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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

Barry Sewall, Shamika Gregory, and Jerome Gregory, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Home Partners Holdings LLC, SFR Acquisitions I LLC, and OPVHHJV LLC, d/b/a Pathlight Property Management,

Defendants.

Court File No.: 27-cv-22-10389

DEFENDANTS' REPLY TO THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS

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INTRODUCTION

Defendants generally agree that the fact issues regarding repair and maintenance are often complex. Ironically, at the same time Plaintiffs are arguing on class certification that the liability and damages of every class member can be easily and summarily determined, they are simultaneously opposing summary judgment on the basis that there are unresolved fact issues that prevent adjudication of Plaintiffs' claims.

Defendants submit, however, that in addition to denying class certification, this Court can also dismiss Plaintiffs' claims at this stage of the case because—after 14 months of discovery, 15 depositions, and hundreds of thousands or millions of dollars spent by the parties—the key undisputed facts show that Defendants did not violate the LTA or Minnesota's consumer protection statutes. This Court should grant Defendants' Motion for Partial Summary Judgment in its entirety.

STATEMENT OF ADDITIONAL DOCUMENTS THAT COMPRISE THE RECORD FOR SUMMARY JUDGEMENT

Additional documents comprising the record are listed on and attached to: (1) the July 7, 2023 Declaration of Carolyn A. Gunkel and all exhibits attached thereto ("CG Decl."); and (2) the June 19, 2023 Declaration of Nathan Brennaman and all exhibits attached thereto ("NB Decl.") (filed with Defendants' Opposition to Plaintiffs' Motion for Class Certification).

ARGUMENT

I. Defendants are entitled to summary judgment on Plaintiffs' LTA claims.

A. The undisputed facts show that Defendants maintained Dr. Sewall's home and the Gregorys' home in compliance with the covenant of habitability set forth in Section 504B.161, Subdivision 1.

Section 504B.161 does not require a landlord to make every repair that a tenant requests or every repair that could improve the condition of the home. *See* Minn. Stat. § 504B.161. It only

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requires the landlord to maintain the premises consistent with covenants of habitability contained in Section 504B.161, Subdivision 1. *Id*; *see also Rush v. Westwood Vill. P'Ship*, 887 N.W.2d 701, 706 (Minn. Ct. App. 2016). Indeed, the LTA defines a "Violation" of the statue as "a violation of any of the covenants set forth in section 504B.161, subdivision 1, clause (1) or (2)." *See* Minn. Stat. § 504B.001, subd. 14; *see also id.* §§ 504B.385, subd. 9(a)(1) (authorizing an action for a "Violation" of the LTA), 504B.395, subd. 1 (same). These covenants require Defendants to keep the premises of the home in reasonable repair and fit for the intended use. Minn. Stat. § 504B.161, subd. 1.

The undisputed facts confirm that Defendants complied with their obligations under Section 504B.161. In their opposition, Plaintiffs attempt to escape summary judgment by arguing that Defendants' leases contain *per se* violations of the LTA and by focusing the Court's attention away from Subdivision 1 to Subdivision 2 of Section 504B.161. But these arguments are simply attempts to obfuscate the correct legal analysis. Similarly, although Plaintiffs point to several factual issues, none show that Defendants failed to comply with the LTA.

1. Plaintiffs cannot prevail on their Section 504B.161 (covenant of habitability) claims based solely on the terms of the lease.

Plaintiffs' primary argument for liability under Section 504B.161 is that the leases, on their own, violate Section 504B.161. (Pls. SJ Opp. at pp. 24–30). They argue that Defendants should be strictly liable for damages, regardless of the actual condition of the homes or whether Defendants failed to make necessary repairs, if the leases disclaim the warranty of habitability in 504B.161, Subsection 1 (even though the undisputed *facts* show the leases do not disclaim this warranty).

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(*Id.*; Defs. MSJ. at pp. 21–23.)[1] This is not the law in Minnesota, and Plaintiffs have not cited a case, statute, or other authority in any of their filings to support the proposition.

As Defendants detail in their Opposition to Plaintiffs' Motion for Class Certification, Section 504B.161 does not impose strict liability on a landlord. (*See* Defs. C.C. Opp. at 22–26); *see also, e.g.*, *Rush*, 887 N.W.2d at 709 ("[T]he landlord's covenants to keep leased premises in reasonable repair and fit for intended use do not impose strict liability upon a landlord or expand the landlord's liability beyond that previously articulated in caselaw."); *Me. Heights v. Hayat LLC*, 2020 WL 7330598, at * 3 (Minn. Ct. App. December 14, 2020) (same). It is not a violation of the LTA for a lease to include language purporting to waive the covenants of habitability contained in Section 504B.161, Subsection 1. *Ellis v. Doe*, 924 N.W.2d 258, 261 (Minn. 2019); *Ghebrehiwet v. Ghneim*, 2016 WL 102510, at *3 (Minn. Ct. App. Jan. 11, 2016); Minn. Stat. § 504B.001 (defining "Violation" of the LTA). "These covenants are not made a part of the lease by agreement between the parties but by statutory mandate." *Fritz v. Warthen*, 213 N.W.2d 339, 341 (Minn. 1973). A violation occurs when a landlord fails to keep the premises of the home in reasonable repair and fit for the use intended. *See, e.g.*, Minn. Stat. §§ 504B.001, subd. 14; 504B.385, subd. 9(a)(1); 504B.395, subd. 1.

For Plaintiffs to prevail on their Section 504B.161 claim, they must show that Defendants failed to make specific and necessary repairs to keep the home in reasonable repair and fit for the intended use. *See, e.g.*, *Rush*, 887 N.W.2d at 709. It is well-established law in Minnesota that liability under Section 504B.161 only begins "when the landlord has breached the statutory covenants." *Fritz*, 213 N.W.2d at 342 (emphasis added). Plaintiffs cannot prove liability simply

[1] Plaintiffs claim that the damages for this violation are some uniform reductions in rent for all residents, regardless of the condition of their home or whether they had any specific problems. (Pls. C.C. Br. at 25.)

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by showing that the lease attempts to waive the covenants of habitability. Defendants' liability turns on whether they made the required repairs, not on the terms of the lease. *Id.* at 341.

