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 1 LLC, and OPVHHJV LLC, d/b/a Pathlight Property Management,

Defendants.

Court File No.: 27-cv-22-10389
Judge Christian Sande

Defendants' Opposition to Plaintiffs' Motion for Class Certification

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INTRODUCTION

Plaintiffs seek certification of two classes: a damages class under Minnesota Rule of Civil Procedure 23.02(c) and an injunctive relief class under Rule 23.02(b). Each class will consist of over 3,500 current and former residents of approximately 2,000 unique single-family homes. The core claims in this case center on whether Defendants complied with Minnesota's Landlord and Tenant Act, Chapter 504B ("LTA") when addressing maintenance and repair issues, security deposits, and charging fees.

Because adjudicating these core claims necessarily requires the Court to address the unique circumstances of every home and every putative class-member, Plaintiffs attempt to reframe this case as a dispute over the legality of Defendants' leases and repackage their core LTA claims as claims under Minnesota's Consumer Fraud Act ("CFA"), Deceptive Trade Practice Act ("DTPA"), and for unjust enrichment, recission, and breach of the covenant of good-faith and fair-dealing. But no matter how Plaintiffs reframe the issues in this case, the specifics of each putative class-member's maintenance and repair requests, the conditions of their unique home, the specifics of how Defendants addressed each request, the actual fees charged and paid, and whether and why Defendants withheld any security deposits will drive the resolution of this case. These individual issues (and others) will predominate over any common ones. Accordingly, Plaintiffs have failed to meet their burden of showing that this case is appropriate for class certification under Rule 23.02(c) or that it is sufficiently cohesive to meet the requirements of Rule 23.02(b).

FACTUAL BACKGROUND

I. Overview of the Lease Purchase Program.

Home Partners has operated in Minnesota since 2014 to help people access single-family rental homes while providing them with a potential path to homeownership through its Lease Purchase Program. (Declaration of Emily Cefalu (June 15, 2023) ¶¶ 3–7 ("Cefalu Decl.").) The

idea for Home Partners' Lease Purchase Program came out of the Great Recession, after which it became much more difficult for moderate-income earners to obtain mortgages. (*Id*. ¶ 4.) Home Partners purchases homes and then leases them to residents while providing them the right—but not the obligation—to purchase the home at a predetermined price at any point during the lease. (*Id.* ¶ 5; *see also* Declaration of Michael F. Cockson (June 16, 2023) at Ex. 7 ("MC Decl.").) If residents later decide they do not want to rent or purchase the home, they can leave after any one-year lease term without penalty. (Declaration of Anne T. Regan at Ex. 5 (May 12, 2023) ("Regan Decl."), Gregory Lease ¶ 3 ("Gregory Lease") (providing that tenant can terminate with sixty days' written notice prior to the end of any one-year term).) Residents can rent the home for up to five years. (*Id*. (providing for automatic renewal for five years, unless notice is given by resident); MC Decl., Ex. 7.) There is no penalty if the resident decides not to purchase the home. (*See* Cefalu Decl. ¶¶ 5, 7; *see also* MC Decl., Ex. 7.)

Home Partners handles the application and acquisition portions of the process; Pathlight prepares the home for the resident, manages the property while occupied, manages move-outs and security deposit dispositions, and prepares properties for re-rental. (Cefalu Decl. ¶ 8.)

A. The application process.

Prospective residents typically find Home Partners either on the internet or by a referral from a real estate agent. (Cefalu Decl. ¶ 11.) Interested applicants first fill out a free pre-qualification questionnaire asking for basic information. (Decleration of Christopher Scallon (June 15, 2023) ¶ 6 ("Scallon Decl.").) If an applicant is pre-qualified, they are invited to proceed with the full application online for a $75 fee. (*Id*. ¶ 7, Ex. 3.) If approved, Home Partners sends the prospective resident a letter informing them of the approval and setting their maximum potential monthly rent. (*Id*. ¶ 8, Exs. 4–5.) The approval letters also include a sample of the lease and a right

to purchase agreement.[1] (*Id*. ¶ 9, Ex. 6.)

Prospective residents are given the sample lease and right to purchase agreement early in the process—before any substantial financial or time commitment—so that they can obtain legal advice and determine whether the program is suitable for their needs. (Scallon Decl. ¶ 10.) Indeed, the approval letter instructs applicants to "review the [lease and right purchase agreement] *and consult with professional legal counsel as soon as possible*." (*Id*. ¶¶ 9–10, Ex. 6 at DEFS_00288893 (emphasis added).)

The approval letter also details the next steps, including how to search for a home and submit it to Home Partners for approval. (*Id*. ¶ 11, Exs. 4–6.) The approval is also clear that once Home Partners enters a contract to purchase a home for the prospective resident, if the resident wants to proceed, they need to sign the lease and right to purchase agreement within two days and pay a deposit of two months' rent. (*Id.*)

B. Approved applicants choose their single-family home.

A key feature of the Lease Purchase Program is that residents are able to choose the home that they want to rent and possibly buy. (Cefalu Decl. ¶ 10.) Applicants are not limited to Home Partners' existing inventory but can select a home from housing inventory on the market. (*Id*. ¶ 12; *see also* MC Decl., Ex. 7 at DEFS_00004341.) Prospective residents can search for homes on Home Partners' website, which identifies the Lease Purchase rental rates for homes available on the multiple listing service ("MLS"). (Declaration of Nathan Brennaman (June 19, 2023) at Ex. 9, Deposition of Jeffery Polanzi at 91:10–19 ("NB Decl.").) Prospective residents can also work with local realtors and tour as many homes as they wish. (Cefalu Decl. ¶ 13; Scallon Decl. ¶ 12.)

[1] Since the beginning of the class period, all prospective residents approved for the Lease Purchase Program are provided a sample lease and right to purchase agreement with their approval letter. (Scallon Decl. ¶ 9.)

Once a prospective resident selects their desired home, the agent working with them submits it to Home Partners for approval. (Scallon Decl. ¶ 13.) Home Partners evaluates the home on a set of basic criteria that are disclosed on its website. (*Id*., Ex. 7.) These criteria have changed over time but are meant to ensure that the home is located within areas where the Home Partners' Lease Purchase Program operates and is of a certain quality. (*Id*.; *see also* Cefalu Decl. ¶ 7.)

After Home Partners approves the chosen home, the prospective resident receives an email informing them of the approval and providing the rental rates and estimated purchase prices for all five years (the "anticipated terms"). (*Id*. ¶ 14, Exs. 8–9.) The rental rates do not change, regardless of the price Home Partners ends up paying or the amount Home Partners spends to prepare the home for occupancy. (*Id*.) The anticipated terms again instruct the prospective resident to carefully review all documents with an attorney. (*Id*.) At this point, the prospective resident can still decline to proceed with the transaction and forfeit only their $75 application fee. (*Id*. ¶ 15.)

Before making an offer on the home, Home Partners requires the prospective resident to sign the anticipated terms. (Scallon Decl. ¶ 16.) If the prospective resident does so and instructs Home Partners to purchase the home, Home Partners then attempts to make the purchase for the lowest price possible. (*Id*.) This process is disclosed to the prospective resident in the sample Right to Purchase Agreement and in the anticipated terms. (*Id*., Ex. 6 at DEFS_00288893, Exs. 8–9.)

C. Prospective residents can walk away, even at the last minute.

After Home Partners enters an agreement to purchase the home, a member of the leasing team sends the prospective resident an email informing them of the purchase. (Scallon Decl. ¶ 17, Ex. 10.) The final lease and right to purchase agreement—which are the same as the samples but populated with the property, rent, and option price information—are then delivered for review and execution. (*See id.*) The prospective resident has two days to sign the lease and right to purchase agreement and pay the deposit. (*Id*.) Even at this point, the prospective resident can walk away and

only forfeit a $75 application fee.[2] (Scallon Decl. ¶ 17.) Home Partners wants applications signed in two days because it is under contract for the house; if the prospective resident decides not to move forward, Home Partners has a better chance of cancelling the purchase. (*Id*.)

D. The Lease Purchase Program is designed to appeal to people with different backgrounds, goals, and preferences.

Although the basics of the Lease Purchase Program are straightforward, it is designed to appeal to different people, in different circumstances, with different goals. (Cefalu Decl. ¶ 6.) For example, the program may appeal to a first-time homebuyer who is cautious about whether they are ready for the responsibilities of home ownership; it may appeal to someone who is relocating to a new city but not ready to commit to a specific neighborhood or home; it may appeal to someone who is not yet able to obtain a mortgage but may be ready within five years; or it may simply appeal to someone who is looking to rent a single-family home but is unable to find an existing home on the rental market. (*Id.*; *see also* MC Decl., Ex. 7 (explaining LPP target demographics).) Each person will also have different tastes, preferences, and requirements for the home they choose, which shape their experience with the Lease Purchase Program. (*Id*.) The named plaintiffs, Dr. Barry Sewall and Mr. Jerome and Mrs. Shamika Gregory, show some of these differences.

Plaintiff Dr. Sewall is a radiologist. (Declaration of Berry Sewall (May 10, 2023) at Ex. 3, Supp. Answers to Defs.' Interrogs. at 21 ("Sewall Decl.").) He is also a prior homeowner that turned to the Lease Purchase Program because he was "coming out of a divorce and a big house." (NB Decl., Ex. 1, Sewall Dep. 18:15-19 ("Sewall Dep.").) He engaged a realtor to help him find a home that was close to his job, parents, and brother and that had space in the garage to store "woodshop equipment," hardwood floors, and taller ceilings. (*Id*. at 36:13-21, 44:19-45:10.)

[2] [redacted]

There were "precious few" houses that met his criteria on the existing rental market. (*Id*. at 36:16–21.) After looking at "three or four homes," Dr. Sewall found the listing for 12817 Jane Lane, Minnetonka ("the Minnetonka Home"), toured it, and decided he wanted to live there. (*Id*. at 36:16-21, 45:18-21.) In May 2016, Dr. Sewall filled out an application, which was approved. (Scallon Decl. ¶¶ 6–8, Ex. 4.) After receiving the sample lease and right to purchase agreement, he informed Home Partners that he wanted to move forward. (*Id.*; Sewall Dep. 37:20–24.) Sewall then received the anticipated terms that provided locked-in rental rates for five years and estimated right to purchase amounts. (Scallon Decl. ¶ 14, Ex. 8.) Home Partners purchased the home and sent Sewall the final lease and right to purchase agreement, which Sewall signed on or about June 28, 2016. (Regan Decl., Ex. 4, Sewall Lease at DEFS_00005598 ("Sewall Lease").)

