

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT

COMES NOW Gordon J. Painter, a Chesterfield County Police Department (“CCPD”) police officer (“Corporal Painter”), by counsel, pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 7(F) and submits this Memorandum in Support of Corporal Painter’s Motion to Dismiss the First Amended Complaint.

FACTS

On October 11, 2022, a female called 911 to report a breaking and entering in progress at her River Forest apartment located at 5741 Quiet Place Circle in Chesterfield County, Virginia. (First Am. Compl., ECF No. 14 at ¶ 14.) *See* Ex. 1, CAD Report for Incident PD2210110254. The apartment in question is located on the ground level of the apartment complex, and it is accessible from a breezeway that runs between the parking lot and an open, grassy area of the complex with sidewalks. *See generally* Ex. 2, Sergeant Hlava Body Worn Camera (BWC) video Part 1; Ex. 3, Corporal Painter BWC video; Ex. 4, Officer Claud BWC video; *See* Ex. 5, Apartment Lease Contract for 5741 Quiet Pine Circle Apt #102 (Lease); Ex. 6, Officer Wilson BWC video; Ex. 7,

Sergeant Hlava BWC video Part 2; Ex. 8, Officer Cash BWC video¹ (showing layout of apartment complex and the specific apartment in question throughout the officers' BWC videos). The front door of the apartment opens to the kitchen and main living area, with a second door on the side of the apartment allowing access from the living area to the fenced-in, ground-floor patio. *Id.* A short hallway directly in front of the main entrance door leads from the main living area to a closet and hall bathroom on the left and two bedrooms off the right side of the hallway, each with windows but no other exit. *Id.*

Several CCPD officers responded to the female resident's breaking and entering call for service, including Corporal Painter and his K-9, Scout. (ECF No. 14 at ¶¶ 9, 15.) *See generally*, Exs. 2; 3; 4; 6; 7; 8 (showing several officers on scene throughout the entire incident). The female complainant reported that she had been staying in Virginia Beach since September 5, 2024, and had returned to her apartment that day to collect some of her belongings. *See* Ex. 8 at 05:33-05:41. After she unlocked the door to her apartment, she could not physically open it because the chain latch on the inside of the door was across the door. *See* Ex. 4 at 01:18-01:25. The female complainant then kicked in the door, entered her apartment, and encountered a tall black male, whom she did not know, naked in her bed and wrapped up in one of her blankets, which prompted her to run out of the apartment and call 911. (ECF No. 14 at ¶¶ 13-14.) *See* Ex. 1; Ex. 2 at 01:50-1:55; Ex. 4 at 00:52-01:40.

The complainant advised the 911 dispatcher that she was the only person on the Lease for the apartment, that no one was supposed to be in the apartment, and that she had not given anyone permission to be in or stay in the apartment while she was gone. *See* Ex. 1; Ex. 2 at 01:55-01:58;

¹ The birth dates and social security numbers that appear in this video have been redacted, in accordance with Fed. R. Civ. P. 5.2.

Ex. 4 at 00:04-00:06; Ex. 7 at 00:53-01:05. A number of CCPD officers were dispatched to the 911 call for Quiet Pine and the officers responded with their emergency lights and sirens activated, allowing them to expedite their driving response given the significant nature of the call. *See* Va. Code § 46.2-920; *see, e.g.*, Ex. 2 at 01:30-02:00; Ex. 6 at 00:30-01:30. While en route, a Sergeant provided an update over the radio advising all responding to Quiet Pine that a K-9 was en route and that officers should “hold the perimeter until they get there and wait for K-9.” *See* Ex. 2 at 02:00-02:10.

After arriving on scene, CCPD officers confirmed with the complainant, who remained on scene outside the apartment waiting in a vehicle, that she had not seen the man in question, or anyone else, exit her apartment since the time she called 911. *See* Ex. 2 at 01:20-01:26, 04:30-04:35 (officer heard over radio saying “the individual is still in her bed”); Ex. 4 at 00:15-00:20.

Acting on the complainant’s representation to 911 and her confirmation on-scene directly to the CCPD officers that no one was supposed to be in her apartment and that she had no idea who this man was, CCPD officers, understanding there was a breaking and entering and burglary in progress, began to set up a perimeter around the building and at the entrance and side exit of the apartment in order to keep the suspect contained. *See* Ex. 2 at 6:05-8:06; Ex. 7 at 01:06-01:13; Ex. 8 at 01:28-03:55 (officers can be seen drawing their service weapons and Tasers on the perimeter of the ground-floor apartment). Once Corporal Painter and his K-9 arrived on the scene, after being summoned by a supervising Sergeant, Corporal Painter was briefed by fellow CCPD officers on the circumstances, told where the apartment in question was located, and provided a description of the apartment’s layout. *See* Ex. 2 at 08:06-10:15; Ex. 4 at 03:50-05:00. Corporal Painter then led K-9 Scout on lead to the front door of the apartment and, after reaching the door,

Corporal Painter activated his BWC. (ECF No. 14 at ¶ 15.) *See* Ex. 2 at 9:20-10:15; Ex. 3 at 00:00-00:48; Ex. 4 at 04:37-05:13.

Corporal Painter and four other CCPD officers positioned themselves around the front door of the complainant's apartment, with Officer Wilson providing Corporal Painter with lethal cover, and the other three officers tactically positioned around the entrance with their guns drawn. *See* Ex. 2 at 09:30-10:15; Ex. 3 at 00:40-00:51; Ex. 6 at 06:55-07:45.

Corporal Painter opened the door to the apartment and announced loudly "police K-9, speak to me now or I'll release the dog, if the dog finds you, you'll be bit." *See* Ex. 2 at 10:13-10:18; Ex. 3 at 00:50-00:58. There was no audible response from anyone in the apartment indicating an intent to surrender and no physical display consistent with surrendering. *See* Ex. 3 at 00:50-01:02.

Corporal Painter then shouted, "police K-9, speak to me now." *See* Ex. 2 at 10:18-10:22; Ex. 3 at 01:00-01:02. Once again, no one in the apartment showed themselves or surrendered. *See* Ex. 3 at 00:50-01:03.

Corporal Painter then yelled "anybody home?" *See* Ex. 2 at 10:22-10:25; Ex. 3 at 01:03-01:06. There was still no acknowledgement or response to Corporal Painter. *See* Ex. 3 at 00:50-01:08.

Then, Corporal Painter loudly warned a fourth time, "now's your chance; speak up." *See* Ex. 2 at 10:25-10:29; Ex. 3 at 01:06-01:08. Despite four loud and clear warnings from Corporal Painter, there was no acknowledgement or response from any individual in the apartment.

Following these four clear warnings, Corporal Painter released K-9 Scout into the apartment, commanding Scout to "find him." *See* Ex. 3 at 01:09. After Scout searched the main living area and kitchen, Corporal Painter recalled him. *See* Ex. 3 at 01:10-01:17.

Before releasing Scout again, Corporal Painter yelled a fifth command for anyone in the apartment to “come out now.” *See* Ex. 2 at 10:35-10:39; Ex. 3 at 01:18-01:19. Still no one came out from the back rooms. *See* Ex. 3 at 00:50-01:22.

Corporal Painter released Scout back into the apartment, and loudly commanded Scout to “find him,” and pointed towards the back of the apartment where the two bedrooms were located and where the claimant said she last saw the intruder. *See* Ex. 2 at 10:40-10:41; Ex. 3 at 01:20-01:26.

As K-9 Scout made his way down the short, narrow, and dark hallway of the apartment, the suspect came out of the back bedroom located off the right side of the hallway. *See* Ex. 3 at 01:26. As soon as Officer Wilson saw the suspect emerging from the bedroom, he yelled loudly at the suspect “let me see your hands” and “keep your hands up.” *See* Ex. 3 at 01:27-01:30; Ex. 5 at 07:38-07:40. Simultaneous with Officer Wilson’s commands, K-9 Scout bit the suspect on the upper left arm and the suspect began yelling “it’s biting me” repeatedly. *See* Ex. 3 at 01:30-01:36. Corporal Painter immediately drew his firearm, activated his weapon mounted light so he could see, and started walking towards the suspect while loudly commanding the suspect to “come here” and “come to me,” while Scout ensured the intruder was contained. *See* Ex. 3 at 01:30-01:36. Corporal Painter then commanded the suspect to “get on the ground” and the suspect complied while continuing to yell “it’s biting me” repeatedly. *See* Ex. 3 at 01:37. Corporal Painter grabbed on to K-9 Scout’s collar, removed the suspect’s left hand from Scout’s collar, and pulled Scout away from Plaintiff, while Officer Wilson crossed over them in the narrow hallway in order to detain the suspect in handcuffs. *See* Ex. 3 at 01:38-02:00.

Officer Wilson then handcuffed the suspect, and the suspect was assisted up from the ground by CCPD officers and removed from the apartment. *See* Ex. 3 at 01:58-02:26; Ex. 5 at

08:10-08:45, 10:09-11:00. No additional force was used after the K-9 seized the suspect and the suspect was placed in handcuffs. *Id.* CCPD officers immediately requested medical assistance and treatment for the suspect's arm. *See* Ex. 1; Ex. 2 at 11:42-11:45. While detained in handcuffs, the suspect was identified as Plaintiff. *See* Ex. 8 at 09:10-09:20. Plaintiff received medical treatment on scene from Chesterfield County Fire and EMS. *See* Ex. 7 at 00:21-04:36. He ultimately needed stitches for the wound on his arm. *See* Ex. 7 at 01:30-01:36. While Plaintiff was receiving medical attention, the responding CCPD officers cleared the apartment and completed their investigation to determine whether charges should be brought. *See e.g.*, Ex. 6 at 08:40-49:05. As part of their investigation, CCPD officers confirmed with the leasing office that the complainant, as she represented to the police, was in fact the only person on the Lease for the apartment. *See* Ex. 5 (Kara Kennedy is the complainant); Ex. 8 at 16:30-17:30.

Throughout the entire encounter, and despite police presence, five warnings by Corporal Painter, numerous other loud directives to Scout to "find him," and the presence of the dog himself, Plaintiff never identified his location, never announced his intent to surrender, and never physically showed an intent to surrender until the very second K-9 Scout located him.

Through questioning Plaintiff after he was detained, CCPD officers determined that the complainant was apparently an ex-girlfriend of Plaintiff's uncle, the uncle had kept a key to Plaintiff's apartment and the uncle had given Plaintiff the key and told him he could stay in the apartment while the complainant was in Virginia Beach. *See* Ex. 6 at 12:48-13:16; Ex. 7 at 01:37-02:03; Ex. 8 at 03:55-12:10.

While Plaintiff was sitting on the edge of the back of the ambulance, CCPD Sergeant Hlava explained to Plaintiff that the officers had responded to a 911 call, what information was known to the officers when they arrived on the scene and why, based on that information, there was probable

cause for their entry into the complainant's apartment and the deployment of K-9 Scout. *See* Ex. 7 at 00:40-02:02. Plaintiff responded by stating he understood, he told the officer "I'm sorry," and he shook the officer's hand. *See* Ex. 7 at 02:02-02:07. After consultation with the Commonwealth's Attorney's Office, Plaintiff was ultimately released from detention and no charges were brought against him or the complainant. *See* Ex. 7 at 02:23-02:37.

The facts set forth above are established with unquestionable clarity from the BWC videos of Corporal Painter, Sergeant Hlava, and Officers Claud, Wilson, and Cash. In addition, the facts established by these BWC videos, the CAD Report, and the Apartment Lease directly contradict many of Plaintiff's allegations in the First Amended Complaint, including, but not limited to, the following:

- a. "Mr. Williams was in at a residence where he was lawfully residing with permission;"
- b. "This apartment was leased under the name of his friend, Tyleek Harris;"
- c. "Defendant Painter entered Mr. Williams' residence with his K-9 without a warrant or probable cause;"
- d. "Following Defendant Painter, Officer Wilson entered the property and encountered Mr. Williams who was coming out of the bedroom to see who was in his apartment;"
- e. "Defendant Painter, without any threat of violence, risk of bodily harm or knowledge of who was present in the apartment, released his K-9 without justifiable cause;"
- f. "The K-9 charged at Mr. Williams' left upper arm and bit Mr. Williams several times;"
- g. "As the K-9 continued to bite Mr. Williams' arm, law enforcement proceeded to cuff him while trying to get the K-9 to release its grip;"
- h. "The K-9 wouldn't release, so Defendant Painter had to punch the dog in the nose to get him to release his bite;"
- i. "The K-9 would not listen to Defendant Painter's commands;"

- j. “Mr. Williams never posed a threat of safety to the officers or others;”
- k. “Mr. Williams never resisted the officers;”
- l. “Defendant Painter was not responding to a serious crime;”
- m. “Neither Defendant Painter, other officers or the public ever faced prior to or at the time of the incident ANY threat of safety;”
- n. “The Plaintiff NEVER resisted arrest nor attempted to evade arrest by flight;”
- o. “Defendant Painter at most of the time of the incident was investigating a trespass ‘of which there was none.’ The only report was of a man asleep in a bed;”
- p. “There was no rush to the situation.”
- q. “Defendant Painter never even communicated with the landlord nor the renter of the property;”
- r. “Defendant Painter engaged in zero targeting of any suspect. He did not even know who was in the apartment;” and
- s. “Defendant Painter did not contact the building owner, the renter.”