Despite the obvious legal flaws with this novel theory, Plaintiffs push it for several reasons: First, they know that the fact-specific inquiry needed to prove liability under Section 504B.161 for each Plaintiff and putative class-member destroys the possibility of class certification. They want the Court to deviate from the clearly established law so that it will certify a class that is otherwise impossible to certify. Second, they know that in conducting the necessary fact-specific inquiry, the Court or a jury will find that at least some putative class-members never suffered an injury, again destroying class certification. (*See* Defs. C.C. Opp. at pp. 29–30.) Finally, and the subject of this motion, a fact-specific inquiry shows that Defendants have not violated Section 504B.161 with respect to Dr. Sewall and the Gregorys.

2. The LTA does not recognize a claim for a violation of 504B.161, Subdivision 2.

Plaintiffs devote a significant portion of their response to arguing that Defendants' leases do not comply with Section 504B.161, *Subdivision 2*. (Pls. SJ Opp. at pp. 24–30). Because Plaintiffs' claims are for a violation of the LTA, the distinction between Subdivision 1 and Subdivision 2 is important for this case. Subdivision 1 *requires* a landlord to make certain repairs to keep the home in compliance with the covenants of habitability. *See* Minn. Stat. § 504B.161, subd. 1. A violation of Subdivision 1 allows a tenant to bring a claim under the LTA. *See, e.g.*, Minn. Stat. §§ 504B.001, subd. 14; 504B.385, subd. 9(a)(1); 504B.395, subd. 1.

By contrast, Subdivision 2 allows a landlord and tenant to agree that the tenant will make certain repairs that are not required by Subdivision 1. *Id.* at subd. 2. Subdivision 2 requires the lease to specify these repairs in a conspicuous writing and to provide adequate consideration, but it does not impose any obligation on the landlord to make repairs beyond those required by

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Subdivision 1. *Id.* The LTA does not recognize a claim for violation of Subdivision 2. *See, e.g.*, Minn. Stat. §§ 504B.001, subd. 14; 504B.385, subd. 9(a)(1); 504B.395, subd. 1

To understand how these different subdivisions operate, consider an example: Dr. Sewall requested that Defendants repair a gas fireplace in his home. (*See* Cefalu Decl., Ex. 3.) Because the fireplace is purely decorative (i.e., is not his home's primary heat source), Section 504B.161, Subdivision 1 does not require Defendants to repair it. (*See* NB Decl., Ex. 8, *Balchtiari v. Pathlight Prop. Mgmt.*, Case No. 82-CV-22-3701, at ¶ 5 (holding that Section 504B.161 does not require a landlord to repair an inoperable fireplace that serves only a cosmetic purpose).) Subdivision 2, however, allows the parties to agree in the lease that the tenant must repair it. Similarly, the parties could also agree in the lease that Defendants must repair the fireplace—but that is an issue of contract, not the LTA. Otherwise, absent an agreement in the lease, neither party has an obligation to repair the cosmetic fireplace under the LTA.

Because Plaintiffs' claims in this case are for violations of the LTA, the Court does not need to address whether Defendants set forth the specific repair and maintenance responsibilities in conspicuous writing and provided adequate consideration. The relevant question for this motion is whether Defendants maintained the homes in reasonable repair and fit for the intended use of the parties. Indeed, although Dr. Sewall has now shifted his complaints to repairs that he made to the home (without informing Defendants of the issues), Plaintiffs' primary complaints have been that Defendants failed to timely address their repair requests.

Even if Subdivision 2 were relevant, however, Defendants met its requirements. Plaintiffs contend that the allocation of maintenance and repair is "neither specific, conspicuous nor supported by adequate consideration." (Pls. SJ Opp. at p. 25). The facts do not support this conclusion.

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First, the leases specify each party's repair and maintenance obligations. Paragraphs 15 and 16 of Dr. Sewall's and the Gregorys' leases, respectively, specify Defendants' and Plaintiff's repair and maintenance obligations in detail.[2] Relying on an old, unpublished case, *Wardin v. Maski*, Plaintiffs assert "Minnesota law requires more." (Pls. SJ Opp. at p. 20.) In *Wardin*, however, the court simply upheld the factual finding that the lease could not broadly require the tenant to "maintain 'all mechanical systems.'" (*Id.*) The leases here, by contrast, detail the parties' specific repair and maintenance obligations and explicitly provide that Defendants are obliged to maintain "*mechanical systems* (including HVAC systems, hot water heater, electrical and plumbing systems and sump pump, if any)." (Gregory Lease ¶ 16 (emphasis added); Sewall Lease ¶ 15.)

Next, Defendants provided Plaintiffs adequate consideration for undertaking certain maintenance obligations. Consideration is simply "something of value given in return for a performance or promise of performance." *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 462 (Minn. Ct. App. 2001). Under Minnesota law, the value or amount of consideration is not relevant if some benefit or detriment is established. *Estrade v. Hanson*, 10 N.W.2d 223, 225 (Minn. 1943). Plaintiffs ask the Court to find that consideration is only adequate when there is a "document or any testimony identifying the monetary amount they would have charged in *higher* rent to named plaintiffs." (Pls. SJ Opp. at p. 28 (emphasis in original).) Under this proposed rule, every lease agreement in Minnesota would need to contain provisions stating the specific dollar amount of rent for each property but for the resident's agreement to undertake certain maintenance

[2] The lease lists, for example, the specific obligation Dr. Sewall and the Gregorys agreed to undertake, including, *inter alia*, maintaining the landscaping, watering the lawn on a regular basis, changing burnt out lightbulbs, and replacing smoke detector batteries, garage door openers, ceiling fan remotes. (Sewall Lease ¶ 15; Gregory Lease ¶ 15.)

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obligations. This is not the law in Minnesota, and Plaintiffs cite no competent authority holding otherwise.

[redacted]

Finally, the split of repair and maintenance obligations in the lease is conspicuous as a matter of law. Plaintiffs again rely on *Wardin* to claim that the provisions are not conspicuous.[3] Unlike the lease in *Wardin*, parts of the repair and maintenance provision are set off in bold type face. (Sewall Lease ¶ 15; Gregory Lease ¶ 16.) Plaintiffs also clearly understood their obligations. (CG Decl., Ex. 2, S. Gregory Dep. 45:10–21, 50:15–51:6; Sewall Decl., Ex., 3 at 18).

