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Honorable Annette Scoca, J.S.C.
Superior Court of New Jersey, Law Division
470 Dr. Martin Luther King, Jr., Blvd.
Chambers 212
Newark, NJ 07102

American Guarantee and Liability Insurance Company, Plaintiff, vs. Victory Highlands Condominium Association, Inc, Marshall & Moran, LLC, Defendants, Larry Chenault, Counterclaim Plaintiff.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY Docket No.: ESX-L-008231-18 **DECISION**

PROCEDURAL HISTORY

On April 15, 2010, Counterclaim-Plaintiff Larry Chenault (hereafter "Chenault") filed a Complaint in the Underlying Action against Defendants Victory Highlands Condominium Association ("VCHA") and Marshall & Moran LLC ("Marshall") alleging that Defendants had negligently failed to exercise reasonable care to maintain his condominium in a safe condition,

that Defendants had violated their legal obligations to exercise reasonable care to maintain the premises in safe condition and warn of dangerous conditions, knowing that the dangerous condition was not likely to be discovered, that Defendants had created a nuisance and breached his right to quiet enjoyment, that Defendants breached the implied covenant of good faith and fair dealing, and that Defendants had breached the implied warranty of habitability.

On May 10, 2012, after performing some discovery, the parties in the Underlying Action entered into a settlement agreement for $110,000 and al claims were dismissed. However, the settlement agreement permitted Chenault to seek damages in excess of the $110,000 from applicable insurance policies of VCHA and Marshall, but no further sums could be collected from VCHA and Marshall.

In 2014, Chenault filed a Motion to Vacate the Dismissal and Reopen the Lawsuit after locating applicable insurance policies from Newark, Clarendon, Sirius, LMI Insurance, and American Guarantee Liability Insurance ("Zurich"). On June 20, 2014, the Hon. Christine Farrington, J.S.C., entered an order allowing Chenault to reopen his lawsuit and file the First Amended Complaint to collect from the insurers. The First Amended Complaint summarized Chenault's injuries and ongoing damages from 1991-2010 realleging the allegations of his original Complaint and adding claims for Declaratory Judgments regarding insurance coverage under the policies as directed by Judge Farrington's Order.

On January 31, 2014, Zurich sent a letter denying coverage based on the Mold Exclusion in their policy and did not participate in the defense of VCHA or the Underlying Action other than filing an Interlocutory Appeal.

On November 21, 2016, after hearing the Interlocutory Appeal made on behalf of Zurich, Clarendon, and Imperium, the Appellate Court ruled that the claims against VCHA and Marshall must proceed prior to the Declaratory Judgment claims.

On March 6, 2019, Chenault and VCHA and the settling insurers (Newark, Clarendon, and Imperium) entered into a settlement agreement in the amount of $2,288,725 plus pre-judgment interest and costs. The settling insurers paid $310,000 of the total and provided an assignment of rights to Chenault to pursue Zurich for the remaining amount.

On November 20, 2018, Zurich filed this action seeking a Declaratory Judgment that its policies do not cover Chenault's claims and the Underlying Settlement is unenforceable.

On February 1, 2019, Chenault filed an Answer and Crossclaim seeking to recover the remaining $1,978,075 of the settlement from Zurich.

On October 17, 2019, the Court awarded Summary Judgment to Zurich declaring that the Mold Exclusion in Zurich's Umbrella Policies precludes coverage to VCHA; therefore, no coverage is applicable unless the injuries fall within the Consumption Exception to the Mold Exclusion.

A Bench Trial was held before the Hon. Annette Scoca, J.S.C., on October 11, 2022, October 12, 2022, October 13, 2022, and October 14, 2022 to determine if the Consumption Exception afforded coverage to Chenault and whether the Underlying Settlement is enforceable.

FINDINGS OF FACT

1. On July 16, 1991, Larry Chenault purchased his condominium and soon noticed water infiltrating the unit through a leak in the basement.

2. Chenault complained of the leak to VCHA and received a letter from the project developer Mainland Development Corp. requesting a report.

3. In 1992, Chenault had an attorney write a letter to VCHA requesting that the problem be fixed. Chenault also contacted several members of the Board of Directors of VCHA with his complaints, which was consistent with the VCHA Bylaws and Master Deed regarding the maintenance of exterior walls and foundations and safety of condominium residents. Some repairs were made, but the problem continued.

4. At one point Chenault withheld $7,000 of his association dues in protest. Subsequent thereto, he was contacted by Ms. Thomas, a property manager for Marshall, who promised to repair the leak upon payment of the back dues. However, the leak was not repaired following payment.

5. In December 2008, Chenault discovered that the flooring in the corner of his bedroom under the nightstand and carpet had been damaged by water intrusions and called Ms. Thomas who retained an inspector to look at the problem; however, Ms. Thomas never called about repairing the problem.

6. Chenault testified that he had not seen the stain prior to December 2008 and the following March a contractor hired to fix Chenault's banister looked at the damage and told him it had been caused by toxic mold, which may be hazardous to his health and referred him to online materials about mold.

7. Chenault retained Superior Mold Remediation to inspect and test the condominium for possible mold contamination. This testing was conducted on March 21, 2009, and the results were submitted by EMLab P&K on March 24, 2009, showing that the condominium had high levels of mold. A surface sample collected in the bedroom showed a

high level of Stachybotrys mold, sometimes referred to as "black mold," which is known to produce a poisonous mycotoxin, Trichothecene.

8. After attempting some remediation work in the summer of 2009, Marshall, on behalf of VHCA, retained MDG Environmental to inspect and test the condominium for mold.

9. A Complaint was filed on May 21, 2009 in the Municipal Court by Ms. Tamica Trotman of the Victory Gardens Board of Health.

10. In a letter dated October 20, 2009, MDG Environmental confirmed that airborne mold contamination still existed throughout the condominium and advised that "it can be stated with a reasonable degree of scientific certainty, that there is airborne, fungal contamination of the home. The presence of airborne fungal concentrations also indicates that there is the possibility of settled, fungal particulate in the dust on surfaces throughout the home." MDG also issued a detailed recommendation to Marshall and VHCA regarding necessary mold remediation efforts.

11. VHCA's contractor unsuccessfully attempted to repair the water leak by working on the outside of the condominium from July 17-21, 2009. VHCA also unsuccessfully attempted to repair and remediate the interior of the condominium in the fall of 2009, but the repair and remediation work did not eliminate the mold contamination in the condominium.

12. VHCA never undertook the remediation recommended by MDG and water intrusion and mold contamination continued, as shown by the report by 1-800 Got Mold of its inspection conducted on February 19, 2011.

13. Ron Tai, PhD, inspected the condominium in March 2011, and confirmed that mold continued to contaminate the condominium.

14. Dr. Tai used a DNA-based method to identify mold species and compared the resulting Environmental Readiness Mold Index (ERMI) score to a statistical sample based on data developed by the U.S. Department of Housing and Urban Development in its 2006 American Healthy Homes Survey (AHHS). The results of Dr. Tai's sampling generated an ERMI score that placed "the home off the upper limits scale chart and amongst the highest percentile of homes measured in the AHHS."

15. The chart of the results of Dr. Tai's 2011 sampling revealed extremely high levels of several species of toxic mold. It is undisputed that these species of mold are known to produce mycotoxins hazardous to human health. Follow-up testing by Dr. Tai in June 2015 still showed "significant mold growth" in the condominium.

16. At Chenault's instruction, Dr. Tai used the Environmental Relative Moldiness Index ("ERMI") Method to conduct his sampling. He had not used that method before testing Chenault's condo and has not used it since.

17. Chenault testified at trial that prior to moving into the condominium he was healthy, employed in a career consistent with his master's degree and a nationally ranked athlete in Taekwondo. He testified that after his exposure to mold he could no longer successfully compete, as he did not have the stamina.

18. Chenault continued that he had ongoing health issues and the first time he sought medical treatment for them was in the 1990s. These symptoms would later be attributed to his mold exposure by Dr. Althea Hankins in her report dated March 23, 2009. These symptoms included ongoing nose bleeds and respiratory problems, shortness of

breath and general lethargy, skin and eye issues. Mr. Chenault testified that his ex-wife and brother Darryl, who lived in the condominium at some-point, experienced mold-related symptoms as well.

19. Dr. Hankins was also a business associate of Mr. Chenault.

20. During his testimony, Mr. Chenault testified that he left the condo due to the mold contamination in March 2009. After leaving he stayed in his martial arts school until 2010 when a friend let him move into the friend's business which was a 20,000 square foot facility. He remained there for a year and a half or two. Subsequent thereto, he rented out 500 square feet of office space in Boonton, New Jersey. He stayed at the office where he took bird baths and slept. After 11 months, he moved to another friend's place in Lake Hopatcong and remained there for two and a half years until he moved to his current apartment in Flanders, New Jersey. During the time he lived at the Marshall Arts Studio from March 2009 until 2010, he did not have a refrigerator. When asked where he stored his food at this time, he testified that he stored it in the refrigerator and on the countertops of the VCHA condominium. He would go shopping and take the food back to the condominium.

21. Following the discovery of mold, Mr. Chenault also consulted with Dr. Adrienne Sprouse who described him as "well until 1991" after which he "experienced progressively severe symptoms that have led to his current disability."

22. Mr. Chenault's cognitive deficits were also evaluated by Dr. Ronald M. Lazar who, in a letter dated August 18, 2009, found that his general recall was significantly impaired, his motor skills showed scores not consistent with someone trained in martial arts, and his mood was consistent with depression. Dr. Lazar opined that "Mr. Chenault has

an organic brain syndrome that is characterized by impaired memory, word finding, and psychomotor retarding that stands in significant contrast to both his educational attainment and his global intellectual function."

23. In January 2014, Mr. Chenault was interviewed by Kirven Weekley, PhD, who administered the Montreal Cognitive Assessment (MOCA) test. Dr. Weekley testified in the underlying case that he was impressed by Mr. Chenault, including his martial arts expertise and master's degree and that his verbal content, sentence structure and vocabulary showed intellectual function that was consistent with his educational background, but the results of the MOCA testing were in the "impaired range."

