The Court said that that was okay. The  
20 Court will construe a renewal clause -- or the law  
21 construes a renewal clause against the landlord and  
22 in favor of the tenant.

23 That is Virginia law, and it is in my

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46441 SPRINGWOOD COURT, STERLING, VIRGINIA 20165

1 argument. And the cases are supported there. The  
2 law construes the lease against the landlord where  
3 there is any ambiguity or any misunderstanding or any  
4 argument of difference. That is the Virginia law.

5 And the law of Virginia abhors forfeiture,  
6 and that is exactly what the landlord claims they  
7 have a right to do without any fair dealing with the  
8 tenant before the forfeiture occurs.

9 I would argue that, in fact, not only  
10 should their motion to strike not be granted, but the  
11 Court also rule, and if they do so find that this  
12 lease provides for notice, they have already admitted  
13 that they are not going to put on any evidence that a  
14 notice was outstanding when the leases were renewed.

15 They have already admitted that all of the  
16 notice defaults before the second extension were  
17 cured.

18 So if the Court believes that a notice was  
19 a prerequisite, or if the Court believes that, after  
20 being asked, they had a duty, then this case is over,  
21 whether they want to put on a ton of evidence about  
22 what a lousy tenant he was or not, because you have  
23 construed the lease.

1           And some form of notice, whether it is  
2 under the lease or, because of the request, was  
3 required, the case is over, and you can make a ruling  
4 today. Otherwise, the case, I say, goes on for them  
5 to put on more evidence.

6           MR. PAGE: Very briefly, Your Honor. The  
7 key thing, it seems to me, that is in dispute here  
8 may be the meaning and interpretation of paragraph 20  
9 of the lease, with respect to waivers, because I  
10 think mostly what Mr. Ragland is saying is that the  
11 Court ought to sympathize with the tenant.

12           And the Court ought to in equity, if you  
13 will, say that this tenant is entitled to be treated  
14 fairly and given notice, and that we ought to be  
15 doing certain things with him by way of conduct.

16           And I submit to you that paragraph 20 of  
17 the lease, whether it is fair or unfair -- and I am  
18 not conceding that it is unfair, but whether it is  
19 fair or unfair -- it basically gave the landlord the  
20 right to do exactly what the landlord is doing here.

21           Paragraph 20 says -- maybe we ought to  
22 take a minute, because there is quite a bit in  
23 paragraph 20.

1           It says that "The failure of the landlord  
2 to complain of any act or omission on the part of the  
3 tenant, no matter how long the same may continue,  
4 shall not be deemed to be a waiver by the landlord of  
5 any of its rights hereunder."

6           I will just stop right there.

7           So even if we knew, as Mr. Ragland  
8 contends, from day one that Blue Skies Travel should  
9 never have gone in there to be a tenant, because it  
10 was a violation of the lease, even if we knew that,  
11 it doesn't make any difference.

12           Paragraph 20 says we are entitled to know  
13 that and to let it sit there and do nothing about it,  
14 and we have given up no rights.

15           THE COURT: Why don't read that and then  
16 read 15 and tell me if there is any ambiguity there?

17           MR. PAGE: I don't think there is any  
18 ambiguity.

19           THE COURT: Well, explain it.

20           MR. PAGE: Well, it seems to me that the  
21 landlord can, for example, give a notice to quit, as  
22 we did.

23           Even if he had not renewed, and we are

1 coming up to the tenth year of the lease, and we knew  
2 that Blue Skies had been in there from year six, we  
3 would be entitled at the tenth year to give a notice  
4 under paragraph 15, claim a default, and if they  
5 didn't cure it, to go into court and ask for  
6 immediate possession.

7 Because under paragraph 20, our knowledge  
8 of the default does not require us to act at the time  
9 that we first learned of it. There is no requirement  
10 in the lease that we do that.

11 And the lease goes on to say that we can  
12 accept rent. This paragraph goes on to say that we  
13 can accept rent, we can do all these other things.  
14 We are not required to take any action.

