

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

CHERYL ALBAUGH, in her capacity as  
Agent/Attorney-in-Fact for SHIRLEY  
VOUMARD,

Plaintiff,

v.

THE RESERVE, A NONPROFIT  
CORPORATION d/b/a THE RESERVE ON  
WALNUT CREEK,

Defendant.

CASE NO. \_\_\_\_\_

**PETITION AT LAW AND JURY  
DEMAND**

COMES NOW Plaintiff Cheryl Albaugh, in her capacity as Agent/Attorney-in-Fact for Shirley Voumard ("Plaintiff Albaugh"), and for her Petition at Law, states as follows:

**PARTIES**

1. Shirley Voumard ("Voumard") was a resident of Unit 232 of Defendant The Reserve, an Iowa Nonprofit Corporation, d/b/a The Reserve on Walnut Creek in Urbandale, Polk County, Iowa, from October 2007 until September 13, 2014. Currently, Voumard resides in Waukee, Dallas County, Iowa.

2. Plaintiff Albaugh is, and was at all times material hereto, a resident of West Des Moines, Polk County, Iowa.

3. Plaintiff Albaugh is Voumard's daughter and holds power of attorney for Voumard. This power of attorney includes the authority to institute, prosecute and defend lawsuits on her behalf.

4. Defendant The Reserve, a Nonprofit Corporation d/b/a The Reserve on Walnut Creek (hereafter "The Reserve") is a nonprofit corporation organized under the laws of the state

of Iowa. The Reserve is located at, and its principal place of business is, 2727 82nd Place, Urbandale, Polk County, Iowa.

### **JURISDICTION**

5. The damages sustained by Plaintiff exceeds the jurisdictional limit of Small Claims Court.

### **VENUE**

6. Pursuant to Iowa Code sections 616.7 and 616.17, venue is proper in Polk County as the county where the parties' contract was to be performed, and the county of The Reserve's residence.

### **FACTS**

7. The Reserve is an Iowa nonprofit corporation organized for the purpose of providing independent living residential facilities for residents age sixty (60) or older. To meet this purpose, The Reserve owns and operates a "senior adult congregate living facility" as defined under Iowa Code Chapter 523D in Urbandale, Polk County, Iowa.

8. The Reserve, and/or Unit 232 at The Reserve, is also a "Dwelling unit" as defined under Iowa Code § 562A.6(3). Residents of The Reserve, including Voumard during her residence at The Reserve, are "Tenant[s]" as defined under Iowa Code § 562A.6(16).

9. The Reserve primarily provides residences to seniors that are capable of living independently. The Reserve does not primarily provide "geriatric services." Any such services provided by The Reserve are incidental to the housing provided to the residents, including Voumard.

10. Section 2.2 of the Reserve's Bylaws sets forth the qualifications for residential membership for a Unit at the Reserve. This includes attaining the age of sixty (60) years of age or above and "hav[ing] the financial resources or sources of income" to meet the financial obligations of The Reserve.

11. The Reserve maintains sole control over the sale and transfer of residential memberships. To receive a residential membership interest, a member must execute an "Application Agreement" with the Reserve designating a particular unit. The "Application Agreement" incorporates The Reserve's Covenants of Occupancy (the "Covenants").

12. Qualifying individuals can receive a residential membership in The Reserve as a transferee of a previous resident's membership.

13. On or about September 27, 2007, Voumard signed a "Transfer Offer" for Unit 232 at The Reserve ("Transfer Offer"). A copy of the Transfer Offer is attached hereto as Exhibit 1, and incorporated herein by reference.

14. On the same date of September 27, 2007, Voumard entered into an "Application Agreement" (hereafter the "Agreement") with The Reserve for Unit No. 232. The Agreement provides that Voumard would be "entitled to occupancy of the above numbered Apartment under the terms and provisions of the 'Covenants of Occupancy' ..., which covenants shall constitute the agreement under which the Applicant shall occupy the Apartment." A copy of the Agreement in Plaintiff Albaugh's possession is attached hereto as Exhibit 2 and incorporated herein by reference. Patty Devens, an employee of The Reserve, signed the Agreement as a witness to Voumard's signature.