24. After reviewing the reports of Dr. Lazar and Dr. Peter C. Badgio, who had been retained by VHCA, Dr. Weekley submitted a letter report, dated October 27, 2017, to Carl A. Salisbury, Esq., counsel for Chenault, and testified that he found Chenault had difficulty with visual perceptual skill, word recall impairment, and that he had short-term memory problems. Dr. Weekley based his opinion that Chenault suffered from mold-related mental problems in part on tests showing that Chenault had mycotoxins in his system known to affect brain functioning with no other medical cause for his symptoms.

25. The reports Dr. Weekley reviewed reflected testing of Chenault's urine that detected abnormal levels of Trichothecene.

26. Dr. S.M. Phillips, VHCA's designated medical expert in the underlying case, testified that "most studies would indicate that urine is probably the best test for looking for mycotoxins."

27. Dr. Adrienne Sprouse submitted a "corrected" report in the Fall of 2009, which referenced a report from Dr. William A. Croft that had detected abnormal levels of the mycotoxin Trichothecene in Chenault's urine.

28. Dr. Sprouse noted that Chenault had been evaluated by Dr. Hankins and that he had undergone two brain MRI's on March 31 and April 11, 2009, which revealed a pattern symptomatic of demyelinating disease.

29. Dr. Sprouse stated that Chenault was an "unemployed volunteer" at the AAA Academy for Children and that he "is now staying at this Diamond Road address [for the AAA Academy], permitted to sleep in this commercial space weekday evenings" and that on weekends, he stayed at an address in East Hanover, N.J. Mr. Chenault did not identify any adverse environmental conditions or odors "in the room where he spends his time."

30. Dr. Sprouse concluded that Chenault's "dysfunction directly coincides with his exposure to the elements in his condominium and there is a clearly defined loss of skills that ultimately resulted in his current unemployment." She also concluded that Chenault had "chronic stress" from his mold exposure, noting that his "headaches, abdominal complaints, hematuria, cognitive impairment, visual problems, and other symptoms all began after he was exposed to the mold in his condominium." She also concluded that "[a]lthough Larry may physically appear to be 'in no acute distress', he lives in chronic distress, struggling to negotiate his life while severely impaired from the mold exposure beginning in 1991…. [h]e is totally and permanently disabled, and currently homeless."

31. Chenault had financial difficulties and economic losses, both before and after he moved out of his condominium. The Sobel Tinari Economics Group Report of November 3, 2017, summarized economic losses in an upper range that exceeded $1,000,000.

32. Mr. Chenault applied for and was awarded Social Security Disability Benefits. Administrative Law Judge Richard De Steno found, "[t]he claimant has had severe impairments involving the effects of toxic mold exposure, Demyelinating Disease, Organic Brain Syndrome and Post Traumatic Stress Disorder." Judge De Steno concluded that the "claimant's job skills do not transfer to other occupations" and that "[considering] the claimant's age, education, and work experience and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant can perform,…" and that under applicable law, he is "disabled."

33. Dr. Hankins issued a third report regarding Mr. Chenault on September 19, 2017, concluding that, after moving into his condominium in 1991, Chenault "developed progressively severe and multiple symptoms that progressed into the loss of job, home and health. One of the worst ongoing problems that developed was his decreasing memory function that resulted in his being unable to work, or function in [a] manner compatible with his previous level of intellectual or physical function." Dr. Hankins also concluded that there were severe documented post-exposure medical issues that resulted in severe and persistent disability, and there will not be a return to baseline function.

34. Chapter 34 of a 1997 Treatise prepared by the Office of the Surgeon General of the Department of the Army (the "Army Treatise") was introduced into evidence at trial and focuses on Trichothecene exposure. The authors discussed dermal exposure, inhalation, or ingestion as routes of exposure, stating that "[s]kin exposure and ingestion of contaminated food are the two likely routes of exposure of soldiers…."

35. During the period from June 1, 2005 – June 1, 2010, Defendant American Guaranty and Liability Insurance Company ("Zurich") issued five umbrella liability insurance policies to VHCA, as named insured.

36. Zurich's adjuster invoked the Mold Exclusion as the basis for denying coverage in the underlying suit. There were two different forms of Mold Exclusion in the policies: Form exclusion U UMB 165-A CW 7/99 is contained in the first two Zurich policies covering the period from 6/1/05-6/1/07, and form exclusion U UMB 385-B-CW 7/03 is contained in the last three Zurich policies covering the period from 6/1/07-6/1/10. The last three policies are applicable to the matter before the court.

37. The Zurich denial letter quoted the language of policy Coverage B, which obligates Zurich to pay damages the "insured becomes legally obligated to pay" as a result of "liability imposed by law" because of bodily injury and property damage, but only if the "injury, damage or offense arises out of your business, takes place during the policy period of this policy and is caused by an occurrence happening anywhere."

38. Zurich's coverage applies if the "loss, claim or suit for which insurance is afforded" is not covered by underlying insurance. QBE Insurance Group had issued a series of primary liability policies to VHCA, but properly denied any coverage for the Chenault claims under its policies.

39. The cited Mold Exclusion states "Under Coverage A and Coverage B this policy does not apply to any liability, damages, loss, cost, or expense: A. caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, the existence of, or presence of any: 1. Fungi or bacteria; or 2. substance, vapor, or gas produced by or arising out of any fungi or bacteria." However, the Exclusion

"does not apply to any fungi and bacteria that are, are on, or contained in, an edible good or edible product intended for human or animal consumption." (The Consumption Exception)

40. At trial, Chenault argued that the Consumption Exception applied if there was proof that the mold at issue was on food intended for human consumption. Zurich argued that Chenault must prove his injuries were caused by fungi and bacteria that are, are on, or contained in, an edible good or edible product intended for human or animal consumption.

41. At trial Zurich called Dr. Robert Laumbach to the stand who was qualified as an Expert Witness in the field of Toxicology, Epidemiology, Industrial Hygiene, as well as Environmental and Occupational Medicine by the Court.

42. Dr. Laumbach testified that he used an exposure pathway analysis to determine whether Chenault was injured by ingesting food contaminated by indoor-growing mold. The pathway analysis included five steps. He testified that for Chenault's alleged injuries to be caused by his ingestion of food contaminated by indoor-growing mold, the evidence must be sufficient to satisfy each and every step.

43. The First Step in the exposure pathway analysis was evaluating whether there was evidence of excessive mold growth in the condo while Chenault was a resident; however, no environmental tests were performed during the eighteen years he was a resident. Dr. Laumbach thus used environmental samples collected after Chenault vacated the property, the first of which was performed by Chenault's contractor, Superior Mold Remediation. Superior's tests did not detect excessive growth of the only mold capable of producing the mycotoxin to which Chenault claims he was exposed – Trichothecene – which can be produced by the mold species Stachybotrys Chartarum. Superior did not test for Stachybotrys Chartarum, but for the genus Stachybotrys, which has many species that

do not produce Trichothecene. Superior detected either no Stachybotrys or the bare minimum that could be detected. Superior's report stated that these spores likely originated outside.

44. Dr. Laumbach testified there were also serious flaws with Superior and its methodology. First, no mold was detected outside. Second, a mold remediation company is typically conflicted out of collecting samples. Third, Superior's extrapolation of raw spore counts to spores per cubic meter is mathematically incorrect and overstates the quantum of spores per meter. In addition to Superior's testing in March 2009, additional air samples were collected in October 2009 and February 2011 and no Stachybotrys was detected.

45. Dr. Laumbach concluded that there was insufficient evidence to meet the first step in his exposure pathway analysis, i.e., there was no evidence of excessive mold growth while Chenault was living in the condo.

46. In the Step 2 analysis, Dr. Laumbach analyzed whether the Stachybtorus allegedly growing in Chenault's condo produced Trichothecene. No tests were performed to see if the species Stachybotrys Chartarum was present and was actually producing Trichothecene, and he testified that the presence of this mold does not mean it is producing Trichothecene. Based on these facts, Dr. Laumbach concluded that there was insufficient evidence to meet the second step in his exposure pathway analysis

47. In Step 3, Dr. Laumbach evaluated whether it was likely that Stachybotrys Chartarum and Trichothecene were in the air in an appreciable quantity for spores to settle on food. Since airborne tests detected either no Stachybotrys or the bare minimum, Dr. Laumbach concluded that there was insufficient evidence to meet the third step in his exposure pathway analysis.

48. In Step 4, Dr. Laumbach evaluated whether Stachybotrys Chartarum was likely to contaminate Chenault's food. There was no evidence that any of Chenault's foods were contaminated by mold because they were never tested, so Dr. Laumbach focused on whether household foods could act as a food source for Stachybotrys Chartarum.

49. Dr. Laumbach's testimony explained that Stachybotrys Chartarum requires a food with high cellulose, a high moisture content, and ambient temperatures to grow and proliferate. Without the conditions necessary to grow, Stachybotrys Chartarum is incapable of producing the quantity of Trichothecene necessary to cause injury. Very few foods have these characteristics, and most foods are stored in a refrigerator, which is too cold to support growth of this mold. Based on these facts, Dr. Laumbach concluded that there was insufficient evidence to meet the Fourth Step in his exposure pathway analysis, that Stachybotrys Chartarum grew in Chenault's food and produced appreciable levels of Trichothecene.

50. In Step 5, Dr. Laumbach evaluated whether Chenault was injured by eating food contaminated with indoor-growing mold by assessing critical principles of toxicology.

51. He explained that to suffer injury by exposure to mold there must be a sufficient dose and sufficient frequency of exposure. Mycotoxin levels that predict disease have not been established. But there have been efforts to evaluate at what levels exposure could be toxic. These studies indicated that a person would have to be exposed to a dose of Stachybotrys containing Trichothecene on the magnitude of ten billion spores. The highest airborne spore count of Stachybotrys ever detected in Chenault's condo was 1 raw spore or 8 spores per cubic meter.

52. Dr. Laumbach further testified there aren't scientific studies, case reports, or other evidence documenting that indoor-growing mold is known to contaminate household foods and lead to injury. Dr. Laumbach testified that it is not generally accepted in the scientific community that injury can be caused by indoor-growing mold mycotoxins that settle on food; therefore, he concluded that there was insufficient evidence to meet the fifth step in his exposure pathway analysis.

53. Additionally, Dr. Laumbach stated the ERMI Method, used by Dr. Tai, has not been validated for any use besides research.