(See generally ECF No. 14).

PROCEDURAL HISTORY

Plaintiff filed the Complaint in this matter on October 2, 2024, and it was served on Corporal Painter on October 19, 2024. (See Compl., ECF No. 1.) Corporal Painter filed a Motion to Dismiss the Complaint, accompanying Memorandum in Support of the Motion to Dismiss and eight exhibits, including six BWC videos, on November 12, 2024. (See Mot. to Dismiss, ECF No. 12; Mem. in Supp. of Mot. to Dismiss and Exs. 1-8, ECF No. 13.) Plaintiff did not oppose the Motion to Dismiss within fourteen calendar days. See Local R. 7(F). Rather, he filed his First Amended Complaint on December 1, 2024. (See ECF No. 14.) After having the benefit of reviewing the exhibits to Corporal Painter’s Motion to Dismiss, including the extensive body worn camera footage depicting the entire encounter at issue, the only changes Plaintiff made to the

allegations as reflected in the First Amended Complaint are references to case law out of the Second and Seventh Circuits of the United States Court of Appeals and the Court of Appeals of Ohio, and to training standards and standing orders that, as will be discussed below, are not applicable in this case. (*See* ECF No. 14 at ¶¶ 39-60.)

ARGUMENT

I. Standard of Review

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). This principle applies only to factual allegations, however, and "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A plaintiff must allege facts sufficient to raise a right to relief above a speculative level and state a claim that is "plausible on its face," rather than merely "conceivable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp.*, 550 U.S. at 556). Therefore, for a claim or complaint to survive a dismissal for failure to state a claim, the plaintiff must "allege facts sufficient to state all the elements of [his or] her claim." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (citing *Dickinson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002)).

A court may also “consider documents attached to the complaint, ‘as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.’” *Fusaro v. Cogan*, 930 F.3d 241, 248 (4th Cir. 2019); *Philips v. Pitt Cty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Yousif v. Hailey*, No. 1:23-CV-81, 2023 WL 7413328, at *1 (E.D. Va. Nov. 9, 2023); *Lawhon v. Edwards*, No. 3:19-CV-924, 2020 WL 4589195, at *4 (E.D. Va. Aug 10, 2020). “[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached . . . , the exhibit prevails.” *Lawhon*, 2020 WL 4589195, at *4 (citing *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *Fayetteville Inv’rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)).

When a video is submitted at the motion to dismiss stage of a case, a court may consider such video “when (1) [it] is ‘integral’ to the complaint and its authenticity is not challenged, but (2) only to the extent that the video ‘clearly depicts a set of facts contrary to those alleged in the complaint,’ or ‘blatantly contradicts’ the plaintiff’s allegations, rendering the plaintiff’s allegations implausible.” *Doriety for Est. of Crenshaw v. Sletten*, 109 F.4th 670, 679-80 (2024) (citing *Saalim v. Walmart, Inc.*, 97 F.4th 995, 1002 (6th Cir. 2024)).

There are eight records attached to Corporal Painter’s Motion to Dismiss the First Amended Complaint—the CAD Report, the Apartment Lease, and six BWC videos—all of which are integral to the alleged violations set out in First Amended Complaint and contradict many of Plaintiff’s allegations in the First Amended Complaint. The CAD Report describes the very basis for the law enforcement encounter that gave rise to the First Amended Complaint and provides the Court with the information known to the responding CCPD officers, including Corporal Painter, before entry into the apartment and the deployment of K-9 Scout. The Apartment Lease establishes that the complainant was the only tenant on the Lease, which is consistent with the complainant’s

representations to 911 and the CCPD officers and the Lease directly contradicts Plaintiff's allegation that the Lease was under the name of his friend, Tyleek Harris. Further, both the CAD Report and the Apartment Lease contain factual information integral to the question of whether there was probable cause for Corporal Painter's actions. These operative records therefore can and should be considered by the Court at this stage of the proceedings.

The attached BWC videos depict a set of facts that are clearly contrary to the facts alleged in Plaintiff's First Amended Complaint. As a result, the Court can and should also consider these BWC videos at the motion to dismiss stage and in ruling on Corporal Painter's entitlement to qualified immunity. *See Goines*, 822 F.3d at 167-69; *Doreity*, 109 F.4th at 679-80.

Where there is conflict between the bare allegations of the First Amended Complaint and the attached records and BWC videos, the facts shown in the records and videos shall prevail. *See Goines*, 822 F.3d at 166; *Fayetteville Inv'rs* 936 F.2d at 1465.

II. Corporal Painter's Actions Were Objectively Reasonable and Did Not Violate Clearly Established Law.

Plaintiff's First Amended Complaint attempts to assert a claim against Corporal Painter, pursuant to 42 U.S.C. § 1983, for excessive use of force in violation of the Fourth Amendment (Count I), and under Virginia law for common law assault (Count II) and battery (Count III). The admissions in the First Amended Complaint combined with the facts established by the CAD Report, Apartment Lease, and the BWC videos, however, demonstrate that Corporal Painter's use of K-9 Scout to seize an intruder who had reportedly broken into the complainant's home, was still hiding in the apartment, and did not comply with numerous police warnings and commands that the K-9 would be released to bite was objectively reasonable under the law. In addition, there was no clearly established law that would have put Corporal Painter on notice that deploying a K-9 during a burglary in progress, in an apartment with limited entrances and exits, on a suspect who

was not lawfully present in the apartment and ignored at least five verbal warnings would violate the suspect's Fourth Amendment rights. *See Putman v. Harris*, 66 F.4th 181, 186-87 (4th Cir. 2023); *Maney v. Garrison*, 681 F. App'x 210, 216-23 (4th Cir. 2017); *Melgar ex. rel. Melgar v. Greene*, 593 F.3d 348, 355 (4th Cir. 2010); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988); *Barker v. Gaylor*, No. 2:20-CV-00357, 2021 WL 3354161, at *4-5 (S.D.W. Va. Aug. 2, 2021).

A. Corporal Painter is entitled to qualified immunity based on the facts presented and actions shown through the attached records and BWC videos and those stated in the First Amended Complaint.

Government officials are entitled to qualified immunity in a 42 U.S.C. § 1983 proceeding when their actions “do[] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The standard is one of objective reasonableness: “whether a reasonable officer could have believed [the conduct at issue] to be lawful, in light of clearly established law and the information the . . . officers possessed.” *Anderson v. Creighton*, 482 U.S. 635, 641 (1987). This is purely a question of law. *Putnam v. Harris*, 66 F.4th 181, 186 (4th Cir. 2023).

There is a two-step procedure for determining whether the defense of qualified immunity applies to a claim of a constitutional violation under § 1983.² *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). First, a trial court determines whether, “[t]aken in the light most favorable to the party asserting the injury,” the facts alleged by that party “show the officer’s conduct violated a constitutional right.” *Id.* at 201. Second, the court must explore “whether the right was clearly established.” *Id.* at 202. In determining whether a right is clearly established, courts consider

² Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted in light of pre-existing law. *Id.*

“[O]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.” *Porterfield v. Lott*, 156 F.3d 563, 567 (4th Cir. 1998). “Qualified immunity thus provides a safe-harbor from tort damages for police officers performing objectively reasonable actions in furtherance of their duties.” *Id.* Whether an officer’s actions are “objectively reasonable” is a question of law, “without regard to their underlying intent or motivation.” *Putman*, 66 F.4th at 187 (citing *Graham*, 490 U.S. at 397).

Qualified immunity is typically an immunity from suit, rather than a mere defense to liability, and is effectively lost if a case is erroneously permitted to proceed through the other burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (stating that qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question”). The United States Supreme Court has “made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims against government officials [will] be resolved prior to discovery.’” *Pearson*, 555 U.S. at 223; *see also Am. Civil Liberties Union v. Wicomico Cnty., Md.*, 999 F.2d 780, 784 (4th Cir. 1993) (stating that “in order to weed out insubstantial § 1983 claims without resort to a trial or extensive pre-trial proceedings, a trial court confronted with an assertion of qualified immunity should first determine whether the plaintiff has properly asserted a constitutional violation”).

This case demonstrates the necessity of evaluating a claim of qualified immunity at the earliest possible stage—motion to dismiss. *Pearson*, 555 U.S. at 232 (“we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation”). While

historically it may have been unusual for a police officer to be able to establish an entitlement to qualified immunity at the motion to dismiss stage, the availability, in particular, of BWC video has allowed law enforcement officers to show the Court early on in the litigation what the actual facts and circumstances are surrounding the incident that give rise to the causes of action in the First Amended Complaint. *See e.g., Harrold v. Hagen*, No. 3:23CV866 (MHL), 2024 WL 4336745 (E.D. Va. Sept. 27, 2024) (granting motion to dismiss in favor of officer on federal claims); *Scott v. Ross, et al.*, No. 3:24CV196 (DJN) (E.D. Va. April 19, 2024) (granting motion to dismiss in favor of officers on federal and state claims). The case at hand is uniquely positioned because of the comprehensiveness of the audio and video captured by the CCPD officers' BWC videos which directly contradict the allegations in the Plaintiff's First Amended Complaint. The facts shown in the BWC videos as well as in the attached CAD Report and Apartment Lease demonstrate that, as a matter of law, Corporal Painter's actions were objectively reasonable and there was no violation of any clearly established constitutional right.

B. Corporal Painter's use of force in deploying his K-9 after giving the suspect numerous warnings was objectively reasonable.

The threshold inquiry pertinent to Counts I, II, and III of the First Amended Complaint is whether Corporal Painter violated Plaintiff's Fourth Amendment right to be free from unreasonable seizures. Claims of excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Corporal Painter's use of force of deploying K-9 Scout on a burglary suspect, after issuing numerous warnings prior to K-9 Scout's release, was objectively reasonable under the circumstances, and therefore did not constitute a violation of Plaintiff's constitutional rights under the Fourth Amendment or an assault or battery. *See Putman*, 66 F.4th at 187 (since the "immediate safety risk [was] reasonably likely to be cured by using the dog, Harris's deployment was justified");

Maney, 681 F. App'x at 216; *Melgar ex rel. Melgar*, 593 F.3d 348 (granting officer qualified immunity for K-9's bite); *Jones v. Wild*, 244 F. App'x 532, 533 (4th Cir. 2007); *Vathekan v. Prince George's Cnty.*, 154 F.3d 173, 175 (4th Cir. 1998) (reinforcing that a police officer needs "to give a verbal warning before deploying a police dog to seize someone"); *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) (recognizing the importance of giving a warning "that the dog is going to attack").

Virginia common law claims that arise from an officer's use of force, such as assault and battery, as claimed here in Counts II and III, respectively, are "subsumed within the federal excessive force claim." *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994). "As a result, state-law tort claims will usually fail or proceed with the federal excessive force violation if the standards of qualified immunity are met or not met respectively." *Bromwell v. Pankoke*, No. 4:17CV60, 2018 WL 3580767, at *7 (E.D. Va. July 25, 2018).

"It is well-established that *all* claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its reasonableness standard, including claims that police canines were improperly deployed." *Melgar*, 593 F.3d at 355 (internal quotation marks and citations omitted); *Vathekan*, 154 F.3d at 178. "The question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." *Barker*, 2021 WL 3354161, at *4-5. "Reasonableness is evaluated from the officer's perspective in recognition of the fact that officers cannot be expected to respond to information they did not possess at the time they acted" *Melgar*, 593 F.3d at 355 (internal citations omitted).

"A reviewing court may not employ the 20/20 vision of hindsight." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citing *Graham*, 490 U.S. at 396-97). "The court's focus should be

. . . on the fact that officers on the beat are not often afforded the luxury of armchair reflection.”

Id. “[T]hreats to officer safety are not imaginary” *Maney*, 681 F. App’x at 222. The reality is that “police are often asked to intervene at a moment’s notice in tense, difficult, situations, on the basis of imperfect information and with little time for deliberation. That is why we do not engage in unrealistic second-guessing of action taken in swiftly developing situations, and why we do not subject officers to personal liability for bad guesses in gray areas.” *Id.* (internal citations and quotation marks omitted).

In determining the objective reasonableness of an officer’s use of force, a court must pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.”³ *Graham*, 490 U.S. at 396. The Fourth Circuit has also instructed that the extent of the plaintiff’s injuries is a relevant consideration. *See Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir. 2003); *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002).