The Gregorys have never owned a home and never rented a standalone single-family residence. (Brennaman Decl., Ex. 3, J. Gregory Dep. at 63:20-23 ("J. Gregory Dep.").) They have four children, and in their search, they were concerned with "a good neighborhood for the kids for school . . . [and] a house that would fit [their] family size." (*Id*., Ex. 2, S. Gregory Dep. 26:11-16 ("S. Gregory Dep.").) They wanted a safe neighborhood, highway access, for their kids to attend Park Center school, and to live close to their relatives. (J. Gregory Dep. 16:20-25, 17:11-14.)

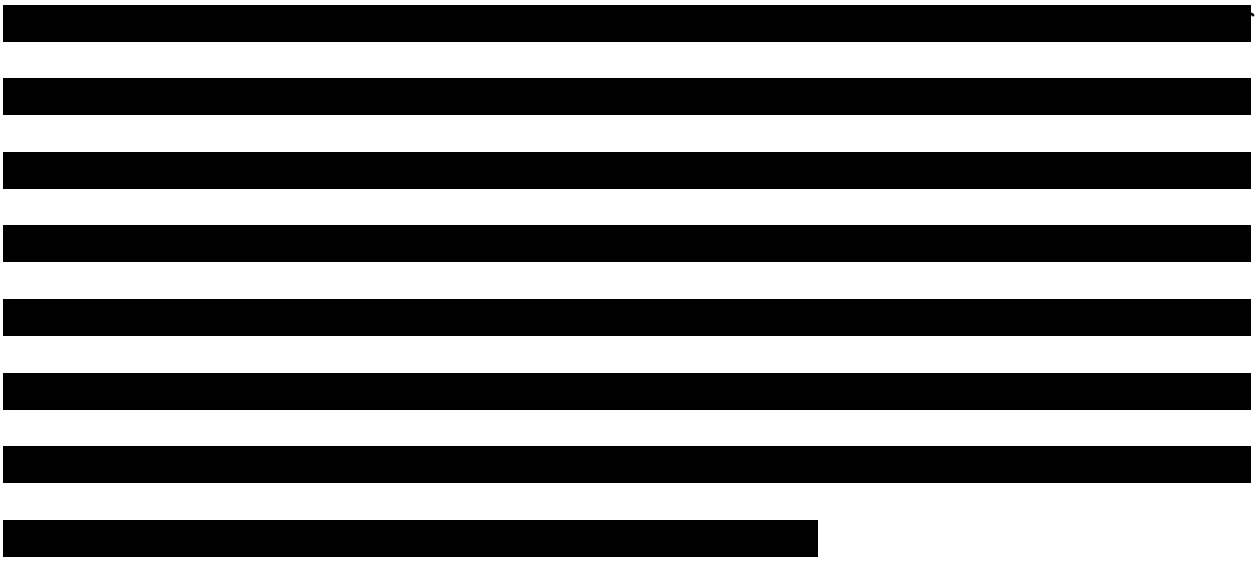
The Gregorys came across Home Partners while looking online for rentals. (S. Gregory Dep. 26:20–27:1.) They looked at "maybe five" homes with a realtor. (*Id*. at 18:13–15.) Eventually they came across 707 69th Avenue N, Brooklyn Center (the "Brooklyn Center Home"), which was at the time undergoing renovations by the seller. (*Id*. at 29:4-13.) They personally visited the home twice. (*Id*. at 29:14–15.) In May 2021, they filled out a Home Partners application. (Scallon Decl. ¶¶ 7–8, Ex. 5.) After receiving the sample lease and right to purchase agreement, the Gregorys informed Home Partners that they wanted it to buy the Brooklyn Center Home and rent it to them,

upon which Home Partners sent the Gregorys the anticipated terms. (Scallon Decl. ¶¶ 14–16, Ex. 9.) Home Partners purchased the home and the Gregorys executed the final lease and right to purchase agreement on July 27, 2021. (Gregory Lease at DEFS_00002801.)

E. Defendants prepare all purchased homes for occupancy.

If a resident signs the lease and right to purchase agreement, Home Partners moves forward to close on the home and then Pathlight begins a "make ready" process to prepare the home. (Scallon Decl. ¶ 19; Cefalu Decl. ¶ 15.) This process includes making improvements identified in a property inspection report. (Cefalu Decl. ¶ 15.) It may also involve replacing the flooring, repainting the home, and installing a new refrigerator. (*Id.*; *see also* NB Decl., Ex. 5.) Residents can request flooring and paint color updates, and they can request a refrigerator if the seller is not leaving one. (Cefalu Decl. ¶ 15; *see also* Scallon Decl., Ex. 7 at DEFS_00280248 (explaining residents' make ready options).) Residents can also choose not to have these renovations done, which will lower their right to purchase amounts. (Cefalu Decl. ¶ 15; Gregory Lease at RTP ¶ 22.)

Because every single-family home is different and residents' preferences vary, the work and expenditures needed for each home are very different. (Cefalu Decl. ¶ 16.) Defendants, however, spend considerable sums on Minnesota properties during the make ready process. (*Id*.)



II. Defendants also rent homes outside the Lease Purchase Program.

Defendants only purchase homes that a resident participating in the lease purchase selects. (Cefalu Decl. ¶ 41.) Defendants do not otherwise purchse homes to lease as standard rentals. (*Id*.) Residents, however, will sometimes leave a home without exercising their right to purchase option. (*Id*.) Defendants are then left with an unoccupied home. (*Id*.) Sometimes Defendants will sell the home. (*Id*.) More frequently, Defendants try to lease the home to a new resident as a standard rental. (*Id*.) These homes are rented for a one-year term, subject to renewal, but without the right to purchase. (Cefalu Decl. ¶ 41.) Defendants refer to them as "NRTP" or "non-right-to-purchase" leases. (*Id*.) Defendants refer to the Lease Purchase Leases as "RTP" or "right to purchase." (*Id*.)

III. Maintenance and repair requests.

At the core of Plaintiffs' claims in this case is their belief that Defendants did not properly handle maintenance and repair. Plaintiffs falsely claim that Defendants shift all maintenance and repair onto residents. (Plaintiffs' Class Certification Memorandum ("Pls.' Br.") at 14–15.)

[redacted]

A. Defendants are clear about the maintenance and repair responsibilities.

Defendants disclose the maintenance and repair responsibilities to tenants on several occasions, including on the website, and, for example, in the anticipated terms:

> Generally, residents are responsible for the following at their own expense: utilities and water service, sewage disposal service, trash removal, regular lawn/landscape maintenance, snow/ice removal and salting, pest control (interior and exterior), smoke/carbon monoxide detector battery replacement no less than every 6 months, light bulbs replacement, and other day-to-day maintenance and repairs but excluding any repairs required to be made by Landlord pursuant to applicable laws which vary by city and state. In general, since you are renting a single-family home, we expect you to maintain it as though you currently own the home.

(Scallon Decl., Ex. 9 at DEFS_00003245; *see also*, Defendants' Brief in Support of Motion for Summary Judgment ("Defs. MSJ") at 3–10.)

These responsibilities are also described in the sample lease that residents receive before asking Home Partners to purchase the home and in the final lease. (*See* Scallon Decl., Ex. 6; Sewall Lease ¶ 15; Gregory Lease ¶ 16.) The lease meets industry standards in providing an explanation of responsibilities for the tenant and the landlord. (Epcar Decl. ¶ 18.) The lease, for example, describes what items Pathlight will maintain, including all "items required by applicable laws:"

- Landlord shall use reasonable efforts to maintain, at its cost (but subject to the terms of the Right to Purchase Agreement): (1) the foundations, roof, exterior walls, structural members and mechanical systems (including HVAC systems, hot water heater, electrical and plumbing systems and sump pump, if any) of the residence located at the Premises, in habitable condition, together with (2) ***any items which are required by Applicable Laws to be maintained by Landlord.***

(Gregory Lease ¶ 16 (emphasis added).)

The same provision also describes what the tenant must maintain:

- Tenant shall maintain the irrigation system, if any, garden, landscaping, trees and shrubs located at the Premises and provide regular and routine landscape care. Tenant agrees to water, on a regular and routine basis, the lawn and landscaping at the Premises;

- Tenant is responsible for repairing damage to the Premises, "whenever such damage or injury to the same shall have resulted from misuse, waste or neglect by any Occupant;

- Tenant is responsible for "all repairs, maintenance or replacement required to the Premises that shall be necessary to restore the Premises to the same condition as when Tenant took possession of the Premises (including any work performed by Landlord thereafter), normal wear and tear excepted;

- Tenant needs to supply and immediately replace at Tenant's cost: (1) all light bulbs, fluorescent tubes, and batteries for smoke detectors and carbon monoxide detectors, garage door openers, ceiling fan remotes and (2) air conditioning/furnace filters at least once every three calendar months.

(*Id*.) Tenants are also provided an explanation of their repair and maintenance obligations in their Welcome Home Packet. (MC Decl., Ex. 9 at DEFS_00004354.)

B. It is easy for residents to make repair and maintenance requests to Pathlight.

The process is straightforward. Residents can either make a written request through the online portal, call Pathlight's 1-800 number and speak to a Pathlight representative, or send an email explaining the issue. (Cefalu Decl. ¶ 18.) Requests are given a work order number and overseen by either Pathlight or a vendor, SMS Assist ("SMS"). (*Id*. ¶ 19.)[3]

C. No set of policies or procedures can cover every repair situation.

It is impossible for Defendants to account for all the near-infinite variety of repair and maintenance issues that may arise in a single-family home. (Cefalu Decl., ¶ 20.) Pathlight does, however, maintain general policies to assist its staff in handling requests. (*Id*.) These policies are more detailed than the external materials to provide guidance for staff. (*Id*., Ex. 1.)

Although these policies provide guidance, they are not the final word on whether any request will be repaired by Pathlight. (*Id*. ¶ 21.) Pathlight's response to any repair and maintenance request will depend on the specific circumstances. (*Id*.) For example, Pathlight may make repairs that are a resident's responsibility under the lease to maintain goodwill with the resident, because the resident has unsuccessfully made efforts to repair and needs assistance, or because of the nature or degree of the problem, among other reasons. (*Id*.)