54. Chenault retained Dr. Guzzardi as an expert after Summary Judgment was granted to Zurich by the Court in October of 2019. Dr. Guzzardi was accepted as an expert in the field of Medical Toxicology. His opinion was based on his review of Chenault's records and certain deposition transcripts, and an interview with Chenault.

55. Dr. Guzzardi reviewed the same environmental tests as Dr. Laumbach but claimed there were high levels of "toxic" mold in the condo, including Stachybotrys Chartarum. He, like Dr. Laumbach, focused on Stachybotrys Chartarum because it is known to produce Trichothecene. However, Dr. Guzzardi also believed that certain species of Aspergillus and Penicillium could produce Trichothecene but did not identify these species or offer any scientific literature to support this theory. In support for his view that there were high levels of toxic mold, Dr. Guzzardi cited to Superior's mold testing in March 2009. He claims a surface sample collected somewhere in Chenault's bedroom did contain high levels of Stachybotrys.

56. Dr. Guzzardi testified that Chenault ate food contaminated by indoor-growing mold and its mycotoxins and suffered injury. He did not identify scientific methodology in

his report or on direct examination; however, he stated it was "common sense" that because there was mold in the air in the condo and Chenault ate food kept in his condo, he must have eaten food contaminated by that mold and suffered injury.

57. Dr. Guzzardi agreed that to suffer injury through exposure to mold, Chenault would have to have been exposed to an "appreciable quantity" of mold or mycotoxins and it must have been a strain capable of producing Trichothecene. Dr. Guzzardi did not know at what dose Chenault consumed mycotoxins at any point in time. Nor did he know with what frequency he consumed food contaminated with mycotoxins.

58. Like Dr. Laumbach, Dr. Guzzardi testified that most household foods do not provide the necessary conditions for Stachybotrys Chartarum to grow, and it is known to grow on high cellulose materials; however, it would on average take 10-20 days for an appreciable amount of mold to grow.

59. Both parties also retained experts to testify as to the reasonableness of the settlement and whether it should be enforced.

60. David Field, Esq. was retained by Chenault as a Legal Expert. He is an Attorney at Law at the Law Firm of Lowenstein Sandler, where his practice includes mass torts and toxic tort litigation. He was accepted by the Court as an expert to testify on the Topic of the Reasonableness and Good Faith Settlements of Civil Litigation. He testified that the settlement was reasonable for the following reasons: a. The mid-point between the Plaintiff's initial settlement demand to the three settling insurers at the mediation and the counteroffer of those three insurers was $398,000 and the case settled with those three insurers for less than the mid-point: $310,000; b. The settlement was negotiated by sophisticated attorneys from Margolis Edelstein firm, and Wilson Elser, Greenbaum Rowe,

and Litvak & Trifiolis, who were all seasoned and experienced lawyers; c. There was an impending trial date in the underlying case and pending motions for Summary Judgment, which led to uncertainty on both sides; d. VHCA, did not have an economic expert to testify about a specific amount of damage that would be admissible, whereas Chenault had an economic expert who would testify that Mr. Chenault's economic losses were between $940,000 and $1,031,000; e. There was a potential for a significant pain-and-suffering award in the seven- or eight-figures range; f. The plaintiff in the underlying case could have "black-boarded" a total of between $1,519,000 and $1,611,000, in loss exclusive of pain and suffering as follows:

1. Economic loss from Sobol at 940,000 to 1,031,000;
2. The value of the condominium that Mr. Chenault purchased and had foreclosed as a result of his problems in the amount of $116,000;
3. Mortgage payments and monthly maintenance payments that Mr. Chenault paid from 1991 to 2009 totaling $463,000;
4. Potential medical bills more than $300,000.
5. The lack of any evidence that the parties colluded to reach the settlement.

61. Mr. Field relied on his experience and a survey of internet research of nationwide mold-related verdicts to support his seven to eight figure pain and suffering award. Mr. Field acknowledged that many of these verdicts had very little information regarding the nature of each plaintiff's alleged injuries. On cross-examination, Mr. Field was shown several recent mold personal injury verdicts and settlements from New Jersey. Of these cases, the single largest award for any single plaintiff was $150,000.

62. During cross-examination, Mr. Field retracted his testimony about the applicability of the continuous tort doctrine after being shown Nicolosi v. Smith, Docket No. A-1108-15T2, which states that the continuing tort doctrine does not apply to personal injury claims. Id.

63. Mr. Field also testified that the Discovery Rule would have tolled the statute of limitations, but conceded that this rule is premised on equitable grounds and thus requires that a court consider the hardship to both sides in tolling the statute of limitations and acknowledged that because of the 19-year delay in bringing suit, VHCA did not have certain evidence needed to defend the case, like air sampling during the period Chenault resided in the condo, as well as witness testimony from VHCA representatives with knowledge of the circumstances.

64. Mr. Field was unfamiliar with the ERMI Method used by Dr. Tai but admitted that the likelihood of a successful verdict would be impacted if Chenault used a scientifically invalid mold sampling method.

65. In addition to credibility issues with Hankins as Chenault's business partner, Mr. Field knew her opinion on causation could be problematic because there is scientific disagreement on whether exposure to mycotoxins could in fact cause the deficits Chenault allegedly experienced.

66. Plaintiff retained Louis Niedelman, Esq. to testify as an expert witness. Mr. Niedelman is employed as an Attorney and is a partner with the Law Firm of Cooper Levinson where he has been working since 1973. He was qualified by the Court as an expert in Prosecuting and Defending New Jersey Personal Injury Actions, Litigation Strategy and Determining Case and Settlement Values. He testified that the underlying

case had a "full jury value" of $1,609,465, which should then be discounted by two thirds, leading him to state a reasonable settlement of the underlying case would have been $536,488.

67. "Number one" among the factors that Mr. Niedelman viewed as a discount to Mr. Chenault's claims was VHCA's statute of limitations defense. Mr. Niedelman correlated the water intrusion into Mr. Chenault's condominium to personal injury from mold. Mr. Niedelman erroneously believed that Mr. Chenault contacted the local Health Department in 1990 about water issues in his condo, which influenced his conclusion that Mr. Chenault knew of mold damage in 1990. Mr. Niedelman learned after he submitted his report that the actual date of Mr. Chenault's complaint to the local Health Department was 2009 but did not change his report.

68. Mr. Niedelman acknowledged the Discovery Rule, which, in certain toxic tort actions, requires some reasonable medical support linking an injury to its cause before the statute of limitations will accrue. However, he identified case law holding that where the physical symptom's causal relationship to the toxic substance is a matter of common understanding by the layperson, the Discovery Rule does not apply and reasonable medical support linking the injury and cause is not required. In that case, the statute of limitations begins to toll when a reasonable person knew or should have known of the relationship between his or her symptoms and their cause, regardless of medical support.

69. Mr. Niedleman testified that because mold is readily understood to cause health problems and damage, two New Jersey Appellate Division decisions have held that the discovery rule is inapplicable to alleged toxic mold cases. He further testified that based upon the same, the statute of limitations on Chenault's claim in the Underlying Action

began to accrue when he noticed his symptoms and was aware of water intrusion in his condo unit. Mr. Niedleman also acknowledged that the two Appellate Division decisions were unpublished and are not considered 100% precedential value but are looked to for some type of guidance by trial courts.

70. He further acknowledged that VHCA filed a motion for Summary Judgment on this issue in the underlying action, which was still pending at the time of settlement.

71. Mr. Niedelman discounted the full-value settlement based on his erroneous belief that some of Mr. Chenault's injuries were due to a diagnosis of multiple sclerosis, which was ruled out via a spinal tap.

72. Mr. Niedelman also based his discount partly on his opinion that Mr. Chenault did not credibly support his claims of mold-related bodily injury.

73. Chenault's counsel prepared a Carter Wallace spread sheet, showing an allocation of the Consent Judgment amount to the three settling insurers and to Zurich in accordance with the pro rata time on the risk rulings in Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994) (asbestos exposure) and Carter-Wallace v. Admiral Ins. Co., 154 N.J. 312 (1998) (progressive environmental damage).

74. The spread sheet mathematically allocates 13.55% ($310,000) of the Consent Judgment amount ($2,288,725) to the settling insurers, based on their total policy limits of $7,050,000; and the spread sheet allocates 86.45% of the Consent Judgment amount to Zurich, based on its total policy limits of $45,000,000. The dollar amount allocated to Zurich is the unpaid balance of the Consent Judgment after deducting the $310,000 amount paid by the settling insurers.

75. The breakdown of the settlement payments made separately by each of the settling insurers in January 2019, before entry of the Consent Judgment in March 2019, is generally consistent with the allocation of payments set forth in the spread sheet. Chenault argues that the above reflects a reasonable sharing of the settlement amount.

CREDIBILITY FINDINGS

LARRY CHENAULT

The Court found Larry Chenault to be a well-spoken witness. The testimony concerning his injuries was consistent with the medical records and testimony of Dr. Hankins and with the report of Dr. Weekley, who reviewed the reports of Dr. Lazar and Dr. Peter C. Badgio. However, the issue before the Court was not whether Chenault was injured, but whether his claims were within the coverage provided by Zurich to VHCA and if the Consumption Exception to the Mold Exclusion provided coverage for the claims asserted by Chenault. The Court did not find Chenault's testimony referenced in paragraph 20 above to be credible. It defies logic that Chenault would store food in the refrigerator and on the countertop of a mold contaminated Condo from which, he testified, he was forced to move due to his belief of health issues as a result of mold contamination.

DR. ROBERT LAUMBACH

The Court found Dr. Robert Laumbach to be a very impressive witness with outstanding credentials. More specifically, he graduated Rutgers University with a degree in Environmental Science. Thereafter he pursued additional studies at Columbia University and obtained a graduate degree/Master of Public Health and Occupational and Environmental Health. In addition, he received an M.D. from U.M.D.N.J., now known as Robert Wood Johnson Medical School. After earning his M.D., he did a residency at Robert Wood Johnson Medical School in

Family Medicine and then he did a fellowship in Occupational and Environmental Medicine. He also received training in Epidemiology as part of Master of Public Health curriculum. The Court accepted him as an expert witness in the field of Toxicology, Epidemiology, Industrial Hygiene, as well as Environmental and Occupational Medicine. He is an Associate Professor at Rutgers University where he teaches Occupational and Environmental Medicine, Epidemiology, and Toxicology. He explained to the Court that Occupational and Environmental Medicine is a field of medicine that specializes in analyzing environmental exposures and how those exposures affect human health. During his voir dire, he explained in the past he taught Evidence-Based Medicine at Robert Wood Johnson Medical School at Rutgers University. He explained that Evidence-Based Medicine focuses on how to use the best available evidence to understand, diagnose, and treat illness and disease. He is Board Certified in Family Medicine and Occupational and Environmental Medicine and is a Diplomat of the American Board of Toxicology. He is also one of only a handful of physicians in the nation who is a Certified Industrial Hygienist. He received his Certification in in 1993.