3. The undisputed facts show that Defendants did not violate Section 504B.161 with respect to Dr. Sewall's home.

Although Plaintiffs continue to insist that Defendants shifted "all" repair and maintenance to them, they do not dispute the keys facts on that issue. [redacted]

[3] Plaintiffs cite other inapposite cases. *DeStefano v. Apts. Downtown, Inc.* is an Iowa case interpreting Iowa (not Minnesota) law that pertains to whether a landlord can contract out of Iowa's statutory obligations. 879 N.W.2d 155, 160, 181–82, 185 (Iowa 2016). *Stubel v. Captial One Bank (USA)* deals with the Truth in Lending act. 179 F. Supp. 3d 320, 325 (S.D.N.Y. 2016). *Partin v. NuWave, LLC* deals with disclaimers in an owner's manual in a products' liability case. 603 F. Supp. 3d 280, 285 (E.D. Va. 2002). None are relevant to Plaintiffs' claims.

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[redacted] And, although Dr. Sewall now claims that he was defrauded and charged illegal rent, there is no dispute that he voluntarily chose to renew his lease four times. (*Compare* Defs. MSJ at p. 18, *with* Pls. SJ Opp. at p. 8.) Finally, Dr. Sewall does not dispute that—through the Lease Purchase Program—he had the option to purchase the home for $22,800 *less* than Home Partners ultimately sold the home for. (Defs. MSJ at p. 18.)

Dr. Sewall requested 17 repairs during his five years at the home, ten of which were repaired and paid for by Defendants, three of which Dr. Sewall canceled, and two of which were duplicates of other requests. (*See* Cefalu Decl., Ex. 3.) The only repairs that Dr. Sewall requested, and Defendants declined to address, were the repair of a cosmetic fireplace and filling a small hole in the yard. (*Id.*) Because these repairs were cosmetic, Section 504B.161 did not require Defendants to make them, and Defendants never required Dr. Sewall to make them either. Based on Plaintiffs' opposition, which does not mention either issue, it appears that Dr. Sewall now agrees that neither the fireplace nor the hole are at issue in this case.[4]

Because Defendants addressed every repair that Dr. Sewall requested and that they were required to make, Dr. Sewall now contends he "made numerous repairs that were never compensated by Defendants." (Pls. SJ Opp. at p. 8.) These repairs included applying self-leveling

[4] [redacted]

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caulk, squeegee-ing water, washing dishes by hand, and other "handyman" responsibilities. It is undisputed that Dr. Sewall never reported most of these issues to Defendants. (Defs. MSJ at p. 17). Even if he had, Plaintiffs cannot seriously contend that these rise to the level of habitability issues—these issues did not keep Dr. Sewall from living in his home, and Section 504B.161 does not require Defendants to make cosmetic repairs, keep small amounts of water out of his garage, repair a dishwasher, or mow his lawn.

The remainder of the "fact issues" raised by Dr. Sewall relate to the withholding of his security deposit because of Pathlight's discovery of mold in his home after he moved out (Pls. SJ Opp. at pp. 7–9.) This is not a "repair and maintenance issue" that relates to the Minnesota covenants of habitability. Dr. Sewall did not disclose the mold and Pathlight did not discover it until after Dr. Sewall moved out. (*Id*. at 9.) The issue is whether Dr. Sewall provided timely notice of the damage, as required by his lease. (Defs. Counterclaim at ¶¶ 6–7, 27–29.) Defendants do not dispute that, had Dr. Sewall provided timely notice, it was Defendants' responsibility to fix and pay for the problem. (*Id.* at ¶ 5.) This dispute over timely notice is part of Dr. Sewall's security deposit claim and Defendants' Counterclaim, which are not a part of this Motion.

4. The undisputed facts show that Defendants did not violate Section 504B.161 with respect to the Gregorys' home.

Plaintiffs also do not dispute the key facts regarding the Gregorys. [redacted] There is no dispute that the Gregorys voluntarily

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chose to renew their lease in August 2022, even after joining this lawsuit, alleging they were victims of Defendants' allegedly illegal practices. (Defs. MSJ at pp. 18–19.)

Contrary to Plaintiffs' claim that "all" maintenance and repair was illegally foisted upon them, the Gregorys do not dispute that they did not perform any maintenance on the Brooklyn Center Home themselves, except for yard work, changing light bulbs, and pest control. (S. Gregory Dep. at 64:13–65:15.) They also do not dispute that Pathlight responded to nearly all of their maintenance and repair requests except those that were clearly resident responsibilities under the terms of the lease, such as certain pest control (although Pathlight did send a vendor when the problem persisted), the washer and dryer, and maid services. (Cefalu Decl., Ex. 3.)

While the Gregorys complain about a delayed move-in, it is not disputed that they were not required to pay any rent until move in. Similarly, the Gregorys complain that certain repairs took longer than they wished (floors, refrigerator, gutters), they do not assert, because they cannot, that Pathlight failed to make the repairs or pay for the repairs. (Pls. SJ Opp. at pp. 11–12.)

Plaintiffs suggest that Pathlight ignored a "gas leak" for an extended period of time. The Gregorys did not report a gas smell until November 21, 2022, when they contacted the gas company, CenterPoint. (S. Gregory Dep. 131:24–132:23; CG Decl., Ex. 4 at DEFS_00281731.) Within hours, CenterPoint turned off the gas going to the dryer, thereby resolving any safety concerns. (S. Gregory Dep. 131:24–132:23 ("A. No. The gas was cut off. He told us that we could leave out for a couple hours and we should be good."). The Gregorys "drove around" for a few hours and returned home that day. (*Id.* at 12:23–24, 132:20–23.) The gas was shut off only to the dryer, and gas was still supplied to all other appliances that required it. (*Id.* at 248:22–249:2.) Within hours of the Gregorys' noticing and reporting a gas leak, the home was safe. Section 504B.161 does not impose liability on landlords when the issue is remedied "within a reasonable

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time using an effective method." *Maine Heights*, 2020 WL 7330598, at * 3.[5] Further, as a gesture of goodwill, Pathlight ultimately replaced the Gregorys' dryer (which was in the home when they moved in and was not supplied by Defendants) because it continued to malfunction, even though Defendants had no obligation to do so per the terms of the lease or the LTA. (S. Gregory Dep. at 131:14–15.)