15. Plaintiff Albaugh is listed as Personal Representative on the Agreement.

16. In accordance with the Agreement, Voumard was to pay a \$64,975.00 Entrance Fee and a \$63,557.00 Supplemental Fee, a total of \$128,532.00, for “Residential Membership in The Reserve.” Voumard made those payments, which nearly depleted Voumard’s life savings.

17. In addition to the Entrance Fee and Supplemental Amount, the Agreement also required Voumard to pay a monthly occupancy fee. The amount of the monthly occupancy fee in the Agreement was \$1,078.00.

18. Voumard’s primary and dominant purpose for entering into the Agreement and corresponding covenants was to secure housing – a residence – and not for geriatric services.

19. By 2014, the monthly occupancy fee for Unit 232 had increased to \$1,283.00.

20. By September 2014, Voumard had been diagnosed with rapidly progressing dementia by her physician Dale T. Steinmetz, M.D. Voumard’s rapidly progressing dementia required an unanticipated increase in the level of care needed for Voumard to carry out the activities of daily living. Dr. Steinmetz recommended Voumard be moved to a facility offering assisted care services that The Reserve did not provide.

21. On or about September 12, 2014, Voumard’s counsel sent correspondence to The Reserve informing The Reserve that Voumard was no longer able to take care of herself or live on her own.

22. On or about September 13, 2014, Voumard vacated Unit 232 and moved to an assisted care facility in Waukee, Dallas County, Iowa.

23. The Reserve did not challenge Dr. Steinmetz’s assessment of Voumard’s condition. In a letter dated September 24, 2014, the Reserve acknowledged Voumard’s need to vacate Unit 232 for an assisted living facility.

24. Voumard's new residence in Waukee, Dallas County, Iowa, costs approximately \$4,400 per month for residence and care services.

25. Since moving out on September 13, 2014, Voumard has not lived at, or received any services provided by, The Reserve.

26. Voumard ceased paying the monthly occupancy fee in November 2014.

27. On January 15, 2015, The Reserve sent correspondence to Plaintiff Albaugh and her spouse Gary Albaugh regarding transfer of Voumard's residential membership in Unit 232 at The Reserve. The correspondence indicated it would take "6-8 weeks" of remodeling work on the Unit before it could be marketed, which would be scheduled once an "Agency Agreement" was executed with The Reserve.

28. Attached to the correspondence was page 22 of a "Membership Handbook," with a "step-by-step" process for expectations in transferring a residence. Step Three stated that "[y]ou will be signing an Agency Agreement form" in the transfer process.

29. Pursuant to the Agency Agreement, the only way Voumard could recover any portion of her Entrance and Supplemental Fees was to set and receive an Entrance and Supplemental Fee from a transferee as the "Transfer Price."

30. Pursuant to the Agency Agreement, Voumard was to pay an Administration Fee and a Decorating Fee of up to \$3,000.00 to refurbish the Unit to The Reserve, to be deducted from the Transfer Price at closing.

31. As of January 15, 2015, a comparable Unit with the same monthly occupancy fee and floor plan as Voumard's Unit was listed at a "Transfer Price" of only \$80,000, minus a

\$5,000 incentive. As per the documentation provided to Voumard and Plaintiff Albaugh, no “comparable” unit was transferred in 2014 for higher than a price of \$75,000.

32. On or about February 5, 2015, The Reserve noticed Plaintiff Albaugh of “default” for Unit 232. The default notice stated that if outstanding occupancy fees of \$5,132.00 (for the time period of November 2014 through February 4, 2015) were not paid to The Reserve by March 10, 2015, Voumard’s rights as a resident would “expire” and Voumard would forfeit the \$128,532.00 in fees paid to The Reserve as an Entrance and Supplemental Fee.

33. On or about March 9, 2015, Voumard and Plaintiff Albaugh, through counsel, disputed the monthly occupancy fee debt and forfeiture of the Fees. The letter notified The Reserve that the Entrance Fees and Supplemental Amounts paid amounted to a security deposit under the Iowa Uniform Residential Landlord and Tenant Act, Iowa Code Chapter 562A (“IURLTA”), and exceeded the amount of the security deposit allowed by law. The Reserve denied the request and The Reserve continues to retain the Entrance Fee and Supplemental Fee paid by Voumard.