If a request is Defendants' responsibility under the terms of the lease, Pathlight and SMS

[3] SMS is unaffiliated with Home Partners. It is a company that helps many landlords across the country with rental home maintenance. (*Id*. at ¶ 19.)

will first assess its urgency. (Cefalu Decl., ¶ 24.) If a request affects health or safety, Pathlight will get a vendor to the home as soon as possible. (*Id*.) [redacted] For routine or non-urgent requests, Pathlight and SMS will reach out to a vendor with the details of the request and ask the vendor to arrange a time with the resident to visit the home and investigate the problem. (Cefalu Decl. ¶ 24.) [redacted]

1. Every resident's experience is different.

[redacted]

2. Every resident is different.

[redacted] In Pathlight's experience, some residents will make dozens or hundreds of requests; others will make none. (*Id*.) Some residents will submit the same request repeatedly until it is addressed, other tenants will submit a request but cancel the

request for reasons unknown to Defendants. (*Id*.) Some residents may request repairs for minor issues; others may wait until there is a significant problem. (*Compare id*., Ex. 3 (showing request for maid services), *with* NB Decl., Ex. 10, Sahr Declaration (showing pictures of widespead mold at Barry Sewall's home a few days after he moved out).) Ultimatetly, the kinds and frequency of repair requests that Defendants receive varies significantly by resident. (Cefalu Decl. ¶ 22.)

This variation in attitudes can be seen from experiences of the named plaintiffs. Dr. Sewall submitted 17 work orders during his five-year tenancy. (*Id*., Ex. 3.) The Gregorys, by contrast, submitted 72 requests in the first 15 months of theirs. (*Id*., Ex. 3.) On average, the Gregorys submitted four work orders per month, while Dr. Sewall submitted four per year. Unlike the Gregorys, who re-submit work orders for repairs denied as resident responsibility until they eventually get approved, (J. Gregory Dep. at 105:14–106:4), Dr. Sewall, who enjoys remodeling, would attempt repairs prior to notifying Defendants. (Sewall Dep. at 40:22–41:23, 74:8–76:24; MC Decl., Ex. 11.)

3. Every home is different.

One of the primary features of the Lease Purchase Program is that prospective residents can choose the single-family home they want to rent and potentially purchase. (Cefalu Decl. ¶ 10; *see also* MC Decl., Ex. 7.) [redacted] (Cefalu Decl. ¶ 23.) Each home will have different repair and maintenance needs during a resident's tenancy. (*Id*.) Some homes will need little or no maintenance. (*Id*.) Some homes will need frequent maintenance. (*Id*.) Some homes simply will not have the same features as others: Some have furnaces, some have boilers; some have fences, others do not; some have basements, others have crawl-spaces or walk-outs; some have skylights, others do not. (*Id*.)

4. Every resident's repair and maintenance experience is different.

What breaks or malfunctions at any given time in a home is unpredictable. Defendants' responses are also not always uniform—whether Defendants handle the repair often depends on the specific circumstances of the request. (Cefalu Decl. ¶ 21.)

The named plaintiffs exemplify the fact that residents will have different issues and requests. Throughout his five years, Dr. Sewall submitted work orders to address items like a clogged bathtub, a running toilet, fireplace cleaning, a small hole in his yard, carpet stains, and a broken garage chain. (Sewall Dep. 27:13–18, 63:17–24, 57:18–58:1, 19:22–20:14.) Pathlight timely addressed many of these issues. (*See* Defs. MSJ. at 16–17.) The Gregorys' requests, although too numerous to list, include items that Dr. Sewall never had an issue with, including pest control, a refrigerator, flooring, window treatments, closet doors, a bathroom fan, and a survey of the property line. (Cefalu Decl., Ex. 3.) Pathlight timely addressed some repairs, declined to perform others, and some repairs took time to complete due to their complexity. (*See* Defs. MSJ. at 17–18.) Understanding the details (and therefore reasonableness) of any given request requires inquiry into each resident's files, including a review of the communication history, vendor, invoices, photos, event logs, work orders, and resolution.

D. There is no dataset or company policy that will allow the Court or a jury to universally assess how Defendants handled every request and why.

The named plaintiffs demonstrate how residents can have very different experiences.

[redacted][4] Plaintiffs' class claims

[4] [redacted]

cannot be proven with class-wide data, because truly understanding each resident's experience will require an individualized inquiry.

[redacted]

[redacted]

[redacted]

IV. Security deposits.

If residents leave the home damaged beyond ordinary wear and tear or with unpaid rent, Defendants will withhold such amounts from the residents' security deposits and return the rest. (Cefalu Decl. ¶ 58.) Plaintiffs allege that Defendants fail to explain withholdings and fail to pay interest, but neither claim is accurate. Although there is not (or not always) a line item for interest on a residents' final security deposit disposition letter, Defendants pay interest on a regular basis and credit such amounts to residents' accounts at that time. (*Id.* ¶ 58, Ex. 4 (highligh added) (showing interest payments).) The final security deposit disposition letters may not always show a line item for interest if it has already been paid. This was the case with Dr. Sewall, who was paid more than the statutory rate of security deposit and therefore did not receive an interest payment on his final security deposit disposition letter. (*See id.*)

Similarly, security deposit withholdings are described as line items in the disposition letters. (Cefalu Decl. ¶ 59.) Dr. Sewall's security deposit disposition letter identified his security deposit was withhled for: (1) unpaid utilities; (2) "Trash Debris Removal and Haul" for a trash pile left in his garage; (3) replacement of light bulbs; and (4) "Remediation and Buildback" related to widespread unreported water damage and mold throughout the house. (*Id*. ¶ 59, Ex. 4. *See*

generally NB Decl., Ex. 10, Sahr Declaration.) Pathlight later provided additional details upon Dr. Sewall's request, including pictures. (*Id*. at 59; NB Decl., Ex. 7 (showing email exchange).)

V. The other fees at issue.

Since 2016, Home Partners and Pathlight have made various changes to the way they handle utility billing, the changing of HVAC filters, and rental insurance. All of Defendants' practices are well-disclosed and agreed-upon by residents.

A. Insurance.

Defendants have their own insurance coverage for each home. (Cefalu Decl. ¶ 46.) The lease, however, requires a resident to pay for damages *caused by* the resident. (Gregory Lease ¶ 12, Attachment C.) It also requires residents to provide proof of liability insurance to ensure payment for any damage caused by negligence. (*Id.*) Home Partners and Pathlight require residents to maintain general liability coverage in an amount of $300,000 and personal property coverage in an amount determined by the resident. (Cefalu Decl. ¶ 46; Gregory Lease at Attachment C.) From roughly the beginning of 2016 to 2017, Defendants required residents to obtain their own insurance and submit a copy to Pathlight. This is what Dr. Sewall did for the five years of his tenancy. (*Id.* ¶ 47; Sewall Lease ¶ 11.)

Starting in 2017, Defendants engaged a vendor to track whether each resident had the requisite insurance. (Cefalu Decl. ¶ 48.) Defendants also allowed the vendor to offer prospective residents an insurance policy that met Defendants' requirements but was less expensive than alternatives on the market. (*Id*. ¶ 48.) In 2019, Home Partners and Pathlight developed the Master Residential Liability Program ("MLRP"), which provides tenants with an even less expensive option for their liability insurance requirement. (*Id.* ¶ 49.) Under the MLRP, which costs tenants $13 per month, Defendants cover the damage to homes caused by residents. (*Id.*; Gregory Lease

at Attachment C.) The Gregorys have paid $13 per month under the MLRP for each month of their tenancy. (MC Decl., Ex. 10 (showing "liability coverage" charge).)

B. Utility payment and fees.

As is typical for single-family home rentals, Defendants (as owners of the property) pay certain utilities themselves and then charge the residents for those utilities. (Cefalu Decl. ¶ 51.) The utilities that Defendants pay have differed over time. (*Id.* ¶ 52.) They also differ based on the agreed-to utilities under the lease, which vary in Minnesota. (*Id.*) Finally, even in circumstances where residents are required by the lease to put utilities in their own name, some residents never do so. (*Id.*) In these circumstances, Defendants continue to carry and pay for those utilities, and provide the residents with statements for reimbursement. (*Id.*)

Beginning in November 2017, Defendants have used a third-party vendor, Conservice, to handle utility payments and reimbursement by residents. (Cefalu Decl. ¶ 53.) Starting with RTP Leases signed in June 2020 and NRTP Leases signed in July 2020, residents are charged a monthly Utility Billing Service Fee ("UBSF") to help offset the administrative cost of ensuring that utilities are properly paid and charged back to residents. (*Id.*) In Minnesota, the UBSF has fluctuated over time and is currently $9.95 a month, as prominently disclosed in the lease. (*Id.*; *see also* Gregory Lease ¶¶ 1.J, 6.)

C. The HVAC filter fee.

Routinely changing HVAC furnace filters is important to ensure the longevity and function of HVAC systems in single-family homes. (Cefalu Decl. ¶ 54.) The lease requires residents to change air filters periodically. (Gregory Lease at Air Filter Addendum; *see also* MC Decl., Ex. 9 at DEFS_00004354.) Since November 2019, Defendants use a program designed to make it easy and convenient for residents to obtain and change their filters. (Cefalu Decl. ¶ 54.) The program eliminates the need for the resident to go out and purchase air filters and to remember to change

them. (*Id.*) For a flat monthly fee of $15, Defendants will have the correct air filters delivered to the home every 60 days. (*Id.*) Residents can opt out of this program but must provide verification that they are routinely changing their HVAC filters. (*Id.*) The HVAC filter fee is applicable only for Minnesota homes that have furnaces, not boilers, as their primary heating system. (*Id.*) Residents must sign a separate "HVAC Air Filter Addendum" that explains the program and discloses the costs. (Gregory Lease at Air Filter Addendum.)

D. Late fees.

Defendants charge late fees in accordance with what is allowed under Minnesota law. (Cefalu Decl. ¶ 56.) Plaintiffs complain that the lease appears to allow a charge of more than 8% in violation of Minnesota law, but the language is clear that it will "not to exceed the maximum late fee permitted by Applicable Law." (Sewall Lease ¶ 3; Gregory Lease ¶ 4.)