In the First Amended Complaint, Plaintiff alleges that Corporal Painter’s disregard for or violation of “National Training Standards,” United States Police Canine Association, Inc. training, and internal operation orders for the Winchester Police Department when he deployed K-9 Scout into the apartment in question constitutes excessive force under the Fourth Amendment. (ECF No. 14 at ¶¶ 39, 48-60.) Training and internal policies and procedures, or “private rules,” however, do not “fix the standard of duties to others” and do not set the standard for the analysis of an officer’s

³ Although Plaintiff makes reference throughout the Complaint to previous lawsuits brought against Corporal Painter in support of his claim of excessive force in this case (*see* ECF No.1 at ¶¶ 51, 59, 69), the mere fact that an officer has had two lawsuits filed against him does not mean that the officer’s use of force at issue in the case at hand is unreasonable, nor is it a factor the Court may consider when determining whether an officer’s use of force was objectively reasonable.

use of force under the Fourth Amendment. *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 110 (4th Cir. 1995) (“[a] person cannot, by the adoption of private rules, fix the standard of his duties to others . . . [c]learly, the Virginia rule is sufficiently bound-up with state policy so as to require its application in federal court.”); see *Murphy v. United States*, 383 Fed. Appx. 326, 335 (4th Cir. 2010); *Zilka v. United States*, No. 23-1961, 2024 WL 4211620, at *1 (E.D. Va. Sept. 17, 2024); *Lucas v. Shively*, 31 F. Supp. 3d 800, 814 (W.D. Va. 2014) (“violations of internal police protocols do not automatically translate into violations of a person’s constitutional rights”).

Even if such training and internal operation orders were a factor the Court should consider in its analysis of whether Corporal Painter’s deployment of K-9 Scout was objectively reasonable, the training and operation orders cited by Plaintiff are not applicable here.⁴ (See ECF No. 14 at 39, 44, 48-60.) First, the United States Police Canine Association, Inc. is an association that any “active full-time paid law enforcement officer . . . who is a canine handler” may voluntarily join through a paid membership and seek certification from for their K-9 team.⁵ See United States Police Canine Association, Inc., Membership, <http://www.uspcak9.com/membership-information> (last visited Dec. 4, 2024). The United States Police Canine Association, Inc. is not a law enforcement oversight agency. In Virginia, the Department of Criminal Justice Services exclusively provides the mandatory training standards for law enforcement agencies and officers. Second, the internal operation order cited by Plaintiff in the First Amended Complaint is for the

⁴ It is unclear what “National Training Standards” Plaintiff is referring to in Paragraph 39 of the First Amended Complaint.

⁵ Chesterfield County Police Department K-9s and their handlers, including Corporal Painter and K-9 Scout, are certified through another well-recognized organization, the Virginia Police Work Dog Association, not the United States Police Canine Association. See *United States v. Legall*, No. 4:12cr106, 2013 WL 623500, at *2 (E.D. Va. Feb. 19, 2013); *Jones v. Commonwealth*, 277 Va. 171, 181 (2009); *Haywood v. Commonwealth*, No. 1408-17-2, 2018 WL 4865985, at *5 (Va. Ct. Appeals Oct. 9, 2018).

Winchester Police Department. (ECF No. 14 at ¶¶ 50-60.) Corporal Painter is a law enforcement officer employed by the Chesterfield County Police Department and is not employed by or in any way affiliated with the Winchester Police Department. (*Compare* ECF No. 14 at ¶ 2 with ¶¶ 50-60.) Therefore, the Winchester Police Department's internal operation orders are in no way binding on Corporal Painter and have no relevance to this case. Rather, the parameters for Fourth Amendment uses of force, like the one at hand, are guided by the *Graham* factors and the clearly established law.

The factors this Court should consider pursuant to *Graham* are addressed in turn, below.

1. The severity of the crimes at issue.

Plaintiff alleges that Corporal Painter lacked probable cause to enter the complainant's apartment with K-9 Scout (*See* ECF No. 14 at ¶ 15.)⁶, however, the BWC videos and CAD Report clearly contradict this allegation and demonstrate that Corporal Painter, through his personal knowledge and the collective knowledge of his fellow CCPD Sergeant and officers, had probable cause that Plaintiff had committed a breaking and entering and was likely in the progress of committing a burglary at the time K-9 Scout was deployed and officers entered the apartment.⁷

⁶ “To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotation marks omitted). “An officer has probable cause to arrest a suspect when the totality of the circumstances indicate to a reasonable person that a suspect has committed, is committing, or is about to commit a crime” *Jack v. Chapman*, No. 3:16CV316, 2018 WL 1785480, at *7 (E.D. Va. Apr. 13, 2018) (internal citations and quotation marks omitted).

⁷ While Plaintiff alleges that Corporal Painter “at most of the time of the incident was investigating a trespass ‘of which there was none,’ and that “[t]he only report was of a man asleep in a bed,” the CAD Report directly contradicts this allegation, as the description for the incident to which Corporal Painter was responding is “BURG, BREAKING & ENTERING.” (ECF No. 14 at ¶ 53.); *see* Ex. 1.

Officers responding to the scene of a suspected crime may act on the information and instruction of other officers under the collective-knowledge doctrine. *See United States v. Massenburg*, 654 F.3d 480, 492-93 (4th Cir. 2011) (citing *United States v. Hensley*, 469 U.S. 221, 223 (1985)). “So long as the officer who orders an arrest or search has knowledge of the facts establishing probable cause, it is not necessary for the officers actually making the arrest or conducting the search to be personally aware of those facts.”⁸ *Id.* (quoting *United States v. Laughman*, 618 F.2d 1067, 1072-73 & n. 3 (4th Cir. 1980)). Based on Corporal Painter’s personal knowledge and the information Sergeant Hlava and Officer Claud shared with Corporal Painter when he arrived on scene, at the time he and K-9 Scout entered the apartment in question, Corporal Painter knew that the complainant broke open her apartment door and found a tall black man, whom she did not know, naked in her back bedroom. (ECF No. 1 at ¶ 14.) *See* Ex. 1; Ex. 2 at 01:50-01:55; Ex. 4 at 00:52-01:40. Corporal Painter also knew the complainant called 911 to report the crime, that she had informed officers she was the only person on the Lease for the apartment, and that she had not given permission to or had any knowledge of any other persons being in the apartment or allowed in the apartment.⁹ *See* Ex. 1; Ex. 2 at 01:56-01:58; Ex. 4 at 00:04-00:06; Ex. 7 at 00:53-01:05. In addition, Corporal Painter knew at the time of entry that the man was reportedly still inside the apartment. *See* Ex. 2 at 04:30-04:35 (officer heard over radio saying “the individual is still in her bed”); Ex. 4 at 00:15-00:20. Corporal Painter and his fellow

⁸ Plaintiff alleges that Corporal Painter “never even communicated with the landlord nor the renter of the property,” and “did not contact the building owner, [or the] renter” before entering the apartment and that he “did not even know who was in the apartment.” (ECF No. 14 at ¶¶ 56, 58, 60.) These allegations are directly contradicted by the BWC video showing Sergeant Hlava and Officer Claud each speaking with the complainant and then sharing what she said with Corporal Painter before he approached the apartment. *See* Ex. 2 at 06:36-09:12; Ex. 4 at 00:00-05:03.

⁹ The complainant, Kara Kennedy, is the only person on the Apartment Lease. *See* Ex. 5 The Lease agreement directly contradicts Plaintiff’s allegation that the Lease for the apartment was in the name of “his friend, Tyleek Harris.” (ECF No. 14 at ¶ 10.)

CCPD officers were entitled to rely on this information provided to them by the complainant to establish the basis for their entry into the apartment and for their use of force. *See Navarette v. California*, 572 U.S. 393, 400 (2014); *United States v. Kehoe*, 893 F.3d 232, 239 (4th Cir. 2018) (stating the officers were entitled to rely on the information provided by the 911 caller). Therefore, based on the facts known by Corporal Painter and the other CCPD officers at the time of entry, an objectively reasonable officer would conclude that a breaking and entering had occurred, a burglary was in progress, and that at least one suspect remained in the complainant's apartment. Therefore, there was probable cause for Corporal Painter to deploy his police K-9 to seize the intruder. *See Pringle*, 540 U.S. at 371.

Notably, despite Plaintiff's allegation that Corporal Painter "was not responding to a serious crime," burglary has been recognized both by courts and the law as a violent crime. (*See* ECF No. 14 at ¶ 41.) The Supreme Court has stated that "[b]urglary is dangerous because it can end in confrontation leading to violence." *Sykes v. United States*, 564 U.S. 1, 9 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). In addition, federal law classifies burglary as a violent felony. 18 U.S.C. § 924(e)(2)(B); *see Harrold*, No. 3:23CV866, 2024 WL 4336745, at *9. Thus, the severity of the crimes which were reported by the complainant to police in this case are considered high. The severity of the crime is further evidenced by CCPD officers responding to the apartment complex with their emergency lights and sirens activated, allowing them to expedite their driving response, as well as by officers running from their vehicle to the apartment in question upon their arrival on scene.¹⁰ *See* Va. Code § 46.2-920; *see, e.g.,* Ex. 2 at 01:30-02:00; Ex. 6 at 00:30-06:47.

¹⁰ This directly contradicts Plaintiff's allegation that "there was no rush to the situation." (ECF No. 14 at ¶ 54.)

Moreover, rather than making his presence known when CCPD officers and Corporal Painter opened the front door to the apartment, announced their presence, and warned that the police K-9 would bite, Plaintiff ignored numerous commands to “speak to [Corporal Painter] now” and ignored warnings that Corporal Painter had and would use the K-9 to bite. *See* Ex. 3 at 00:50-01:26. As such, an objectively reasonable officer would not only suspect Plaintiff of burglary but would also suspect he was obstructing justice and would at a minimum consider that Plaintiff was looking for an alternative way out of the apartment or even preparing to ambush the officers.¹¹ Va. Code Ann. § 18.2-460. Thus, the first factor—severity of the suspected crimes—weighs heavily in favor of Corporal Painter.

2. Whether the suspect poses an immediate threat to the safety of the officers or others.

Plaintiff’s allegation that he “never posed a threat of safety [to] the officers or others” (*see* ECF No. 14 at ¶¶ 29, 42) is not made from the perspective of an objectively reasonable officer who was responding to the scene of a dispatched breaking and entering and burglary in progress at an apartment complex, which is the perspective mandated by the United States Supreme Court for a qualified immunity analysis. *See* Ex. 1. The BWC video directly contradicts Plaintiff’s allegation regarding the threat posed and it clearly demonstrates, given the totality of the circumstances surrounding this incident, that each of the officers on scene perceived the suspect

¹¹ Plaintiff’s passive resistance of ignoring multiple law enforcement commands, as clearly depicted on the BWC video, directly contradicts Plaintiff’s allegation that he “never resisted the officers.” (*See* ECF No. 14 at ¶¶ 30, 43.) *See also* Ex. 3 at 00:50-01:26. It also directly contradicts Plaintiff’s allegation that Corporal Painter “released his K-9 without justifiable cause.” (*See* ECF No. 14 at ¶ 20.) Further, it is notable that the BWC video shows that Plaintiff ignored Corporal Painter’s commands for almost 40 seconds before Plaintiff finally exited the bedroom. *See* Ex. 3 at 00:50-01:26. Officer Wilson commanded that Plaintiff put his hands up only after Plaintiff finally exited the bedroom—which was simultaneous with K-9 Scout’s bite. This directly contradicts Plaintiff’s allegations in Paragraphs 16 through 20 of the Complaint. (*See* ECF No. 14 at ¶¶ 16-20.)

to be an immediate threat to their safety and the safety of other people in the apartment complex. The threat to the safety of the officers and others was objectively reasonable and is supported in the first part by the fact that the complainant ran out of her apartment and called 911 to report a breaking and entering with the suspect still inside her home. *See* Ex. 1; Ex. 2 at 01:50-1:55; Ex. 4 at 00:52-01:40. In addition, the fact that CCPD officers were directed to set a perimeter and wait for the arrival of the requested K-9 and K-9 officer, Corporal Painter, demonstrates that both supervision and officers believed their safety would unnecessarily be at risk if they were to go in to the apartment and back bedroom without first deploying the K-9. *See* Ex. 2 at 02:00-02:10. Since the suspect was in the residence and there were therefore so many unknowns for the officers, an objectively reasonable officer would conclude the suspect had a distinct advantage—an ability to prepare, hide or ambush—and waiting for K-9 Scout to be deployed allowed the officers to make a safer entry into the apartment.