34. Voumard executed The Reserve’s Agency Agreement on April 6, 2015 by and through Plaintiff Albaugh as Agent.

35. On or about January 8, 2016, Plaintiff Albaugh received an additional “default” notice for Unit 232. The default notice demanded outstanding occupancy fees of \$19,245.00 (for the time period of November 2014 through January 1, 2016).

36. On or about February 5, 2016, Plaintiff Albaugh, through counsel, again disputed the monthly occupancy fee debt and forfeiture of the Fees. The letter again demanded return of the Fees as an initial deposit pursuant IURLTA, the Landlord-Tenant law.

37. On or about March 8, 2016, The Reserve through counsel noticed Plaintiff Albaugh that “Ms. Voumard’s unit has been defaulted and now belongs to the Reserve.”

38. Despite this notice, The Reserve has sent additional marketing reports to Voumard and Plaintiff Albaugh, leaving the status of Voumard’s interest entirely uncertain.

39. Since Voumard moved out on September 13, 2014, The Reserve failed to undertake reasonable efforts to sell Voumard’s membership.

40. Upon Plaintiff’s knowledge and belief, Unit 232 has remained unoccupied from Voumard’s departure on September 13, 2014 to date.

41. Upon Plaintiff’s knowledge and belief, The Reserve has taken other defaulting residents’ “interest” in particular units at The Reserve.

42. Upon Plaintiff’s knowledge and belief, The Reserve is renting or selling the defaulted units to new tenants without requiring residential memberships and the payment of Entrance and Supplemental Fees.

43. Upon Plaintiff’s knowledge and belief, The Reserve is able to rent or sell such units at a significantly lower cost to potential tenants than the cost of a residential membership and the payment of Entrance and Supplemental Fees.

44. As such, The Reserve is able to undercut the market for residential memberships in units at the Reserve so that residents are unable to find new transferees for residential memberships.

45. As a result, The Reserve’s residential members are obligated to indefinitely pay monthly occupancy fees, or default and forfeit Entrance and Supplemental Fees and residential membership interest to The Reserve.

46. Neither the State of Iowa nor any of its political subdivisions, including those political subdivisions charged with administering Iowa Code Chapter 523D, actively supervise or regulate the day-to-day operations of The Reserve.

**COUNT I**  
**VIOLATIONS OF THE IOWA UNIFORM RESIDENTIAL**  
**LANDLORD AND TENANT ACT**

47. Plaintiff incorporates by reference all preceding paragraphs.

48. Voumard's "Application Agreement" with The Reserve was a "rental agreement" within the meaning of Iowa Code § 562A.6(10).

49. Voumard's Entrance Fee and Supplemental Amount constituted a "rental deposit" within the meaning of Iowa Code § 562A.6(11).

50. The Application Agreement contains provisions prohibited and/or made unlawful by Iowa's Uniform Residential Landlord and Tenant Act, including:

- a. An agreement to pay The Reserve's attorneys' fees for disputes arising out of the rental arrangement;
- b. Charging a rental deposit of a value grossly exceeding the maximum amount allowed under Iowa Code § 562A.12(1); and
- c. Withholding rental deposits in amounts not "reasonably necessary" to remedy a tenant's default or other funds.

51. Because the "Application Agreement" was of indefinite duration, and because Voumard was required to pay her occupancy fee on a monthly basis, Voumard's tenancy at The Reserve was considered month to month. *See* Iowa Code § 562A.9(4).



52. Voumard provided notice to The Reserve of her intent to vacate Unit 232, and subsequently vacated the apartment.

53. Despite Voumard's notice of intent to terminate the rental, The Reserve continued to charge Voumard monthly rent.

54. The Reserve also failed to provide a written statement explaining why Voumard was not entitled to a refund of her rental deposit (i.e., Entrance Fee and Supplemental Amount).