ARGUMENT

Minnesota Rule of Civil Procedure 23 governs certification of a class action. *See* Minn. R. Civ. P. 23. For a class to be certified, it must meet all four prerequisites of Rule 23.01 and also satisfy at least one category of requirements under Rule 23.02. *See id.*

Rule 23.01 requires a plaintiff to show that: (1) the class is so numerous that joinder of all parties is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). A plaintiff's failure to prove any one of these prerequisites is fatal. *See* Minn. R. Civ. P. 23.

Plaintiffs must also satisfy Rule 23.02. In this case, Plaintiffs seeks certification of two separate classes under two different subparts of this rule. First, an unwieldy damages class under Rule 23.02(c), which includes:

> All persons within the State of Minnesota who, since March 1, 2016, paid rent or other fees to Defendants pursuant to a lease.

Certification of this Rule 23.02(c) class requires Plaintiffs to prove that: (1) common questions of law or fact will predominate over questions affecting individual class members only; and (2) class treatment is a superior method for resolving claims (the "predominance and superiority" requirements). Minn. R. Civ. P. 23.02.

Second, and ancillary to their damages class, Plaintiffs request certification of an injunctive relief class under Rule 23.02(b):

> All persons within the State of Minnesota who, since March 1, 2016, have or will enter into a lease with Defendants within the state of Minnesota and who will pay rent and other fees to Defendants pursuant to a lease.

Certification of this Rule 23.02(b) class requires Plaintiffs to prove that the class claims are cohesive. *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016).[5] Class claims are cohesive only if the Plaintiff can show "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (cleaned up; citation omitted).

Importantly, "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. 338 at 350. Rather, courts must perform a "rigorous" analysis to determine whether the Rule's requirements are satisfied. *Ebert*, 823 F.3d at 478; *Hoekman v. Educ. Minn.*, 335 F.R.D. 219, 243 (D. Minn. 2020) ("[T]he standard for obtaining class certification is an onerous one." (quotation omitted)). In performing this analysis, "it may be necessary for the [C]ourt to probe behind the pleadings before coming to rest on the certification question. . . . Such an analysis will frequently

[5] "Because of the substantial similarity between Minnesota's rule 23 and Fed. R. Civ. P. 23, federal precedent is instructive in interpreting our rule." *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009) (quotation omitted).

entail overlap with the merits of the plaintiff's underlying claim." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks and citations omitted).

Plaintiffs cannot meet the requirements for class certification for either of their proposed classes under Rule 23. The Court should deny Plaintiffs' motion.

I. Plaintiffs' proposed damages class cannot be certified under Rule 23.02(c) because individual issues predominate.

The question for certification of the damages class under Rule 23.02(c) is not simply whether common issues exist; "any competently crafted class complaint literally raises common 'questions.'" *Dukes*, 564 U.S. at 349 (2011) (cleaned up; citation omitted). Rather, certification is appropriate only if a class action trial of the common questions would "drive the resolution" of the plaintiffs' claims. *Id.* at 350 (citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (same).

Accordingly, for the Court to certify Plaintiffs' damages class, Plaintiffs must prove that common, resolution-driving questions "predominate" over the individual ones and that a class action is superior to other methods of adjudicating the controversy. Minn. R. Civ. P. 23.02(c); *Whitaker*, 764 N.W.2d at 638. Predominance is a "far more demanding" inquiry than commonality. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997) (citation omitted). "Mere assertion by class counsel that common issues predominate is not enough"—Plaintiffs must prove predominance by a preponderance of the evidence. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *Whitaker*, 764 N.W.2d at 638. The predominance requirement is not satisfied if "individual . . . questions overwhelm questions common to the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 68 (2013).

A. Defendants' liability under the LTA turns on individualized issues.

Plaintiffs' principal claims in this case are that Defendants violated Minnesota's LTA; and

specifically, for their proposed damages class, Sections 504B.161 (habitability and reasonable repairs), 504B.172 (recovery of attorney fees); 504B.177 (late fees), and 504B.178 (security deposits). (Pls.' Br. at 18–20). As detailed below, whether Defendants violated any of these statutory provisions, and the extent of any class member's damages, ultimately turns on a fact-intensive inquiry that is unique for each lease, single-family home, and individual.

1. Establishing Defendants' liability under Section 504B.161 for failing to make the repairs will require individual proof.

[redacted] Although it is impossible to list every unique characteristic, these single-family homes will have different kinds, ages, and configurations of appliances, HVAC systems, plumbing, insulation, siding, cabinets, countertops, landscaping, driveways, paint, and windows. They may have finished or unfinished basements. They may have carpet, hardwood floors, linoleum, tile, or concrete. And every one of these two-thousand different homes may (or may not) be subject to the countless kinds of maintenance issues that are part of living in a single-family home.

Despite the countless differences in each resident's experience with their single-family home, Plaintiffs ask the Court to certify a class that would hold Defendants financially liable for failing to maintain *every single one* of these 2,000 homes in the condition required by Section 504B.161. (Pls.' Br. at 15.) Plaintiffs "prove" that class-certification is appropriate for their Section 504B.161 by arguing that two questions predominate: (1) whether Defendants' leases impermissibly waive the covenant of habitability in violation of Section 504B.161, Subdivision 1; and (2) whether Defendants' leases, on their face, fail to provide "adequate consideration" "set forth in conspicuous" writing in exchange for certain repairs or maintenance performed by the

tenants as required by Section 504.161B, Subdivision 2. (Pls.' Br. at 15, 18–19; Regan Decl., Ex. 6.) Answering these questions, however, will not drive resolution of the case.

a. Regardless of the facial legality of the lease, Defendants' liability for breach of Section 504B.161 will turn on individual facts.

Plaintiffs' claims under Section 504B.161 suffer from a terminal flaw for their class certification motion: Even if Plaintiffs could prove that every one of Defendants' leases impermissibly attempts to waive the covenant of habitability and fails, on its face, to provide "adequate consideration" in exchange for certain repairs or maintenance performed by the tenants, these findings will do "little to advance an end to the litigation." *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 515 (Minn. 1985).

This is because whether Defendants failed to comply with Section 504B.161 does not depend on the express terms of the lease. It depends on whether, for each of the 3,500 single-family homes at issue, Defendants failed to keep the premises fit for the use intended by the parties or otherwise make the repairs as required by law. As the Minnesota Supreme Court has held, liability under Section 504B.161 only begins "when the landlord *has breached the statutory covenants*." *Fritz v. Warthen*, 213 N.W.2d 339, 342 (Minn. 1973) (emphasis added). Defendants' liability turns on compliance with the statute, not on the terms of the lease. *Id.* at 341 ("These covenants are not made a part of the lease by agreement between the parties but by statutory mandate."); *see also 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).

Put another way, the Court cannot find Defendants liable for breaching Section 504B.161 based on the terms of the lease. Defendants are only liable for breaching Section 504B.161 if they failed to make necessary repairs. *See, e.g.*, *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 709 (Minn. Ct. App. 2016) (holding that "the landlord's covenants to keep leased premises in

reasonable repair and fit for intended use do not impose strict liability upon a landlord. . . ."); *Maine Heights v. Hayat LLC*, 2020 WL 7330598, at * 3 (Minn Ct. App. December 14, 2020) (same). To prevail on their claims, each putative class member will need to prove, by a preponderance of the evidence, that Defendants failed to keep their home in *reasonable* repair and fit for the intended use during their tenancy. *See, e.g.*, Minn. Stat. § 504B.161; *see also Rush* 887 N.W.2d at 709; *Ghebrehiwet*, 2016 WL 102510, at *3.

Minnesota law also allows Defendants to prevail in an action for violations of Section 504B.161 by showing that the alleged violations do not exist or have been remedied; that the violations were caused by the willful malicious, negligent, or irresponsible conduct of the tenant; or that the tenant refused entry to the premises. Minn. Stat. § 504B.415; *see also Stangel v. Schlegel*, 2022 WL 16910626, at *1 (Minn. Ct. App. Nov. 3, 2022) (affirming district court opinion that Plaintiff was not entitled to a reduction in rent after landlord remedied the issues). It "imposes no liability on landlords who cure or attempt to cure a defect within *a reasonable* time using an *effective method*." *Maine Heights*, 2020 WL 7330598, at * 3 (emphasis added). This is true "even when the tenant prefers a different repair method or is inconvenienced by the chosen method." *Rush*, 887 N.W.2d at 709. Defendants, of course, have a due process right to present these defenses, rebuttal evidence, and show that there was no violation "against one or more members of the class." *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976). A class action cannot sacrifice procedural fairness. *Lindsey v. Normet.* 405 U.S. 56, 66 (1972).

Adjudicating these claims and defenses will require factually intensive inquiries into whether the home is in "reasonable repair"; whether the alleged problems breached the statute; whether Defendants acted in a reasonable time and used an effective method; and others. The proof needed to establish these claims will thus necessarily require individual class members (and

Defendants) to present evidence on the specific condition in each home; how those conditions impacted the use of the home; what repairs were needed (if any); when the tenants provided notice; and if, when, and how Defendants addressed the issue. *Ghebrehiwet*, 2016 WL 102510, at *2. This individual proof is fatal to class treatment. *See, e.g.*, *Hoekman*, 335 F.R.D. at 244; *Thompson v. Am. Tobacco Co., Inc.*, 189 F.R.D. 544, 556 (D. Minn. 1999).

Plaintiffs themselves demonstrate why it is impossible to prove a breach of Section 504B.161 on a class-wide basis. They each had different experiences in their homes and requested different repairs, which required Defendants to take different steps to address. (*See generally*, Defs. MSJ at 16–18.) Defendants have also moved for summary judgment on Plaintiffs' claims in this matter based on the undisputed facts from their depositions, discovery responses, and other documents produced in discovery. (*See generally* Defs. MSJ.) In addressing Defendants' Motion for Summary Judgment, the Court will need to consider the individual, undisputed facts specifically related to the repairs that the Plaintiffs requested. (Defs, MSJ at 23–24.) This same inquiry and individual discovery will be necessary for every one of the 3,500 class members.