The immediate threat posed to the officers and others at the apartment complex is further apparent from the BWC video which shows the responding CCPD officers strategically positioning themselves along the perimeter of the apartment building and at the entrance and patio exit to the apartment in order to contain the suspect and prevent his flight. *See* Ex. 7 at 01:06-01:13; Ex. 8 at 01:28-03:55. Also supporting the objective reasonableness of the safety threat posed by the suspect at the time of the response is the fact that the officers positioned near the apartment's patio and near the front entrance to the apartment all had their service weapons or Tasers drawn, and Officer Wilson provided Corporal Painter with lethal cover. *Id.* The responding CCPD officers took necessary precautions to protect themselves and other individuals at the apartment complex due to the immediate safety threat posed by the suspect, based on the facts known to them at the time.

Again, at the time of entry, Corporal Painter had been advised that a large man had unlawfully broken into complainant's apartment; the suspect was still in the apartment; it was unknown if the suspect had access to weapons or had used weapons to break into the apartment; it was unknown if the suspect was alone; and the suspect was not complying with Corporal Painter's several loud, verbal commands to show himself or the police K-9 would be released and bite. *See* Ex. 1; Ex. 2 at 01:50-1:55, 04:30-04:35; Ex. 3 at 00:50-01:26; Ex. 4 at 00:15-00:20, 00:52-01:40. The suspect's failure to adhere to Corporal Painter's numerous commands, despite having had time to comply, heightens an officer's concern as to the threat the suspect poses. Therefore, it was reasonable for Corporal Painter to "conclude that [] resistance present[ed] some immediate danger despite its non-violent character." *See Putman*, 66 F.4th at 188.

It was also objectively reasonable to conclude, given the potentially violent nature of a burglary in progress, that the suspect could have been armed. In fact, the Fourth Circuit Court of Appeals has recognized that the suspected crime of burglary is "a felony that often involves the use of weapons." *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (citing *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987)). There was no way for Corporal Painter or the other CCPD officers to confirm whether the suspect was armed or unarmed until (1) the suspect was within arms' reach of the CCPD officers so they could perform a pat down or (2) the suspect followed commands to show himself and put his hands up, commands which the suspect admittedly heard but did not follow until after the K-9 had been deployed and was biting the suspect. *See* Ex. 6 at 09:50-10:00; *see Putman*, 66 F.4th at 187.

The objective reasonableness of the safety threat perceived by Corporal Painter and the other CCPD officers is also supported by the fact that after the suspect was placed in handcuffs, CCPD officers continued to clear the remaining areas and rooms within the apartment with their

weapons drawn to ensure there were no other suspects hiding in the apartment. *See* Ex. 6 at 8:30-10:15. Therefore, the second *Graham* factor—immediacy of the threat to the safety of officers or others—weighs in Corporal Painter’s favor.

3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

After the complainant knocked in the front door to her apartment, which had been locked from the inside, and found the suspect in her bedroom, she told him she was going to call the police. (ECF No. 14 at ¶¶ 13-14.) Plaintiff made the decision to remain in the apartment for a number of minutes before Corporal Painter arrived on scene, opened the apartment door, and announced himself and the presence of his K-9. *See* Ex. 2 at 04:30-04:35; Ex. 4 at 00:15-00:20. After Corporal Painter announced himself at the doorway, the suspect continued to remain in the bedroom at the end of a dark hallway, not visible to the officers, while Corporal Painter gave several commands and warnings, all of which Plaintiff heard but did not comply with. *See* Ex. 3 at 00:50-01:26. Given Corporal Painter’s (and the other CCPD’s officers’) reasonable belief that the suspect had broken into the home, there was a burglary in progress, that the suspect may have been armed, and that the suspect had remained in the apartment without displaying any intention of surrendering despite law enforcement presence and several commands and warnings, an objectively reasonable officer would construe Plaintiff’s actions as an attempt to resist or evade arrest. The third and final *Graham* factor therefore weighs in Corporal Painter’s favor.

4. The extent of Plaintiff’s injuries.

As a result of K-9 Scout’s deployment, Plaintiff suffered a bite in his upper left arm, which ultimately required stitches. *See* Ex. 7 at 01:30-01:36. While the extent of a plaintiff’s injuries can be considered in determining whether an officer’s use of force was excessive, such factor does not weigh in Plaintiff’s favor in this case, as Plaintiff was a suspect in a serious crime and the injury

inflicted was not severe. *See e.g., Jones*, 325 F.3d at 527, 530-31 (finding that the “severe” injuries suffered by the plaintiff—“a nose crushed into numerous pieces, lacerations of the nose and lips, each requiring multiple sutures, and bruised ribs” weigh in the plaintiff’s favor when determining whether the officer’s use of force was excessive); *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (finding that the plaintiff’s injuries—three cracked teeth, cuts to her nose, and bruising to her face—weigh in plaintiff’s favor); *Rowland*, 41 F.3d at 174 (the court considered the fact that the plaintiff “suffered a serious leg injury over a lost five dollar bill”). Further, when the CCPD Sergeant spoke with Plaintiff while he was receiving medical assistance, Plaintiff appeared in good spirits and not in distress, suggesting that the injuries he sustained were not serious. *See* Ex. 7 at 00:40-02:37. Therefore, the final factor in determining whether Corporal Painter’s actions were objectively reasonable weighs in his favor.

Based on the totality of the circumstances, construed in the light most favorable to Plaintiff, Corporal Painter’s decision to deploy K-9 Scout to seize Plaintiff, a burglary suspect, after giving at least five loud and clear commands and verbal warnings was objectively reasonable and does not plausibly violate Plaintiff’s clearly established Fourth Amendment rights. *Graham*, 490 U.S. at 396. Moreover, on the facts known to Corporal Painter at the time of the seizure, Corporal Painter’s decision to deploy his K-9 certainly was not plainly incompetent.” *Putman*, 66 F.4th at 188 (citing *Ashcroft*, 563 U.S. at 743). Therefore, Corporal Painter is entitled to qualified immunity and the Court should dismiss the Complaint with prejudice in its entirety.

C. There is no binding precedent holding that use of a police K-9 in sufficiently similar circumstances constituted an unreasonable use of force.

For a right to be clearly established, it must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. *Ashcroft*, 563 U.S. at 741-42; *Wilson v. Layne*, 526 U.S. 603, 617 (1999). “A clearly established right is one that is

‘sufficiently clear that every reasonable official would have understood that what he was doing violates that right.’” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (internal citations and quotation marks omitted) (quoting *Reichle v. Howards*, 566 U.S. 658, 663 (2012)).

The Supreme Court “has repeatedly told courts . . . not to define clearly established law at a high level of generality.” *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). Explaining that “[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue” *Id.*; see also *Barker*, 2021 WL 3354161, at *7; *Benton v. Layton*, No. 3:22-CV-225, 2023 WL 3727934, at *10 (E.D. Va. May 30, 2023).

At the time of the events in question, October 11, 2022, the state of the law simply did not provide Corporal Painter with “fair warning” that his conduct in this case would violate a constitutional rule. In fact, most of the Fourth Circuit cases involving police canines that existed prior to October 22, 2022 focused primarily on the importance of law enforcement providing a verbal warning before releasing the K-9 or allowing it to bite an individual. Here, Corporal Painter issued not one, but five warnings prior to using Scout to aid him in seizing Plaintiff. See e.g., *Maney*, 681 F. App’x at 216, 223; *Melgar*, 593 F.3d at 178-79; *Kopf*, 942 F.2d at 266-68.

There is not a single case with controlling authority that puts police canine officers on notice that it would be a violation of a burglary suspect’s Fourth Amendment rights to be caught in the act and seized, at the precise moment he’s finally coming out of his hiding place, by a police

K-9 after officers had already given multiple loud and clear warnings regarding the presence of the K-9. Nor are there any controlling cases holding that an officer must immediately release a K-9 from his bite before placing a suspect in handcuffs, as Plaintiff seems to contend.¹² To the contrary, in *Putman*, the Fourth Circuit held that a K-9 bite that lasted 30 seconds, did not constitute excessive force. *Putman*, 66 F.4th at 185. And, in *Maney*, the Fourth Circuit held that an officer may even briefly prolong a K-9's bite on an individual even after the officer has determined that the individual is not the suspect they are searching for. *Maney*, 681 F. App'x at 218.

The lack of controlling authority that would put an officer on notice as to what constitutes excessive force in this case is further evidenced by Plaintiff's new "allegations" in the First Amended Complaint. (See ECF No. 14 at ¶¶ 45-47.) In his First Amended Complaint, Plaintiff cites in support of his claim of excessive force against Corporal Painter two cases from the Second and Seventh Circuits of the United States Court of Appeals and a state court case from the Court of Appeals of Ohio, none of which are controlling authority for purposes of the qualified immunity analysis, nor do they define clearly established law that squarely governs the specific facts of this case. (See ECF No. 14 at ¶¶ 45-47.)

The first case cited by Plaintiff is *McKinney v. City of Middletown*, which was decided by the Second Circuit Court of Appeals, not the Fourth Circuit Court of Appeals, and was decided only a few weeks before the incident at hand. 49 F.4th 730 (2nd Cir. 2022). Unlike the case at hand, *McKinney* involved the use of a baton, taser, and police K-9 to subdue a prisoner who refused to comply with officers' directives to come out of his cell. Moreover, there was no allegation in

¹² While Plaintiff alleges that K-9 Scout "continued to bite [Plaintiff's] arm [while] law enforcement proceeded to cuff him," the BWC video clearly shows that Corporal Painter grabbed Scout by the collar and pulled him away from Plaintiff approximately 15 seconds after Scout made contact with him in order for Officer Wilson to then be able to step in and place handcuffs on Plaintiff.

McKinney that any commands were given prior to the use of the K-9. *Id.* *McKinney* is simply not controlling legal authority for the use of force at issue in this case.

In *Becker v. Elfreich*, the second case cited by Plaintiff in the First Amended Complaint, police responded to a residence to execute an arrest warrant for an alleged crime that occurred three weeks prior. 821 F.3d 920 (7th Cir. 2016). A police K-9 was deployed in the house to locate the suspect when he did not surrender. In *Becker*, there also was a factual dispute as to whether police gave verbal warning and commands prior to the release of the K-9. Not only is *Becker* not controlling because it is out of the Seventh Circuit but it is also not factually similar to Corporal Painter's deployment of K-9 Scout where Corporal Painter releases the K-9, after giving multiple commands, to locate the suspect of a burglary in progress.

The third and final case identified by Plaintiff in his First Amended Complaint is *Callaway v. Akron Police Department*. 183 N.E.3d 1 (Ohio Ct. App. 2021). *Callaway* involved a police K-9 biting an innocent person rather than the intended suspect, which is not the case here where Plaintiff was the intended suspect, was the only person in the apartment in question, and was the person K-9 Scout lawfully seized based on the probable cause provided by the 911 caller, who was the only person on the Apartment Lease.

Because there is no controlling case out of the Supreme Court or Fourth Circuit Court of Appeals that squarely governs the facts at hand and would have provided Corporal Painter with notice that his actions in the case at hand were unconstitutional, Corporal Painter is entitled to qualified immunity at this stage of the case. *See Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismiss before the commencement of discovery.").

CONCLUSION

For the reasons stated herein, and in the Motion to Dismiss, Corporal Painter respectfully requests that his Motion to Dismiss be granted and that the First Amended Complaint be dismissed with prejudice.

GORDON J. PAINTER

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Chesterfield County

Detailed History

PD2210110254

Incidents Between 10/11/2022 and 10/12/2022

Event Number	Unit	Operator	Address	Apartment/Lot	Beat
PD2210110254	12A	Chapman, Colin	5741 QUIET PINE CIR	102	81

Incident Description	Disp 1	Disp 2	Disp 3	Disp 4	Disp 5
BURG	14	23	14	BURG	01
BREAKING & ENTERING	14 ASSIST MADE	23 CANINE	14 ASSIST MADE	BREAKING & ENTERING	01 REPORT

Victim(s): **Involved Unit(s):** 10A, 11A, 12A, 13A, 172, 176, 177, 178, 181, AIR1, CE22, ERT4, ERT8, K12, K4

Caller Name	Caller Address	Caller Phone
SARAH KENNEDY		757 9743454

Answered	Received	Dispatched	Arrived	Closed	DOW	Priority
12:17:01	12:16:55	12:17:35	12:20:56	13:38:39	Tuesday, October 11, 2022	1

Comment(s): SEES SOMEONE IN HOUSE RIGHT NOW AVIATION: CALL HENRICO FOR AVIATION[Agency/IRF] TALL B/M IN BED BLANKET... NO IDEA WHO HE IS... NO WEAP SEEN... COMP OUTSIDE IN CAR... ADV HOUSE WAS PREV BROKEN INTO SEP 5TH COMP WALKED INSIDE AND SAW HIM IN THE BED AND THEM CAME OUTSIDE AIR1 SWITCHING COMP IN BLU TAHOE COMP SAID SHE IS THE ONLY ONE ON THE LEASE HASNT SEEN ANYONE LEAVE.. WALKED BACK UP TO DOOR WHILE ON THE PHONE... CALLER SAID SHE HAD TO KICK HER OWN DOOR IN TO GET IN HER HOUSE DOOR IS NOW SHUT 10A COPIED VIA PHONE RADIO HELD @ 1228HRS DOG BITE/PD ON SCENE PER 11A, 10-4 FOR RESCUE TO ENTER RADIO 10-8 @ 1233HRS 178 HAS A CAMERA



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 2

Thumb Drive Containing Sergeant Hlava's Body Worn Camera Video Part 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 3

Thumb Drive Containing Corporal Painter's Body Worn Camera Video

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 4

Thumb Drive Containing Officer Claud's Body Worn Camera Video

APARTMENT LEASE CONTRACT



Date of Lease Contract: December 27, 2021
(when the Lease Contract is filled out)

This is a binding document. Read carefully before signing.