Admittedly, the home selected by the Gregorys had several issues. While Defendants' response to those issues took time, the undisputed record does not support Plaintiffs' claim in this lawsuit that Defendants violated 504B.161 by failing to maintain the home in reasonable repair and fit for the uses intended by the parties.

Finally, if the Court decides that the length of time it took to make a repair is relevant to liability or damages, then that simply underscores why this case is unsuitable for class certification. Whether any repair is made in a reasonable time is dependent on numerous factors, including vendor availability, how the tenant reported the problem (*e.g.*, did they report a malfunctioning appliance or a gas leak), whether parts or building materials are available, whether the landlord attempted reasonable methods that failed, and others. This information is not available in summary data and making the individualized determination for tens of thousands of repairs over seven years is impracticable and unmanageable. [redacted]

[5] The Gregorys reported other issues with their washer and dryer starting in April 2022, including that it smelled "like something is dying" and that it "smelled like . . . burning," but they did not report a gas smell until November 2022. (CG Decl., Ex. 4 at DEFS_00002885, PL003162, DEFS_00281741; *see also* Gregory Decl., Ex. 3 at 10, 13 (stating the "washer/dryer stopped working" and discussing a bad "pump" with a Pathlight representative); (S. Gregory Dep. 128:13–21, 131:24–10 (admitted it "smelled like a burning" and that the gas leak occurred later).)

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[redacted] This same analysis would be required for every putative class member that complains a repair took too long.

B. Defendants do not charge illegal late fees.

Plaintiffs contend that Defendants' leases violate the LTA because they allowed Defendants to collect a late fee of $100 if that amount is more than eight percent of the outstanding rent. (Pls. SJ Opp. at p. 33). Section 504B.177, however, only applies if a landlord charges more than the statutory amount. Minn. Stat. § 504B.177. The undisputed facts show that Defendants never charged the Gregorys a late fee exceeding eight percent of their overdue rent. (Cockson Decl., Ex. 10; Defs. MSJ at p. 13 n. 3.) In fact, Defendants charged the Gregorys late fees of less than $100 when that amount was eight percent of the outstanding amount. (*See, e.g.*, Cockson Decl., Ex. 10 ("2/06/2023").)

Defendants also did not charge a Gregorys a cumulative late fee in October 2022. (Pls. SJ Opp. at pp. 7–18.) The Gregorys failed to pay all amounts due in September 2022. (Cockson Decl., Ex. 10 at DEFS_00281436.) [redacted]

Finally, Plaintiffs ask the Court to hold that only charges identified in the Gregorys' lease as "base rent" are "Rent" under Section 504B.177. Plaintiffs acknowledge, however, that the term

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"rent" is not defined in the LTA. Under Minnesota law, this means that the parties are free to contract on what is included in rent under the lease. *Persigehl v. Ridgebrook Invs.*, 858 N.W.2d 824, 832 (2015). Here, the parties expressly agreed that "Rent" included "all Monthly Base Rent, Pro-Rated Rent and Additional Rent together with any other amounts due and payable by the Tenant under this Lease." (Gregory Lease ¶ 2.T.) Plaintiffs cite no Minnesota case preventing the parties from making this agreement.

C. Defendants do not charge illegal attorney fees.

The LTA does not bar Defendants from charging attorneys' fees if they are expressly provided by the terms of the lease. Minn. Stat. § 504B.172. Section 504B.172 simply requires reciprocal obligations if the tenant is the prevailing party in a proceeding, but it does not bar any other agreements. *Id.* If Defendants charge fees based on the terms of the lease, there is no violation of the law. *Persigehl*, 858 N.W.2d at 832 (Minnesota courts will not "'read into the statute a requirement that the Legislature has omitted.'" (*quoting Karl v. Uptown Drink*, *LLC*, 835 N.W.2d 14, 19 (Minn. 2013)). Section 504B.171 reads in full:

> If a residential lease specifies an action, circumstances, or an extent to which a landlord, directly, or through additional rent, may recover attorney fees in an action between the landlord and tenant, the tenant is entitled to attorney fees if the tenant prevails in the same type of action, under the same circumstances, and to the same extent as specified in the lease for the landlord.

Plaintiffs claim that this section "allows for landlord recovery of attorneys fees only when it is the prevailing party" and that it "expressly forbids" other kinds of fees. (Pls. SJ Opp. at pp. 17, 34, 44). Section 504B.171 does not, however, contain any words of prohibition or limitation (*e.g.*, "may not" or "only"), and Plaintiffs cite no authority for their proposed revision to the plain language of the statute.

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II. The Lease's savings clauses render any allegedly "illegal" provisions valid and enforceable.

Plaintiffs complain of several instances of Defendants' use of the "subject to Applicable Laws" language—in the late fee provision, in the security deposit provision, in provisions where Defendants state the homes are being leased "as-is," and in the agreed upon/negotiated rent provision. As stated in Defendants' opening brief, the point of this language is to balance Defendants' desire for a consistent resident experience across all of its markets with its desire to adhere to all state and local laws.

As Plaintiffs stated, a savings clause resolves any conflict between the language of a contract and applicable law "to preserve the remaining, non-conflicting contract language." *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 & n.16 (1st Cir. 2006). Plaintiffs identify a handful of examples where the lease contains a savings clause and claim there is no "non-conflicting contract language" if the allegedly illegal parts of these provisions are stricken, but that is simply not true:

- If the option to charge $100 is read out of the lease's late fee provision, that provision undisputedly complies with Minnesota Code § 504B.177, which allows 8% to be charged, as stated in the Lease;

- In the paragraph detailing the collection and use of tenant security deposits, the lease states that the landlord is not obligated to pay a tenant interest on the security deposit. If that specific term is read out of the security deposit paragraph, the remainder of that paragraph undisputedly complies with Minnesota Code section 504B.178, subd. 2; and

- Plaintiffs claim that a few instances in the lease where tenants agree to take the homes "as-is" conflicts with Minnesota's statutory covenants of habitability. If Plaintiffs' interpretation of the "as-is" language was correct (which is contrary to Defendants' interpretation), (*see* Defs. MSJ at p. 25), is read out of the Lease, the landlord's statutory covenants—which are implied in every single Minnesota lease by law—still apply.