Other cases also demonstrate how an individual inquiry will be required to establish any violation of Section 504B.161. Plaintiffs, for example, claim that, from the 3,500 class members, "dozens of escrow actions" have been filed against Defendants since 2016. Decisions from these escrow actions demonstrate the factual inquiry required for each class member. Take the decision in *Balchtiari v. Pathlight Prop. Mgmt.*, Court File Number 82-CV-3701. (NB Decl., Ex. 8.). In that case the plaintiff complained of four repair issues: (1) a smoke smell in the house and garage; (2) a fireplace with missing parts; (3) a falling retaining wall; and (4) broken gutters. (*Id.* ¶ 1.) The Court, after examining each issue separately, sided with Defendants on all but the issue of the retaining wall, which the Court found was high enough that it required repairs. (*Id*. ¶¶ 2–7.)

Similarly, Plaintiffs attach as an exhibit to their Motion for Class Certification a rent escrow action from August 2019, against HPA Borrower 2017-1 ML, LLC (a subsidiary of Home Partners). (Regan Decl., Ex. 10.) This escrow action involved an alleged bed-bug infestation. (*Id.*) The court heard testimony at an evidentiary hearing regarding the existence of the infestation, defendant's efforts to remedy it, and whether the problem persisted because of the resident's conduct. (*Id*.) The testimony included the exterminator, who testified that the resident failed to follow the proper procedures. (*Id.* at Findings of Fact ¶ 21). Although the court found on behalf of the resident, it only did so after assessing the evidence of the specific facts at issue.

These examples illustrate some of the numerous individual issues, proof, and evidence that the Court will face in adjudicating claims for a breach of Section 504B.161. Answering these individual questions will quickly overwhelm any common ones, making certification impossible. *Maier v. Cmty. Res. Mgmt. Co.*, 2006 WL 664215, at *2 (Mich. Ct. App. Mar. 16, 2006) (denying class certification of a class consisting of tenants on landlord tenant act and consumer fraud claims because "questions of fact affecting individual members of the class will clearly predominate over questions common to the class"); *Allegheny Cnty. Hous. Auth. v. Berry*, 487 A.2d 995, 998 (Pa. Sup. Ct.) (affirming order denying certification of habitability claims).

Plaintiffs cite only one case that certified a class on issues related to habitability, *Peviani v. Arbors at California*, 277 Cal. Rptr. 3d 223 (Cal. App. 2021). Although an out-of-state case, *Peviani* underscores why class certification is impossible here. There, the plaintiffs were residents of a large, multi-unit rental complex with multiple *common* areas. *Id.* at 883. The court only certified habitability issues on the areas *common to all tenants*. *Id.* at 896. It refused to certify a class on habitability for each individual apartment. Here there are no common areas, only single-family homes.

b. It is impossible for Plaintiffs to show predominance under either Subdivision 1 or Subdivision 2 of Section 504B.161.

Complicating class certification is the fact that Plaintiffs challenge Defendants' conduct under two separate Subdivisions of Section 504B.161 but never explain which Subdivision Defendants have violated. This explanation is critical because the two Subdivisions of Section 504B.161 impose very different burdens: Subdivision 1 *requires a landlord to make* certain repairs to keep the home fit to live in and in reasonable repair. *See* Minn. Stat. § 504B.161, subd. 1.

By contrast, Subdivision 2 *allows the landlord* to require tenants to make repairs that are not covered by Subdivision 1. *Id.* at subd. 2. Neither Subdivision, however, requires a landlord to make every repair that a tenant might request. *See id.* at subd. 1, 2. Rather, the statute only requires a landlord to make repairs sufficient to keep the property in compliance with Subdivision 1—the covenant of habitability. Plaintiffs' only real contention that Defendants violated Subsection 2 is that the subsection requires "adequate consideration" for the tenant to make repairs. They claim that they received none.

But this does not drive resolution of any issue in this litigation. Minnesota law does not recognize a standalone claim for breach of Subdivision 2; responsibilities for repairs beyond Subdivision 1 are governed by contract. Whether any given repair was required by Subdivision 1 will require the highly individualized inquiry described above. *See* Supra Section I.A.1.a.

c. Individualized damages confirm the lack of predominance.

Although Plaintiffs are correct that individualized damages calculations alone will not preclude certification, (*see* Pls.' Br. at 24), Plaintiffs nonetheless must establish that damages are capable of measurement on a class-wide basis without individualized issues overwhelming common ones. *Comcast*, 569 U.S. 34. Here, the record does not reveal any basis for performing a class-wide damages calculation because there is nothing uniform about the experiences of the

3,500 putative class members in their unique single-family homes. *See Kerr v. Abbott Labs.*, 1997 WL 314419, at * 2 (Minn. Dist. Ct. Feb. 19, 1997).

A claim for a breach of Section 504B.161 sounds in contract. *Ghebrehiwet*, 2016 WL 102510, at *3. "'[T]he appropriate measure of damages for breach of contract is that amount which will place the plaintiff in the same situation as if the contract had been performed," *see In re RFC & RESCAP Liquidating Trust Action*, 332 F. Supp. 3d 1101, 1191 (D. Minn. 2018) (citing *Peters v. Mut. Ben. Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988)), but, critically, "not in a better position." *RLI Ins. Co. v. Stan Koch & Sons Trucking, Inc.*, 2021 WL 4199370, at *6 (D. Minn. Sept. 15, 2021).

Consistent with this general rule, Minnesota law requires a court to take a proportionate approach to damages under Section 504B.161. A court must consider "*the extent* to which any uncorrected violations impair the residential tenants' use and enjoyment of the property. . . ." Minn. Stat. § 504B.425(a), (e) (emphasis added); *Ghebrehiwet*, 2016 WL 102510, at *3. Thus, each plaintiff's damages must be tied to their own specific lost use and enjoyment of the property—the damages that would put them in the same position as if there was no breach of Section 504B.161, but not in a better position.

The burden is on each plaintiff to prove these specific damages by a preponderance of the evidence. *Id.* at *3. Courts recognize that the calculation of damages in a case for a breach of the covenant of habitability is often "uncomfortably amorphous" and "not susceptible to precise determination." *Avignone v. Valigorski*, 137 N.Y.S.3d 911, 913 (N.Y. C. Ct. December 12, 2020) (quotation omitted). But "'[w]hile the law most certainly does not require that damages be calculable with absolute precision, damages must nevertheless be ascertainable with reasonable exactness and may not be the product of benevolent speculation.'" *Ghebrehiwet*, 2016 WL 102510,

at *3 (quoting *Faust v. Parrott*, 270 N.W.2d 117, 120 (Minn.1978)). Here the proof of damages requires "specificity and documentation" of the alleged problems. *Id.*

Because the conditions of each single-family home differ significantly, measuring damages for a breach of Section 504B.161 will differ for each putative class member. The Court will need to consider evidence of how each alleged unrepaired problem impacted and diminished a putative class member's use and enjoyment of the property. Consider, for example, the difference between the escrow action involving the falling retaining wall and the escrow action involving bedbugs. A serious bedbug issue would cause significantly greater impairment of the use of the property and result in much higher damages. The process of making these decisions will be factually intensive and "quickly degenerate into thousands and thousands of individual trials." *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987) (affirming certification denial where "any determination of fact or amount of individual damage will require thousands of factual examinations" done on an individual basis).

To prevent their class action from devolving into mini-trials (which it will), Plaintiffs contend that they can prove damages on a class-wide basis in one of two ways. First, they claim that they are entitled to the entire amount of the rent paid to defendants because the leases are void. Plaintiffs cite no caselaw to support that this is an appropriate measure of damages, and Minnesota courts have already rejected similar remedies in the context of Section 504B.161. *See Ghebrehiwet*, 2016 WL 102510, at *3 (holding that the district court erred by awarding as damages the entire rent for each month of a violation of Section 504B.161 because that award would require a factual finding that the tenant did not receive any use and enjoyment from the rental property). Awarding the entire amount of rent paid as damages would require every putative class to prove

that they received no use or enjoyment from the property for the entire tenancy. *Id.* This proof is impossible, and Plaintiffs have cited no evidence that would support the conclusion.

Second, Plaintiffs contend that they can prove damages for breach of Section 504.161B through the methodology of Dr. Robert Kneuper. (Pls.' Br. at 26.) [redacted]

[redacted] This discrepancy is fatal to Plaintiffs' request for class certification. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 623–24 (D.C. Cir. 2019) (holding that the court properly denied certification where 12 percent of the proposed class suffered no injury); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("No concrete harm, no standing.").

[redacted] In the cases that Defendants did not make the repair, individual inquiries remain regarding what specific repair the resident requested and whether Defendants were obligated to make it. [redacted]

2. Whether Defendants are liable for violating Section 504B.161 by withholding security deposits turns on an individualized inquiry.

Plaintiffs present two theories of liability that Defendants violated Section 504B.178. First, they claim that Defendants withhold money from residents for "ordinary wear and tear." Second, Plaintiffs claim that Defendants fail to credit the statutorily required interest for security deposits. Individual issues will predominate these claims for the same reasons that they will predominate the claims for violations of 504B.161.

a. Withholding security deposits for repairs.

Minnesota law allows Defendants to withhold from a security deposit the amount necessary to (1) remedy "any default in the payment of rent or other funds due to the landlord pursuant to an agreement" and (2) "to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted." Minn. Stat. § 504B.178, subd 3(b)(1), (2). Although it requires Defendants to provide a "written statement showing the specific reason" for withholding the

deposit, *id.*, subd 3(a)(2), it does not require Defendants to provide the tenant with "photographs, bills, or invoices" as Plaintiffs claim. *Id.*; (Pls.' Br. at 9.) Notably, 1,500 class members are still in their home and have no ripe claim under Section 504B.178.

Section 504B.178 also provides the remedy, allowing a tenant to bring an action to recover the amount wrongfully withheld. Minn. Stat. § 504B.178, subd 9. Under the statute, however, Defendants can defeat the claim by "proving, by a fair preponderance of the evidence, the reason for withholding all or any portion of the deposit." *Id.* at subd. 3(b)(c). Defendants have a statutory right to present this defense for every tenant. *Id.*

Plaintiffs contend that the Court can adjudicate this defense by looking at the disposition letters, (Pls.' Br. at 20,) but this is not the law. As with Section 504B.161 claims, Minnesota Courts must undertake a fact-intensive inquiry, considering testimony, photographs, receipts, and other specific evidence presented by the parties at trial before making a factual determination of whether the security deposit withholding was warranted. *See, e.g.*, *Evan v. Niklas*, 2021 WL 4824568, at *2–3 (Minn. Ct. App. Oct. 18, 2021); *Smith v. Broadway Flats LLLP*, 2021 WL 3277236, at *2–3 (Minn. Ct. App. Aug. 2, 2021).