Moving In — General Information

1. **PARTIES.** This Lease Contract (sometimes referred to as the "lease") is between you, the resident(s) (list all people signing the Lease Contract):

Kara Kennedy

and us, the owner: River Forest NRDE, LLC

(name of apartment community or title holder). You've agreed to rent Apartment No. 5741102, at 5741 Quiet Pine Circle Apt #102

(street address)

in Chester

(city), Virginia, 23831 (zip code) (the "apartment" or the "premises") for use as a private residence only. The terms "you" and "your" refer to all residents listed above. The terms "we," "us," and "our" refer to the owner listed above (or any of owner's successors' in interest or assigns). Written or electronic notice to or from our managers constitutes notice to or from us. The names and addresses of the persons authorized to manage the premises are listed below. If anyone else has guaranteed performance of this Lease Contract, a separate Lease Contract Guaranty for each guarantor is attached.

Managers: Pegasus Residential, LLC

2. **OCCUPANTS.** The apartment will be occupied only by you and (list all other occupants not signing the Lease Contract):

No one else may occupy the apartment. Persons not listed above must not stay in the apartment for more than 14 consecutive days without our prior written consent, and no more than twice that many days in any one month. If the previous space isn't filled in, two days per month is the limit.

3. **LEASE TERM.** The initial term of the Lease Contract begins on the 27th day of December, 2021, and ends at 11:59 p.m. the 28th day of November, 2022. This Lease Contract will automatically renew month-to-month unless either party gives at least 60 days written notice of termination or intent to move-out as required by paragraph 45 (Move-Out Notice). If the number of days isn't filled in, at least 30 days notice is required.

4. **SECURITY DEPOSIT.** Unless modified by addenda, the total security deposit at the time of execution of this Lease Contract for all residents in the apartment is \$ 0.00, due on or before the date this Lease Contract is signed.

5. **KEYS.** You will be provided 1 apartment key(s), 1 mailbox key(s), 1 FOB(s), and/or 1 other access device(s) for access to the building and amenities at no additional cost at move-in. If the key, FOB, or other access device is lost or becomes damaged during your tenancy or is not returned or is returned damaged when you move out, you will be responsible for the costs for the replacement and/or repair of the same.

6. **RENT AND CHARGES.** Unless modified by addenda, you will pay \$ 1491.00 per month for rent, payable in advance and without demand:

☐ at the on-site manager's office, or
☐ at our online payment site, or
☒ at Retail-Resident e Money Order or www.riverforestapartments.com

Prorated rent of \$ 240.48 is due for the remainder of [check one]: ☒ 1st month or ☐ 2nd month, on December 27, 2021

Otherwise, you must pay your rent on or before the 1st day of each month (due date). You must not withhold or offset rent unless authorized by statute. If you fail to pay rent after we have given you written notice of your nonpayment and of our intent to terminate tenancy if rent is not paid within the statutorily required time period, we may then terminate your tenancy and obtain possession of the premises. We may, at our option, require at any time that you pay all rent and other sums in cash, certified or cashier's check, money order, or one monthly check rather than multiple checks. At our discretion, we may convert any and all checks via the Automated Clearing House (ACH) system for the purposes of collecting payment. Rent is not considered accepted if the payment/ACH is rejected, does not clear, or is stopped for any reason. If the periodic rent is not paid on or before the 5th day of the month, you will be assessed a late charge, which such late charge will not exceed the lesser of 10% of the outstanding periodic rent or 10% of the remaining balance due at the time said late charge is assessed. To the extent permitted by applicable law, you will also pay a charge of \$ 50.00 for each returned check or rejected electronic payment, in addition to the assessment of the aforesaid late charge as provided herein. If you don't pay rent on time, you'll be delinquent and all remedies under this Lease Contract will be authorized. We'll also have all other remedies for such violation. All payment obligations under this Lease Contract shall constitute rent under this Lease Contract.

7. **UTILITIES.** We'll pay for the following items, if checked:

☐ water ☐ gas ☐ electricity ☐ master antenna.
☐ wastewater ☐ trash ☐ cable TV
☐ other _____

You'll pay for all other utilities, related deposits, and any charges, fees, or services on such utilities. You must not allow utilities to be disconnected—including disconnection for not paying your bills—until the lease term or renewal period ends. Cable channels that are provided may be changed during the lease term if the change applies to all residents. Utilities may be used only for normal household purposes and must not be wasted. If your electricity is ever interrupted, you must use only battery-operated lighting. If any utilities are submetered for the apartment, or prorated by an allocation formula, we will attach an addendum to this Lease Contract in compliance with state agency rules or city ordinance.

8. **INSURANCE.** Please note that we do not maintain insurance to cover your personal property and/or any personal injury and/or any such damages related thereto. Further, we are not responsible to any resident, guest, invitee, or occupant for damage or loss of any personal property or personal injury proximately caused by the following incidents (including but not limited to) fire, smoke, rain, flood, water and pipe leaks, hail, ice, snow, lightning, wind, explosions, earthquakes, interruption of utilities, theft, hurricanes, negligence of other residents, occupants, or invited/uninvited guests, and/or vandalism unless otherwise required by applicable Virginia law.

We ☐ require ☒ do not require you to obtain your own renter's insurance in order to protect you and your household and your guests or invitees from any losses to personal property and/or to

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personal injury proximately caused by any occurrences or incidents such as the ones listed herein, which such list is not exclusive. If no box is checked, renter's insurance is not required.

In addition, we urge all Tenants, and in particular those residing in property located in a special flood hazard area such as coastal areas, areas near rivers, and areas prone to flooding, to obtain your own flood insurance. Renter's insurance does not cover damage to your property due to flooding. Consequently, you are advised to contact the Federal Emergency Management Agency (FEMA) or visit the websites for FEMA's National Flood Insurance Program or to contact the Virginia Department of Conservation and Recreation's Flood Risk Information System to obtain information regarding whether the subject property is located within a special flood hazard area.

Additionally, you are ☒ required to purchase personal liability insurance ☐ not required to purchase personal liability insurance. If no box is checked, personal liability insurance is not required. If required, failure to maintain personal liability insurance throughout your tenancy, including any renewal periods and/or lease extensions, is an incurable breach of this Lease Contract and may result in the termination of tenancy and eviction and/or any other remedies as provided by this Lease Contract or state law.

You acknowledge that no portion of the rent paid by you under this agreement will be specifically allocated for the purchase of the owner's structural fire insurance, though the owner may use a portion of gross rental proceeds obtained from all rental units in the community to purchase such structural fire insurance, and in such an event, that you are in no way a co-insured under any such policy.

If any damage insurance or any renter's insurance premiums are to be paid to the landlord prior to the commencement of the tenancy, the total amount of all security deposits, insurance premiums for damage insurance, and insurance premiums for renter's insurance shall not exceed the amount of two months' periodic rent. The landlord, however, shall be permitted to add a monthly amount as additional rent to recover additional costs of any renter's insurance coverage premiums.

- 9. LOCKS AND LATCHES.** Keyed lock(s) will be rekeyed after the prior resident moves out. The rekeying will be done before you move into your apartment.

You may at any time ask us to change or rekey locks or latches during the Lease Term. We must comply with those requests, but you must pay for them, unless otherwise provided by law.

Payment for Rekeying, Repairs, Etc. You must pay for all repairs or replacements arising from misuse or damage to devices by you or your occupants, or guests during your occupancy. You may be required to pay in advance if we notify you within a reasonable time after your request that you are more than 30 days delinquent in reimbursing us for repairing or replacing a device which was misused or damaged by you, your guest or an occupant; or if you have requested that we repair or change or rekey the same device during the 30 days preceding your request and we have complied with your request. Otherwise, you must pay immediately after the work is completed.

Special Provisions and "What If" Clauses

- 10. SPECIAL PROVISIONS.** The following special provisions and any addenda or written rules furnished to you at or before signing will become a part of this Lease Contract and will supersede any conflicting provisions of this printed lease form.

See any additional special provisions.

- 11. EARLY MOVE-OUT.** To the extent permitted by applicable law, you'll be liable to us for a reletting charge of \$ 1491.00 (not to exceed 100% of the highest monthly rent during the lease term) if you:

- (1) fail to give written move-out notice as required in paragraph 45 (Move-Out Notice); or
- (2) move out without paying rent in full for the entire lease term or renewal period; or
- (3) move out at our demand because of your default; or
- (4) are judicially evicted.

The reletting charge is not a cancellation fee and, to the extent permitted by applicable law, does not release you from your obligations under this Lease Contract. See the next paragraph.

Not a Release. The reletting charge is not a lease cancellation fee or buyout fee. It is an agreed-to liquidated amount covering only part of our damages, that is, our time, effort, and expense in finding and processing a replacement. By law, we are limited to the recovery of actual damages. These damages may be uncertain and difficult to ascertain—particularly those relating to inconvenience, paperwork, advertising, showing apartments, utilities for showing, checking prospects, office overhead, marketing costs, and locator-service fees. You agree that the reletting charge is a reasonable estimate of such damages and that the charge is due whether or not our reletting attempts succeed. If no amount is stipulated, you must pay our actual reletting costs so far as they can be determined. The reletting charge does not release you from continued liability for: future or past-due rent; charges for cleaning, repairing, repainting, or unreturned keys; or other sums due.

- 12. REIMBURSEMENT.** You must promptly reimburse us for loss, damage, government fines, or cost of repairs or service in the apartment community due to a violation of the Lease Contract or rules, improper use, or negligence by you or your guests or occupants. Unless the damage or wastewater stoppage is due to our negligence, we're not liable for—and you must pay for—repairs, replacement costs, and damage to the following that result from your or your invitees, guests, or occupants' negligence or intentional acts: (1) damage to doors, windows, or screens; (2) damage from windows

or doors left open; and (3) damage from wastewater stoppages caused by improper objects in lines exclusively serving your apartment. We may require payment at any time, including advance payment of repairs for which you're liable. Delay in demanding sums you owe is not a waiver.

- 13. PERSONAL PROPERTY LEFT IN YOUR APARTMENT.** For this purpose, "apartment" excludes common areas but includes interior living areas and exterior patios, balconies, attached garages, and storerooms for your exclusive use.

Removal After Termination of Tenancy and Delivery of Possession. We may consider any property left behind in your apartment as abandoned property. Except as provided by applicable law, we're not liable for casualty loss, damage, or theft. We will give you 10 days' written notice to your last known address, address correction requested, if we are going to dispose of the property in any way. If we have sold any abandoned property, we may apply the funds received to any amounts you may owe us, including reasonable costs incurred by us in selling or storing the abandoned property. Any remaining funds will be treated as a security deposit. All property in the apartment is presumed to be yours unless proven otherwise. This paragraph is not applicable if we have been granted a writ of possession for the apartment.

Removal after Eviction. To the extent permitted by applicable law, we may ask the sheriff to place all property remaining in the apartment or in common areas (including any vehicles you or any occupant or guest owns or uses) in the public way if you are judicially evicted (see definitions in paragraph 50 - Deposit Return, Surrender, and Abandonment). You will have 24 hours to remove your property from the public way or it will be disposed of by the landlord.

Removal after Surrender or Abandonment. To the extent permitted by applicable law, we may remove or store all property remaining in the apartment or in common areas (including any vehicles you or any occupant or guest owns or uses) if you surrender or abandon the apartment (see definitions in paragraph 50 - Deposit Return, Surrender, and Abandonment).

Disposition or Sale. Disposition or sale of your abandoned property, if any, must comply with Virginia Code Section 55.1-1254.

- 14. FAILING TO PAY FIRST MONTH'S RENT.** If you don't pay the first month's rent when or before the Lease Contract begins such noncompliance will constitute a default by you under this Lease.