In fact, this is precisely how Defendants operated: there is no evidence in the record that they ever charged $100 in lieu of an 8% late fee, failed to pay interest on a security deposit when required, or rested on the lease's "as-is" language to evade a repair that affected a resident's habitability.

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Further, none of the cases that Plaintiffs cite for the proposition that landlords cannot include savings clauses in leases pertain to a situation like this one, where the "subject to Applicable Laws" language is within the same sentence as the provisions it modifies. In *Leardi v. Brown*, the illegal language was in all capital, bold letters next to the savings clause, which contributed to (or was the sole source of) any potential confusion. 474 N.E.2d 1094, 1099 (Mass. 1985) (noting that the offending language was in capital letters and "bold face"). None of the cases cited by Plaintiffs in footnote 9 on page 37 even discuss savings clauses. Finally, Plaintiffs mispresent the holding of *Thompson v. St. Anthony Leased Housing Associates II, LP*. Plaintiffs insinuate that the holding of *Thompson* is that a rent escalation provision was illegal because it contained the phrase "in accordance with all applicable state and local laws" language. (Pls. SJ Opp. at p. 37). The fighting issue in *Thompson* was not whether rent could be pegged to "applicable state and local laws"; rather, it was whether the benchmark for acceptable rent increases was set by federal HUD law or a metro housing authority. 979 N.W.2d 1, 11–12 (Minn. 2022).

Put simply, Defendants dispute that its lease terms are illegal on their face. Even if they are illegal, the savings clauses within the lease override any illegal provisions. Finally, and most importantly, Plaintiffs have no evidence that Defendants applied any of these allegedly illegal terms in a manner inconsistent with Minnesota law.

III. Plaintiffs are bound by their signatures on the lease.

Plaintiffs next spend several pages arguing that the lease is an adhesion contract and that, therefore, "standard contracting principles do not apply." (Pls. SJ Opp. at pp. 38-41). Even if Plaintiffs are correct that the leases are contracts of adhesion (which Defendants dispute), contracts of adhesion are not *per se* illegal. *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W. 687, 693–94 (Minn. 2018). The significance of a contract being one of adhesion is that any

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ambiguities are resolved against the drafter. *Id*. But, Plaintiffs explicitly state that they "do not argue that the relevant terms of the Leases are ambiguous." (Pls. SJ Opp. at p. 40 n. 10). Therefore, the question of whether the leases are contracts of adhesion is not relevant to Plaintiffs' claims.

Plaintiffs cite cases claiming that "[c]ourts have refused to enforce adhesive terms" in certain situations (Pls. SJ Opp. at p. 39). However, they have not articulated why these specific cases, with specific sets of facts (for example, a term that "insulated a landlord from personal injury and negligence claims," a fact scenario that is undisputedly not at issue in this lawsuit), have any bearing on Plaintiffs' claims.

The record plainly shows that Defendants ***want*** residents to understand the legal relationship being created through the Lease Purchase Program. Plaintiffs do not dispute that they were encouraged to consult with an attorney.[7] Although Plaintiffs attempt to create a fact issue about when they were provided a sample lease, the record plainly shows that they received sample leases weeks before they were required to sign, see *infra*.

Finally, Plaintiffs claim that Defendants "have not cited a single case to support their claims that Plaintiffs" agreed to the leases. (Pls. SJ Opp. at p. 41). This is patently false: it is Plaintiffs who have not attempted to counter or distinguish any of the many cases cited by Defendants that stand for the proposition that people who voluntarily sign contracts are bound by their provisions. *See, e.g.*, *Currie State Bank v. Schmitz*, 628 N.W.2d 205, 210 (Minn. Ct. App. 2001) (quotation marks and citation omitted); *see also Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982);

[7] Plaintiffs insist that "no reasonable person" would pay an attorney to review a lease for a rental home. But they present no evidence that this is accurate, and they also ignore that Dr. Sewall and the Gregorys were not merely entering into a periodic lease of the home; rather, they were a part of the Lease Purchase Program that included both a lease and a Right to Purchase.

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Shaughnessy v. New York Life Ins. Co., 203 N.W. 600, 602 (Minn. 1925); *Cent. Metro. Bank v. Chippewa Cnty. State Bank*, 199 N.W. 901, 903 (Minn. 1924).

IV. Defendants' leases do not violate Minnesota's consumer protection laws.

Plaintiffs claim that Defendants' leases violate Minnesota's Consumer Fraud Act ("CFA") and Deceptive Trade Practices Act ("DTPA") for various reasons, none of which are persuasive. This Court should grant summary judgment in favor of Defendants on Plaintiffs' consumer protection law claims.

A. Defendants did not charge "illegal rent."

Plaintiffs' first argument, which appears to be some sort of catch-all, is that Defendants' leases contain "duplicative and unlawful fees and recit[e] that all terms comply with applicable law." (Pls. SJ Opp. at pp. 42–43). Plaintiffs do not dispute that the amounts Defendants charge in rent are disclosed long before any resident is required to sign a lease and that the rents disclosed never change. (Defs. MSJ at pp. 5–6, 9.) If residents believe the rents are too high, they can leave without penalty at the end of any year. (Defs. MSJ at p. 10.) None of the Plaintiffs did so. (Defs. MSJ at pp. 17–18.)

Plaintiffs focus on whether Defendants and Plaintiffs did or did not separately "negotiate" or "agree to" a reduction in rent for the maintenance and repair undertaken by the Plaintiffs under the terms of the "Maintenance and Repair" section of their leases. (Pls. SJ Opp. at pp. 28–29.) There are no disputed facts related to these terms of the lease or Plaintiffs' claim of fraud. The issue for the Court is whether the lease language—whereby Plaintiffs acknowledged that the rental rate would be higher without them conducting certain repair and maintenance—is fraudulent. Defendants' position is that the rental rate and repair obligations of the lease were "negotiated" and "agreed to" pursuant to the parties' dealings leading up to the signing of the lease and pursuant

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to the offer and acceptance inherent in the formation of the contract. Plaintiffs do not dispute that they could have rejected the deal at any time—even after Home Partners had purchased the houses Plaintiffs' chose, and only forfeited their $75 application fee. Instead, Plaintiffs chose to engage in the program under the terms stated in the lease.