Throughout his academic career, Dr. Laumbach has maintained a clinic practice at the Clinical Center for Occupational and Environmental Medicine at Rutgers, treating patients allegedly exposed to a variety of substances, including mold. During his time at the clinic, Dr. Laumbach has treated approximately twenty patients a year who believe their illnesses were caused by exposure to mold. Other physicians routinely refer patients to him so that he may identify the source of their exposure and whether that exposure is the cause of their medical issues. His employment history includes Health Inspector in local health departments in New Jersey, and Assistant Professor on the faculty at Robert Wood Johnson Medical School.

The Court found Dr. Laumbach to be extremely credible. He was very confident when testifying. He was very self-assured, and his testimony was based on scientific analysis as well as vast experience and his training.

DR. LAWRENCE GUZZARDI

The Court found that Dr. Guzzardi also had impressive credentials. He attended Boston College, graduated cum laude in three years, received a Presidential Scholarship in 1967. He next graduated Jefferson Medical College and earned a Trustee Scholarship in 1971. He did his medical internship in Emergency Medicine at the University of Kentucky. Simultaneously, he did the course work for his Master's Degree in Toxicology. He finished his residency in 1980. Subsequent to the same, he completed his Master's Degree in Business Administration at the Wharton School at the University of Pennsylvania.

As far as employment, Dr. Guzzardi practiced as an Emergency Medical Physician and had a family practice. He had both administrative and clinical positions. He also became the Medical Director of the White Rose Basic and Advanced Life Support Services in York, Pennsylvania, and was responsible for the training and medical care provided by Paramedics and EMTs. His last certification in Emergency Medicine boards expired at or about 2009 and he did not take the boards again. As a result, he limited his practice solely to providing consultations for individuals and for attorneys in matters related to Medical Toxicology. He has been board certified and re-certified in Family Practice, and Emergency Medicine. He has been Board Certified by the American Board of Toxicology since 1980. He testified that he is a member of the American College of Medical Toxicologists in full standing with that organization. He further testified that there are about 300 doctors certified in Medical Toxicology in the United States.

While the Court found Dr. Guzzardi's qualifications impressive, the Court did not find his opinion to be credible. The following represents the Summary of Dr. Guzzardi's Opinions contained in his report and admitted into Evidence as D-19, without objection, as follows:

If mold, mold spores, and mold fragments are present in the air, as they undisputedly were in Mr. Chenault's condominium, mold, mold spores, and mold fragments will inevitably be deposited on food and beverages in the condominium.

If mold, mold spores, and mold fragments are present in and on walls, carpets, and furniture, as they undisputedly were in Mr. Chenault's condominium, mold, mold spores, and mold fragments will be deposited on kitchen surfaces and on food present on kitchen surfaces and in an opened refrigerator. The same will be true for foods present on other surfaces including offices desks, beds, and night tables.

Trichothecenes and other mycotoxins are present in many species of molds, including those found in Mr. Chenault's condominium.

Therefore, it is my opinion that the mold that was present in Mr. Chenault's condominium and, specifically, the mold, mold spores and mold fragments in the air and on the surfaces of the condominium, also were present on the food and beverages in his condominium and contaminated those foods and beverages, including those that he consumed during the more than 18 years that he lived at the condominium residence from 2001 through March, 2009.

All of the opinions in this report have been reached to a reasonable degree of medical and scientific certainty. I may supplement this report if additional information becomes available.

During his testimony and in his report, it was clear that Dr. Guzzardi read the reports of Dr. Rigley, Dr. Hankins, Dr. Lazaro and Dr. Strauss. He admitted on cross-examination that none of those reports provided an opinion as to whether Mr. Chenault ingested mold-contaminated food. Dr. Guzzardi was not an expert in the underlying case. He was retained after the underlying case settled.

In addition, Dr. Guzzardi could not identify a single study addressing whether indoor-growing mold contaminates food and causes injury. Dr. Guzzardi testified that Chenault ate food contaminated by indoor-growing mold and its mycotoxins and suffered injury. He did not

identify scientific methodology in his report or on direct examination; however, he stated it was "common sense" that because there was mold in the air in the condo and Chenault ate food kept in his condo, he must have eaten food contaminated by that mold and suffered injury.

He also said that the urine tests of Mr. Chenault were critical to his conclusions. However, according to Dr. Laumbach, the CDC and the FDA have not approved urine testing for accuracy or for clinical use. He also testified that Trichothecene has a short life, and it would be discharged from the body immediately, but he never explained how Trichothecene could exist in Mr. Chenault's body long after exposure. The tests were done in June 2009 and December of 2013 and he testified that they are "definite proof" of Chenault's ingestion of mycotoxins in his condo. However, according to Chenault's testimony referenced above, he left the condo due to the mold contamination in March of 2009. After leaving he stayed in the martial arts school until 2010 when he moved into a friend's business. He remained there for a year and a half or two and then he rented office space in Boonton, New Jersey before moving to another friend's place in Lake Hopatcong for two and a half years. Finally, he moved into his current apartment in Flanders. Even if the Court accepted his testimony that he stored food in the refrigerator and on the countertops in the Condo from 2009 -2010 as credible, there is no credible, scientific explanation for a positive result for Trichothecene in Chenault's urine analysis from 2013.

Dr. Guzzardi agreed that to suffer injury through exposure to mold, Chenault would have to have been exposed to an "appreciable quantity" of mold or mycotoxins and it must have been a strain capable of producing Trichothecene. Dr. Guzzardi did not know at what dose Chenault consumed mycotoxins at any point in time. Nor did he know with what frequency he consumed food contaminated with mycotoxins.

Based upon Dr. Guzzardi's lack of scientific explanation, lack of knowledge of dosing and the frequency of consumption of food contaminated with mycotoxins, the use of testing (urine analysis) not recognized by the CDC and the FDA, the Court did not find Dr. Guzzardi's opinions credible, especially when compared to the testimony of Dr. Lambauch.

LOUIS NEIDELMAN, ESQ.

Louis Niedelman was qualified as an expert in Prosecuting and Defending New Jersey Personal Injuries Actions, Litigation Strategy, and Determining Cases and Settlement Values. He testified on behalf of the Plaintiff. He graduated Temple University in Philadelphia in 1996. He attended the Villanova School of Law and graduated and passed the bar in 1969. He is a partner at the Law Firm of Cooper Levinson since 1973. He represents insurance companies and their insureds and self-insureds in the defense of personal injury and property damage claims and litigation and has been doing so for the past 53 years. He practices throughout the State of New Jersey and in the Federal Courts. He has tried approximately 125 cases during his career to verdict. He has practiced in the area of toxic torts and has defended lawsuits filed by Plaintiffs alleging they were exposed to toxins including mold, carbon monoxide, and Benzene. He testified that his analysis of the cases in toxic tort or product liability cases usually prevails with the ultimate result. He testified that he has provided assessments of liability damages in over several thousand cases and the numbers he estimates to be the settlement value, or the verdict come to fruition probably 80% of the time. He is a member of the Atlantic County Bar Association, the New Jersey Bar Association, the New Jersey Defense Association, and the South Jersey Chapter of the American Board of Trial Advocates (ABOTA) where he is also a Diplomat. He is a certified civil trial attorney. His ultimate opinion in the case at bar was that the underlying settlement was unreasonable. He

believed that the full value of the settlement was $1.6 million which was $700,000.00 less than what it settled for. He did not, however, give an opinion based upon the guidance set forth in Griggs vs. Bertram 88 N.J. 347 (1982). Also, he did not consider when giving his opinion, whether Victory Highlands Condominium Association engaged in reasonable efforts to defend against Mr. Chenault's claims. He was also not asked to give an opinion about whether the settlement was a product of collusion or bad faith. The Court did note that Mr. Niedelman believed that some of Mr. Chenault's injuries could be attributable to a nonexistent diagnosis of multiple sclerosis. Based upon Mr. Niedelman's failure to address the above referenced issues, the Court does not accept his opinion that the underlying settlement was unreasonable.

DAVID FIELD, ESQ.

David Field testified as an expert on behalf of Chanault. He graduated college in 1977 with a degree in Economics. He worked for Liberty Mutual Insurance Company before going to Law School. He was trained at Liberty Mutual to investigate, evaluate, and settle insurance claims. He then worked as an adjuster for Liberty Mutual for about a year and a half before his promotion to investigate, evaluate, and settle claims. He testified that only 2 – 5 % of his claims concerned mold. He testified that while at Liberty Mutual he attended law school and graduated in June of 1984. He started working at a small law firm in Newark handling insurance defense work. He joined the firm of Lowenstein Sandler, in April of 1986 and is employed there today. He described Lowenstein Sandler as a large firm where he has been primarily involved in toxic tort litigation, which does include some mold cases.

Currently, he is the senior litigator at the firm. He is the chair of the practice group for products liability and specialty torts. He is also the chair of the trial department. He has tried hundreds of cases to verdict and is a certified civil trial lawyer since 2005. He has handled

some high-profile cases concerning childhood clusters of cancer in New Jersey and other cases involving 535 adults who had either cancer or respiratory diseases in New Jersey and around the Country. He has also settled tens of thousands of cases. He represents only Defendants. The Court excepted Mr. Field as an expert on the topic of the Reasonableness and Good Faith of Litigation Settlements.

Mr. Field testified that he did find the underlying settlement to be fair and reasonable and entered into by good faith of all the parties meeting the standards set forth in Griggs v. Bertran, 88 N.J. 347 (1982) which is applicable to establish its enforceability against an insurer who has otherwise unlawfully denied its insured available liability coverage. While the Court accepted Mr. Field's testimony that the underlying settlement was fair and reasonable, based upon his experience and testimony, the Court did not find that Zurich unreasonably withheld coverage pursuant to Griggs v. Bertran. The issue of whether a settlement is enforceable is a separate issue discussed below.