- 15. RENT INCREASES AND LEASE CONTRACT CHANGES.**

No rent increases or Lease Contract changes are allowed before the initial Lease Contract term ends, except for changes allowed by any special provisions in paragraph 10 (Special Provisions), by a written addendum or amendment signed by you and us, or by reasonable changes of apartment rules allowed under paragraph 19 (Community Policies or Rules). If, at least 5 days before the advance notice deadline referred to in paragraph 3 (Lease Term) or such longer period as is

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required by applicable law, we give you written notice of rent increases or lease changes effective when the lease term or renewal period ends; this Lease Contract will automatically continue month-to-month with the increased rent or lease changes. The new modified Lease Contract will begin on the date stated in the notice (without necessity of your signature) unless you give us written move-out notice under paragraph 45 (Move-Out Notice).

- 16. DELAY OF OCCUPANCY.** If occupancy is or will be delayed for construction, repairs, cleaning, or a previous resident's holding over, we're not responsible for the delay. The Lease Contract will remain in force subject to: (1) abatement of rent on a daily basis during delay; and (2) your right to terminate as set forth below. Termination notice must be in writing. After termination, you are entitled only to refund of deposit(s) and any rent paid. Rent abatement or lease termination does not apply if delay is for cleaning or repairs that don't prevent you from occupying the apartment.

If there is a delay and we haven't given notice of delay as set forth immediately below, you may terminate up to the date when the apartment is ready for occupancy, but not later.

- (1) If we give written notice to any of you when or after the initial term as set forth in paragraph 3 (Lease Term)—and the notice states that occupancy has been delayed because of construction or a previous resident's holding over, and that the apartment will be ready on a specific date—you may terminate the Lease Contract within 3 days of your receiving the notice, but not later.
- (2) If we give written notice to any of you before the initial term as set forth in paragraph 3 (Lease Term) and the notice states that construction delay is expected and that the apartment will

be ready for you to occupy on a specific date, you may terminate the Lease Contract within 7 days after any of you receives written notice, but not later. The readiness date is considered the new initial term as set forth in paragraph 3 (Lease Term) for all purposes. This new date may not be moved to an earlier date unless we and you agree.

17. AD VALOREM TAXES/FEES AND CHARGES - ADDITIONAL RENT.

Unless otherwise prohibited by law, if, during the term of this Agreement, any locality, city, state, or Federal Government imposes upon us, any fee, charge, or tax, which is related to or charged by the number of occupants, or by the apartment unit itself, such that we are charged a fee, charge, or tax, based upon your use or occupancy of the apartment, we may add this charge as Additional Rent, during the term of the Lease Contract, with thirty (30) days advance written notice to you. After this written notice (the amount or approximate amount of the charge, will be included), you agree to pay, as Additional Rent, the amount of the charge, tax or fee imposed upon us, as a result of your occupancy. As examples, these charges can include, but are not limited to: any charges we receive for any zoning violation, sound, noise or litter charge; any charge under any nuisance or chronic nuisance type statute, 911 or other life safety, per person, or per unit charge or tax and any utility bill unpaid by you, which is then assessed to us for payment.

- 18. DISCLOSURE RIGHTS.** If someone requests information on you or your rental history, we are only permitted to release your rent payment record and amount of payment without your prior consent. A contract purchaser of the rental property may inspect all tenants' information without obtaining your consent.

While You're Living in the Apartment

- 19. COMMUNITY POLICIES OR RULES.** You and all guests and occupants must comply with any written apartment rules and community policies, including instructions for care of our property. Our rules are considered part of this Lease Contract. To the extent permitted by applicable law, we may make reasonable changes to written rules, if they are distributed and applicable to all units in the apartment community and do not change dollar amounts on page 1 of this Lease Contract and you have been given reasonable notice of the same.

- 20. LIMITATIONS ON CONDUCT.** The apartment and other areas reserved for your private use must be kept clean and free of trash, garbage, and other debris. Trash must be disposed of at least weekly in appropriate receptacles in accordance with local ordinances. Passageways may be used only for entry or exit. You agree to keep all passageways and common areas free of obstructions such as trash, storage items, and all forms of personal property. No person shall ride or allow bikes, skateboards, or other similar objects in the passageways. Any swimming pools, saunas, spas, tanning beds, exercise rooms, storerooms, laundry rooms, and similar areas must be used with care in accordance with apartment rules and posted signs. Glass containers are prohibited in all common areas. You, your occupants, or guests may not anywhere in the apartment community: use candles or use kerosene lamps or kerosene heaters without our prior written approval; cook on balconies or outside; or solicit business or contributions. Conducting any kind of business (including child care services) in your apartment or in the apartment community is prohibited—except that any lawful business conducted "at home" by computer, mail, or telephone is permissible if customers, clients, patients, or other business associates do not come to your apartment for business purposes. We may regulate: (1) the use of patios, balconies, and porches; (2) the conduct of furniture movers and delivery persons; and (3) recreational activities in common areas. You'll be liable to us for damage caused by you or any guests or occupants.

We may exclude from the apartment community guests or others who, in our judgment, have been violating the law, violating this Lease Contract or any apartment rules, or disturbing other residents, neighbors, visitors, or owner representatives. We will serve written notice personally on any such guest and also serve you a copy of the notice if your guest is the one in violation. In addition to the remedies we may have against you, we can apply to a magistrate for a warrant for trespass, provided we have served the required notice. We may also exclude from any outside area or common area a person who refuses to show photo identification or refuses to identify himself or herself as a resident, occupant, or guest of a specific resident in the community.

You agree to notify us if you or any occupants are convicted of any felony, or misdemeanor involving a controlled substance, violence to another person or destruction of property. You also agree to

notify us if you or any occupant registers as a sex offender in any state. Informing us of criminal convictions or sex offender registry does not waive our right to evict you.

- 21. PROHIBITED CONDUCT.** You, your occupants or guests, or the guests of any occupants, may not engage in the following activities: behaving in a loud or obnoxious manner; disturbing or threatening the rights, comfort, health, safety, or convenience of others (including our agents and employees) in or near the apartment community; disrupting our business operations; manufacturing, delivering, possessing with intent to deliver, or otherwise possessing a controlled substance or drug paraphernalia; engaging in or threatening violence; possessing a weapon prohibited by state law; discharging a firearm in the apartment community; displaying or possessing a gun, knife, or other weapon in the common area in a way that may alarm others; storing anything in closets having gas appliances; tampering with utilities or telecommunications; bringing hazardous materials into the apartment community.

- 22. PARKING.** We may regulate the time, manner, and place of parking cars, trucks, motorcycles, bicycles, boats, trailers, and recreational vehicles by anyone. Motorcycles or motorized bikes may not be parked inside an apartment unit or on sidewalks, under stairwells, or in handicapped parking areas. We may have unauthorized or illegally parked vehicles towed from the apartment community at your expense under the terms of this Lease Contract or by appropriate statute. A vehicle is unauthorized or illegally parked in the apartment community if it:

- (1) has a flat tire or other condition rendering it inoperable; or
- (2) is on jacks, blocks or has wheel(s) missing; or
- (3) has no current license plate or no current registration and/or inspection sticker; or
- (4) takes up more than one parking space; or
- (5) belongs to a resident or occupant who has surrendered or abandoned the apartment; or
- (6) is parked in a marked handicap space without the legally required handicap insignia; or
- (7) is parked in a space marked for manager, staff, or guest at the office; or
- (8) blocks another vehicle from exiting; or
- (9) is parked in a fire lane or designated "no parking" area; or
- (10) is parked in a space marked for other resident(s) or unit(s); or
- (11) is parked on the grass, sidewalk, or patio; or
- (12) blocks garbage trucks from access to a dumpster; or
- (13) belongs to a resident and is parked in a visitor or retail parking space.

- 23. RELEASE OF RESIDENT.** Unless you're entitled to terminate your tenancy under paragraphs 10 (Special Provisions), 16 (Delay of Occupancy), 32 (Responsibilities of Owner), or 45 (Move-Out Notice), or any other applicable law, you won't be released from this Lease

Contract for any reason—including but not limited to voluntary or involuntary school withdrawal or transfer, voluntary or involuntary job transfer, marriage, separation, divorce, reconciliation, loss of co-residents, loss of employment, bad health, or death.

24. MILITARY PERSONNEL CLAUSE. All parties to this Lease Contract agree to comply with any federal law, including, but not limited to the Service Member's Civil Relief Act, or any applicable state law(s), if you are seeking to terminate this Lease Contract and/or subsequent renewals and/or Lease Contract extensions under the rights granted by such laws.

25. RESIDENT SAFETY AND PROPERTY LOSS. You and all occupants and guests must exercise due care for your own and others' safety and security, especially in the use of smoke and carbon monoxide detectors, keyed deadbolt locks, keyless bolting devices, window latches, and access control devices.

Smoke and Carbon Monoxide Detectors. We'll furnish smoke detectors and carbon monoxide detectors only if required by statute, and we'll test them and provide working batteries when you first take possession. After that, we will provide a certificate to you stating that all smoke and carbon monoxide detectors are present, have been inspected, and are in good working order no more than once every twelve (12) months. You are required to maintain said smoke and carbon monoxide detectors and are to pay for and are required to replace batteries as needed, unless the law provides otherwise. We may replace dead or missing batteries at your expense, without prior notice to you. You must immediately report smoke detector and carbon monoxide detector malfunctions to us. Neither you nor any others may disable the smoke detectors or the carbon monoxide detectors. If you disable or damage the smoke detector or carbon monoxide detector or fail to replace a dead battery or report malfunctions to us, you will be in breach of this Lease Contract and will be liable to us for any actual damages and for any loss, damage, or fines proximately cause by or related to any fire, smoke or water.

Casualty Loss. We're not liable to any resident, guest, or occupant for personal injury or damage or loss of personal property from any cause, including but not limited to: fire, smoke, rain, flood, water and pipe leaks, hail, ice, snow, lightning, wind, explosions, earthquake, interruption of utilities, theft, or vandalism unless otherwise required by law. During freezing weather, you must ensure that the temperature in the apartment is sufficient to make sure that the pipes do not freeze (the appropriate temperature will depend upon weather conditions and the size and layout of your unit). If the pipes freeze or any other damage is caused by your failure to properly maintain the heat in your apartment, you'll be liable for damage to our and other's property. If you ask our representatives to perform services not contemplated in this Lease Contract, you will indemnify us and hold us harmless from all liability for those services, provided that we owe no legal duty to you under the applicable law.

Crime or Emergency. Dial 911 or immediately call local medical emergency, fire, or police personnel in case of accident, fire, smoke, or suspected criminal activity or other emergency involving imminent harm. You should then contact our representative. Unless otherwise provided by law, we're not liable to you or any guests or occupants for injury, damage, or loss to person or property caused by criminal conduct of other persons, including theft, burglary, assault, vandalism, or other crimes. We're not obliged to furnish security personnel, security lighting, security gates or fences, or other forms of security. If we provide any access control devices or security measures upon the property, they are not a guarantee to prevent crime or to reduce the risk of crime on the property. You agree that no access control or security measures can eliminate all crime and that you will not rely upon any provided access control or security measures as a warranty or guarantee of any kind. We're not responsible for obtaining criminal-history checks on any residents, occupants, guests, or contractors in the apartment community. If you or any occupant or guest is affected by a crime, you must make a written report to our representative and to the appropriate local law-enforcement agency. You must also furnish us with the law-enforcement agency's incident report number upon request.

26. CONDITION OF THE PREMISES AND ALTERATIONS.

Except for our duty to maintain in good and safe condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities, and, except for conditions materially affecting the health or safety of ordinary persons, you accept the apartment, fixtures, and furniture as is. You'll be given an Inventory and Condition form on or before move-in. Within 5 days after move-in, you must note on the form all defects or damage and return it to our representative. Otherwise, everything will be considered to be in a clean, safe, and good working condition.

You must use customary diligence in maintaining the apartment and not damaging or littering the common areas. You must follow proper trash removal procedures. Unless authorized by statute or by us in writing, you must not perform any repairs, painting, wallpapering, carpeting, electrical changes, or otherwise alter our property. No holes or stickers are allowed inside or outside the apartment. But we'll permit a reasonable number of small nail holes for hanging pictures on sheetrock walls and in grooves of wood-paneled walls, unless our rules state otherwise. No water furniture, washing machines, additional phone or TV-cable outlets, alarm systems, or lock changes, additions, or rekeying is permitted unless statutorily allowed or we've consented in writing. You may install a satellite dish or antenna provided you sign our satellite dish or antenna lease addendum which complies with reasonable restrictions allowed by federal law. You agree not to alter, damage, or remove our property, including alarm systems, smoke and carbon monoxide detectors, furniture, telephone and cable TV wiring, screens, locks, and access control devices. When you move in, we'll supply light bulbs for fixtures we furnish, including exterior fixtures operated from inside the apartment; after that, you'll replace them at your expense with bulbs of the same type and wattage. Your improvements to the apartment (whether or not we consent) become ours unless we agree otherwise in writing.