B. Defendants' fees are disclosed and are not "deceptive."

Plaintiffs argue that certain fees contained in their leases are deceptive, but all the fees are disclosed. Plaintiffs do not even argue that they were charged fees that were inconsistent with the express written lease terms.

As a preface to their argument about specific fees, Plaintiffs claim the *Persigehl* case, which expressly states that "parties are free to contract to whatever terms they agree, provided that those terms are not prohibited by law," 858 N.W.2d at 832, only applies to the narrow issue of utility billing within multi-unit residential housing. This, of course, is not true; the freedom-of-contract holding of *Persigehl* has been invoked by Minnesota courts in other contexts. *Bartell v. Tara Mut. Fire Ins. Co.*, 2002 WL 2297807 (Minn. Ct. App. June 27, 2022) (insurance coverage for a grain dyer); *Jama v. Garbiye*, 2021 WL 1168940 (Minn. Ct. App. Mar. 29, 2021) (money wiring service); *Bluffs on Sans Pierre Townhomes & Villas Ass'n v. Wooddale Builders, Inc.*, 2018 WL 455 8317 (Sept. 24, 2018) (homeowners' association agreement).

1. Defendants' attorney fee lease provision is lawful.

Similarly, because Defendants' attorney fee provision does not violate the law, it is also not deceptive. (*See supra* Section I.C.)

2. Defendants' insurance program is lawful.

Next, Plaintiffs claim that their insurance liability program is unlawful, but they do not articulate why. Plaintiffs appear to take the position that Defendants must present some statute or

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case that "allows" them to require liability insurance. However, again, *Persigehl* stands for the proposition that parties can enter into contracts with whatever terms they agree to, provided that the terms are not illegal. Plaintiffs have cited no authority showing that Defendants' insurance program is illegal.

Plaintiffs attempt to muddy the water on this issue by citing to the fact that Defendants have the potential to earn a profit through this insurance program. Plaintiffs cite *Graphic Comms. Local JB Health & Welfare Fund A vs. CVS Caremark Corp.*, but that case does not have anything to do with insurance or "pass-through" fees. 850 N.W.2d 682 (Minn. 2014). *Coleman v. CubeSmart* pertains to situations where companies claim they are "passing through" fees to another party but keeping part of the fees for themselves. 328 F. Supp. 3d 1349, 1362–63 (S.D. Fla. 2018). *Coleman* is irrelevant, because Defendants are upfront that they themselves are administering the insurance—they do not claim that they are "passing through" the fee to a different insurance company.

3. Defendants' UBSF and HVAC filter fees are lawful.

Next, Plaintiffs attempt to find illegality with respect to Defendants' UBSF and HVAC filter fees. Plaintiffs claim the UBSF fee is deceptive because it is "not explained in the lease," but it is undisputed that there is a UBSF provision in the lease and that Plaintiffs could have asked about it if they did not understand it. (Gregory Lease ¶ 1.J.) The amount of fees charged to each Plaintiff is disclosed on Plaintiffs' ledgers, which are in the record, and those fees are consistent with what was provided in their leases. (Cockson Decl., Ex. 10, Gregory Ledgers.)

Plaintiffs strain to characterize Defendants' requirement that their tenants make periodic and routine replacements of the HVAC filters in their homes (a task that takes zero skill and, at most, a couple minutes of time) as Defendants' attempt to shift their burden under Minnesota

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Statute 504B.161 to maintain "safe air quality" to Plaintiffs. This is absurd, of course, and Defendants do not believe that Plaintiffs would prefer to schedule a time each month for a vendor to come to their homes and perform the filter replacement.

C. Defendants do not defer necessary maintenance and repair.

Plaintiffs lump a series of seemingly unrelated arguments into a claim that Defendants defer necessary maintenance and repair. The undisputed facts show that there was no "fraud" or "deception" related to how Defendants made Plaintiffs' homes ready for occupancy and how they communicated with Plaintiffs about that process.

First, Plaintiffs claim that they did not receive sample leases prior to signing their own leases. Home Partners sends all approved prospective residents a sample lease and right to purchase agreement with their approval email. (Scallon Decl. ¶ 9.) Instead of confronting this undisputed fact head on, Plaintiffs now claim they do not "recall receiving the sample agreement." (Pls. SJ Opp. at p. 22; Sewall June 27 Decl. ¶ 4; Gregory June 27 Decl. ¶ 4.) However, Defendants produced an email to Ms. Gregory showing the attached sample lease and right to purchase agreement sent on May 28, 2021—***24 days*** before they signed their lease.

SCREENSHOT OF CONFIDENTIAL EXHIBIT REDACTED

(Scallon Decl., Ex. 5 (text box with enlarged text for readability).) Defendants produced the attachment, with contains the sample lease and right to purchase, and filed a true and correct copy with the Court. (*See* Scallon Decl., Ex. 6.) Defendants produced an approval letter sent to Sewall telling him to review his sample lease and right to purchase agreement with a legal advisor on June 6, 2016—***22 days*** before he signed his lease.

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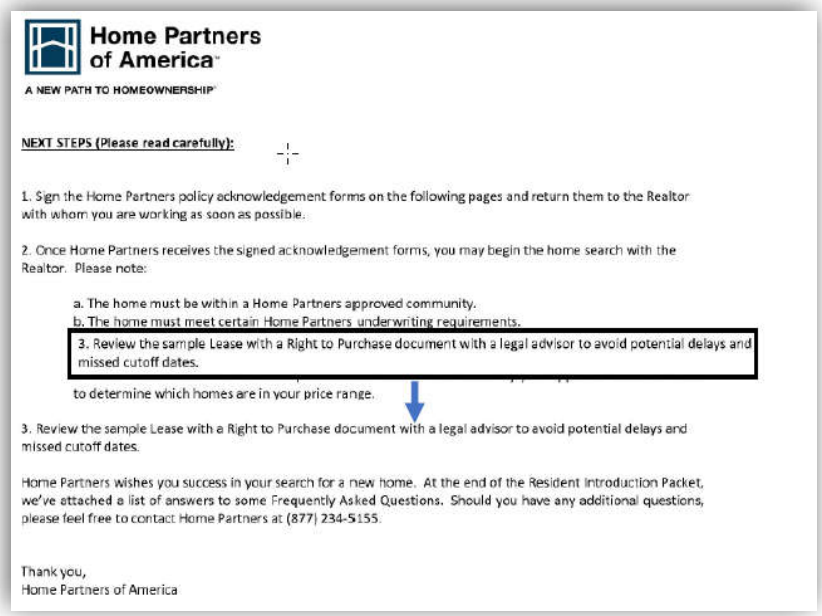

Home Partners of America

A NEW PATH TO HOMEOWNERSHIP

NEXT STEPS (Please read carefully):

1. Sign the Home Partners policy acknowledgement forms on the following pages and return them to the Realtor with whom you are working as soon as possible.