ANALYSIS

The issues presented to the Court were as follows: (1) Whether the underlying settlement was within the coverage provided by Zurich to VHCA and if the Consumption Exception to the Mold Exclusion provided coverage for the claims asserted by Mr. Chenault; (2) Whether Mr. Chenault's injuries manifested prior to the first Zurich policy incepted on June 1, 2007; (3) Whether Zurich breached its duty to defend; and (4) Whether the underlying Settlement was reasonable, entered into in good faith, and non-collusive.

A. Whether the underlying settlement was within the coverage provided by Zurich to VHCA and if the Consumption Exception to the Mold Exclusion provide coverage for the claims asserted by Mr. Chenault

It is well established that insurance policies are recognized as contracts of adhesion and, as such, Courts must assume a vigilant role in ensuring conformity to public policy and principles of fairness. Meier v. New Jersey Life Ins. Co., 101 N.J. 597, 611 (1986); Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). Ambiguous language in insurance policies is construed in favor of the insured in accordance with the objectively reasonable expectations of the insured. Di Orio v. New Jersey Mfrs. Ins. Co., 79 N.J. 257, 269 (1979). This construction of the insurance contract is also applicable in extreme circumstances where the language is clear. Werner Indus. V. First State Ins. Co., 112 N.J. 30, 35-36 (1988). It is the burden of the insurer to show that a policy exclusion applies. Burd v.Sussex Mut. Ins. Co., 56 N.J. 383, 399 (1970). Once it is shown that an exclusion applies, it is the burden of the insured to show that an exception to the exclusion restores coverage under the policy. Redding-Hunter, Inc. v. Aetna Casualty & Sur. Co., 206 A.D.2d 805, 807, 615 N.Y.S.2d 133 (N.Y. App. Div. 3d Dep't 1994); Air Prods. & Chems. v. Hartford Accident & Indem. Co., 25 F.3d 177, 180 (3d Cir. 1994); E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997).

The Mold Exclusion contained in the policy states "Under Coverage A and Coverage B this policy does not apply to any liability, damages, loss, cost, or expense: A. caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, the existence of, or presence of any: 1. Fungi or bacteria; or 2. Substance, vapor, or gas produced by or arising out of any fungi or bacteria." Zurich has already been awarded Summary Judgment on October 17, 2019, by way of Court finding that the Mold Exclusion precludes

coverage. Therefore, the remaining issue for this Court is whether the Consumption Exception to the Mold Exclusion restores coverage under the Policy. The Consumption Exception states that the Mold Exclusion "does not apply to any fungi and bacteria that are, are on, or contained in, an edible good or edible product intended for human or animal consumption."

Chenault argues that the exception is triggered when mold is on an edible good that is intended for human consumption. He argues that there is no language barring the application of the exception because mold did not originate on the product but contaminated it due to its presence in the air, and Zurich could have written it as such if that's what they meant. Additionally, he states it also does not contain language that the exception only applies if the fungi-containing good or product produces a mycotoxin that is actually consumed and caused an identifiable injury. He argues that if there is mold on edible goods for consumption than the exception is triggered and nothing more must be shown. Chenault cites Acuity v. Reed & Associates of TN, LLC, 124 F.Supp. 3d 787 (W.D. Tenn. 2015) in support of his position. There, the Court addressed a claim made by homeowners that mold affected their water supply and caused injury. The Court, addressing the Mold Exclusion, focused on an exception, Chenault states was nearly identical to the one at issue, and decided that water in a tub or shower is a good intended for human consumption and the exception would apply. Id. at 795.

Chenault further contends that there was no allegation in that case that the Plaintiffs had been directly injured by drinking the mold contaminated water, but that some of it would be ingested through drinking and bathing. Chenault next brings to the Court's attention Nationwide Mutual Fire Ins. Co. v. Dillard House, 651 F. Supp.2d 367 (N.D. Ga. 2009), stating the decision there also did not suggest that plaintiffs had actually consumed the water by drinking it, but the

Court narrowed its analysis to whether the water of the spa hot tub was intended for human consumption and found that it was.

Chenault states it is obvious that the food and beverages, here, were goods intended for human consumption and he did consume them. Therefore, he maintains the Court should find that the Exception to the Mold Exclusion applies to his mold related injuries, in light of the above, the facts presented in the Underlying Case, and in this trial. He states the Underlying Case established that he was injured through chronic exposure to mold via inhalation and dermal contact, but also mold on the food that he consumed, which triggers and establishes full coverage for all the mold related claims.

In contrast, Zurich argues that the Consumption Exception only restores coverage for injuries caused by a fungi or bacteria that are, are in, or are on an edible good or product intended for human consumption. They state merely showing that food became contaminated, but not that he was directly injured by it, does not trigger the Exception or restore coverage for the injuries caused by inhalation or dermal contact with mold. Zurich relies on a multitude of Court decisions from throughout the United States in favor of this interpretation. See Harris v. Durham Enters., 586 F. Supp.3d 856, 865 (S.D. Ill. Feb. 22, 2022); Frey v. Anderson Corp., 2015 Ohio Misc. LEXIS 21992 (Ohio Ct. Cm. Pleas 2015); Acuity v. Reed & Assocs. of TN, LLC, 124 F. Supp. 3d 787, 795 (W.D. Tenn. 2015); Heinecke v. Aurora Healthcare, Inc., 2013 WI App 133 (WI App. Ct. 2013; NGM Ins. Co. v. Low Country Finish Carpentry, Inc., 2012 U.S. Dist. LEXIS 200367 (D.S.C. Oct. 31, 2012). Zurich also notes that the Court in Nationwide Mut. Fire. Ins. Co. v. Dillard House, 651 F. Supp. 2nd 367 (N.D. Ga. 2009) states, despite Chenault's contentions, that "the Consumption Exception allows for coverage under both policies for

allegations of harm caused by bacteria that are, are on, or are contained in, a good or product intended for (bodily) consumption."

Zurich asserts that of these cases, coverage was found to have been restored in situations where the complaint alleged an injury caused by a fungi or bacteria in a good or product intended for human consumption. Specifically, they state the Complaints in Acuity and Dillard Houses and Westport Ins. Corp. v. VN Hotel Grp., LLC, 761 F. Supp. 2d 1337, 1347 (M.D. Fla. 2010), aff'd, 513 Fed. App'x 927 (11th Cir. 2013) alleged injuries caused by mold due to water contamination and those decisions, as noted by Chenault above, turned on whether the water was a good intended for human consumption; however, this is not the issue in front of this Court. Therefore, Zurich asserts they support their assertion that Chenault must have been injured by mold contained in or on his food to restore coverage.

Zurich next states Harris v. Durham Enters., 586 F. Supp.3d 856, 865 (S.D. Ill. Feb. 22, 2022) is instructive. There, the insurance company denied coverage based on the same type of exclusion found here and rejected the Plaintiff's assertion that they had breached their duty to defend because they should have known that the Consumption Exclusion had been triggered. The Court stated the "Bodily Consumption Exception excepts from the Bacteria Exclusion bodily injury or losses caused by 'bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.'" Id. Because the pleadings did not allege that bacteria were in or on a good intended for bodily consumption "and then actually consumed by Harris," there was "simply nothing in the Amended Complaint that could reasonably have placed Harris' claim within the Bodily Consumption Exception without exercising 'an unacceptable degree of imagination.'" Id. at 866. This, Zurich asserts, is nearly identical to the situation at bar, as

Chenault did not allege any injury caused by consumption of mold in the Underlying Case and he has not proven such.

Additionally, Zurich states that the plain reading of the Consumption Exception supports this interpretation. They state that reading the Exclusion and Exception as required by Prather v. American Motorist Ins. Co., leads to one conclusion – that the Consumption Exclusion will restore coverage if such injury was caused by "fungi or bacteria that are, are on, or are contained in, an edible good or product intended for human or animal consumption." 2 N.J. 496, 502 (1949) (stating an insurance policy must be read as a whole). Zurich argues that allowing application of the Consumption Exception as interpreted by Chenault would swallow the entire exclusion which cannot be allowed, relying on GTE Corp. v. Allendale Mut. Ins. Co., 372 F.3d. 598, 614 (3d Cir. 2004) (applying New Jersey Law). Next, they argue Chenault's interpretation would create coverage that does not exist under the insuring grant, which is also improper as exceptions to policy exclusions cannot create or expand insurance coverage. Unitrin Direct Ins. Co. v. Esposito, 751 Fed. Apex. 213, 215 (3d. Cir. 2018).

Here, they contend the insuring grant, which states Zurich will pay for "damages the insured becomes legally liable for imposed by law… because of bodily injury, property damage… covered by this insurance but only if the injury, damage, or offense… takes place during the policy period and is cause by an occurrence," would be rendered meaningless if the Court were to read the Exclusion as Chenault has asked. See Ex. P-3 p. 27 of 42. VCHA could not be obligated to pay damages to Chenault simply because there was mold on his food nor because he ate moldy food because reading the policy as a whole allows for coverage for bodily injury caused by mold on food.

Zurich also draws to the Court's attention that Chenault originally proffered an interpretation of the exception in line with theirs stating "The Zurich Umbrella Policies "contain an exception to the modified Mold Exclusions when the injury is the result of any fungi or bacteria that are, are on, or are contained in, an edible good or edible product intended for human…consumption." Ex. P-70, at ¶23.

Lastly, Zurich asserts Chenault does not have proof that he was injured by ingestion of mold, and his expert, Dr. Guzzardi, provided unreliable, uncredible testimony that mold contaminated Chenault's food and caused him injury. In contrast, they argue, their expert, Dr. Laumbach, testified using a credible scientific method to show that the necessary requirements for airborne mycotoxins to contaminate the food and cause injury to Chenault were simply not met. They also emphasize that Dr. Guzzardi did not perform a scientific analysis, but rather stated it was "common sense," which is not a scientifically valid methodology, not supported by reliable data, and net opinion under N.J.R.E. 703, nor does it satisfy the requirements of N.J.R.E. 702 for expert testimony. Additionally, the data relied on by Dr. Guzzardi to show ingestion were urine tests, which Zurich emphasizes are unreliable and not approved by the FDA for this purpose, and the scoring system used was not one with which he was familiar. Zurich also draws attention to the lack of differential diagnosis performed by Dr. Guzzardi as well the lack of scientific and/or epidemiological studies to support his opinions or the theory that indoor growing mold contaminated food and caused injury.