In addition to the requirements outlined in this Lease Contract, you are responsible for complying with the obligations imposed on you by applicable provisions of the building and housing codes materially affecting health and safety.

27. REQUESTS, REPAIRS, AND MALFUNCTIONS. IF YOU OR ANY OCCUPANT NEEDS TO SEND A NOTICE OR REQUEST—FOR EXAMPLE, FOR REPAIRS, INSTALLATIONS, SERVICES, OR SECURITY-RELATED MATTERS—IT MUST BE SUBMITTED THROUGH EITHER THE ONLINE RESIDENT/MAINTENANCE PORTAL, OR SIGNED AND IN WRITING AND DELIVERED TO OUR DESIGNATED REPRESENTATIVE (except in case of fire, smoke, gas, explosion, overflowing sewage, uncontrollable running water, electrical shorts, or crime in progress). Our written notes on your oral request do not constitute a written request from you.

Our complying with or responding to any oral request regarding security or non-security matters doesn't waive the strict requirement for written notices under this Lease Contract. You must promptly notify us in writing of: water leaks; electrical problems; malfunctioning lights; broken or missing locks or latches; and other conditions that pose a hazard to property, health, or safety. We may change or install utility lines or equipment serving the apartment if the work is done reasonably without substantially increasing your utility costs. We may turn off equipment and interrupt utilities as needed to avoid property damage or to perform work. If utilities malfunction or are damaged by fire, water, or similar cause, you must notify our representative immediately. Air conditioning and lack of heat are considered emergencies. Consequently, in the event of any air conditioning or heating or other such equipment malfunctions, you are to notify our representatives as soon as possible. We'll act with customary diligence to make repairs and reconnections.

If the premises are damaged or destroyed by fire or other casualty to such an extent that your enjoyment of the premises is substantially impaired, you may immediately vacate and serve on us a written notice within 14 days thereafter, indicating your intent to terminate your tenancy. Your tenancy would be terminated as of the day you vacated the premises. If we and you cannot agree as to the issue of habitability, the decision of the local building inspector will govern.

28. ANIMALS. Unless otherwise provided under federal, state, or local law, no animals (including mammals, reptiles, birds, fish, rodents, and insects) are allowed, even temporarily, anywhere in the apartment or apartment Community unless we've so authorized in writing. You must remove an illegal or unauthorized animal within 24 hours of notice from us, or you will be considered in default of this Lease Contract, after which you will receive a 21/30 Material Noncompliance Notice. If we allow an animal as a pet, you must execute a separate animal addendum which may require additional deposits, rents, fees or other charges. An animal deposit is considered a general security deposit. We will authorize an assistance animal for a disabled person. When allowed by applicable laws, before we authorize an assistance animal, if the disability and/or the disability-related need for the assistance animal is not readily apparent, we may require a written statement from a qualified professional verifying the disability and/or disability-related need for the assistance animal. If we authorize an assistance animal, we may require you to execute a separate animal and/or assistance animal addendum. Animal deposits, additional rents, fees or other charges will not be required for an assistance animal needed due to disability, including an emotional support or service animal, as authorized

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under federal, state, or local law. You must not feed stray or wild animals.

If you or any guest or occupant violates animal restrictions (with or without your knowledge), we may serve on you a written notice describing your violation and stating that your tenancy will terminate on a date not less than 30 days after you have received the notice if you do not cure the violation within 21 days. If you properly remedy the violation within 21 days, then your tenancy will not terminate. To the extent permitted by applicable law, if an animal has been in the apartment at any time during your term of occupancy (with or without our consent), we'll charge you for defleaing, deodorizing, and shampooing. Animal-violation charges are liquidated damages for our time, inconvenience, and overhead (except for attorney's fees and litigation costs) in enforcing animal restrictions and rules.

29. WHEN WE MAY ENTER. You shall not unreasonably withhold consent for us to enter the apartment in order to inspect the apartment, make necessary or agreed upon repairs, decorations, alterations or improvements, supply necessary or agreed upon services or exhibit the apartment to prospective or actual purchasers, mortgagees, tenants, workmen or contractors. We may enter the apartment without your consent in the event of an emergency. Unless impractical, we will give you 72 hours written notice of routine maintenance (not requested by you) to be performed in the apartment.

We will give you written notice no less than 48 hours before the application of pesticide in the apartment unless you agree to a shorter notice period. If you have requested us to apply pesticide in the apartment, we are not required to give you written notice. If

you are concerned with specific pesticides, you must notify us in writing no less than 24 hours before the scheduled pesticide application.

If a tenant, without reasonable justification, declines to permit the landlord or managing agent to exhibit the dwelling unit for sale or lease, the landlord may recover damages, costs, and reasonable attorney fees against such tenant. As used herein, "reasonable justification" is defined in accordance with Virginia Code Section 55.1-1229 (A)(3).

Further, during a state of emergency declared by the Governor pursuant to § 44-146.17 in response to a communicable disease of public health threat as defined in § 44-146.16, access will be provided in accordance with Virginia Code Section 55.1-1229 (A)(4).

You must notify us of any anticipated extended absence from your apartment of greater than 7 days. During this absence, we may enter the apartment at times reasonably necessary to protect the apartment. If you fail to give us such notice, we may recover actual damages from you.

30. JOINT AND SEVERAL RESPONSIBILITY. Each resident is jointly and severally liable for all lease obligations. If you or any guest or occupant violates the Lease Contract or rules, all residents are considered to have violated the Lease Contract. Notices and requests from any resident or occupant (including notices of lease termination, repair requests, and entry permissions) constitute notice from all residents. *Security-deposit refunds and deduction itemizations of multiple residents will comply with paragraph 50 - Deposit Return, Surrender, and Abandonment.*

Replacements

31. REPLACEMENTS AND SUBLETTING. Replacing a resident, subletting, assignment, or granting a right or license to occupy is allowed only when we expressly consent in writing. If departing or remaining residents find a replacement resident acceptable to us before moving out and we expressly, in writing, consent to the replacement, subletting, assignment, or granting a right or any license to occupy, then:

- (1) a reletting charge *will not* be due;
- (2) a reasonable administrative (paperwork) and/or transfer fee *will* be due, and a rekeying fee *will* be due if rekeying is requested or required, and
- (3) the departing and remaining residents will remain liable for all lease obligations for the rest of the original lease term.

Procedures for Replacement. If we approve a replacement resident, then, at our option: (1) the replacement resident must sign this Lease Contract with or without an increase in the total security deposit; or (2) the remaining and replacement residents must sign an entirely new Lease Contract. Unless we agree otherwise in writing, your security deposit will automatically transfer to the replacement resident as of the date we approve. The departing resident will no longer have a right to occupancy or a security deposit refund, but will remain liable for the remainder of the original lease term unless we agree otherwise in writing—even if a new Lease Contract is signed.

Responsibilities of Owner and Resident

32. RESPONSIBILITIES OF OWNER. We'll act with customary diligence to:

- (1) keep common areas reasonably clean and in a structurally safe condition, subject to paragraph 26 (Condition of the Premises and Alterations);
- (2) maintain fixtures, furniture, hot water, heating and A/C equipment;
- (3) comply with applicable federal, state, and local laws regarding safety, sanitation, and fair housing; and
- (4) make all reasonable repairs, subject to your obligation to pay for damages for which you are liable.

If we violate the above, the following remedies apply:

- (a) you must make a written request for repair or remedy of the condition, and all rent must be current at the time;
- (b) after receiving the request, we have a reasonable time to repair, considering the nature of the problem and the reasonable availability of materials, labor, and utilities;

If we fail to remedy the condition within a reasonable time, you may exercise any other remedies provided under Virginia law, including but not limited to Virginia Code Section 55.1-1244.1, as amended.

33. DEFAULT BY RESIDENT.

Default by Resident. You'll be in default if you or any guest or occupant violates any terms of this Lease Contract including but not limited to the following violations: (1) you don't pay rent or other amounts that you owe when due; (2) you or any guest or occupant violates the apartment rules, or fire, safety, health, or criminal laws, regardless of whether or where arrest or conviction occurs; (3) you abandon the apartment; (4) you give incorrect or false answers in a rental application; (5) you or any occupant is arrested, convicted, or given deferred adjudication for a felony offense involving actual or potential physical harm to a person, or involving possession,

manufacture, or delivery of a controlled substance, marijuana, or drug paraphernalia under state statute; (6) any illegal drugs or paraphernalia are found in your apartment; or (7) you or any guest or occupant engages in any of the prohibited conduct described in paragraph 21 (Prohibited Conduct).

Under Virginia law and this Lease Agreement, we may terminate this tenancy in accordance with the following provisions:

- A. **Material Noncompliance by Your Failing to Pay Rent When Due.** Your rent is due and payable on the 1st day of each calendar month. If you fail to pay such rent after we have served a material noncompliance notice for failure to pay rent, or pay or quit notice, as applicable, we may terminate your tenancy in accordance with applicable Virginia law.
- B. **Material Noncompliance by You Which Can Be Remedied Within 21 Days.** If you commit a material noncompliance under this Lease Contract which can be remedied within 21 days, we may serve on you a material noncompliance notice stating that if you do not remedy the specified noncompliance(s) within 21 days from the date of such notice, we have the right to terminate your tenancy on a date that is not less than 30 days after your receipt of such material noncompliance notice. Notice may be by: (1) personal delivery upon the tenant; or (2) if the tenant cannot be found, by delivery at the apartment to any family member occupant who is at least 16 years old, or (3) in the absence of such tenant or person, to post the same in some conspicuous place upon the apartment.
- C. **Repeat Violations.** If you have been served with a prior written notice which required you to remedy a breach, and you remedied such breach, where you intentionally commit a subsequent breach of a like nature as the prior breach, we may serve on you a 30 day termination notice. Such notice must make reference to the prior breach of a like nature and state that your tenancy

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will terminate on a date not less than 30 days after your receipt of such notice for the reasons stated therein without allowing you an opportunity to remedy such subsequent breach.

- D. **Nonremediable Violations.** If you commit a material noncompliance, we may serve on you a termination notice stating that your tenancy will terminate on a date that is not less than 30 days after your receipt of such notice for the reasons stated in such notice. If a breach of your obligations under the Virginia law, or the Lease Contract, involves or constitutes a criminal or willful act, which is not remediable and which poses a threat to health or safety, we may terminate your tenancy immediately by written notice to you.
- E. **Remediable Violations.** If you commit a material noncompliance, we may serve on you a termination notice stating that your tenancy will terminate on a date that is not less than 30 days after your receipt of such notice for the reasons stated in such notice. If the noncompliance can be remedied by repair or payment of damages or otherwise and you adequately remedy the noncompliance within 21 days of the receipt of notice, your tenancy will not terminate. If you fail to maintain the apartment as required by applicable law or by this Lease Contract but the violation is remediable by repair, replacement or cleaning, the owner or the owner's representative shall send a written notice to the resident specifying the breach and stating that the owner or the owner's representative will enter the dwelling unit and perform the work in a workmanlike manner and submit an itemized bill for the actual and reasonable cost for such work to the tenant, which shall be due as rent on the next rent due date or, if the rental agreement has terminated, for immediate payment.
- In case of emergency the owner or the owner's representative may, as promptly as conditions require, enter the dwelling unit, perform the work in a workmanlike manner, and submit an itemized bill for the actual and reasonable cost for such work to the resident, which shall be due as rent on the next rent due date or, if the rental agreement has terminated, for immediate payment.
- F. **Acceptance of Rent With Reservation.** Unless we accept the rent with reservation in accordance with Virginia Code Section 55.1-1250, acceptance of periodic rent payments with knowledge of a material noncompliance by you constitutes a waiver of our right to terminate your tenancy. If we have given you written notice that the periodic rental payments have been accepted

with reservation, we may accept full payment of all rental payments, damages and other fees and still be entitled to receive an order of possession terminating your tenancy. Subject to applicable law, any rental payment received after judgment and possession have been granted to us against you, but prior to eviction, will be accepted with reservation, and will be applied to the judgment amount, including the late charges, applicable costs and attorney's fees, but will not affect the pending eviction pursuant to the order of possession granted by a court of competent jurisdiction. Further, the acceptance of the said amount with reservation in no way creates a new landlord/tenant relationship with you.

- G. **Remedies Available to Us Upon Breach or Noncompliance of the Lease Contract.** In the event of a breach of the Lease Contract or noncompliance by the Resident as provided herein and under applicable Virginia law, the Owner shall be entitled to recover from the Resident the following, regardless of whether a lawsuit is filed or an order is obtained from a court: (i) rent due and owing as contracted for in the Lease Contract, (ii) other charges and fees as contracted for in the Lease Contract, (iii) late charges contracted for in the Lease Contract, (iv) reasonable attorneys' fees incurred by Owner, (v) costs of the proceeding as contracted for in the Lease Contract or as provided by law only if court action has been filed, and (vi) damages to the dwelling unit or premises as contracted for in the Lease Contract. The Owner may also file an unlawful detainer action in a court of competent jurisdiction seeking a judgment for possession of the leased premises, as well as a judgment for the aforesaid available remedies. Upon termination of the Lease Contract, we may treat the security deposit as provided in other provisions of this Lease Contract, appropriate addenda hereto, and applicable Virginia law.