55. The Agreement as described above is unconscionable and contains terms prohibited by Iowa Code § 562A.11. Pursuant to Iowa Code § 562A.7, the Court should declare the agreement unenforceable.

56. Plaintiff is entitled to return of the Entrance Fee and Supplemental Amount pursuant to Iowa Code § 562A.12(4), as well as actual damages, three months' rent, and attorneys' fees pursuant to Iowa Code § 562A.11(2).

**COUNT II**  
**VIOLATION OF IOWA CODE**  
**CHAPTER 523D**

57. Plaintiff incorporates by reference all preceding paragraphs.

58. Upon information and belief, The Reserve failed to make contract disclosures compliant with Iowa Code chapter 523D.6.

**COUNT III**  
**CONSUMER FRAUD**  
**IOWA CODE CHAPTER 714H**

59. Plaintiff incorporates by reference all preceding paragraphs.

60. The Reserve engaged in unfair and deceptive practices, and made omissions of material fact, in connection with the advertisement and sale of consumer “merchandise” as defined in Iowa Code Chapter 714H.

61. The Reserve’s consumer fraud caused damages to Voumard.

**COUNT IV**  
**BREACH OF FIDUCIARY DUTIES**

62. Plaintiff incorporates by reference all preceding paragraphs.

63. The Reserve and its Board of Directors, as an active manager of Voumard’s investment, owe fiduciary duties to Voumard.

64. The Reserve has breached its fiduciary duties by failing or refusing to act pursuant to Iowa law in its dealings with Voumard/Plaintiff Albaugh as outlined in this Petition.

65. The Reserve has breached its fiduciary duties of care by failing to act with the care that a manager in a like position would reasonably exercise under the same or similar circumstances, or in a manner that the manager reasonably believes to be in the best interests of the investors.

66. The Reserve has breached its fiduciary duties of loyalty by its self-dealing, failing to act in good faith and in the best interests of Voumard, lack of honesty, and advancing its own interests as outlined in this Petition at the expense of Voumard.

67. The Reserve has breached its fiduciary duties in failing to furnish information concerning the prospective return on investment.

68. The Reserve breached its fiduciary duties by taking actions detrimental to Voumard’s investment in The Reserve, by among other things:

- a. Failing to deal with Voumard/Plaintiff Albaugh in an open and honest manner, including regarding “default” of her fees and residential membership;
- b. Failing to disclose how Voumard’s investment in The Reserve was adversely affected by certain actions of The Reserve, including, but not limited to:
  - i. Selling and/or transferring memberships/apartments of former residents at prices below the investment of Voumard;
  - ii. By renting forfeited units at rental fees different from the monthly occupancy fees paid by Voumard;
  - iii. By selling and/or transferring forfeited units at prices below the investments of Voumard for similar apartments;
  - iv. By advising other similarly situated residents to sell and/or transfer their memberships/investments at prices lower than the investment of Voumard for similar apartments;
  - v. By advising some former residents to forfeit their investments/apartments rather than continuing to pay monthly occupancy fees while no longer occupying their apartments;
  - vi. By decreasing the amenities offered by The Reserve or failing to add amenities in order to attract buyers willing to invest similar amounts as Voumard; and
  - vii. Failing to maintain The Reserve at a level that would attract buyers willing to invest similar amounts as Voumard.

69. The Reserve's breach of fiduciary duties has damaged and continues to damage Voumard's investment in The Reserve. As a direct and proximate result of the Reserve's breaches of fiduciary duties, Voumard has suffered damages.