The Consumption Exception restores coverage for injuries caused by the consumption of mold contaminated food. Chenault asserts that Acuity v. Reed & Associates of TN, LLC, 124 F. Supp. 3d 787 (D. Tenn. 2015) and Nationwide Mutual Fire Ins. Co. v. Dillard House, 651 F. Supp.2d 367 (N.D. Ga. 2009) direct the Court to find that the exception applies because the

Plaintiffs there did not assert they had been directly injured by drinking the mold contaminated water, but that some of it would be ingested through drinking and bathing. However, contrary to Chenault's contention, review of these cases reveals to the Court that the Complaints specifically alleged mold related injuries had resulted from use of the mold contaminated water; therefore, those Courts did not need to address this issue.

The question here is whether the Consumption Exception is triggered by the presence of mold on Chenault's food or by injuries alleged to have been caused by consumption of mold on Chenault's food. The Court does, however, find statements of those Courts to be instructive. For example, the Nationwide Mut. Fire Ins. Court stated, "the Consumption Exception allows for coverage under both policies for allegations of harm caused by "bacteria that are, are on, or are contained in, a good or product intended for (bodily) consumption." 651 F. Supp.2d 1367 (N.D. Ga. 2009). The policy exception to the exclusion there was nearly identical to the one at issue, but it is distinguishable because Chenault did not allege that his injuries were caused by consumption of mold in any pleadings, including those of the underlying action.

Furthermore, allowing recovery simply because there was mold on food that Chenault consumed would create additional coverage and swallow the Mold Exclusion itself, which the Court cannot allow. GTE Corp., 372 F.3d. 614; Unitrin Direct Ins. Co., 751 Fed. Apex. at 215. Reading the insurance policy as a whole, as required by Prather v. American Motorist Ins. Co., Supra at 502, the insurance policy applies "because of bodily injury," and the Mold Exclusion itself bars coverage for bodily injury "caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, the existence of, or presence of any: 1. Fungi or bacteria." Reading the policy as a whole, the Court is not persuaded that the Consumption Exception can be triggered without a showing of bodily injury. This would not

only swallow the Mold Exclusion but be contrary to the insuring grant itself and create extra coverage. One cannot trigger an insurance policy for bodily injury where bodily injury has not been proven.

Therefore, Chenault must have shown that he was injured through consumption of mold on his food. However, he did not allege such in his pleadings and his attempts at proving such during this trial were insufficient. The Court finds Dr. Guzzardi's testimony to be unreliable, as he could not cite to any supporting literature for his opinions and his "common sense" methodology is not one that the Court can accept as credible as it lacks scientific analysis. In contrast, Dr. Laumbach used a credible scientific analysis to conclude that Chenault was not injured by consuming mold contaminated food.

Additionally, Dr. Laumbach found that there was insufficient evidence that mold even grew on Chenault's food at all. He testified that very few household foods could support the growth of Stachybotrys Chartarum as it requires a high cellulose, high moisture content, and ambient temperatures to grow and proliferate. Without the conditions necessary to grow, Stachybotrys Chartarum is incapable of producing the quantity of Trichothecene necessary to cause injury. At trial, Chenault's expert Dr. Guzzardi conceded that very few household foods could support Stachybotrys Chartarum growth to produce appreciable levels of Trichothecene. He also testified that it would on average take 10-20 days for an appreciable amount of mold to grow on the food. The Court found Dr. Laumbach's educational background and experience impressive. The court also found him to be credible, articulate, and extremely knowledgeable about the issue at hand.

In light of the foregoing, the Court finds that Chenault has not proven that mold grew on his food, nor has he has met his burden of showing that he was injured through the consumption

of such food thereby triggering the Consumption Exception to the Mold Exclusion under the Zurich Umbrella Policies. Therefore, coverage is not restored. Despite the Court's finding above, the remaining issues will be analyzed and discussed.

B. Whether Mr. Chenault's injuries manifested prior to the first Zurich policy incepted on June 1, 2007.

Zurich claims the underlying action and Consent Judgment were not covered by the Umbrella Policies because neither the property damage nor bodily injury occurred during the Zurich Policy Periods.

New Jersey applies the first manifestation rule to determine when a commercial general liability policy must respond to an occurrence causing bodily injury and property damage claims, under which only the policy in effect when the injury first manifests is triggered. Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 19, 28 (1084). When certain latent injuries like asbestos are at issue, Courts use the continuous trigger rule. Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994). Here, an occurrence triggering coverage occurs each year from the time the injured party is exposed to an injurious condition up to and including the date of manifestation of the resulting disease. Id. at 454, 478.

Zurich claims that the continuous trigger theory is not applicable to mold exposure, as the only case in New Jersey to address the question applied the first manifestation rule. Crivelli v. Selective Ins. Co. of Am., 2005 N.J. Super. Unpub. 703 (App. Div. Sept. 27, 2005). The Court there stated because there was no evidence of "demonstrated progressive injury" there was no basis to extend the continuous trigger theory "as has been applied in asbestos and environmental contamination cases." Id. at *1-3. Zurich argues that in addition to having been

rejected, the predicates warranting the application of the continuous trigger theory are absent. One basis is that the injury arising from exposure does not necessarily display the harmful effects until long after the initial exposure. Owens-Illinois, 138 N.J. at 455. The Court in Polarome stated "it is only the undetectable injuries at and after exposure and prior to initial manifestation that are progressive and indivisible" that trigger successive commercial general liability policies. 404 N.J. Super. 241, 268 (App. Div. 2008). Zurich states where predicates are absent there is no basis to deviate from the first manifestation rule.

Zurich relies on the Pennsylvania Supreme Court's decision in Pa. Nat'l Mut. Cas. Co. v. St. John, 630 Pa. 1 (Pa. 2014). There, the Court rejected the argument that bodily injury and property damage do not manifest until the insured is able to ascertain that the injury or damage is traceable to some outside causative force or agency, finding that this would conflate the first manifestation rule with the discovery rule used to toll the statute of limitations. In addition, the language of the insurance policy in that case did not contain language requiring the cause of injury to be identifiable before coverage is triggered. The Court also found that it was a moral hazard to allow continuous trigger after injuries manifest since parties could insure themselves for events which have already taken place. Id. at 20, 24-27. Zurich states that Chenault asserts the same argument that the Court rejected, and it is instructive. Zurich argues it is undisputed that the injuries manifested before the policy period, so there is no basis to extend the continuous trigger doctrine, and extending such would create disincentives for Plaintiffs to remedy the problem and would permit policyholders to make claims for known losses.

Next, Zurich argues that, even if the Court were to apply the continuous trigger rule, no coverage would be afforded because, like the first manifestation rule, no policies incepting after the initial manifestation of injury would be triggered. Palorme, Supra. Zurich states Chenault's

symptoms began their debilitating effects in the early 1990s, a decade before the inception of the Zurich Umbrella Policy. They state Courts have previously held that the date when the claimant learned the cause of the symptoms to be irrelevant. The relevant date is the date of the symptoms' manifestation citing Palorme, 404 N.J. Super. at 257; Air Master, 452 N.J. Super. 35, 48 (App. Div. 2017); St. John, supra. They emphasize the Air Master Court's statement that it would be unfair and inappropriate to use statute of limitations equitable tolling concepts to impose coverage and defense obligations on insurers that issued occurrence-based policies years after an injury had clearly manifested.

Zurich contends that Chenault has not offered any legal authority or policy language that would support departing from this precedent, nor any legal authority to support an extension of the first manifestation rule to the exposure in during the Zurich Policy periods. They state the holding in Polarme makes it clear that injuries occurring after the initial manifestation do not trigger additional policies regardless of whether there is continued exposure. 404 N.J. Super. at 268.

In contrast, Chenault asserts that, in a case involving progressive environmental injury, all policies in effect during the continuous injury period must share in damages exposure based on their limits and their time on the risk. Owens-Illinois, 138 N.J. 437 (1994); Carter-Wallace v. Admiral Ins. Co., 1544 N.J. 312 (1998). Chenault emphasizes that prior to 2008 there had been no indication that he had been exposed to mold and before March 2009 no doctor had suggested such. Chenault states that unknown mold, like asbestos, presents a classic case for the application of the continuous trigger doctrine. Chenault states that the cases cited by Zurich support his position that there was no manifestation prior to the March 2009 EMLab P&K and first diagnosis by Dr. Hankins on March 23, 2009. He states that in Palorme the claimants last

injurious exposure had taken place prior to the insurance policy at issue commenced, whereas, here, his exposure did not end until the last Zurich Policy expired. Next Chenault claims Air Master was not a toxic tort personal injury case but addressed progressive property damage caused by ongoing water intrusion.

Chenault further states the Appellate Division noted in Potomac Ins. Co. v. PMA ins. Co., 215 N.J. 409 (2013) that the public policy reasons underlying the continuous trigger doctrine in bodily injury cases applied equally to property damage, and Chenault did not discover the construction defect that led to the water intrusion until 2009 and there was no report of mold in the condominium until March 24, 2009. They state this is akin to the caselaw relied on by Air Master, which found the proper initial manifestation of property damage was the issuance of a report delineating the nature and extent of the problems. Chenault contends it is undisputed that there was no report of any kind showing mold infestation prior to March 24, 2009 and the failure of VCHA to undertake proper remediation work following took place during the applicable policy period. Chenault alleges VCHA's negligent failure to repair the water intrusion constitutes a new tort and distinctly actionable injury.

The Court finds that the manifestation of the injury occurred before Zurich policies activated in the 90s; therefore, the Court will not decide whether the continuous trigger theory is triggered. However, even if the continuous trigger theory was triggered, the caselaw does not support the notion that the cause of the injury must have been known. To the contrary, Palorme states the last pull of the trigger is the manifestation of the personal injury, when symptoms become known. The purpose of the continuous trigger doctrine as applied in toxic tort cases like asbestos is that injuries remain undetectable and are not discoverable for years; however, once they manifest that is the last pull of the trigger, not necessarily when the cause is

known. See, Owens-Illinois, 138 N.J. 437 (1994). Chenault's debilitating injuries were obvious to him beginning in the late 1990s, which was well before the inception of the Zurich policies. As to Chenault's arguments about the property damage they are excluded by the Mold Exclusion and cannot be restored through the Consumption Exemption. Therefore, this does not affect the Court's analysis. Furthermore, Chenault was aware of the water intrusion in the 1990s, like the Plaintiff in Crivelli, supra.