Here there is no dispute that Defendants do not universally withhold the entire security deposit and provide disposition letters when they withhold the deposit. Moreover, with some residents, like Dr. Sewall, Defendants will have counterclaims that the resident caused damage that exceeded the deposit. (*See* Dfs.' Counterclaim; NB Decl., Ex. 10.) Because the "Court would have to consider the move-in condition of each [home], each [home]'s condition at the termination of each class member's tenancy, whether the amounts Defendant deducted from the security deposits were attributable to ordinary wear and tear, what constituted ordinary wear and tear in each [home], the damage each tenant caused, and many more individualized facts unique to each

potential class member," and do it 2,000 times (for each class member that has vacated), class treatment is impossible. *See, e.g.*. *Jang v. Asset Campus Hous., Inc.*, 2016 WL 11755106, at *8 (C.D. Cal. April 4, 2016).

Other Courts have reached the same conclusion. *Neil v. Kuester Real Estate Serv., Inc.*, 764. S.E.2d 498, 506 (N.C. 2014) (affirming denial of class certification on statutory security deposit claims because "the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled"); *Maier v. Cmty. Res. Mgmt. Co.*, 2006 WL 664215, at *2 (Mich. Ct. App. March 16, 2006) ("[B]ecause the damage done to each property and the associated charges vary from tenancy to tenancy[,] . . . questions of fact affecting individual members of the class will clearly predominate over questions common to the class.").

Individualized damages also confirm the lack of predominance. Minnesota laws requires that damages for withholding a security deposit in violation must be specifically tied to the amount *wrongfully* withheld. Minn. Stat. § 504B.178(4). This requires the same kind of individualized inquiry that liability requires. *Niklas*, 2021 WL 4824568, at *2–3 (finding that the landlord lawfully withheld some amounts from the deposit and unlawfully withheld others); *Neil*, 764 S.E.2d at 506–507 (individualized damages for security deposits defeats predominance).

b. Interest on the security deposits.

Plaintiffs also contend that a common issue will be whether Defendants failed to pay interest. (Pls.' Br. at 10, 19.) As evidence common to the class, Plaintiffs contend that many (but not all) disposition letters do not include a line-item for the interest returned, including Dr. Sewall's letter. (*Id*. at 9.) These letters do not include a line-item for interest, because Defendants have already paid the interest. (Cefalu Decl. ¶ 58, Ex. 4 (highlight added) (showing interest payments).) Defendants credit the interest directly to the tenant's account during the tenancy on a periodic

basis. (*Id.*) The payments for interest appear on each resident's account ledger as they are credited. (*Id.*) The resident has access to the ledger and can see these payments when they are received. Below, for example, is an entry from Dr. Sewall's ledger crediting him the required one percent, noncompound interest for a two-year period:

SCREENSHOT OF CONFIDENTIAL EXHIBIT REDACTED

(*Id.*) By the end of his tenancy, Defendants credited Dr. Sewall more than the one percent required by law. (Cefalu Decl. ¶ 58, Ex. 4.) Furthermore, although the Gregorys have not vacated their home, Defendants have already credited them interest. (MC Decl., Ex. 10.)

There is no law that prevents Defendants from paying the interest on the security deposit during the tenancy. Section 504B.178 only requires that Defendants pay interest by a certain date after the tenant leaves. Minn. Stat. § 504B.178, subd. 3(a).

Section 504B.178 also only allows a tenant to recover damages for interest that is *withheld* over the amount needed "to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted." *Id.* subd. 4. It provides no legal remedy for a tenant, like Dr. Sewall, who received the full interest back before the statutory time limit; for a tenant that damaged the home; or for the approximately 1,500 putative class members that are still residents, including the Gregorys.

Plaintiffs' failure to produce any reliable evidence that Defendants do not pay the required interest means that they cannot satisfy even the basic commonality requirement of Rule 23.01(c), which requires that there is some question *common to all or a substantial number of class members* that is apt to drive resolution of the litigation. *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors*, 650 N.W.2d 445, 453 (Minn. Ct. App. 2002); *Henry v. Bozzuto Mgmt. Co*. 159 N.E.3d 701, 707 (Mass. App. Ct. 2020) (affirming denial of class certification where Plaintiffs "did not offer anything more

than argument and speculation about whether and how the defendant's practices in handling tenants' security deposits affected anyone else").

Even if Plaintiffs could show that there was a common question, individual issues would still predominate. First, individual class members must prove that they received some deduction and the specific amount of the deduction. This inquiry will require parsing through over 2,000 individual accounts to identify class members that did not receive the required interest, if any. Second, because Defendants are legally allowed to deduct certain repairs from the interest, there remain the core questions for liability and damages under Section 504B.178: Did defendants use the money to make legally allowable repairs? If not, what are the damages?

Finally, because Dr. Sewall received the full interest on his deposit, and the Gregorys are current tenants, they lack standing to bring their own claims, let alone represent others. Thus, their interests are not representative of the class they seek to represent and fail to meet the commonality and typicality requirements of Rule 23.01. *Ario*, 367 N.W.2d at 513 ("[P]laintiffs' interests must coincide with the interests of other class members."); *Wilson v. Polaris Indus., Inc.*, 1998 WL 779033, at *2 (Minn. Ct. App. Nov. 10, 1998) ("Appellant's failure to prove actual damages of his own defeats the commonality and typicality requirements of rule 23.01.").

3. Whether Defendants charged fees in violation of Sections 504B.172 (attorney's fees) or 504B.177 (late fees) turns on an individualized inquiry.

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 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 v. Ridgebrook Invs.*, 858 N.W.2d 824, 832 (2015) (Minnesota courts will not "'read into the statute a requirement that the Legislature has omitted.'" *Id.* (*quoting Karl v. Uptown*

Drink, LLC, 835 N.W.2d 14, 19 (Minn. 2013)). Even if there was a violation of the law, however, a class action is still inappropriate. This is because the Court will need to sort not only through the 3,500 class members to identify those charged a fee, but it will also need to decide, for each putative class-member, whether that fee was permissible under Section 504B.172. Moreover, because there is no evidence that Defendants charged attorney's fees to every putative class member, the Court cannot certify the class. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d at 623–24; *TransUnion LLC*, 141 S. Ct. at 2200.

The LTA also does not bar Defendants from charging late fees. Minn Stat. § 504B.178. As Defendants explained in their Motion for Summary Judgment, Plaintiffs have presented no evidence that Defendants charged more than eight percent as anything other than an error. Similarly, Plaintiffs present no evidence that Defendants charged any cumulative late fees. The Gregorys, for example, have never paid more than eight percent. (Cefalu Decl. ¶ 56; MC Decl., Ex. 10; *see also* Defs. MSJ at 13 n.3.) Determining, which class members have claims, Defendants' liability, and the putative class members' damages will require the Court to investigate the unique facts of each resident to determine whether (1) the resident ever paid a late fee and (2) whether that late fee exceeded the statutory amount. And again, there is no evidence that every putative class member paid a late fee.

B. Liability under the CFA turns on individualized issues.

In addition to the LTA, Plaintiffs ask the Court to certify a damages class under Rule 23.02(c) for violations of Minnesota's CFA and DTPA. Although they rely on both statutes to request certification, only the CFA allows the Plaintiffs to recover damages. The DTPA only permits injunctive relief and is not appropriate for certification under Rule 23.02(c). *Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1020 (D. Minn. 2003).

Prevailing on a CFA claim requires Plaintiffs to prove first that Defendants intentionally engaged in a "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice." Second, because Plaintiffs are private citizens, they must prove that they were "injured" by the alleged illegal conduct. Minn. Stat. § 8.31. This means proving a causal nexus between their alleged injury and defendants conduct.[6] *Grp. Health Plan v. Philip Morris*, 621 N.W.2d 2, 13–15 (Minn. 2001). Third, Plaintiffs are required to prove actual damages. Minn. Stat. § 8.31; *see also*, *Higgins v. Harold Chevrolet-Geo, Inc.*, 2004 WL 2660923, at *5 (Minn. Ct. App. Nov. 23, 2004). Finally, under Minnesota law, Defendants "'retain the right to assert' that their 'misrepresentations did not cause' an individual plaintiff's injuries." *Hudock v. LG Elecs.*, 12 F.4th 773, 776 (8th Cir. 2021) (reversing class certification of CFA claim); *State v. Minn. Sch. of Bus., Inc.*, 935 N.W.2d 124, 139–40 (allowing defendants to present evidence that each claimant did not rely on alleged misrepresentations at individual proceedings in front of a special master).

The Court must conduct a rigorous analysis to determine whether the Plaintiffs have met the requirements for class certification. *Dukes*, 564 U.S. at 350 ("Rule 23 does not set forth a mere pleading standard."). Here that analysis requires the Court to assess how Plaintiffs will prove injury and damages for each of the alleged misrepresentations on a class-wide basis, along with the impact of any defenses that Defendants may assert. *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008). Accordingly, "fraud cases often are unsuitable for class treatment, because proof

[6] Plaintiffs try to show causal nexus with the testimony of Dr. Akshary Rao. Dr. Rao cannot meet their burden. First, he is wrong about the facts. Most egregiously, he claims that prospective residents do not see the lease until after they pay a deposit. This is false. (*See* Supra Sections I.A.–I.D.). Second, he makes little effort to apply his theory to actual class members. The reason is obvious: His theory is contradicted by the named Plaintiffs, who were not deceived by Defendants about their repair responsibilities. (Epcar Decl. at ¶¶ 14, 27–29; S. Gregory Dep. at 33:14–35:19; Sewell Dep. at 47:18–20, 56:25.) Third, individual facts raised in any claims and defenses will predominate regardless, as detailed below.

often varies among individuals concerning what representations were received, and the degree to which particular persons relied on the representations." *Hudock*, 12 F.4th at 776 (discussing the CFA) (citation omitted); *In re St. Jude Med., Inc.*, 522 F.3d at 838 (same). Because they want to avoid this rigorous analysis, Plaintiffs are vague about exactly what Defendants said or did that was misleading or how it caused any harm. Defendants address the vague allegations in turn.