**COUNT V**  
**BREACH OF IMPLIED COVENANT OF**  
**GOOD FAITH AND FAIR DEALING**

70. Plaintiff incorporates by reference all preceding paragraphs.

71. Every contract in Iowa implies a covenant of good faith and fair dealing.

72. The Reserve breached its good faith obligation and implied covenant of good faith and fair dealing owed under both the Agreement and Agency Agreement, including one or more of the following particulars:

- a. In requiring execution of a new Agency Agreement with The Reserve, including payment of new fees and several months of "remodeling" after Voumard was forced to vacate the Unit;
- b. In providing Voumard inconsistent information regarding "default" of her fees and residential membership interest;
- c. In failing to reasonably market and/or assist with transfer of Voumard's residential membership of the Unit; and
- d. In deflating the market and residents' ability to transfer a unit and causing perpetual payment of monthly occupancy fees and forfeiture of Entrance/Supplemental fees by taking actions including, but not limited to:
  - i. Selling and/or transferring memberships/apartments of former residents at prices below the fees paid by Voumard;

- ii. By renting forfeited units at rental fees different from the monthly occupancy fees paid by Voumard;
- iii. By selling and/or transferring forfeited units at prices below the fees paid by Voumard for similar apartments;
- iv. By advising other similarly situated residents to sell and/or transfer their memberships/investments at lower prices for similar apartments;
- v. By advising some former residents to forfeit their investments/apartments rather than continuing to pay monthly occupancy fees while no longer occupying their apartments;
- vi. By decreasing the amenities offered by The Reserve or failing to add amenities in order to attract buyers willing to pay similar amounts as Voumard; and
- vii. Failing to maintain The Reserve at a level that would attract buyers of residential memberships.

73. The Reserve's breach of its implied covenant of good faith and fair dealing was a proximate cause of Voumard's damages and injury.

74. The Reserve's breach of its implied covenant of good faith and fair dealing was willful and wanton and in reckless disregard of the rights and economic well-being of Voumard, entitling Plaintiff Albaugh to punitive damages.

**COUNT VI**  
**IMPOSSIBILITY/FRUSTRATION OF PERFORMANCE**

75. Plaintiff incorporates by reference all preceding paragraphs.

76. The Reserve has previously taken the position that the dominant or primary purpose of The Reserve is to provide Voumard and other residents with geriatric or similar services.

77. Plaintiff Albaugh disputes this position because the primary purpose of The Reserve is to provide housing, and any services are incidental thereto. However, to the extent The Reserve claims that its services are the primary purpose of the parties' contract, then such contract would constitute a personal services contract.

78. Voumard's physical and mental inability to live independently resulted in impossibility of performance and/or frustration of purpose of the Agreement.

79. As of the date of Voumard's inability to perform the Agreement by living independently in Unit 232 at The Reserve, her duty to perform the Agreement was discharged.

**COUNT VII**  
**DECLARATORY JUDGMENT**  
**UNCONSCIONABILITY**

80. Plaintiff incorporates by reference all preceding paragraphs.

81. The Reserve's Agreement with Voumard is unconscionable in, among others, the following ways:

- a. By purporting to allow The Reserve to continue charging monthly occupancy fees after the resident is required to vacate their apartment;
- b. By contracting for payment of attorney fees on behalf of The Reserve;
- c. By purporting to bind a resident to pay monthly occupancy fee into perpetuity; and

d. By purporting to allow The Reserve to forfeit the resident's entire Entrance Fee, Supplemental Fee and/or residential membership for any breach of the Agreement.

82. The Reserve's Agreement should be declared unconscionable and unenforceable.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Cheryl Albaugh, in her capacity as Agent/Attorney-in-Fact of Shirley Voumard, prays that the Court enter judgment in favor of Plaintiff Albaugh and against The Reserve as follows:

1. Declare the Agreement terminated pursuant to Iowa Code Chapter 562A;
2. Declare the Agreement unconscionable and unenforceable;
3. Declare the Agreement void for violations of Iowa Code Chapters 523D and 562A;
4. Declare Voumard's performance under the Agreement discharged;
5. Award damages and/or restitution at least equal to the Entrance Fee and Supplemental Amount and monthly occupancy fees paid to The Reserve by Voumard;
6. Award such other damages in an amount to compensate Voumard for the damages incurred;
7. Award punitive damages;
8. Award statutory damages pursuant to Iowa Code §§ 562A.11(2) and 562A.12(7);
9. Award attorney fees incurred by Plaintiff Albaugh in pursuing this relief; and
10. Award costs and interest as allowed by law.

**JURY DEMAND**

Plaintiff Albaugh hereby demands trial by jury.

/s/ Jason M. Craig

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