15 On the second page of paragraph 20, it  
16 says, "Any and all rights and remedies which landlord  
17 may have under this lease, and by operation of law,  
18 either at law or in equity, upon any breach, shall be  
19 distinct, separate and cumulative, and shall not be  
20 deemed inconsistent with each other. And no one of  
21 them, whether exercised by landlord or not, shall be  
22 deemed to be an exclusion of the other, and any two  
23 or more or all of such rights and remedies being

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1       exercisable at the same time."

2               This goes directly to the point that Mr.  
3       Ragland is saying.

4               He is basically saying, "You can't deny us  
5       the right to exercise a renewal under paragraph 34  
6       unless you have first told us, under paragraph 15 or  
7       maybe under 24, with a notice that we are in  
8       default."

9               This sentence that I just read actually  
10       says just the opposite. These remedies shall not be  
11       deemed to be inconsistent. They shall not be deemed  
12       to be an exclusion of the other. And we are entitled  
13       to do any or all of these things.

14              And this is the kind of provision which is  
15       in the Hindquarter case. That case turns on the  
16       existence of this kind of provision in the lease.

17              And it seems to me, Your Honor, that  
18       basically a tenant can come in and make a plea in  
19       equity, in effect, which is what Mr. Ragland is  
20       doing, saying, "Relieve us of this written  
21       obligation. Relieve us of the terms of the lease.  
22       You should impose upon the landlord a requirement  
23       that the landlord act, when he knows. You should



1 impose upon the landlord fairness, meaning give us a  
2 notice, give us an opportunity to cure."

3 But the lease doesn't say that. And I  
4 submit that the Court is without the power to imply  
5 into paragraph 34 a written notice, and that this  
6 provision -- and the reason Mr. Ragland saves it  
7 until last and deals with it as sort of a side  
8 argument is that it is a key provision.

9 It is a key provision which negates the  
10 entire theory of his case.

11 The two key provisions, it seems to us,  
12 are paragraph 34, which says they have to be free of  
13 default with no notice -- and my argument about  
14 paragraph 15 and paragraph 24 is that you have to  
15 contrast 15 and 24 on the one hand with paragraph 34  
16 on the other hand.

17 In other words, under paragraph 15 and 24,  
18 notice is specified. And if we were trying to do any  
19 of these things, we would have to show notice. But  
20 under paragraph 34, we are not required to have  
21 notice to the tenant.

22 We are entitled to sit back, watch a  
23 default, and if a default has occurred, to tell them,

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1 "Because you are in default, you are not entitled to  
2 renew your lease."

3 We are entitled to do that. That is what  
4 I think this lease means. Both of the cases that I  
5 attached here, plus the other cases cited from some  
6 five or six jurisdictions -- there is a Maryland  
7 case, which is quoted from in one of the cases --  
8 have permitted such a result.

9 And I submit to the Court it is not  
10 unfair. It is not illegal. There is nothing wrong  
11 with it. The parties agreed to it, and you are  
12 merely enforcing the words of the lease. That is all  
13 we are asking you to do.

14 THE COURT: Well, I am going to step out  
15 for a minute. I am going to read them again. I will  
16 be back in a few minutes. I am going to step out to  
17 read these cases.



1  
2 THE COURT: The Court, after reviewing  
3 certainly the two memos and cases, would deny the  
4 motion to strike.

5 The Court, however, viewing the evidence  
6 in a light most favorable -- certainly, at this  
7 time -- to the plaintiff, feels that there are a  
8 couple of issues that certainly have to be resolved,  
9 if there is any further evidence that would shed any  
10 light on it. But at this time the motion is denied.

11 Does counsel intend to put on any  
12 evidence?

13 MR. PAGE: Well, yes, Your Honor. We do  
14 have further evidence. If, when you say there are  
15 open issues, you could help me determine which of the  
16 evidence I have I might as well not put on, if you  
17 are inclined to do so. In other words --

18 THE COURT: Well, I think -- well, if I  
19 was going to do that, I might as well be prepared to  
20 rule.

21 And if counsel wishes me to rule, then, I  
22 mean, I could call it as I see it. But if you wish  
23 to make sure that I hear everything, then I will --

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1 then I will wait to rule is what I am saying.