2. Once Home Partners receives the signed acknowledgement forms, you may begin the home search with the Realtor. Please note:

a. The home must be within a Home Partners approved community.
b. The home must meet certain Home Partners underwriting requirements.
3. Review the sample Lease with a Right to Purchase document with a legal advisor to avoid potential delays and missed cutoff dates.

to determine which homes are in your price range.

3. Review the sample Lease with a Right to Purchase document with a legal advisor to avoid potential delays and missed cutoff dates.

Home Partners wishes you success in your search for a new home. At the end of the Resident Introduction Packet, we've attached a list of answers to some Frequently Asked Questions. Should you have any additional questions, please feel free to contact Home Partners at (877) 234-5155.

Thank you,
Home Partners of America

(Scallon Decl., Ex. 4 (text box with enlarged text for readability).)[8] The fact that none of the Plaintiffs "recall" receiving sample leases, when all evidence indicates that they did, does not amount to a violation of Minnesota's consumer protection statutes.[9]

Next, Plaintiffs claim that "common sense" dictates that prospective residents would not perform their own home inspections and complain that Defendants did not share the results of the inspections they hired others to perform (despite the fact that the inspection reports prohibited Defendants from doing so). Defendants agree that they did not provide the housing inspection reports to Dr. Sewall and the Gregorys. Plaintiffs do not allege that this is required by law or even a standard practice in the industry.

[8] Due to an inability to retrieve certain emails from 2016, Defendants did not produce the email to Dr. Sewall with the attached sample lease and right to purchase.

[9] Furthermore, if the Court decides that the timing of when residents receive a sample lease is relevant to liability and damages, then this case is unsuitable for class treatment, as individualized investigations of delivery of the sample leases would need to be conducted for every resident. In Plaintiffs' view, this would apparently need to include a deposition of every resident, so they could be asked about what they "recall."

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Whether Defendants shared the results of the inspections is immaterial to determining liability under Minnesota's consumer protection statutes. Plaintiffs do not allege that this is required by law or even a standard practice in the industry. (Pls. SJ Opp. at p. 49.) There is no legal obligation for Defendants to have delivered to Plaintiffs "perfect" houses, and, in fact, the Lease specifically disclaims that the homes will be of a certain quality or condition. The meaning of the "as-is" clause in the leases, when read in conjunction with the other lease terms (as it must be) meant that Defendants would deliver to Plaintiffs the homes with the agreed-to make ready work performed. (Defs. MSJ at pp. 25–26.) [redacted]

There is no basis for Plaintiffs' claim that Defendants were required to perform more work on the home than what was agreed to in the make-ready costs. For example, Plaintiffs suggest that Defendants should have replaced the roof of Dr. Sewall's home based on the inspection report. However, Dr. Sewall does not and cannot claim that the house was not in reasonable repair during his tenancy as a result of Defendants' decision to not replace the roof, or that Pathlight failed to make any requested repairs during Dr. Sewall's tenancy related to the roof or water intrusion.[10]

[10] If the Court disagrees and finds that liability and damages can only be determined by assessing whether the make-ready work was sufficient, in light of the property inspection report, then this case is not appropriate for class certification. Line-by-line review of inspection reports—and comparison to the make-ready work performed by Defendants—will be required for thousands of Minnesota properties. Defendants are entitled, for each property, to defend themselves by showing that the decisions made for each property were justified and did not lead to any habitability issue. This would require investigation into each putative class members' experience and home to determine whether Defendants' failure to conduct make-ready work violated Sec. 504B.161.

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In short, there is no evidence of "deception" in how Defendants prepare homes for occupancy or communicate with residents about this process. The undisputed facts here establish that Defendants provided the homes to Dr. Sewall and the Gregorys in a habitable condition and—as described above—did not refuse to make any repairs necessary to keep the homes in "reasonable repair."

D. Plaintiffs have not been injured by any alleged violation of Minnesota's consumer protection laws.

According to Plaintiffs, the sole evidence that they have been injured by any alleged violation of Minnesota's consumer protection laws is that they have "overpaid for rent and other illegally charged fees." (Pls. SJ Opp. at p. 51). As discussed above, there is no evidence that they overpaid for rent or paid any fees beyond what they agreed to in the Lease. In other words, Plaintiffs have not suffered any harm.

E. Plaintiffs are not at risk for future harm.

The Gregorys claim they are at risk for future harm under Minnesota's consumer protection statutes because they are still subject to the lease—but they cannot credibly claim they continue to be deceived or misled by any lease provisions. (Pls. SJ Opp. at p. 52). *Bhatia v. 3M Co.*, 323 F. Supp. 3d 1082, 1097 (D. Minn. 2018) ("[N]ow that Plaintiffs are aware of the alleged defects . . . [and] alleged misrepresentations, they cannot show that they are likely to be deceived by such representations in the future."). The cases cited by Plaintiffs do not change this outcome. The court in *Blue Cross & Blue Shield of Minnesota v. Wells Fargo Bank, N.A.* was deciding whether to dismiss a DTPA claim pursuant to a motion to dismiss at an "early stage of the proceedings," and in *Surdyk's Liquor v. MGM Liquor Stores, Inc.*, the court was ruling on a motion for a preliminary injunction at a similarly early stage in the case. Unlike in those cases, the parties here have a well-developed record showing that Plaintiffs' eyes are wide open regarding the lease terms. Further,

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Plaintiffs cannot dispute that now that Dr. Sewall has purchased another home (not from Defendants), he is no longer at risk of future harm.

In sum, the undisputed evidence shows that Plaintiffs do not have a credible claim for violation of Minnesota's consumer protection statutes, and this Court should dismiss Plaintiffs' CFA and DTPA claims.