Lease Renewal When A Breach or Default Has Occurred. In the event that you enter into a subsequent Lease prior to the expiration of this Lease and you breach or otherwise commit a default under this Lease, We may, at our sole and absolute discretion, terminate the subsequent Lease, even if the subsequent Lease term has yet to commence. We may terminate said subsequent Lease by sending you written notice of our desire to terminate said subsequent Lease.

Remedies Cumulative. Any remedies set forth herein shall be cumulative, in addition to, and not in limitation of, any other remedies available to Landlord under any applicable law.

General Clauses

34. ENTIRE AGREEMENT. Neither we nor any of our representatives have made any oral promises, representations, or agreements. This Lease Contract is the entire agreement between you and us.

35. NO AUTHORITY TO AMEND UNLESS IN WRITING.

Our representatives (including management personnel, employees, and agents) have no authority to waive, amend, or terminate this Lease Contract or any part of it, unless in writing, and no authority to make promises, representations, or agreements that impose security duties or other obligations on us or our representatives unless in writing.

36. NO WAIVER. No action or omission of our representative will be considered a waiver of any subsequent violation, default, or time or place of performance. Our not enforcing or belatedly enforcing written-notice requirements, rental due dates, acceleration, liens, or other rights isn't a waiver under any circumstances.

37. NOTICE. Written notice to or from our managers constitutes notice to or from us. Any person giving a notice under this Lease Contract should retain a copy of the memo, letter or fax that was given. Fax signatures are binding. All notices must be signed. To the extent allowed by law, notice to or from us may be made via email, including all notices required by Section 55.1-1245 of the Code of Virginia or other law.

38. MISCELLANEOUS.

- A. Exercising one remedy won't constitute an election or waiver of other remedies.
- B. Unless prohibited by law or the respective insurance policies, insurance subrogation is waived by all parties.
- C. All remedies are cumulative.
- D. No employee, agent, or management company is personally liable for any of our contractual, statutory, or other obligations merely by virtue of acting on our behalf.
- E. This Lease Contract binds subsequent owners.
- F. Neither an invalid clause nor the omission of initials on any page invalidates this Lease Contract.

G. To the extent permitted by applicable law, all provisions regarding our non-liability and nonduty apply to our employees, agents, and management companies.

H. This Lease Contract is subordinate or superior to existing and future recorded mortgages, at lender's option.

I. All lease obligations must be performed in the county where the apartment is located.

J. All discretionary rights reserved for us within this Lease Contract or any accompanying addenda are at our sole and absolute discretion.

39. WAIVER OF JURY TRIAL. To minimize legal expenses and, to the extent allowed by law, you and we agree that a trial of any lawsuit based on statute common law, and/or related to this Lease Contract shall be to a judge and not a jury.

40. CONTACTING YOU. By signing this lease, you are agreeing that we, our representative(s) or agent(s) may contact you. You agree that we may contact you using any contact information relating to your lease including any number (i) you have provided to us (ii) from which you called us, or (iii) which we obtained and through which we reasonably believe we can reach you. You agree we may use any means to contact you. This may include calls made to your cellular telephone using an automatic telephone dialing system, artificial or prerecorded voice messages, text messages, mail, e-mail, and calls to your phone or Voice over Internet Protocol (VoIP) service, or any other data or voice transmission technology. You agree to promptly notify us if you change any contact information you provide to us. You are responsible for any service provider charges as a result of us contacting you.

41. OBLIGATION TO VACATE. If we provide you with a notice to vacate, or if you provide us with a written notice to vacate or intent to move-out in accordance with paragraph 3 (Lease Term), and we accept such written notice, then you are required to vacate the Apartment and remove all of your personal property therefrom at the expiration of the Lease term, or by the date set forth in the notice to vacate, whichever date is earlier, without further notice or demand from us.

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42. FORCE MAJEURE. If we are prevented from completing performances of any obligations hereunder by an act of God, strikes, epidemics, war, acts of terrorism, riots, flood, fire, hurricane, tornado, sabotage, or other occurrence which is beyond the control of the parties, then we shall be excused from any further performance of obligations and undertakings hereunder, to the full extent allowed under applicable law.

Furthermore, if such an event damages the property to materially affect its habitability by some or all residents, we reserve the right to vacate any and all leases and you agree to excuse us from any further performance of obligations and undertakings hereunder, to the full extent allowed under applicable law.

43. PAYMENTS. Payment of all sums is an independent covenant. At our option and without notice, we may apply money received (other than sale proceeds under paragraph 13 (Personal Property Left in Your Apartment) or utility payments subject to governmental

regulations) first to any of your unpaid obligations, then to current rent—regardless of notations on checks or money orders and regardless of when the obligations arose. All sums other than rent are due upon our demand. If we have accepted without reservation rent payments that were materially noncompliant and have given you written notice of such acceptance, then we have waived our right to terminate your tenancy. If we have given you written notice that your rent payments have been accepted with reservation, then we may accept all rent payments and still be entitled to an order of possession terminating the tenancy.

44. ASSOCIATION MEMBERSHIP. We represent that either: (1) we or; (2) the management company that represents us, is at the time of signing this Lease Contract or a renewal of this Lease Contract, a member of both the National Apartment Association and any affiliated state and local apartment (multi-housing) associations for the area where the apartment is located.

When Moving Out

45. MOVE-OUT NOTICE. Before moving out, either at the end of the lease term, any extension of the lease term, or prior to the end of the lease term, you must give our representative advance written notice of your intention to vacate as required by paragraph 3 (Lease Term). If you move out prior to the end of the lease term, your notice does not act as a release of liability for the full term of the Lease Contract. If you vacate early (paragraph 23 - Release of Resident) you will still be liable for the entire Lease Contract term or until a new lease contract is executed, whichever occurs first, except if you are able to terminate your tenancy under the statutory rights explained under paragraphs 11, or 23 (Early Move-Out or Release of Resident), or any other applicable laws. All notices to vacate must be in writing and must provide the date by which you intend to vacate. If the notice does not comply with the time requirements of paragraph 3 (Lease Term), even if you move by the last date in the lease term, you will be responsible for an additional month's rent. If you fail to vacate by the date set forth in your notice of nonrenewal or in your notice to vacate, or in our notice of nonrenewal or in our notice to vacate delivered to you, you will automatically and will immediately become a holdover tenant pursuant to applicable Virginia law, and we will have all rights and remedies available to us under this Lease Contract and Virginia law, including but not limited to charging you a liquidated damage penalty not to exceed an amount equal to 150 percent (150%) of the per diem of the monthly rent, for each day you remain in the dwelling unit after the termination date specified in your notice of nonrenewal or in your notice to vacate, or in our notice of nonrenewal or in our notice to vacate delivered to you.

46. MOVE-OUT PROCEDURES. The move-out date can't be changed unless we and you both agree in writing. You won't move out before the lease term or renewal period ends unless all rent for the entire lease term or renewal period is paid in full. *Early move-out may result in reletting charges under paragraph 11 (Early Move-Out).* You're prohibited by law from applying any security deposit to rent. You won't stay beyond the date you are supposed to move out.

47. CLEANING. You must thoroughly clean the apartment, including doors, windows, furniture, bathrooms, kitchen appliances, patios, balconies, garages, carports, and storage rooms. You must follow move-out cleaning instructions if they have been provided. If you don't clean adequately, you'll be liable for reasonable cleaning charges.

48. MOVE-OUT INSPECTION. You should meet with our representative for a move-out inspection. Our representative has no authority to bind or limit us regarding deductions for repairs, damages, or charges. Any statements or estimates by us or our representative are subject to our correction, modification, or disapproval before final refunding or accounting. If you wish to be present when we make the inspection, you must so advise us in writing, and then we will provide you with written notice of the time and date of our inspection of the apartment. You will have the right to be present at our inspection of the apartment for the purpose of determining the amount of security deposit to be returned. We will provide you with notice of the time and date of the inspection at least ten (10) days before the date of the inspection. The inspection will be made within three (3) days (excluding Saturdays, Sundays and holidays) after delivery of possession. If you attend the inspection, we will upon completion of the inspection give you an itemized list of damages to the apartment known to exist at the time of the inspection. We suggest that you do accompany us during the inspection to help resolve any problems that may arise. Failure to do so will constitute a concurrence by you in our assessment of charges for damages or

cleaning. After inspection by us, appropriate charges will be assessed by us for any missing items, damages or repairs to the apartment, or its contents (except for ordinary wear and tear).

49. SECURITY DEPOSIT DEDUCTIONS AND OTHER CHARGES.

You'll be liable for the following charges to the extent permitted by applicable law, including but not limited to: unpaid rent; unpaid utilities; unreimbursed service charges; all repairs or damages, including stickers, scratches, tears, burns, stains, or unapproved holes; replacement cost of our property that was in or attached to the apartment and is missing; replacing dead or missing smoke-detector or carbon monoxide detector batteries; utilities for repairs or cleaning; trips to let in company representatives to remove your telephone or TV cable services or rental items (if you so request or have moved out); trips to open the apartment when you or any guest or occupant is missing a key; unreturned keys; missing or burned-out light bulbs; removing or rekeying unauthorized access control devices or alarm systems; agreed reletting charges; packing, removing, or storing property removed or stored under paragraph 13 (Personal Property Left in Your Apartment); removing illegally parked vehicles; special trips for trash removal caused by parked vehicles blocking dumpsters; false security-alarm charges unless due to our negligence; animal-related charges under paragraphs 6 (Rent and Charges) and 28 (Animals); government fees or fines against us for violation (by you, your occupants, or guests) of local ordinances relating to smoke and carbon monoxide detectors, false alarms, recycling, or other matters; late-payment and returned-check charges; a charge (not to exceed \$100); and other sums due under this Lease Contract.

To the extent permitted by applicable law, you'll be liable to us for: (1) charges for replacing all keys and access devices referenced in paragraph 5 (Keys) if you fail to return them on or before your actual move-out date; and (2) a reletting fee if you have violated paragraph 11 (Early Move-Out).

50. DEPOSIT RETURN, SURRENDER, AND ABANDONMENT.

Provided that you have satisfied each of the following conditions, we shall return your security deposit to you as provided in this lease:

- You must completely vacate the entire Premises at the expiration or other termination of this lease or when any subsequent month to month tenancy is terminated.
- You must pay all Rent required under the lease, up to and including the date of expiration or termination of the lease or month to month tenancy.
- You must thoroughly clean your apartment including all kitchen appliances (refrigerator, oven, range, dishwasher, baths, closets, storage areas, patios/balconies, etc.), so that your apartment and such appliances are in the same condition as they were in on the beginning date of the initial term of the lease, except for ordinary wear and tear.
- There must be no defects or damages to the apartment, caused by you, your family, guests, invitees, agents, pets or otherwise.
- You must not be in default at the expiration or termination of the lease or any subsequent month to month tenancy.
- You must provide us with a written copy of your forwarding address.

Upon your satisfaction of each of the conditions set forth above, but no later than forty-five (45) days after the expiration or termination of the lease or any subsequent month to month tenancy we will do one of the following:

- Within the 45-day period prescribed above, we will refund to you the balance of the security deposit (if any) including accrued interest to which you are entitled, less any amounts that we have properly applied to your obligations under the Lease pursuant to the terms of the lease.

To the extent permitted by applicable law, surrender, abandonment, and judicial eviction end your right of possession for all purposes and give us the immediate right to: clean up, make repairs in, and relet the apartment; determine any security deposit deductions; and remove property left in the apartment (paragraph 13 - Personal Property Left in Your Apartment), but do not affect our mitigation obligations set forth under this Lease Contract and under applicable Virginia law.

53. ACKNOWLEDGMENT OF RECEIPT OF STATEMENT OF TENANT RIGHTS AND RESPONSIBILITIES. A Statement of Tenant Rights and Responsibilities and an Acknowledgment Form, as developed by DHCD, has been provided to the Resident herewith this Lease Contract.

12/27/2021

SPECIAL PROVISIONS (CONTINUED FROM PAGE 2)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 6

Thumb Drive Containing Officer Wilson's Body Worn Camera Video

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 7

Thumb Drive Containing Sergeant Hlava's Body Worn Camera Video Part 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DERRICK WILLIAMS,

Plaintiff,

v.

Civil Action No.: 3:24-CV-00696

GORDON J. PAINTER,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT

EXHIBIT 8

Thumb Drive Containing Officer Cash's Body Worn Camera Video