2 MR. PAGE: Here is what I would say to the  
3 Court: I will proffer to the Court that we do not  
4 have any evidence of giving notice of default. I  
5 think, actually, that may already be in evidence.

6 Now, I am prepared to go forward with  
7 evidence of default. I have witnesses that will  
8 testify about the existence of defaults.

9 THE COURT: And I think if you have  
10 evidence that you believe that the Court should hear  
11 about default and whether or not -- well, hold on.  
12 You say you have nothing with regards to notice.

13 MR. PAGE: That is correct.

14 THE COURT: Well, then maybe the Court is  
15 prepared to rule then.

16 MR. PAGE: Let me say this: If --  
17 maybe -- I would have to sit down and look at the  
18 evidence. Maybe that is the best thing to do, come  
19 back tomorrow morning and talk to the Court then.  
20 But I am prepared to substantially reduce my case if  
21 the Court is going to rule that notice is required.

22 MR. RAGLAND: Your Honor, as they put  
23 it -- in one of the requests for admissions, they

1 admitted that no notice was given prior to August  
2 9th, prior to January 3rd, and prior to March 9th, of  
3 any defaults.

4 They can't put on any evidence that  
5 contradicts that, because the admission is before the  
6 Court. And that is the end of that issue.

7 So if that is all he has got is to put on  
8 some evidence of defaults and notice, the case is  
9 over because they have already admitted there are no  
10 such notices.

11 THE COURT: Counsel being seated, I assume  
12 that that is --

13 MR. PAGE: Well, I think there is an  
14 admission that is in evidence. And we do have -- and  
15 I told the Court we had evidence of the existence of  
16 defaults.

17 That is, as we contend, non-compliance  
18 with the lease in a number of regards. There is no  
19 notice of telling the tenant that they have to cure  
20 or face a remedy.

21 There is no such notice other than --  
22 excuse me, other than the ones that were in evidence  
23 where there was a cure, such as a payment.

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1 I mean, I don't want to be so general  
2 there that I eliminate the evidence that we did talk  
3 about that had to do with late payment, had to do  
4 with the existence of a law firm. They took actions  
5 on that. There were notices about those things.

6 Your Honor, if I could just take a minute.  
7 Let me look at the request for admissions. Yes. It  
8 is number 50. That is it. Admission number 50 is  
9 correct, Your Honor. In between those dates there  
10 were some notices and some cure actions.

11 THE COURT: Well, that being the case, the  
12 Court would be prepared to rule then.

13 The Court finds that in looking at the  
14 contract -- that in -- certainly in reading paragraph  
15 15, and then also reviewing the paragraphs that have  
16 been in controversy with regards to the waiver  
17 provision, and in looking at paragraphs 15, 24, 34,  
18 and 20, the Court finds that there is some ambiguity,  
19 because at one point it does appear that notice is  
20 required.

21 Later, it does talk about the waiver  
22 provision, wherein it would not be required. And the  
23 landlord is basically saying it can hold these

1 defaults and has not waived any of its rights.

2 That is an ambiguity that the Court would  
3 resolve in favor of the tenant. Certainly objections  
4 to everything are certainly noted -- to the Court's  
5 ruling.

6 MR. RAGLAND: Is it the Court's ruling  
7 then that its declaratory judgment is that the lease  
8 extension request was effective and the lease has  
9 been extended thereby?

10 THE COURT: That is the declaratory  
11 judgment on this ruling of the Court.

12 MR. RAGLAND: All right. Does the Court  
13 have a ruling on our request for attorney's fees and  
14 damages pursuant to 24-B of the contract?

15 THE COURT: The Court does. With regard  
16 to the attorney's fees, the Court does award the  
17 attorney's fees. But does not award the additional  
18 fees requested.

19 The Court is of the opinion that this is  
20 clearly within the scope of his regular employment.  
21 There is nothing that was in excess of that.

22 MR. RAGLAND: Thank you, Your Honor.

23 MR. PAGE: Note my exception, Your Honor.

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