C. Whether Zurich breached its duty to defend.

Chenault alleges that Zurich breached its duty to defend in the underlying case and therefore, cannot contest the proofs presented in the underlying action. "[A] settlement may be enforced against an insurer…only if it is reasonable in amount and entered into in good faith." Griggs v. Bertram, 88 N.J. 347, 368 (1982). The predicate for the application of Griggs is that the insurer wrongfully breached its duty to defend the insured. Wear v. Selective Ins. Co., 455 N.J. Super. 440, 457 (App. Div. 2018). A "good-faith challenge to coverage is not a breach of an obligation to defend." Id. citing Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 617 (2011). Nor does an insurer breach its duty to defend when it denies coverage based on "the existence of a substantial issue as to whether its policy provided coverage for that claim." Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984). If the insurer has not wrongfully breached its duty to defend, a so-called Griggs settlement between a claimant and policyholder does not bind the insurer even if the policy is determined to afford coverage for the injury. In support of this concept, Zurich relies upon Liss v. Fed. Ins. Co., 2006 N.J. Super. Unpub. LEXIS 2379, *21 (App. Div. 2006), as well as County of Gloucester v. Princeton Ins. Co., 317 Fed. Appx. 156 (3d Cir. 2008). For the reasons

discussed above as to whether coverage was provided, Zurich states they did not breach a duty to defend, and they are not bound by the settlement.

Chenault contends that Zurich did breach its duty to defend and indemnify and asserts an insurer who breaches its policy obligations by failing to defend and indemnify its insured, is not entitled to second-guess the defense that its insured actually did present: The strategic steps taken by plaintiff in defense of the [underlying claim], after the [insurer's] wrongful default, should not be second-guessed if, in hindsight, a more expedient path toward a favorable resolution on the merits was possible. So long as Plaintiff took objectively reasonable steps in defending the [claim], [the insurer] should be bound to compensate Plaintiff for the fair and reasonable costs of those steps. Hebela v. Healthcare Ins. Co., 370 N.J. Super. 260, 278 (App. Div. 2004)

Chenault states the decision in LCS, Inc. v. Lexington Ins. Co., 371 N.J. Super. 482 (App. Div. 2004) is instructive. In that case, the insurance carrier had denied all coverage and failed to defend its insured in an underlying bodily injury lawsuit in which the Plaintiff was struck and knocked down by a "bouncer" employed by the Defendant, an insured bar, invoking a policy exclusion for assault and battery. The Appellate Division ruled that upholding a "denial of insurance coverage on an assumption that a particular cause of action is specious or doomed to failure by summary judgment or jury verdict contradicts established law as well as public policy in favor of finding coverage absent the clear applicability of a policy exclusion." Id. The Court discussed in some detail multiple cases addressing the duty to defend, including Ohio Cas. Ins. Co v. Flanagan, 44 N.J. 504 (1965) and Voorhees v. Preferred Mut. Ins. Co., 246 N.J. Super. 564, aff'd, 128 N.J. 165 (1992). The LCS Court noted that in Flannagan, the Court had ruled that "[i]t is the nature of the claim for damages, not the details of the accident or the

ultimate outcome, which triggers the obligation to defend," and that in Voorhees, the Court had ruled that an insurer's duty to defend continued until "every covered claim is eliminated." 44 N.J. at 512; 371 N.J. Super. at 490. On the issue of coverage, the LCS Court concluded as follows: While Lexington obviously disputes the issue, we state once again that it had its opportunity to participate in the defense of the action under reservation or rights but chose instead to disclaim and leave its insured to fend for itself. Accordingly, Lexington is not entitled to a hearing to re-litigate on the issue of whether… [the plaintiff's] injuries were the proximate result of a negligent or intentional act. Id. at 497.

Chenault states the facts of the underlying case clearly establish that he did not pursue and ultimately settle a bogus or spurious claim and Zurich breached its policy obligations by ignoring the exception to the Mold Exclusion and by failing to defend its insured and participate in the settlement.

The Court finds that Zurich did not breach its duty to defend. The Court is not convinced that Zurich simply ignored the Consumption Exception. Rather they made a good faith challenge to coverage as the nature of the claim in the underlying Complaint was a mold injury with no allegation that Chenault was injured by consuming contaminated food. As previously decided, this must have been pled and proved for the Consumption Exception to be triggered resulting in coverage. Good faith challenges to coverage do not constitute a breach of the duty to defend. Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 617 (2011). Nor does an insurer breach its duty to defend when it denies coverage based on "the existence of a substantial issue as to whether its policy provided coverage for that claim." Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984). Here, as

evidenced by this litigation and Opinion, a substantial issue as to coverage existed; therefore, Zurich did not breach its duty to defend.

D. Whether the Underlying Settlement was reasonable and negotiated in Good Faith

Zurich claims the Underlying Settlement was not reasonable and not negotiated in good faith. The initial burden to establish reasonableness, good faith and non-collusiveness of the settlement is on the insured, but the ultimate burden of persuasion is the responsibility of the insurer. Griggs, at 368. The insurer will not be liable if the underlying settlement is unreasonable or reached in bad faith. Imbesi, 826 A. 2d 735, 746

Reasonableness is determined by the size of possible recovery and degree of probability of the claimant's success against the insured. Id. In settled cases, "the reasonableness of the compromise is a proper subject of inquiry which cannot be answered without some examination into the merits of the claim." Excelsior Ins. Co. v. Pennsbury Pain Ctr., 975 F. Supp. 342, 356 (D.N.J. 1996). When evaluating the merits of an underlying claim subject to a Griggs Settlement, Courts have considered several factors, including whether causation was properly established in the Underlying Action and whether the underlying expert reports were credible.

Zurich contends that Chenault cannot establish that the Settlement was reasonable, in good faith and non-collusive. More specifically, Zurich argues that the evidence shows that the Settlement was the definition of collusive, unreasonable, and bad faith because: (a) the Settlement does not reflect a compromise; (b) the allocation of $1.9 million of a $2.3 million Settlement to Zurich is a sham; and (c) the Settlement includes covered and non-covered damages.

Zurich states settlements are unreasonable and entered in bad faith where the policyholder attempts to "squeeze" in covered and uncovered damages. Fireman's Fund at 756. Zurich asserts the law requires an allocation between covered and non-covered damages. SL Indus. v. AM. Motorists Inc. Co., 128 N.J. 188, 216 (N.J. 1992). "By permitting the dispute of uncovered claims, courts protect both parties by ensuring that the insurer does not incur responsibility for uncovered claims…" Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 617 (2011). Thus, "[i]f the judgment resulted from a settlement, the insurer is also typically entitled to a determination of what percentage of the settlement, if any, was based on covered claims as opposed to uncovered claims." First Trenton Indem. Co. v. River Imaging, P.A, 2009 N.J. Super. Unpub. LEXIS 2190 (App. Div. Aug. 11, 2009). "This is so even if the insurer's refusal to defend was wrongful." Id. at *27 citing SL Indus., 214-215. It is Zurich's position that the Underlying Chenault Settlement includes multiple forms of uncovered damages.

First, there are damages for bodily injury arising from airborne mold exposure. Zurich repeats that the Court already awarded Summary Judgment to Zurich holding that the Mold Exclusion bars coverage for "liability, damage, loss, cost or expense…caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any…Fungi, or bacteria, or…Substance, vapor or gas produced by or arising out of any fungi or bacteria." Therefore, all injuries suffered by Chenault are excluded, unless they come under the Consumption Exception, which would not restore coverage for injuries caused by inhalation of or dermal contact with mold. As a result, Zurich asserts that the Settlement included covered and non-covered damages without allocation. Zurich states that New Jersey Courts have made clear an insurer is not obligated to pay for

uncovered damages, and because Chenault failed to allocate his damages or even seek a declaration in this case attempting to allocate between those damages, his settlement cannot be enforced. See Imbesi, 826 A.2d at 75.

Zurich states Chenault also settled and released his claim for "property damage," however, his reasonableness expert identified Chenault's "significant out-of-pocket losses for property damage" as a factor justifying the settlement. Zurich states that under no circumstance does the Consumption Exception restore coverage for property damage. Thus, Chenault's attempt to recover these damages from Zurich through the underlying settlement is improper.

Zurich next argues the significant disparity between the amount paid by the primary insurers and Zurich's allocation of 86% is strong evidence that the settlement was unreasonable and collusive. In support of this position, they rely on Imbesi, 826 A.2d 735 where the Court found an allocation of approximately 25% to settling insurers and approximately 75% of the settlement to the non-settling insurer to be indicative of bad faith and collusion, and Pasha, 344 N.J. Super. 350, 357-8 where it was found that an allocation of 94% of settlement to the non-settling insurer to be evidence of bad faith. Further they state, Chenault's use of the allocation method set forth in Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J 312 (1998) is applicable only to cases involving a continuous injury trigger, which Zurich argues is inapplicable to this case.

Zurich states that, either way, Chenault's allocation to Zurich is mathematically wrong because it fails to allocate responsibility to insurance policies issued by LMI Insurance between 1994 and 2000, providing $6 million in coverage. They say Chenault received an assignment to pursue LMI, which entered insolvency, but argues that he deliberately chose not to because Zurich's policies had to be exhausted first pursuant to the decision in Farmer's Mut. Fire Ins.

Co. v. New Jersey Property-Liability Ins. Guar. Ass'n., 215 N.J. 522 (2013). Zurich argues that the Appellate Division's subsequent decision in Ward Sand & Materials Co. v. Transamerica Ins. Co., 2016 N.J. Super. Unpub. LEXIS 59 (App. Div. 2016) is applicable. In addition, Zurich argues in Farmers Mut., the issue was whether the insurance policies issued by an insurer that entered insolvency in 2007, should be considered in the allocation of damages for a long-tail claim, and turned on the interpretation of the 2004 amendment to the PLIGA Act and the definition of the word "exhaust" in N.J.S.A. 17:30A-5. The Court in Farmer's Mut. held that "when one of several insurance carriers is insolvent in a continuous-trigger case, then the limits of the policies issued by solvent insurers 'in all other years' must first be exhausted before the Guaranty Association is obligated to pay statutory benefits." Id. at 543. However, the Court's subsequent Opinion in Ward Sand instructs that because LMI entered insolvency before the 2004 amendment to the PLIGA Act and the amendment is not retroactive the policy should be included in the allocation. Zurich states that the NJPLIGA website reflects LMI's "insolvency date" as May 23, 2000, four years before the amendment, so they should have been included in a Carter-Wallace allocation. See, 2016 N.J. Super. Unpub. LEXIS 59, *5-6.