V. Plaintiffs' good faith and fair dealing claim fails as a matter of law.

In their Opposition, Plaintiffs appear to first claim that Defendants breached the covenant of good faith and fair dealing because Defendants do not disclose how they calculate the rent they charge. Plaintiffs cite absolutely no authority for the proposition that this is required by law (or even commonly done). Again, Plaintiffs do not dispute that Plaintiffs chose their own homes, Defendants disclosed the rental rates long before Plaintiffs were required to sign a lease, and those rental rates never changed. (Defs. MSJ at pp. 4, 5, 7, 9) The internal considerations Defendants use to set rents are irrelevant. If rents were not priced competitively, homes would not rent, and Defendants' business would fail—that is simply how the market works. It is obviously not "bad faith" for a company to sell products without explaining to consumers every reason for the prices it charges.

Next, Plaintiffs claim that Defendants breached the covenant of good faith and fair dealing with a laundry list of other conduct, but all fall short:

- Defendants do not dispute that there was no "move-out inspection" for Dr. Sewall, but neither the law nor the lease require one, and the absence of such inspection cannot possibly constitute "bad faith."

- Similarly, there can be no dispute that—contrary to Plaintiffs' demonstrably inaccurate statement that Defendants never provided justification for the withholding of Sewall's security deposit—Defendants in fact sent him many photographs of the damage:

> Q: …Were you surprised at the extent of damage you saw in the photos [Defendants] sent [after move out]?

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> A: [Barry Sewall] I was surprised only by some of the unusual photos that were presented….The first set of photos [had] probably, half a dozen photos that I responded to…. So the answer is, no, I wasn't surprised. ***I was surprised by the number and subsequent scope of photos***….

(CG Ex. 1, Sewall Dep. 122:7-21 (emphasis added).)

- It is undisputed that the Gregorys' rental assistance check for $10,800 was received and credited to the Gregorys' account and that Defendants waived all late fees incurred during this process. (S. Gregory Dep. 236:2–24; Cockson Decl., Ex 10.) The Gregorys made "zero payments" for April through August 2022, incurring five late fees on the sixth day of each month, all of which Defendants waived. (S. Gregory Dep. 237:13–20; Cockson Decl., Ex. 10.)

- Plaintiffs invoke the Gregorys' dryer issue as a health and safety concern; as discussed above, the Gregorys' dryer was repaired within hours after they understood the issue was a gas leak. Plaintiffs also bring up pest control. It is undisputed that pest control is a resident responsibility per the terms of the lease. (Gregory Lease ¶ 16.) Pathlight nonetheless paid for it when the Gregorys' efforts did not control the issue.

- Finally, Plaintiffs claim—for the first time ever, after extensive written discovery and having taken ten depositions (including eight of Defendants' employees)—that Defendants' portal was shut down for a period of time, interfering with their ability to timely pay rent. Plaintiffs did not produce any evidence that this shut-down occurred.

There simply is no evidence that Defendants breached the implied covenant of good faith and fair dealing, and this Court should grant summary judgment in favor of Defendants on this claim.

VI. Plaintiffs have no valid rescission claim, unjust enrichment claim, or claims for equitable relief.

Next, Plaintiffs' rescission and unjust enrichment claims and claims for equitable relief are predicated on the same allegations as their LTA and consumer protection claims—that the leases were allegedly illegal, unenforceable, deceptive, and misleading. As stated in detail above, the evidence does not support Plaintiffs' claims. This Court should grant summary judgment in favor of Defendants on Plaintiffs' rescission and unjust enrichment claims and claims for equitable relief.

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VII. Plaintiffs admit the Gregorys have no claim related to their security deposit.

Finally, Plaintiffs explicitly "agree that the Gregorys do not yet have a claim under Minn. Stat. § 504B.474." (Pls. SJ Opp. at p. 56). Based on this concession alone, this Court should grant summary judgment in favor of Defendants on the Gregorys' security deposit claim.

VIII. Plaintiffs' Rule 56.04 arguments are not compelling.

There is no merit to Plaintiffs' arguments that the Court cannot decide Defendants' Motion because Plaintiffs must be given: (1) the opportunity—at some undisclosed, future time— to move to compel additional discovery; and (2) the opportunity to depose Christopher Scallon.

Discovery closed in this case on June 14, 2023. Plaintiffs did not bring a motion to compel before the close of discovery and have not brought a motion to compel since, despite the fact that the Court has offered the parties an expedited process to resolve such disputes. If Plaintiffs do not have the discovery they need to litigate the named Plaintiffs' claims, it is due to their own lack of diligence, which is not a cause for the Court to delay adjudication of Defendants' Motion.[11]

Plaintiffs concede that Defendants disclosed Chris Scallon before discovery ended. Additionally, and more importantly, Plaintiffs fail to mention that Chris Scallon was disclosed on April 28, 2023, during the deposition of Mr. Scallon's supervisor, Greg Slankard:

25 Q Who were your direct reports in 2023?

1 A My direct reports have changed over
2 2023. Currently my direct reports are Christopher
3 Scallon, Nicholas Sohl, Harrison Nichols, Nicole
4 Cooper, Robert Lindemann, and Gyna McElwee.

* * *

[11] Notably, Plaintiffs have completely failed to respond to Defendants' June 1 and June 21, 2023 correspondence regarding Plaintiffs' demands for additional discovery about The Master Resident Liability Program and the calculation of monthly rent. (*See* CG Decl., Ex. 8.)

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> Q And is the applications team a team that you supervise?
>
> A The applications team reports up to Chris Scallon who reports up to me. They are a part of the acquisitions team.

(CG Decl., Ex. 7, Slankard Dep. 44:25–45:4, 52:11–15.) Also, notably, Plaintiffs' counsel had the opportunity to, and did, question Mr. Slankard and other Defendants' witnesses about the "applications team," whose work Mr. Scallon describes in his declaration. (*See id.*) Moreover, there have already been fifteen depositions in this case, of which Plaintiffs have taken ten. (CG Decl., Ex. 8.) Plaintiffs knew about Scallon and could have chosen to depose him before the close of discovery, and there is no basis for the Court to re-open fact discovery and delay adjudication of Defendants' motion.

CONCLUSION

For the reasons stated above, this Court should grant summary judgment in favor of Defendants on all Counts with respect to the Gregorys and on Counts I, II, III, VI, VII, VIII, IX, and X with respect to Dr. Sewall.

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