1. Agreed to or negotiated the rent price and consideration for repairs.

Plaintiffs point to statements in the lease that the parties have "negotiated the rent," that "amount of rent was agreed to with the express understanding that Tenant will be responsible for the maintenance needs of the Premises. . . ," and that the rent would have been higher but for the tenant's agreement to take on certain responsibilities. (Pls.' Br. at 6, 11, 15, 22.) They claim these statements are false because Defendants will not actually reduce the price of the rent at the request of a resident and that "[t]here is no evidence that Defendants adjust or discount the monthly rental rate to compensate the tenants for the alleged agreement to maintain and repair." (Pls.' Br. at 6).

As Defendants explain in their motion for summary judgment, there is nothing false or deceptive about these statements. (Defs. MSJ at 29–30.) Prospective residents receive the rent amounts and a copy of the lease several times before signing. (*See generally* Scallon Decl.) They are also told to seek legal advice. (*Id.* ¶ 10, Exs.4–6.) Prospective residents can walk away at any time, including at the last minute, and only forfeit a $75 application fee. (*Id.* ¶ 17.) They can also terminate the lease at the end of any term. This is a bargained-for exchange and is backed by consideration. *Rebecca Minkoff Apparel, LLC v. Rebecca Minkoff, LLC*, 2018 WL 3014942, at *2 (Minn. Ct. App., June 18, 2018). These statements are not fraudulent and present no common questions apt to drive resolution of Plaintiffs' CFA claim as required by Rule 23.01.

Even if Plaintiffs could prove that these statements were false, adjudicating the required causal nexus and damages requires an individualized inquiry. In cases like this one, where the

plaintiffs allege a lost opportunity to negotiate, Minnesota law requires each putative class member to show two things: First, that they would have attempted to negotiate a lower rent, and second *if they did not receive the lower rent, they would have refused the deal. Higgins*, 2004 WL 2660923, at *5 (granting summary judgment on CFA claim where "appellant testified that he *would have probably* tried to negotiate the credit insurance price or refused to buy it, but that he was *not sure*") (emphasis in original). This inquiry will require numerous individual factual determinations. Dr. Sewall, for example, requested a reduction of rent on two occasions. When Defendants refused, he did not cancel his lease. The Gregorys (and numerous other putative class members) have decided to renew their leases despite having the opportunity to cancel each year, including after they filed this lawsuit claiming that their lease is fraudulent.

Plaintiffs attempt to avoid the necessary inquiry by arguing that the requirements for reliance are relaxed under a CFA claim, so there is no need for an individualized inquiry. (Pls.' Br. at 21–22.) But Plaintiffs misstate the relevant case law. The CFA does relieve Plaintiffs of their burden to show causation and damages for each individual class member. *Grp. Health Plan*, 621 N.W.2d at 13. It simply allows proof of reliance by either direct or circumstantial evidence, depending on the specifics of the case. *Id.* "But causation is still a necessary element of a damages action under the consumer fraud statutes, and proof of a reliance component is still required: '[W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, *as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes*.'" *In re St. Jude Med., Inc.*, 522 F.3d at 839–40 (quoting *Grp. Health Plan*, 621 N.W.2d at 13) (emphasis in original).

Minnesota law also allows defendants to obtain discovery and present evidence that putative class members would have accepted the deal regardless. *Id.* at 840 (holding that where the defendant can present evidence to negate individual reliance, potential liability to each plaintiff under the consumer fraud statutes would be dominated by individual issues of causation and reliance); *Hudock*, 12 F.4th at 776. The highly individualized nature of this defense defeats class certification. *Johannessohn v. Polaris, Inc.*, 450 F. Supp. 3d 931, 984–86 (D. Minn. 2020).

2. "Quality" homes.

Plaintiffs contend that Defendants misrepresent their homes as "quality" and "qualified." Because the condition of every single-family home is unique, individual issues will predominate on whether Defendants made a false statement that any home is "qualified" and "quality" and whether any Plaintiff was injured by any such statement. (Pls.' Br. at 10.) In addition to evidence on what they understood "quality" to mean, class members will need to present evidence regarding the actual condition of their home; whether they experienced any repair and maintenance issues; the severity of those issues; and how those issues impacted their enjoyment of the home. Because these issues go to whether there is a fraud or injury at all, not reliance, Plaintiffs must present direct evidence that they did not receive a quality home.

Defendants can also present affirmative evidence that individual class members knew about the potential issues after viewing the home. *Buetow v. A.L.S. Enters., Inc.*, 259 F.R.D. 187, 191–92 (D. Minn. 2009). Furthermore, because home repair and maintenance issues can appear without warning, Defendants can also present evidence that they did not know of issues with the home or that they tried to remedy the problem either before or during the tenancy. Defendants are entitled to present this evidence for each putative class member. *Hudock*, 12 F.4th at 776.

3. Property management services.

Plaintiffs contend that Pathlight provides assurances that its services will be "high-quality" and professionally managed. (Pls.' Br. at 10.) Individual issues will also predominate these claims, because showing a fraud or injury will depend on the specific repair and maintenance issue and how Defendants handled the request. If, for example, Defendants repaired the issue in line with their legal obligations and the terms of the lease, then there is no fraud and no injury. Indeed, there are numerous class members that either never made a request or had all their repairs resolved. (Gorowsky Decl. ¶¶ 20–21; Cefalu Decl. ¶¶ 44–45.) Even with repairs that Defendants did not make, injury will still depend on whether Defendants were legally obligated to make the repair.

4. Repair and maintenance responsibilities.

Plaintiffs contend that Defendants deceive residents about their actual repair and maintenance responsibilities through marketing materials and the leases. Defendants' leases are thorough, complete, and given to potential residents long before they are asked to sign. (Epcar Decl. ¶¶ 13, 17–18; Scallon Decl. ¶¶ 8–9.) But even if Plaintiffs could show that Defendants required residents to make repairs inconsistent with the terms of the leases, individual issues will still predominate. Whether any Plaintiff was injured, for example, will depend on whether Defendants refused to make a repair that they were required to make under the lease or pursuant to statements made in marketing materials. To the extent a given class-member never requested a repair, had all their repairs made by the Defendants, or requested repairs that were explicitly assigned to the resident in marketing materials and the lease, those class members have suffered no injury.[7]

[7] Injury is fatal for the named Plaintiffs. They paid almost nothing in maintenance and repair and any amount they paid was related to repair that either was: (1) never disclosed to Defendants; or (2) clearly disclosed as a tenant responsibility. (See Defs. MSJ. at 17–18.)

Defendants are also allowed to present the individual evidence of non-reliance. *Hudock*, 12 F.4th at 776. None of the Plaintiffs in this case, for example, testified that they were deceived—or even confused—by the terms of the lease. Dr. Sewall did not ask any questions before he signed, and he elected to simply "skim" the lease as opposed to reading it in detail. (Sewall Dep. at 34:22-35:13; 108:16-21.) The Gregorys spent two days reviewing the lease with "careful thought" and testified that they understood it. (S. Gregory Dep. at at 35:4-19, 34:5-10, 44:13-15.) They also chose not to ask any questions about the lease before they signed it. (J. Gregory Dep. at 56:19-25.) Minnesota law allows Defendants to present this kind of evidence for each individual class-member. *Hudock*, 12 F.4th at 776.

5. Fees agreed to in the lease.

Finally, Plaintiffs contend that Defendants misled residents by charging them the UBSF fee, HVAC filter fee, insurance, attorneys fees, and late charges. Because each fee is expressly provided for in the lease, Plaintiffs cannot argue that Defendants mislead consumers by failing to inform them of fees. Rather, Plaintiffs claim that because the fees are illegal, residents are misled about what they are "responsible for." (Pls.' Br. at 22.)

These claims do not present a common issue under Rule 23.01 because, as Defendants explain in their motion for summary judgment, there is nothing illegal about the fees. (Defs. MSJ at 27–29.) With respect to the HVAC, UBSF, attorney, and insurance fees, Plaintiffs do not cite a single statute or case that would make these fees illegal under Minnesota law. They do not even bring a claim that Defendants violated the LTA by charging the insurance, HVAC, or UBSF fees. The reason is simple: Charging these fees is not against the law. *Persigehl*, 858 N.W.2d at 832 ("[P]arties are free to contract to whatever terms they agree, provided that those terms are not prohibited by law." (citation omitted)); (Defs. MSJ at 27–29.) Furthermore, individual issues will predominate for the same reasons they would predominate over statutory claims—whether any

individual paid a fee in violation of law will be dependent on the specific resident.

6. Damages confirm the lack of predominance.

The CFA allows relief in the form of actual, out-of-pocket damages or other equitable remedies. Minn. Stat. § 8.31. Equitable remedies are not available unless actual damages would be inadequate. *Buetow*, 259 F.R.D. at 192. Out-of-pocket damages are calculated in Minnesota by determining the difference between the value of the property received and the price paid. *Id.*; *Higgins*, 2004 WL 2660923, at *3. Because class members received a unique single-family home, any difference in value will depend on the specific condition of the home, the repairs that Defendants failed to make, and the impact on the enjoyment of the home.

Plaintiffs propose three theories of damages to escape this individualized inquiry: First, as with their habitability claims, Plaintiffs contend that every former resident is entitled to a refund of the full amount paid. But like the habitability claims, this remedy would require every putative class-member to prove that they received *no value* from their home. *Buetow* 259 F.R.D. at 192 n.4 (rejecting theory that class-members could receive a full refund on the purchase price without an individual showing). Because the value that a consumer received from their own home will depend on their individual experience, the refund model does not work on a class-wide basis.

Second, Plaintiffs contend that they are entitled to restitution or disgorgement of Defendants' profits. Neither of these remedies measure out-of-pocket damages, and any class-member that seeks these remedies will need to show that it is impossible to calculate their specific actual damages. *Id.*

[redacted]

[redacted]

In fact, the cases cited by Plaintiffs to support Dr. Kneuper's methodology demonstrate why it is inappropriate here. *Nguyen v. Nissan N. Am.*, 932 F.3d 811 (9th Cir. 2019) and *Victorino v. FCA US LLC*, 2021 WL 662264 (S.D. Cal. Feb. 19, 2021), are both product defect cases involving automobiles that the plaintiffs alleged had the *exact same inherent defect* in their clutch system as every other vehicle at issue. Calculating the difference between the price paid and the value received may be possible when all class-members received the exact same car with the exact same defect. It is impossible when class-members received a unique single-family home with different alleged problems—problems that Defendants needed to take a fact-based and nuanced approach to address. The Court will need to do the same.