Chenault argues that there is no evidence that the settlement was entered into in bad faith or was collusive, nor did Zurich's expert testify to such. They state that the record of the Underlying Case and the lengthy settlement negotiations that led to resolution of the case, show that the settlement was neither collusive nor in bad faith, so only reasonableness is to be determined by the Court. They state an insured is not required to prove that it had "actual liability to the party with whom it has settled so long as potential liability on the facts is known…" Luria Brothers& Co. v. Alliance Assurance Co., 780 F.2d 1082, 1091 (3d Cir. 1986). Chenault states he has carried his burden in showing that VHCA faced potential liability

for its actions and that the settlement is reasonable because the settling insures paid 4.397% of their policy limits and Zurich is asked to pay the same percentage. They state the allocation is appropriately allocated to Zurich and is objectively reasonable under Carter-Wallace. Chenault contends that Ward Sand did not overrule the Farmer's Mut. decision and that LMI's insolvency proceedings did not commence until December 2, 2008. Chenault also states that amicus curiae in Farmer's Mut. made the same argument as Zurich here and the Supreme Court expressly rejected them. 215 N.J. at 544.

Chenault next states that his expert testified that the reasonableness of the settlement is supported by several factors: the uncertainty of a decision on the pending Summary Judgment cross-motions; (b) a trial date of November 26, 2018 had been assigned; (c) Victory Highlands did not have an economic expert to refute Chenault's expert opinion establishing an economic loss of between $940,510 and $1,031,748 by providing a quantitative amount in damages suffered by Chenault if causation was established; (d) a potential 7- or 8-figure jury verdict for the pain and suffering and permanent injury claims asserted by Chenault; (e) significant out-of-pocket losses for property damage; (f) significant out-of-pocket losses for medical treatment; (g) significant out-of-pocket losses for future medical treatment; and (h) the significant ongoing defense costs.

Chenault states Zurich focused only on (d) at trial and that no other cases involving mold came to this level of an award. However, he states, this case is factually different due to the length of exposure, finding of disability by the Social Security Administration, and substantial medical evidence. Chenault then goes on to draw the Court's attention to several cases in which juries returned multimillion dollar verdicts and cites the Supreme Court in Johnson v. Scacetti, 192 N.J. 256, 279-80 (2007) in stating that there is no formula for

translating pain and suffering into monetary compensation and damages are not susceptible to scientific precision. Further, the model jury charge states "Disability or impairment means worsening, weakening or loss of faculties, health or ability to participate in activities."

Chenault next takes issue with Mr. Niedelman's testimony as to his loss of earnings being only $36,495 compared to the Sobel Tinari report which found the $772,359 plus damages for pain and suffering and mental distress and impairment and loss of enjoyment of life and that would have been presented to a jury. Based on this report, a jury verdict of damages more than $3,000,000 would have been supported by the evidence in the underlying case. Chenault contends that Mr. Niedelman improperly limited his suggested pain and suffering damages to the 18-year period that he inhabited the condominium, ending on the date he moved out; however, the disability and related injury determinations, as well as the disability award of the Social Security Administration, all support a continuation of pain and suffering and "disability and impairment" damages well beyond the March 2009 cutoff. He states that if ongoing pain and suffering and emotional distress/loss of enjoyment of life damages were extended to the end of Mr. Chenault's statistical life expectancy the damages calculation would have been increased by approximately 22 years. Chenault states, even using Mr. Niedelman's calculation the total potential pain and suffering and disability damages would be $2,880,000, which exceeds the total amount of the Consent Judgment and is well within the range of damages that could have been awarded by a rational jury.

Next, Chenault argues Mr. Niedelman also inappropriately discounted his understated damages amount by two-thirds based on the statute of limitations defense available to VHCA and questions about Larry Chenault's "credibility." This deduction was based on his notion that the "discovery rule" would not toll the statute of limitations, because he "knew, or in the

exercise of reasonable diligence and reasonable intelligence, would have discovered, that he possessed claims for his multiple health complaints as against [VHCA]…." and that "a person of reasonable diligence and intelligence should have known that the water intrusion, which is known to cause mold, was the cause of the alleged medical issues well before April 15, 2008." Id. p.6. Chenault states these statements are speculation and were not supported by any legal authority. Chenault states the limitations issue goes with the "occurrence" issue addressed above and restates the argument that there was no manifestation of an "occurrence" of possible or likely mold-related bodily injury before Mr. Chenault was advised of such injury by Dr. Hankins.

In support of his position, he relies on Vispisiano v. Ashland Chemical Co., which states it is the "first diagnosis" of injury caused by toxic exposure that is the date for measuring the accrual of the statute of limitations, 107 N.J. 416, 436-37 (1987). In Vispisiano, the Supreme Court considered the issue of "the application of the 'discovery rule' to a toxic-tort case." Id. at 420. The Vispisiano Court stated: [I]t is not self-evident at the time of a toxic tort injury that the cause was the fault of a third party. Not only is the nature of the injury generally unclear, but its very existence is also frequently masked. Id. at 434. The Court summarized its ruling on this as follows: "Given our requirement that before a toxic-tort case plaintiff may be deemed, in a 'discovery rule' context, to have the requisite state of knowledge that would trigger the running of the statute of limitations his impression of the nature of the injury and of its cause must have some reasonable medical support…" Id. at 437. Likewise, Chenault states there is nothing in the record to indicate he suspected mold until March 2009.

Further, he states the statute of limitations defense also ignores that VHCA committed a continuing tort by negligently failing to repair the conditions that caused the formation of

toxic mold and by failing, during the summer of 2009 and afterwards, to remediate the mold contamination, as recommended by its own consultant. In Wrenden v. Township of Lafayette, 436 N.J. Super. 117 (App. Div. 2014), the Court ruled that "when a continuing nuisance has been committed, the new tort is an "alleged present failure" to remove the nuisance, and "[s]ince this failure occurs each day that [defendant] does not act, the [defendant's] alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day.'" Based on this, he argues Mr. Niedelman's deduction was in error, and notes that Zurich withdrew its defense based upon the statute of limitations. As to the deduction based on credibility, he states the genuineness of his complaints of mold related injury and damage is undisputed and supported by the voluminous records of the underlying case. Chenault contends, Zurich's expert based his opinions of the settlement on erroneous assumptions, thus, Zurich has not carried its "heavy burden of proof" to establish that the settlement of the underlying case was unreasonable. Chenault also argues that the jury would not have heard the testimony of Dr. Laumbach, but contradictory testimony by the experts in the underlying case and the expert, Dr. Phillips, retained by VHCA made findings that would contradict Dr. Laumbach as to the validity of the urine test and the primary pathway of mold exposure.

Chenault emphasizes that the settling insurers thought there was enough evidence of mold-related injury and causation to settle, and there should be no dispute that VHCA and the three insurers took extremely diligent, lengthy and "objectively reasonable" steps in defending against Mr. Chenault's claims in the underlying case.

It is Chenault's contention that the determinative issue here is whether the decision of the insurers who decided to settle the underlying case did so in good faith and on a reasonable basis. See generally Griggs v. Bertram, Supra. He states, neither the defenses undertaken by the

settling insurers, nor the settlement amount they agreed to pay, if within the reasonable range of potential verdicts, should be "second guessed." Thus, in reviewing a Griggs settlement, "the question confronting the Court [is] the reasonableness of a business decision, and not '[w]hat a particular jury in fact would decide as to the liability ... or the amount of damages....'" Pasha v. Rosemount Mem'l Park, Inc., 344 N.J. Super. 350, 358 (App. Div. 2001).

Moreover, he states, while the evidence in the underlying case undisputedly establishes the potential liability of VHCA, an "insured does not need to establish actual liability to the party with whom it has settled to meet this burden. The insured may meet its burden by establishing 'potential liability on the facts known to [it] ... culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured.'" Armkel, LLC v. Pfizer Inc., 2005 WL 2416982, at *18 (D.N.J. Sept. 29, 2005) quoting , 780 F.2d 1082, 1090 (2d Cir.1986). Chenault states under Armkel, "[s]ome factors that a Court may look to in determining reasonableness of the settlement include: the possibility of exposure to a jury verdict in excess of settlement, the length of the negotiation period, the discrepancy between the plaintiff's initial demand, and the ultimate settlement figure." Id. Chenault states the final settlement contribution from the insurers that defended VHCA totaled $310,000, which is about 46.1% of their allocable $672,500 share of the Chenault's initial $5,000,000 settlement demand. Similarly, the Consent Judgment amount, $2,288,725, is 45.7% of the Chenault's $5,000,000 settlement demand. Chenault asserts these percentages demonstrate that the settlement at issue constitutes a classic "split-the-difference" negotiation resolving the underlying case on reasonable, justified compromise.

Chenault notes that at trial his expert testified that the payment by the "settling insurers" was close to the "midpoint" of the amount that would have been paid on the $5 million mediation demand, and this "movement" by both parties shows that they negotiated and that the "further that they moved, the easier it is to conclude that there was good faith." It is Chenault's position that the settlement amount reflected in the Consent Judgment represents a meaningful compromise of the parties' claims and defenses in the underlying case.

The Court has not been presented with enough evidence to allow it to conclude that the underlying settlement was unreasonable or was reached in bad faith. As previously stated, the Court accepted the opinion of Mr. Field that the underlying settlement was fair and reasonable and not negotiated in bad faith. However, due to the Court's previous conclusions, Zurich is not bound by the settlement, as they did not breach their duty to defend, and the consumption exception does not restore coverage to Chenault's claims.

CONCLUSION

For the foregoing reasons, the Court finds that there is no coverage afforded to Chenault under the Zurich Umbrella Policies. An Order consistent with this Opinion is executed this date.

/s/Annette Scoca

HON. ANNETTE SCOCA