C. The covenant of good faith and fair dealing turns on individualized issues.

Plaintiffs make a brief argument that there is sufficient common evidence to certify a class on their claim for breach of the covenant of good faith and fair dealing. Plaintiffs state that "[i]n the context of landlord-tenant law, a failure to comply with a statute's requirement can form the basis of a breach of good faith and fair dealing claim," (Pls.' Br. at p. 23), but the case they cite for that proposition, *Thompson v. St. Anthony Leased Hous. Assocs. II, LP*, 979 N.W.2d 1 (2002), does not involve a claim for breach of good faith and fair dealing. Plaintiffs have not shown this claim is even appropriate in the context of landlord-tenant law (which is governed by a strict statutory scheme).

Plaintiffs also contend that the evidence to support this claim is the same as the consumer fraud and Section 504 claims. (Pls.' Br. at p. 23.) These claims turn on individual issues. Thus, the

same individual issues driving the CFA and LTA claims predominate over any common issue related to breach of good faith and fair dealing.

D. Unjust enrichment and recission turn on individualized issues.

Plaintiffs spend comparatively little effort explaining why the Court should grant class certification on their unjust enrichment or recission claims. There is a good reason for that: unjust enrichment cases are categorically ill-suited for class treatment. *See, e.g.*, *Daigle v. Ford Motor Co.*, 2012 WL 3113854, at *5 (D. Minn. July 31, 2012) (stating that "the elements of an unjust enrichment claim cannot be proven through class-wide evidence") (citing *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (finding that "common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts")). This is because the elements of an unjust enrichment claim—whether the defendant has knowingly received or obtained something of value which the defendant in good conscience should pay for—is necessarily an individualized inquiry. *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 247 (Minn. Ct. App. 2011). To determine whether any given class member conferred a benefit on Defendants, and the value of that benefit, can only be done on a resident-by-resident basis.

Similarly, rescission claims are also poor candidates for class treatment: If the putative class prevails, some residents may prefer to rescind their leases and right to purchase agreements and vacate their homes, while others may prefer to remain in their homes and receive money damages. "[T]hese conceivably antagonistic goals preclude effective administration as a class action." *Young v. Trailwood Lakes, Inc.*, 61 F.R.D 666, 667 (E.D. Ky. 1974) (declining to grant class certification of a putative class asserting, in part, a rescission claim). Plaintiffs' class definition also includes former residents who are no longer active parties to a lease. Those former residents have no legally cognizable rescission claim, because "[o]ne cannot rescind a contract no longer in existence." *Gatz v. Frank M. Langenfeld & Sons Const., Inc.*, 356 N.W.2d 716, 718

(Minn. Ct. App. 1984); *Henry v. Schultz*, 408 N.W.2d 635, 637 (Minn. Ct. App. 1987). Thus, the putative class is comprised of (1) residents who want to have their contracts rescinded if they prevail; (2) residents who want money damages but do not want rescission of their contracts if they prevail; and (3) former residents who do not have a viable rescission claim. These individual issues will overwhelm any common issues related to Plaintiffs' rescission claim.

II. A class action is not a superior method of adjudicating class claims.

Rule 23.02(c) also requires the Court to weigh the benefits and efficiencies gained through certification with the costs and burdens of a class action, as well as other factors such as the class members' interests in individually controlling the prosecution of their claims. *See, e.g.*, Minn. R. Civ. P. 23.02(c). A class action here is not superior (or even viable) for several reasons:

First, Plaintiffs have defined their class so broadly and included so many disparate claims on different issues that it is impossible for the Court to manageably determine which putative class-members even have standing on a specific issue. For example: Which class members paid which fees? Which class members had their maintenance and repair requests handled appropriately? Which class members had their security deposits wrongfully withheld? How do these groups overlap? Sorting through these issues and others for each of the 3,500 class members to determine standing—let alone litigate the merits—is unmanageable. *Johannessohn*, 9 F.4th 988.

Second, Plaintiffs made no effort to propose any sort of trial plan for either proposed class. And it is difficult to see how they could, given the disparate claims and individualized issues. "Even if the Court were to certify common issues, the subsequent separate proceedings necessary for each plaintiff would undo whatever efficiencies such a class proceeding would have been intended to promote." *McCormick v. Halliburton Energy Servs., Inc.*, 2015 WL 918767, at *4 (W.D. Okla. Mar. 3, 2015).

Third, Minnesota law provides tenants with options for pursuing remedies. These options include paying rent in escrow, suing under in district court under the LTA, or suing in conciliation court or the district court for rent abatement. Minn. Stat. §§ 504B.178, 385, 395. Prevailing on these actions may allow the tenant to recover attorney's fees. *Id.* §§ 504B.172, 178. Instead of allowing each individual to decide how to proceed, Plaintiffs here want to void all the leases, leaving thousands of tenants at a month-to-month tenancy. As detailed below, the named-Plaintiffs' desire to void all existing leases not only makes them inadequate class representatives, but it also gives members of the class a strong interest "in individually controlling the prosecution or defense of separate actions." Minn. R. Civ. P. 23(c)(1).

III. Plaintiffs' Rule 23.02(b) injunctive relief class fails because it is not cohesive and because Plaintiffs are really seeking monetary damages.

Plaintiffs end their Class Certification Motion with a half-hearted request that the Court certify a Rule 23.02(b) declaratory judgement and injunctive relief class. Given the variations of the lease documents available during the years at issue, as well as Plaintiffs' focus on obtaining monetary damages, Plaintiffs cannot satisfy the requirements for the certification.

A court may certify an injunctive relief class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) (quotation omitted). "Cohesiveness is even more important" for an injunctive class because "there is no provision for unnamed class members to opt out of the litigation." *Id.* Accordingly, individuals comprising an injunctive class are "'generally bound together through preexisting or continuing legal relationship or by some significant common trait such as race or gender.'" *Muzaliwa v. Brott*, 2016 WL3960371, at *6 (*quoting Homes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983)). "The existence of

a significant number of individualized factual and legal issues defeats cohesiveness and is a proper reason to deny" the certification of an injunctive relief class. *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1093 (8th Cir. 2021). The putative class-members are not "bound together" by any significant common trait or continuing legal relationship—in fact, as set forth above, individual issues predominate the putative class-members' claims.

Plaintiffs claim their proposed injunctive relief and declaratory judgment class is cohesive because all putative class members "are subject to the same lease terms." (Mot. For Class Cert. at p. 28). This is false. The Gregorys' Lease assessed the UBSF, the HVAC filter fee, and the option to opt into Home Partners' Master Resident Liability Program for insurance. (Gregory Lease ¶¶ 1.J, 6, Air Filter Addendum, Attachment C.) Certain provisions, like the HVAC filter fee and the Master Resident Liability Program, were set forth on separate addenda. (*Id.*, Air Filter Addendum, Attachment C.) It is undisputed that Dr. Sewall's Lease, which pre-dates the Gregory Lease, did not contain any of these provisions. (*See generally* Sewall Lease.) Accordingly, the injunctive and declaratory relief requested by Plaintiffs would not be applicable to all class members, and it is not sufficiently cohesive.

Courts also do not permit Rule 23.02(b) class "where monetary relief is sought, unless such monetary relief is incidental to the requested injunctive or declaratory relief." *Glenn v. Daddy Rocks, Inc.*, 203 F.R.D 425, 430-31 (D. Minn. 2001) (citation omitted). Plaintiffs expressly state they seek monetary damages for Defendants' alleged violations of the CFA, LTA, and state contract law. (Pls.' Br. at p. 25.) In fact, Plaintiffs specifically request the return of "100% of the amount they paid" in rent, among other monetary damages. (*Id.*). This case is about monetary relief; it is not "incidental" to the equitable relief sought. Plaintiffs have not shown that they meet the requirements for the certification of an injunctive relief and declaratory judgment class.

IV. Plaintiffs' claims are not typical, and they will not adequately represent the class.

"'Typicality is satisfied when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the other class members.'" *Soderstrom v. MSP Crossroads Apts. LLC*, 2018 WL 692912, at *5 (D. Minn. Feb. 2, 2018) (*quoting Lockwood Motors v. Gen. Motors Corp.*, 162 F.R.D. 569 (D. Minn. 1995)). Plaintiffs' claims are neither based on the same event, nor are they based on identical legal theories.

First, putative class members' claims do not "emanate from the same event." In *Soderstrom*, for example, the court analyzed typicality in a case involving allegations that the defendants, who owned and operated an apartment complex, violated the Fair Housing Act by *discriminating* against tenants. *Id.* at *1. The court found that the claims of the named plaintiffs were typical, in part, because they all resided at the apartment complex at the same time and were no longer tenants. *Id.* at *5. The proposed class members here lived in different homes, with different conditions and issues, at different times, with different lease terms.

Second, Putative class members' claims are also not all based on the same legal theory. Plaintiffs' Class Action Complaint contains claims related to various fees and the security deposit. But not all leases contained these fee provisions and not all putative class members have ripe claims related to the return of their security deposits.

Finally, Plaintiffs have not demonstrated that they will adequately protect the interests of the class. Here they must show "that (1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously, and (2) each representative's interests are sufficiently similar to those of the class such that it is unlikely that their goals and viewpoints will diverge." *Brancheau v. Residential Morg. Grp.*, 177 F.R.D. 655, 659 (D. Minn. 1997) (quotation omitted). In this case, Plaintiffs' interests are not like those of the class, because they are requesting recission of leases that some class-members may not want terminated.

[redacted] *See, e.g.*, *Mid Continent Mgmt. Corp. v. Donnelly*, 372 N.W.2d 814, 816 (Minn. Ct. App. 1985) (citations omitted). Plaintiffs have not shown (and cannot possibly know) whether all class members want this remedy. If theses leases are voided and converted to month-to-month leases, class-members will lose their locked-in rental rates and options to purchase their homes at pre-set prices, which were, presumably, substantial factors in their respective decisions to participate in the Lease Purchase Program.

The putative class members will also lose the opportunity to assert their claims in the other (likely much quicker) established ways, including a tenant remedies action, an action for rent abatement, or a rent escrow action. Plaintiffs and this Court cannot know how each tenant would prefer to proceed without a tenant-by-tenant inquiry. Plaintiffs cannot deprive putative class members of that choice by imposing their preferred method on the entire class.

CONCLUSION

For all the reasons described above, the Court should deny Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Counsel.

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